Supreme Court of British Columbia

Milina v. Bartsch
Date: 19850124
Docket: No. C823424

January 24, 1985. MCLACHLIN J:

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I. INTRODUCTION

On 8th October 1981, James Milina, aged 18, was injured in the course of performing an acrobatic ski stunt at the Toronto Ski Show. The accident tragically left him a quadriplegic.

James Milina seeks damages on account of his injury from: the organizers of the acrobatic ski event in which he was injured (Bartsch and Phillips); the organizers of the Toronto Ski Show (Show Producers of Canada Limited); the sponsors of the acrobatic ski event (Labatt Brewing Company Limited); and the owners of the building in which he was injured (T.I.C.C. Limited). The third party proceedings have been issued against the manufacturer of the ski ramp and the supplier of the air bags used for the stunt in which James Milina was injured (K2 Corporation); the Canadian corporation which first sold the equipment (K2 Ski Canada Ltd.); the persons who bought the equipment from K2 Ski Canada Ltd., used it, and sold it to Bartsch and Phillips (Darryl

Bowie, Richard Bowie and Avalanche Ski Show Productions Ltd.); and the manufacturers of the air bag (Wapello Fabrications Inc.). Wapello, a United States corporation, has not attorned to the jurisdiction and did not appear at the trial.

Both liability and the quantum of damages are in issue.

II. LIABILITY

After reviewing the circumstances preceding and surrounding the accident, I shall consider the relationship between the parties with a view to determining what legal duties the various defendants owed the plaintiff. Having determined what duties lie, I shall address the question of whether, on the evidence, the accident was caused by breach of any of those duties. Finally, I will consider the defences of waiver and volenti non fit injuria.

A. *The Circumstances Preceding and Surrounding the Accident*

In the early 1970s the Sport of freestyle skiing began to achieve prominence. The K2 Corporation, the largest manufacturer of skis in the United States and one of the largest ski manufacturers in the world, decided to mount a freestyle show in the United States as a promotional device. To this end it designed and assembled certain equipment. The equipment consisted of two main elements: (1) a ramp, mounted on a truck and covered with snow-simulating material; and (2) an air bag. The ramp was built by K2 Corporation; the air bag by Wapello Fabrications Inc. Both were built to K2 Corporation's specifications as established by its design team. This team consisted of a freestyle skier, Jim Stelling, and an applied engineer, Alvin J. Jarvis. The concept was simple – the performers would ski down the ramp, perform their acrobatic manoeuvres in the air, and land on the air bag, which would absorb much of the impact of their landing.

As conceived and used by K2 Corporation, the base of the ramp and the air bag were set at the same level – ground level. The air bag was kept relatively soft, to better absorb impact. Air was maintained in the bag by a compressor. The softness of the air bag was determined by a zipper opening. The wider the zipper was opened, the more air was let out and the softer the air bag became.

K2 Corporation assembled a number of sets of equipment. It then searched out and retained first-class freestyle skiers who, after training with the equipment and learning how to use it, toured the United States as teams, giving demonstrations of freestyle skiing at K2 Corporation's distributorships.

In 1976 K2 Corporation's Canadian subsidiary and distributor, K2 Ski Canada Ltd., requested that K2 Corporation supply it with a ramp and air bag so that it could undertake similar promotions in Canada. Accordingly, K2 Corporation manufactured a set of equipment for K2 Ski Canada Ltd. It instructed K2 Ski Canada to obtain world-class skiers and to send them to its Vashon Island, Washington plant for training before allowing them to perform on the equipment.

K2 Ski Canada Ltd. complied with these instructions. It retained Darryl and Rick Bowie, who ranked among the top freestyle skiers in the world, to run its shows. The Bowies, together with another world-class freestyle skier, Peter Judge, attended at Vashon Island for three days. While the memories of all concerned were vague as to precisely what instruction was given, I am satisfied that the Bowies and Mr. Judge met with Mr. Stelling and that they were given basic instruction in the use of the equipment, including how soft the air bag should be kept. In addition, Rick Bowie was already familiar with the K2 assembly, having previously used one in Munich while on tour in Europe.

After returning to Canada, the Bowies set up and practised on the equipment before beginning their tour. The air bag and ramp were set up on the same level. The air bag was kept quite soft at this time; Mr. Lloyd indicated that the performers sank to their knees on landing and sometimes had difficulty getting off the bag.

The Bowies toured for K2 Ski Canada Ltd. for two seasons, 1976-77 and 1977-78. In the first season K2 Ski Canada retained some control over the day to day running of the show. In the second season the Bowies assumed the entire responsibility for running the show. In the spring of 1978, the Bowies purchased the ramp and air bag from K2 Ski Canada and ran the ski show in the subsequent season as proprietors, with K2 Ski Canada as one among several sponsors.

In the 1977-78 season the Bowies experimented with the use of the ramp in an elevated position. Mr. Lloyd of K2 Canada observed the first occasion on which this was done. The ramp was slightly higher than the air bag on this occasion due to a slope in the parking lot where the equipment had been set up. Mr. Lloyd testified that while he was somewhat concerned that the ramp was higher than the air bag, he was content to accept the Bowies' appraisal of the situation as safe since they – not he – were the experts in freestyle skiing and the safe use of the equipment.

After purchasing the equipment in June 1978, the Bowies began to routinely use the ramp in an elevated position. In their judgment, elevation of the ramp increased the safety of the equipment by giving the performer more height and hence more time in which to complete his manoeuvre or make a correction for any error he might have committed. At the same time, the Bowies recognized that the additional height increased the force of the impact on the air bag upon landing. To compensate for this, they made the air bag slightly harder. The increase in the elevation of the ramp was in keeping with the general trend in freestyle skiing to jumps of greater height to accommodate manoeuvres of increasing complexity.

There is no evidence that the Bowies ever expressly told K2 Ski Canada that they were using the ramp in an elevated position. However, I find it probable that K2 Ski Canada was shown a sketch of the elevated ramp (Ex. 136) in the course of negotiations prior to selling the equipment to the Bowies. Moreover, it is clear that the Bowies routinely supplied K2 Ski Canada Ltd., as one of their sponsors, with numerous reports and press clippings of their shows. K2 Ski Canada Ltd. had in its files 1978 photographs of the ramp in an elevated position. While no one could identify the precise source of the photographs, I find on a balance of probabilities that they were supplied by the Bowies in the summer of 1978 in the course of routinely informing K2 of its activities. Neither Mr. Nelson nor Mr. Lloyd, K2 Ski Canada Ltd.'s responsible officers, deny seeing the photographs. They admit that they might have been filed by an employee of K2 Ski Canada Ltd. in the usual course of dealing with incoming mail without first having been brought to their attention. In these circumstances, it must be concluded that K2 Ski Canada Ltd. had notice of the fact that the Bowies were using the ramp in an elevated position.

The Bowies continued to operate the ramp show in the seasons of 1978-79 and 1979-80. In early 1981, having got out of the ramp show business, the Bowies sold the equipment (then in the name of their company, Avalanche Ski Show Productions Ltd.) to Randy Bartsch and L.R. (Ernie) Phillips. Messrs. Bartsch and Phillips were, like the Bowies, world-class freestyle skiers, although their expertise in aerial ski acrobatics did not equal that of the Bowies. Randy Bartsch and Ernie Phillips also had experience in the production of shows, having for some years operated a revolving deck show featuring ballet freestyle skiing. They had frequently observed the Bowies' ramp show when performing at the same events as the Bowies. Indeed, they had on occasion assisted the Bowies with setting up and dismantling their equipment. Given these circumstances, the Bowies were justified in assuming that Messrs. Bartsch and Phillips were reasonably familiar with the equipment and that detailed instructions to them were not required. In particular, there is no doubt that Messrs. Bartsch and Phillips were familiar with the way the softness of the bag was controlled by the zipper setting. Nor is it conceivable that they would not have realized that the ramp was originally designed to be set on the same level as the air bag, since the usual method of elevation (placing the ramp on a rented flatbed truck trailer) was cumbersome, difficult and obviously an ad hoc adaptation. Finally, they knew, as any reasonable person would know, that to land on an air bag from a greater height than intended by the designer would increase somewhat the force of impact.

Messrs. Bartsch and Phillips, under the trade name R. & E. Shows Ltd., proceeded to organize acrobatic ski shows for the 1981-82 seasons. They met with Mr. Rodgers, president of Show Producers of Canada Limited, and tentatively agreed to perform at ski shows produced by show producers in Toronto, Calgary and Vancouver in the fall of 198]. These arrangements were finalized in late August 1981. The show producers agreed to pay Bartsch and Phillips (R. & E. Ski Shows) $8,000 for the latter's performing at the Toronto Ski Show. Mr. Rodgers was led to expect world-class performers. He was not told that the plaintiff, Jim Milina, would be performing until a few weeks before the November 198] ski show in which the plaintiff was injured.

In the meantime, Mr. Rodgers confirmed arrangements with Labatts that they sponsor Messrs. Bartsch and Phillips' freestyle ski show, in exchange for having their logo prominently displayed and having the team perform under the name "The Labatts' Acrobatts". Similar arrangements had been made in previous years between Show Producers and Labatts with

respect to the Bowie show. Ultimately, Labatts and Show Producers entered into a contract whereby Labatts agreed to pay Show Producers $7,000 for having brought the Bartsch and Phillips team to perform at the Toronto Ski Show as the Labatts' ° Acrobatts.

I turn from the nature of the performance in which the plaintiff was injured to the plaintiff's background. Jim Milina had been interested in freestyle skiing for some years. The consensus of those who knew him was that he was in the process of becoming a very good, world-class freestyle skier, although he had not yet achieved that level. He had won many competitions, including the title of British Columbia Freestyle Champion in 1981.

In the spring of 1981, at a camp where Jim Milina was training, Messrs. Bartsch and Phillips noticed his promise and approached him with respect to performing for their show. After consulting with his parents, Jim Milina agreed.

Messrs. Bartsch and Phillips hired Jim Milina as a supplementary performer to provide local colour for British Columbia shows. He was to perform less difficult jumps at local shows. However, before long Jim Milina requested permission to perform a more difficult manoeuvre than he was scheduled for – the double back somersault, or "flip". Messrs. Bartsch and Phillips consulted the other performers on the team as to whether Jim Milina should be allowed to perform this stunt. These performers agreed that Jim Milina was ready and capable of doing a double back flip. Accordingly, Messrs. Bartsch and Phillips gave the plaintiff permission to do this stunt.

Jim Milina performed double back flips at shows at Chilliwack and Abbottsford in the summer of 1981. At both these shows, the ramp was in an elevated position. He declined to perform double back flips at a third show in Clearbrook, because at that show the ramp and air bag were set at the same level, and he felt that he did not have enough air time to complete the stunt successfully.

In the early fall of 1981 it became apparent that one of the performers whom Messrs. Bartsch and Phillips had intended to take to the Toronto Ski Show in November would be unable to perform due to injury. They therefore asked Jim Milina to come to Toronto. Jim, after obtaining his parents' permission, agreed. It

was agreed that Jim Milina would be paid $50 a day for assisting in driving the truck and equipment to Toronto, and $50 a day for each day of performance. As in the past, these payments would be labelled reimbursement for expenses, in order to maintain Jim Milina's amateur standing in freestyle skiing.

The evening before the first performance at the Toronto Ski Show, all the performers gathered with Mr. Phillips in the room of Mr. Phillips' friend, Miss Fiddler. Mr. Phillips gave each performer a release form which he had drafted. After discussing the nature of the release and explaining that he could get no insurance and he could not allow anyone to perform unless they signed such a release, he said, "Read it. Understand it. Sign it." Jim Milina, by his own admission, read the release form, understood it and signed it.

The next day, after completing the erection of the equipment and jumping on it to test it, the performers attended a press conference. Mr. Phillips suggested to his performers that they not drink. Some did, however. Jim Milina estimated that he drank about 1 1/2 bottles of beer. Sometime later the performance commenced. Jim Milina performed his stunts, including double back flips, without incident, until his last jump.

A number of witnessed described Jim Milina's last jump. Some stated that he did not come down the ramp with as much speed as usual. In any event, it seems clear that he did not get as good a "take-off" as usual off the end of the jump. The reason may be, as Mr. Phillips testified, that his body weight was too far forward. Consequently, Mr. Milina appears not to have attained as much height as he usually did for a double back flip. To make matters worse, he did not extend his head back as far as he should have to promote fast rotation. The result was that instead of completing two full rotations as required for double back somersaults, Jim Milina was able to complete only 1 3/4 rotations before landing on the air bag – an occurrence described by freestyle skiers as "coming short".

The witnesses do not agree on how Jim Milina landed. A spectator beside the air bag, Mr. Keane, stated that at a point three quarters through his second rotation, the tips of Jim Milina's skis hit the air bag. His head immediately before impact was aligned with or perhaps a little forward of his upper body. At the moment his skis impacted, his head and upper body snapped forward. His knees and head hit the bag about the

same time. Mr. Keane then lost sight of Mr. Milina's head for about one second as it penetrated the air bag.

Mr. Phillips, who was standing at the bottom of the jump at the kicker stated that after a bad take-off, Mr. Milina completed 1 7/8 rotations in a loose tuck formation. He extended his body out preparatory to landing a little too early. He landed on the bottoms of his skis on the portion in front of the ski boots. The angle of the ski to the air bag described by Mr. Phillips was less than 45°. The contact of his skis with the bag halted his backward rotation. After an instant of hesitation, Jim Milina's hands went forward to meet the air bag. He did a slow forward roll across his shoulders and the back of his head. One ski came off and one hand was slightly ahead of the other. It was a "slow unspectacular roll" according to Mr. Phillips, the sort of manoeuvre he had done many times without injury. He was surprised when he realized that Jim Milina was injured.

Mr. Phillips' version of the jump was supported by the evidence of Jim Sidorchuk, the skier who was waiting at the top of the ramp while Mr. Milina did his jump. Jim Milina's rotation was, Mr. Sidorchuk said, very slow with no observable effort at correction to speed rotation. His skis contacted the air bag between the tip and the ski binding. At that point he proceeded to do a slow forward roll over the tips of his skis, coming to rest on his back.

Barbara Fiddler was standing to the right of the ramp. She testified that Jim Milina's descent was slower than usual and that his body was too far forward on his skis as he came off the kicker. He went to the left and not as high as usual. His tuck was not as tight as it should have been. After completing 1 3/4 rotations his skis hit the bag at their tips – the top portion where they start to curve. One of the skis came off. He rolled forward slowly, fell to the side, and rolled onto his back.

On all the evidence, I have concluded that the most probable sequence of events which occurred on the jump on which Jim Milina was injured, is as follows. He did not achieve as good a "take-off" as usual. Once in the air, his rotation was slower than usual. His head, instead of being extended back as it should have been to increase his momentum and to permit him to spot his landing, was in a neutral or slightly forward position. Three-quarters of the way through the second rotation, his skis contacted the

air bag at a point near their tips, or the curved portion of the skis. The angle of the skis to the bag was, in my view, probably less than 45°. Upon the skis contacting the air bag, Jim Militia's backward rotation was stopped and a forward, or rebound force, propelled him forward. This change in direction, which occurred in a fraction of a second, might well be perceived by one witness (Mr. Phillips) as a moment of hesitation before a forward roll, and by another (Mr. Keane) as the jerking forward of the body and the head after landing. Mr. Milina's head moved downward and into the bag and his body came over to bring him onto his back, appearing to some onlookers as a forward roll. If Jim Milina's hands did extend as described by some of the witnesses, they did not effectively take up the impact of his landing – that impact was largely borne by the head and transferred to the neck. Instead of falling straight forward after contacting the air bag, Jim Milina seems to have fallen somewhat to one side, as described by Miss Fiddler. As he rolled over onto his back and the weight of his body came onto his neck, his neck in all probability twisted. This caused one facet of the vertebrae to lock above the other and damage the spinal cord, in the manner described by Dr. Thompson.

The evidence establishes that "coming short" is not uncommon. All the freestyle skiers who testified had "come short" on many occasions, without injury. They spoke of landing on their chest and face when they "came short". This is because, in executing the double back flip, the head is properly kept extended back to speed rotation and better observe the landing. An incident of the head being extended to the rear is that the performer who comes short is more likely to take the impact of his fall on his chest and face than on the top of his head and his neck. Because Jim Milina's head was not extended back on the jump on which he was injured, it seems likely that the front top portion of his head hit the air bag, as Dr. Thompson testified, rather than his face. This caused the bending movement which dislocated his neck and damaged his spinal cord.

It must be noted at this point that while Jim Milina was not as advanced a skier as many of those who performed with the ramp, he had performed double back flips over hay pits for sometime prior to performing them on the ramp. He had presumably received coaching and instruction in the manoeuvre. He does not deny that he had been taught to keep his head back in executing the manoeuvre – indeed he testified

that he tried to do this in the jump in which he was injured – "like I had been taught".

B. *Duty of Care*

In this portion of my reasons, I shall consider what duties, if any, lay on the respective defendants. Later I will address the question of whether such duties as are found to exist were discharged in the circumstances of this case.

1. The duty of Labatts to the plaintiff

Labatts was the sponsor of the ski show produced by Bartsch and Phillips in which the plaintiff was performing. Pursuant to a contract with Show Producers, Labatts agreed to pay Show Producers $7,000 for the privilege of displaying its logo and name on the equipment, having the skiers perform under the name "Labatt's Acrobatts", and generally associating itself in the minds of the public with the show. Labatts neither manufactured nor owned the equipment on which the plaintiff was injured. It took no part in the erection of the equipment and had no control over the stunts which were performed on the equipment.

The plaintiff raises three allegations against Labatts:

(a) that Labatts owed the plaintiff a duty of care in tort;

(b) that Labatts owed the plaintiff a duty in contract;

(c) that Labatts is vicariously liable for the negligence of other defendants.

Each of these contentions will be considered in turn.

(a) Duty of care in tort

The plaintiff's first position is that Labatts put itself in a position where it knew or should have known that the plaintiff and his parents were or might be relying on it to protect his interests and safety. By so doing, the plaintiff submits, Labatts placed itself in a sufficient relationship of proximity to give rise to the prima facie duty of care referred to by Lord Wilberforce in *Anns v. Merton London Borough Council,* [1978] A.C.

728 at 751-52, [1977] 2 W.L.R. 1024, [1977] 2 All E.R. 492 (sub nom *Anns v. London Borough of Merton) (H.L.):*

> Through the trilogy of cases in this House – *Donoghue* v. *Stevenson* [19321 A.C. 562, *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964] A.C. 465, and *Dorset Yacht Co. Ltd.* v. *Horne Office* [1970] A.C. 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter – in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise: see *Dorset Yacht* case [1970] A.C. 1004, *per* Lord Reid at p. 1027.

In support of this contention the plaintiff relies on the use by the Bowie group of the Labatts' name and insignia during performances at the Pacific National Exhibition, observed by the plaintiff in 1979 and 1980, the presence and participation of Labatts' employees at that show, promotional material published under Labatts' authority prior to August 1981, the Labatts' sign which was at one time (but not immediately prior to the accident) permanently affixed to the truck used in the performances, the fact that the equipment was commonly referred to as the Labatts' truck, and the absence of any disclaimer by Labatts of responsibility for the equipment or its performances.

I am not satisfied that these considerations establish that Labatts was in a position where it knew or it should have known that the plaintiff and his parents were or might be relying on it to protect his interests and safety in the fall of 1981. Whatever the plaintiff may have thought in 1979 and in 1980 when he saw the Bowie group performing under the Labatts' insignia, by the time of the accident he was fully aware of the limited role that Labatts played in the performances. He had performed on the same equipment with the same team for other trade shows sponsored by other sponsors. He knew that these sponsors, including Labatts, had nothing to do with the safety of the performers or the erection or use of the equipment. In the face of this knowledge, it is not surprising that at trial the plaintiff did not at any time

suggest he relied upon Labatts in any respect whatsoever to provide for his safety. It follows that the allegation of the duty of care based upon his reliance must fail.

Counsel for the plaintiff, however, alleged that the plaintiff's parents relied upon Labatts to ensure their son's safety and that this gave rise to a duty of care to the plaintiff. I need not consider the question of whether reliance by an 18-year-old youth's parents can give rise to a duty of care towards an 18-year-old who does not rely. The evidence of the plaintiff's parents taken as a whole does not support the allegation that they relied on Labatts. Mr. Milina did not state that he relied upon Labatts to supply or erect the ramp equipment or ensure the performer's safety. All he stated was that he understood Labatts to be a reputable corporate sponsor, like the other sponsors of shows in which his son had performed. He had only a very vague idea of the sort of shows in which his son was performing and took little interest in the details. As for Mrs. Milina, she knew that Labatts had no responsibility for any aspect of her son's training or supply or erection of equipment and no responsibility for the manner in which the show was performed. While she stated that her assumption that Labatts was a responsible corporation contributed to her decision to allow her son to go to Toronto, this is insufficient to give rise to a duty of care on Labatts to ensure the safety of the show in which her son was performing.

Even if Mr. and Mrs. Milina did rely on Labatts, the duty of care is not created unless it was in Labatts' reasonable contemplation that the plaintiff was relying on it to ensure his safety. Labatts never indicated to any of the performers or to their parents that it took any responsibility for the equipment used or the manner in which the show was run. No circumstances are established from which Labatts might reasonably have concluded others were relying on it to protect the plaintiff's safety.

(b) Duty in contract – Labatts as an employer

The plaintiff submits that Labatts owed a duty of care to ensure the safety of the plaintiff because it was the plaintiff's employer. In order to establish that allegation the plaintiff must prove:

(i) that his contract of employment was with Labatts, and

(ii) that the contract was one of service.

I turn first to the allegation that there was a contract of employment between Labatts and the plaintiff. In my view, there was not. I am satisfied on the evidence that the plaintiff was employed by Bartsch and Phillips, doing business as R & E Ski Shows. He was hired by Messrs. Bartsch and Phillips operating under the name R & E Ski Shows and he was paid by them. They, and they alone, exercised control over his conduct in the course of his employment. R & E Ski Shows had a contract with Show Producers of Canada Limited. Show Producers of Canada Limited in turn had an agreement with Labatts whereby Labatts paid a fee to Show Producers in return for the right to advertise their name in connection with the ski performance. Labatts had no legal relationship either with R & E Ski Shows or with the plaintiff.

Secondly, any relationship between the plaintiff and Labatts could not have been a contract of service. The indicia of a contract of service as set out in *Short v. J. & W. Henderson Ltd.* (1946), 62 T.L.R. 427 at 429 (H.L.), per Lord Thankerton are:

(i) the master's power of selection of his servant;

(ii) the payment of wages or other remuneration;

(iii) the master's right to control the method of doing work; and

(iv) the master's right of suspension or dismissal.

None of these indicia of a contract of service are present in this case. Labatts had no power of selection over the plaintiff. Labatts did not pay his wages. They had no control over the method of doing work and no right of suspension and dismissal. The element of superintendence and control which is fundamental to contracts for service was entirely lacking.

Alternatively, the plaintiff alleges that Labatts is estopped from denying that it stood in the relation of employer to the plaintiff. It is contended that Messrs. Bartsch and Phillips represented to the plaintiff that they were authorized by Labatts to solicit members for the Labatts' ski team and to enter into contractual relationships with members of the Labatts' ski team on behalf of Labatts. It is conceded that Messrs. Bartsch and Phillips had no actual authority to make these representations. It is argued, however, that Labatts is estopped from denying the authority of Messrs. Bartsch and Phillips by reason of the

conduct of Labatts in permitting Bartsch and Phillips and the previous owners and users of the equipment to use Labatts' logo in connection with the ski performances.

This contention fails for several reasons. First, there is no evidence that Messrs. Bartsch and Phillips represented to the plaintiff that they were authorized by Labatts to enter into a contractual relationship with him on behalf of Labatts. The plaintiff did not so testify, and the suggestion was not even put to Messrs. Bartsch and Phillips in cross-examination. Were I wrong in this conclusion, I would nevertheless find that this submission fails because the element of reliance is lacking; the plaintiff, on the evidence discussed earlier, knew that his only employers were Messrs. Bartsch and Phillips carrying on business through R & E Ski Shows. He knew, furthermore, that Labatts had no responsibility for any matters concerned with his employment.

(c) Vicarious liability of Labatts

The plaintiff in his statement of claim alleges in the alternative that Labatts is vicariously liable for the negligence of Bartsch and Phillips and Show Producers. Show Producers and Messrs. Bartsch and Phillips were not servants of Labatts, and hence in the ordinary course Labatts would not be responsible for their negligence. The plaintiff, however, alleges that when a person orders work to be done which is inherently dangerous, that person cannot delegate his responsibility for the safety of those doing the work to contractors, relying on *Haseldine* v. *Daw & Son Ltd.,* [1941] 2 K.B. 343, [1941] 3 All E.R. 156 (C.A.); *Walker* v. *Crabb, [* 1916] W.N. 433.

Labatts in reply submits (1) neither Show Producers nor Messrs. Bartsch and Phillips were employed by Labatts either as employees or as independent contractors; (2) that the activity in which the plaintiff was engaged is not inherently dangerous; and (3) that in any event, the duty alleged would extend only to third parties who might incidentally be injured by the activity, not to performers.

I am satisfied that the plaintiff's contention cannot succeed for the following reasons. First, the relationship of Labatts to Show Producers and Messrs. Bartsch and Phillips was neither that of employer-employee nor that of a person retaining independent contractors to perform services for him. Show Producers simply sold to Labatts the right

to advertise its name in connection with the show. As for Messrs. Bartsch and Phillips, Labatts had no dealings with them at all.

Secondly, I am satisfied that the activity in which the plaintiff was engaged was not inherently dangerous within the meaning of the rule relied on by the plaintiff. In *St. John v. Donald, [* 1926] S.C.R. 371 at 383, [1926] 2 D.L.R. 185, the principle relied upon by the plaintiff is stated to arise:

> ... where the danger of injurious consequences to others from the work ordered to be done is so inherent in it that to any reasonably well-informed person who reflects upon its nature the likelihood of such consequences ensuing, unless precautions are taken to avoid them, should be obvious, so that were the employer doing the work himself his duty to take such precautions would be indisputable. That duty imposed by law he cannot delegate to another, be he agent, servant or contractor, so as to escape liability for the consequence of failure to discharge it.

In assessing whether an activity is inherently dangerous, regard must be had to the degree of training and expertise of the persons executing the activity. What is dangerous for one person may be safe for another. The evidence indicates that stunts such as the one the plaintiff was performing at the time of his injury have been done thousands of times on the same equipment, without serious mishap. A reasonably well informed person reflecting on the nature of this activity and the likely consequences would conclude that it was reasonably safe, provided that the performers were properly qualified.

Finally, the principle relied on by the plaintiff appears to apply only to hazards to persons not directly associated with the dangerous activity. If a person retains an independent contractor to use dynamite to blast rock on his property, he owes a non-delegable duty to see that his neighbour's property is protected. I was referred to no authority, however, suggesting that the person ordering such work owes a duty to the employees of his independent contractor to ensure that they are not injured by the blasting. It is up to the independent contractor and the employees to take care for their own safety.

(d) Summary as to the duty of care on Labatts

For the reasons set out above, I am satisfied that Labatts owed no duty to the plaintiff. No relationship of sufficient proximity between Labatts and the plaintiff or his parents is established to give rise to a duty of care in tort. There is no contract between them. Nor is there any room for imputation of vicarious liability.

As sponsor of the show, Labatts was in the position of the consumer of a product supplied by others. It bought the right to display its logo and name on the equipment and the privilege of having the skiers perform under the name "The Labatt's Acrobatts", just as it might buy advertising space in a magazine or on television. There is no legal foundation for suggesting that a person purchasing such right to publicize his product, is legally responsible for the consequences of the activity with which it associates its name.

2. The duty of Messrs. Bartsch and Phillips to the plaintiff

The plaintiff alleges that Messrs. Bartsch and Phillips, as his employers, owed him a duty to ensure that the equipment upon which he was performing was reasonably safe in all the circumstances of the case.

I am satisfied that Messrs. Bartsch and Phillips, carrying on business under the name of R & E Ski Shows, employed the plaintiff to give ski performances in their show. I am further satisfied that the contract was one for service on the indicia indicated in *Short v. J. &* W. *Henderson Ltd.,* supra. Messrs. Bartsch and Phillips had and exercised the power of selecting the plaintiff to perform for them. They paid him a fee for each performance. While they did not insist that he perform work with which he was uncomfortable, they generally exercised control over the method of doing his work, such as the time of performances, the setting up of the equipment and the nature of the stunts to be done. Their superintendence and control over the plaintiff is demonstrated by the fact that they were consulted as to whether the plaintiff could perform the double back somersault. After some consideration they agreed he could. Not until then did he perform this stunt. Finally, it is not disputed that they could have suspended or dismissed the plaintiff had they wished to.

The standard of care owed by a master to his servants has been summarized recently in *Poppe v. Tuttle* (1980), 14 C.C.L.T. 115 at 122 (B.C.S.C.), where Ruttan J. quoted from Fleming, The Law of Torts, 2nd ed. (1961), at p. 448:

> "It is to-day well settled that an employer, in addition to being vicariously answerable for the casual negligence of his servants towards one another, also owes to his men an overriding managerial responsibility to safeguard them from unreasonable risks in regard to the fundamental conditions of employment – the safety of plant, premises and method of work. The relevant standard of care exacted from employers is high, and over many years tended to increasing stringency ... The employer's obligation is

> to exercise reasonable care, not to warrant safety; even if in some circumstances the taking of reasonable care may fall little short of absolute obligation."

I conclude that Messrs. Bartsch and Phillips, as the plaintiff's employers, owed him a duty to safeguard him from unreasonable risks associated with the performance and, in particular, the equipment upon which he was performing.

At the same time it must be borne in mind that what constitutes an unreasonable risk varies with the type of work involved. For some types of work, for example, sedentary office work, the duty of care to provide safe working conditions may fall little short of an absolute obligation. Other types of employment, for example police work, may involve inherent risks against which it would be unreasonable to demand that an employer protect the employee. The type of work here under consideration – acrobatic skiing – was clearly fraught with risk. The plaintiff, as he freely admitted, knew this and accepted it.

Where a recognized risk is associated with an activity a duty of care to guard against that risk may be negatived. As noted by Spencer J. in *King v. Redlich,* Penticton No. 228/x/83, 5th October 1984 [[1984] 6 W.W.R. 705, 30 C.C.L.T. 247], this arises from an application from the second of the two stages in establishing negligence referred to in the judgment of Lord Wilberforce in *Anns v. Merton London Borough Council* at p. 751. Where a relationship sufficient to give rise to a prima fade duty of care is established, the court must inquire whether there are any considerations which ought to negative, reduce or limit the scope of the duty, the class of persons to whom it is owed, or the damages to which a breach may give rise. Spencer J. concluded that the knowledge of a recognized risk in the warm-up to a hockey game negatives any duty of care on other players to guard against that risk.

The same reasoning is applicable in the case at bar. Messrs. Bartsch and Phillips owed the plaintiff no duty to guard against risks which were recognized and accepted in the sport of freestyle skiing.

I shall consider later in these reasons the question of whether, on the evidence before me, Messrs. Bartsch and Phillips discharged the duty upon them of safeguarding the plaintiff from unreasonable risk of harm.

3. The duty of Show Producers of Canada Limited

The plaintiff raises three allegations against the defendants Show Producers of Canada Limited:

> (a) that the plaintiff had a contract of service with Show Producers effected through the agency of Bartsch and Phillips from which responsibilities of master/servant flow;
>
> (b) that Show Producers as occupier of the premises in question are subject to the duties imposed on the occupier by the Occupiers Liability Acts of Ontario and British Columbia;
>
> (c) that under the general principles of negligence, Show Producers owed a duty to the plaintiff to do various things which it failed to discharge.

Each of these contentions will be considered in turn.

> (a) Duty as employer

The plaintiff submits that a contract of service between him and Show Producers was effected through the agency of Messrs. Bartsch and Phillips, with Show Producers as the undisclosed principal of Bartsch and Phillips. Show Producers Ltd. denies that any such relationship existed.

The evidence does not support the plaintiff's contention. First, there is no evidence that Messrs. Bartsch and Phillips were the agents of Show Producers for the purpose of engaging the services of the plaintiff. Show Producers contracted with Messrs. Bartsch and Phillips to purchase an acrobatic ski performance from them (through R & E Ski Shows).

Show Producers was buying a finished package. Other than assuring itself that the quality of the package would be up to standard, it was not concerned with who performed. It knew nothing of Jim Milina, and Jim Milina knew nothing of it. When the plaintiff left for Toronto he had never heard of Show Producers. Show Producers was not involved in his training, selection of stunts, or the manner in which the feats were to be done. Show Producers was not involved with the equipment or its use. By his own admission the plaintiff did not look to Show Producers for direction or guidance. He had no conversations with Show Producers about any aspect of his performance, and did not expect them to provide any expert assistance in the jump show. No one from Show Producers stipulated what stunts were to be performed. All the evidence points to the fact that Messrs. Bartsch and Phillips were the plaintiff's employers. It was they who chose him, retained him and controlled his performance. Show

Producers intended its only legal relations to be with Bartsch and Phillips, as did Jim Milina. In these circumstances, there can be no contractual relationship between Show Producers Ltd. and the plaintiff.

Secondly, the indicia of a contract of service discussed earlier in connection with the duty of care on Labatts are not present in the case of Show Producers. Show Producers exercised no control over the choice of the plaintiff as a performer. Show Producers did not pay his wages or remuneration, nor did Show Producers exercise any control over the method of performing the stunts. Finally, Show Producers had no right to suspend or dismiss the plaintiff.

(b) Duty as occupier of premises

The plaintiff submits that Show Producers is liable to him under applicable occupier's liability legislation. The plaintiff pleads the Occupiers' Liability Act of Ontario, R.S.O. 1980, c. 322, where the accident took place, but relies as well on the Occupiers Liability Act of British Columbia, R.S.B.C. 1979, c. 303.

I accept the submission of the defendants that in order to succeed in his action in. British Columbia with respect to occupier's liability, the plaintiff must satisfy the two part test set out in *Can. Nat. S.S. Co. v. Watson,* [1939] S.C.R. 11, [1939] 1 D.L.R. 273 [Que.], and applied in British Columbia in *Gronlund v. Hansen* (1968), 65 W.W.R. 485, 69 D.L.R. (2d) 598, affirmed 68 W.W.R. 329, 4 D.L.R. (3d) 435 (B.C.C.A.):

> (i) that the wrong is of such a character that it would have been actionable if committed in British Columbia, and
>
> (ii) that the act was not justifiable by the law of the place where it was committed, i.e., Ontario.

In order to satisfy the first branch of the test the plaintiff must establish liability pursuant to the British Columbia Occupiers Liability Act. In order to satisfy the second branch, the plaintiff must satisfy the less stringent test that the conduct complained of was unjustifiable in Ontario. Conduct may be unjustifiable if it is tortious, or if it is in breach of a criminal or quasi-criminal provision. Here, there is no question of a criminal or quasi-criminal violation. Therefore, the plaintiffs must establish that the conduct complained of was tortious in Ontario, that is, actionable under the Ontario Occupiers' Liability Act.

I therefore conclude that the plaintiff must establish that the conduct of the defendant Show Producers was actionable under both the British Columbia and Ontario Occupiers Liability Acts to succeed. To the extent that the claim fails under either Act, it fails entirely.

In fact the two Acts are quite similar. The duty of an occupier under the British Columbia statute is set out as follows:

> 3. (1) An occupier of premises owes a duty to take that care that in all the circumstances of the case *is* reasonable to see that a person, and his property, on the premises, and property on the premises of a person, whether or not that person himself enters on the premises, will be reasonably safe in using the premises.
>
> (2) The duty of care referred to in subsection (1) applies in relation to the
>
> (a) condition of the premises;
>
> (b) activities on the premises; or
>
> (c) conduct of third parties on the premises.
>
> (3) Notwithstanding subsection (1), an occupier has no duty of care to a person in respect of risks willingly accepted by that person as his own risks.
>
> (4) Nothing in this section relieves an occupier of premises of a duty to exercise in a particular case, a higher standard of care which, in that case, is incumbent on him by virtue of an enactment or rule of law imposing special standards of care on particular classes of person.

The equivalent section of the Ontario Act provides:

> 3. -(1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.
>
> (2) The duty of care provided for in subsection (1) applies whether the danger is caused by the condition of the premises or by an activity carried on on the premises.
>
> (3) The duty of care provided for in subsection (I) applies except in so far as the occupier of premises is free to and does restrict, modify or exclude his duty.

Under both statutes, the duty owed by an occupier of premises is to take reasonable care to see that persons using the premises will be reasonably safe. The Acts do not impose a duty to take reasonable care to insure that persons using the premises will be "absolutely safe". As stated in *Hagerman v. Niagara Falls* (1980), 29 O.R. (2d) 609, 114 D.L.R. (3d) 184 (H.C.), per Labrosse J. at p. 613, the occupier does not owe a duty to provide safety in all circumstances, but rather a duty to use reasonable care to prevent injury or damage from danger which is known or which ought to be known.

Labrosse J. set out the method by which the reasonable standard is to be defined. The court must take into consideration:

1. the nature of the undertaking;

2. its inherent risks;

3. the appreciation of those risks by the participant.

In the *Hagerman* case, the plaintiff was struck by a hockey puck that went over the protective plexiglass above the sideboards of a rink. On the basis of this test, his action was dismissed.

In the case at bar, having regard to the nature of the undertaking, its inherent risks, and the appreciation of those risks by the participants, I am satisfied that no actionable duty of care has been established under either the Occupiers Liability Acts of Ontario or British Columbia. The undertaking, by its nature, involved risks. These were fully appreciated by the plaintiff, as he readily agreed on cross-examination. Show Producers could not reasonably be expected to analyze the various components of the equipment to ascertain whether or not they were safe. In this respect, Show Producers was entitled to rely on the defence of having hired a competent independent contractor, Messrs. Bartsch and Phillips.

Under both Acts, an occupier is not negligent if he exercises reasonable care in the selection and supervision of an independent contractor.

Under the British Columbia Act, s. 5, an occupier is stated not to be liable for damages caused by an independent contractor if in all the circumstances:

(1) the occupier exercised reasonable care in the selection and supervision of the independent contractor;

(2) it was reasonable that the work should have been undertaken.

As for the Ontario Act, s. 6 provides that an occupier is not liable for damage caused by the independent contractor where:

(1) the occupier acted reasonably in entrusting the work to the independent contractor;

(2) the occupier took reasonable steps to satisfy himself that the contractor was competent and that the work had been properly done;

(3) that it was reasonable that the work should have been undertaken.

The plaintiff did not raise any complaint or tender any evidence that the performance should not have been undertaken. Nor can it be contended that Show Producers did not act reasonably in selecting Messrs. Bartsch and Phillips as contractors. Mr. Rogers of Show Producers knew Mr. Bartsch and Mr. Phillips from previous ski shows when they produced a revolving deck show for Western Show Producers Ltd., another company with which he was involved. He had found them to be very competent and experienced people who were well known in the industry and who put on an excellent show. He testified that he had no reason to have any concern with respect to their ability to put on a ramp show. He knew and verified that they would be using the same equipment that the Bowies had used in previous years without mishap. He could not distinguish between the skiers' abilities and relied on the judgment of Messrs. Bartsch and Phillips to choose the performers. He expected that they were to put on a show as good as the Bowies had staged.

I conclude that Show Producers was under no duty as occupier of the premises where the plaintiff was injured, to inquire into the safety of the equipment, having delegated that task to its independent contractors, Messrs. Bartsch and Phillips.

The plaintiff contends, however, that the activity of acrobatic skiing was inherently dangerous, with the result that responsibility for its consequences could not be delegated, and Show Producers is vicariously liable for any negligence established against Messrs. Bartsch and Phillips: *Haseldine v. Daw & Son Ltd.,* supra; *Walker* v. *Crabb,* supra. I cannot accept this submission for two reasons. First, the matter is governed by the Occupiers Liability Acts of British Columbia and Ontario rather than by the common law, and where there is a difference between the two the specific legislation must prevail. Under the Acts, as discussed above, the occupier is not responsible for the consequences of negligence caused by an independent contractor when he has acted reasonably in his selection and supervision and the work was work which should have been undertaken. Secondly, I am not satisfied that the activity in question was inherently dangerous, for the reasons discussed in connection with the claim against Labatts.

A further defence available under the Occupiers Liability Acts of both Ontario and British Columbia, arises from the provisions of those Acts that an occupier owes no

duty of care to a person in respect of risks willingly accepted by that person as his own risks: Occupiers Liability Act (B.C.), s. 3(3); Occupiers' Liability Act (Ont.), s. 4(1). To establish such assumption of the risk, Show Producers need not prove the traditional volenti defence. The standard is considerably lower. For example, in *Epp v. Ridgetop Bldr. Ltd.* (1978), 8 Alta. L.R. (2d) 195, 7 C.C.L.T. 291, 94 D.L.R. (3d) 505, 15 A.R. 120 (T.D.), it was held that a person who was familiar with the circumstances so that he could recognize and avoid danger, assumed the risk of that danger, with the result that the occupier was not liable. Similarly, in *Schulz v. Leeside Del). Ltd.,* [1978] 5 W.W.R. 620, 6 C.C.L.T. 248, 90 D.L.R. (3d) 987 (B.C.C.A.), it was held that an occupier is not liable for dangers that are known to the user or are obvious to him or are so commonly known that it can be reasonably assumed that the user will be familiar with them. In *Holman v. EllsmarApt. Ltd. (1963),* 40 D.L.R. (2d) 657 (B.C.S.C.), the plaintiff was held to have been fully aware of the condition of an unlighted sidewalk and to have fully accepted the risk of danger. The occupier was absolved of responsibility.

In the case at bar, the evidence establishes that the plaintiff was fully familiar with the risk which he was incurring in performing the stunt in which he was injured. He testified that he knew inverted aerials were potentially the most dangerous and that there was a risk of injury. He admitted that he knew he could be hurt, break bones or that he could hurt his head or neck: "You can bang your head, it's pretty dangerous". The night before the accident he had signed waivers accepting that there was a risk of injury and accepting the risks in the equipment as set up in Toronto. He testified that he understood this document when he signed it. For reasons which will be discussed elsewhere, I am satisfied that there was no hidden defect or danger associated with the equipment on which the plaintiff performed.

For these reasons, I am satisfied that there is no liability on Show Producers on the basis of occupier's liability.

(c) Duty under general principles of negligence

I am satisfied that the duties of Show Producers to the plaintiff are defined by the Occupiers Liability Acts reviewed above. Having discharged that duty, no liability lies on general principles of negligence.

However, were I to consider the matter on the basis of general principles of negligence, I would conclude that no duty was owed by Show Producers to the plaintiff. The only duty of Show Producers at common law would be to provide adequate and safe space. It had no duty with respect to the equipment that was the responsibility of Bartsch and Phillips. Nor, for reasons already discussed, would Show Producers be vicariously liable for any negligence of Bartsch and Phillips.

4. Duty of care on T.I. C. C. Limited

T.I.C.C. Limited owned and operated the building in which the plaintiff was injured. By written agreement, it licensed Show Producers to use the portion of the premises in which the plaintiff was injured.

The first question which arises is whether T.I.C.C. Limited was the occupier of the premises at the relevant time. T.I.C.C. Limited contends that it was not an occupier but a landlord. Under both the British Columbia and Ontario Occupiers Liability Acts, a landlord's duty is confined to maintenance and repair of the premises, and he is not in default of this duty unless his default would be actionable at the suit of the occupier: Occupiers Liability Act (B.C.), s. 6(3); Occupiers' Liability Act (Ont.), s. 8(2). The reason for this limitation on the liability of landlords is apparent – landlords customarily surrender possession of and all power of control over the premises for the term of their tenancy.

In considering whether T.I.C.C. Limited is an occupier or whether it is a landlord, I look first to statutes. The Occupiers Liability Act of British Columbia defines occupier as follows:

> 1. In this Act
>
> "occupier" means a person who
>
> (a) is in physical possession of premises; or
>
> (b) has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises...

Tenancy is defined as follows:

> "tenancy" includes a statutory tenancy, an implied tenancy, and any contract conferring the right of occupation, and "landlord" shall be construed accordingly.

Similar definitions are found in the Ontario statute.

The matter seems to come down to this: Did T.I.C.C. Limited have the right of occupation and the right to control the activities going on in the premises, or had it, by its agreement with Show Producers, surrendered these rights to Show Producers?

In my view, the provisions of the agreement between T.I.C.C. Limited and Show Producers establish that T.I.C.C. Limited was not an "occupier" within the definition of the Act.

Pursuant to the agreement, T.I.C.C. Limited was not in physical possession of the relevant premises at the time the plaintiff was injured. Moreover, the agreement places all responsibility for the activities conducted on the premises on Show Producers. T.I.C.C. Limited did not have "control" over the activities conducted on the premises in the sense intended by the Act. T.I.C.C. Limited's control under its contract with Show Producers was limited to very specific matters. The only power which T.I.C.C. Limited retained was the right to remove persons who were "objectionable" or "offensive". The show in which the plaintiff was injured cannot be described as either objectionable or offensive.

On these facts, I am satisfied that T.I.C.C. Limited does not fall within the definition of "occupier" under the relevant occupier's liability legislation. While technically it may not have called itself a landlord under the terms of this agreement, it was a landlord for purposes of determining its duty of care to those entering on and conducting activities on the premises. One must look to the substance of the relationship between T.I.C.C. Limited and Show Producers. As stated in *Bentley v. Vancouver Exhibition Assn.,* 50 B.C.R. 343, [1936] 1 W.W.R. 480, [1936] 2 D.L.R. 128, per Martin J.A. at p. 480:

> We are all of the opinion that the appeal should be allowed. We think, in brief, that the defendant association cannot be held to be liable, because it had given up possession and control of the building in question for the time in question to the joint societies of Girl Guides and Boy Scouts, and therefore was exonerated from liability while it was in the occupation and control of those societies, who were in the position of lessees, or something in legal effect equivalent thereto, of the owner (the defendant).

For these reasons I conclude that T.I.C.C. Limited is not an occupier within the relevant Occupiers Liability Acts. Its duty was confined to that of a landlord. Under

s. 6 of the British Columbia Occupiers Liability Act, the duty placed on a landlord is not sufficiently broad to create a duty to the plaintiff in the circumstances of this case.

In any event, even if T.I.C.C. Limited were an occupier, the plaintiff has failed to establish that it was in breach of the standards prescribed by the relevant Occupiers Liability Acts, discussed previously.

T.I.C.C. Limited had no experience in the technical aspects of aerial skiing. It knew, however, that the ski show and ski jump exhibition were being run by professional skiers who were competent and experienced in what they were doing. The first time the ski jump exhibition was held on its premises, Mr. Franklin of T.I.C.C. Limited inquired about the safety of the show. He was assured by Mr. Rodgers, whom he had every reason to trust, that it was safe and involved professionals who knew exactly what they were doing. He was further informed that they had performed jumps on many occasions.

I accept the submission of counsel for T.I.C.C. Limited that under these circumstances it would be unreasonable to expect T.I.C.C. Limited to make further inquiries. In particular, T.I.C.C. Limited was under no duty to ascertain the manufacturers of the equipment and make inquiries of them regarding its proper use. T.I.C.C. Limited rents space to many people for many purposes – people who are presumably competent to organize the shows which they put on. To require that T.I.C.C. Limited perform independent inquiries on every aspect of every activity being performed on its premises would be to go beyond the boundaries of reasonableness. In my view, T.I.C.C. Limited was reasonably entitled to rely on Show Producers and through them, on Messrs. Bartsch and Phillips to conduct the show in a safe manner.

As for the plaintiff's contention that T.I.C.C. Limited was not entitled to so rely because the activity in question was inherently dangerous, my reasons on this point in connection with the claim against Labatts and Show Producers apply equally to the claim against T.I.C.C. Limited.

For these reasons, I am satisfied that liability has not been established against T.I.C.C. Limited.

5. *Summary of duties owed by the defendants to the plaintiff*

I have concluded that Labatts owed no duty of care to the plaintiff. I have further concluded that the only liability of Show Producers and T.I.C.C. is under the relevant occupier's liability legislation, and that any duties thereunder were discharged.

Only the liability of Messrs. Bartsch and Phillips is in issue. I have concluded that as the plaintiff's employers, they owed him a duty to safeguard him from unreasonable risks associated with the performance, and in particular, the equipment upon which he was performing. This duty does not, however, extend to recognized and accepted risks associated with the activity in question.

The question which remains to be determined is whether breach of the duty owed to the plaintiff by Messrs. Bartsch and Phillips has been established.

C. *Was the Plaintiff's Injury Caused by the Negligence of the Defendants?*

In order to determine whether Messrs. Bartsch and Phillips are liable to the plaintiff, it is necessary to determine whether the plaintiff's injury was caused by their negligence.

The plaintiff alleges that these defendants negligently breached the duty of care which they owed to him in a number of respects. It was contended that he was improperly trained and supervised and that the defendants were negligent in allowing him to do the stunt he was doing when he was injured. The most significant contention, however, related to the equipment used in the performance. It was submitted that the accident was caused by the improper: use of equipment or, alternatively, that the equipment was so unsafe that it should not have been used in any event.

The plaintiff contends that the air bag was over-inflated, with the result that it was inadequate to absorb the additional impact caused by the elevation of the ramp. This, the plaintiff submits, constituted an invisible danger, for the consequences of which the defendants are liable.

The defendants, on the other hand, assert that the plaintiff's injuries were caused by the peculiar manner in which he fell and not by any defect in the erection or use of the equipment. They further submit that any risks associated with the equipment were known and accepted by the plaintiff.

1. Was the accident caused by the improper use of equipment?

The plaintiff submits that the accident was caused by the combination of elevation of the ramp and over-inflation of the air bag. If the ramp had been used at ground level, or if the air bag had not been over-inflated, the accident would not have occurred, the plaintiff contends.

The plaintiff sought to support its contention that improper use of the equipment was the cause of the plaintiff's injuries by the evidence of Mr. Jarvis and Dr. McNiece. I find that the evidence of Mr. Jarvis, the designer of the equipment, does not establish the proposition that use of the equipment caused the plaintiff's injuries. Mr. Jarvis did not choose the air bag, performed no meaningful tests on the air bag, and did not extensively observe the skiers landing on the air bag. While he testified that the ramp should not have been elevated and the bag should have been softer, his opinion was not supported by any calculations as to the amount of force generated by the skier or the amount of force dissipated by the air bag. He has no formal training in business or engineering. In my opinion, his conclusion as to the cause of the accident has little more validity than that of a lay person.

Another expert witness called by the plaintiff on the cause of the plaintiff's injury was Dr. McNiece. Dr. McNiece concluded that if the air bag had permitted 30 inches of penetration by the ski tips and if the ramp had not been elevated, then the plaintiff would not have, in all probability, sustained the spinal cord injury which he did.

I have concluded that Dr. McNiece's evidence does not support the plaintiff's contention as to the cause of the accident. My reasons are the foll owing:

1. Dr. McNiece's opinion is that the air bag should have been so soft that the plaintiff's ski tips would have penetrated to a depth of 30 inches. This is the entire depth of the air bag. On the evidence before me, I must conclude that it would have been dangerous and unreasonable to have the bag so soft that the ski tips would penetrate 30 inches. Mr. Jarvis and Mr. Stelling of the K2 Corporation suggested that it should permit the penetration of 12 to 15 inches. All of the freestyle skiers who testified were adamant that the bag must not be so soft that it permits penetration to the floor, since this would permit the skier to come into contact with the floor on

landing, which would be highly dangerous. The plaintiff, relying on Mr. Jarvis, does not take the position that the air bag should have been so soft as to permit 30 inches of penetration by the ski tips. In short, none of the parties including the plaintiff, accept the hypothesis on which Dr. McNiece's study was premised.

2. Dr. McNiece neither examined nor tested the air bag in question. His estimate that 50 per cent of the energy upon landing would be dissipated by impact with the air bag is nothing more than an educated guess.

3. Dr. McNiece's analysis understates the forces generated on impact because:

> (a) it ignores the horizontal velocity of the skier which I am satisfied from the video tapes and the evidence of Greg Athans and Dr. Hutton is a significant factor;
>
> (b) the assumption that the air bag would absorb 50 per cent of the energy is admittedly optimistic.

4. Dr. McNiece's analysis is valid only if the plaintiff fell precisely in the manner assumed by Dr. McNiece in his report. The evidence which I have accepted as to how the accident occurred differs from the assumptions of Dr. McNiece. The plaintiff's skis did not, in my view, impact at an angle of 45° or greater. Furthermore, Dr. McNiece ignored horizontal and rotational velocity, and took no account of the probability that the plaintiff fell to one side, thereby producing a twisting action to the neck. It was apparent from cross-examination that small differences in these assumptions might dramatically affect the calculation as to the force necessary to produce the injury.

Against the evidence of Dr. McNiece stands the evidence of Dr. Hutton, called by the defendants. Dr. Hutton performed certain tests on the air bag which was in use at the time of the plaintiff's injury. Based on these tests, he concluded that the air bag does not permit sufficiently slow penetration time to prevent the force generated on landing from building up to the point where it can cause the injury the plaintiff sustained, regardless of whether the ramp was elevated or set at floor level. The defendants rely on this conclusion to support their contention that the elevation of the ramp and degree of inflation of the air bag used at the time of the plaintiff's injury did not cause the accident.

In my view, none of the criticisms made by the plaintiff of Dr. Hutton's evidence detract from the validity of his conclusions. I deal first with his tests of the air bag. He admitted that he did not test the bag with the zipper at the maximum opening. However, it is apparent that if the zipper were open to that extent, one would hit the floor if one landed on the air bag in the normal fashion, which skiers testified would present a hazard. The tests Dr. Hutton performed indicate that with a zipper opening of 19.2 inches, the test weight of 102 lbs. descended to the ground. No one, including the plaintiff, suggests that the air bag should have been that soft. Dr. Hutton's use of bags of lead shot for testing was not ideal in that it had the effect of overestimating the impact force which would be necessary to cause injury to the plaintiff's head. However, insofar as this introduced inaccuracies, they favour the plaintiff. Nor do I accept the criticism that the drop test involving a person contradicts the lead-shot tests; this criticism is based on an invalid extrapolation from only two data points. Finally, as to the criticism that the air bag may have become softer by the time Dr. Hutton tested it, if that were the case and if the air bag in that condition could not have prevented the injury, it follows that the air bag as it was when used by the plaintiff certainly could not have prevented the accident. I therefore conclude that criticisms made of Dr. Hutton's tests of the air bag are not supported by the evidence.

Nor do I find the criticisms directed at Dr. Hutton's calculations to be convincing. While Dr. Hutton ignored rotational velocity, the effect of this was to reduce the final impact force to the head which would be necessary to produce an injury. If the bag could not absorb this lesser impact, it follows that it could not absorb the greater impact which would have resulted had rotational energy been considered as well. As for the criticism that the horizontal velocity used by Dr. Hutton was based on horizontal travel distance of 15 feet, I find this to be established on the evidence. I also find that the horizontal velocity would have been constant as calculated by Dr. Hutton. Further, I am satisfied that Dr. Hutton's use of only the horizontal factor to the exclusion of the vertical factor is a conservative calculation in that if the vertical factor counteracted the horizontal component, the horizontal component would have had to have been greater than Dr. Hutton posited to produce injury. If the air bag was incapable of preventing injury at the minimum horizontal force, it follows that it could not have prevented injury occurring when the force was greater. Given that the vertical

component of the force would have changed as the plaintiff did a forward roll into the bag and twisted sideways, Dr. Hutton's method of proceeding seems to me to have been eminently sensible as well as conservative.

In summary, therefore, I am not satisfied that over-inflation of the air bag or elevation of the ramp or a combination of the two was the effective cause of the plaintiff's injuries. Rather, I am satisfied on the evidence of Dr. Hutton that the injury would probably have happened regardless of elevation and regardless of the zipper setting on the air bag.

2. *Was the equipment inadequate and unsuitable for the plaintiff's use?*

The plaintiff submits alternatively, that if Dr. Hutton is right and the air bag is incapable of dissipating the impact of a landing such as the plaintiff sustained, then it is established that the equipment provided was inadequate and unsuitable for the plaintiff's use and that such inadequacy was the cause of his injury.

In a trite sense, it is obvious that the plaintiff's injury was caused by coming into contact with the air bag. However, that is not enough to establish liability. It begs the critical question of whether the equipment was inadequate in all the circumstances revealed by the evidence.

The defendants concede that the equipment in use on 8th November 1981 was not absolutely safe in the sense that it would prevent all possible injuries. However, they maintain that it was reasonably safe for the use to which it was put. They contend that the accident was "a freak accident" and that the true cause of the plaintiff's injuries was the unfortunate way in which he landed on this particular jump.

I am satisfied that the evidence does not establish that the equipment provided was inadequate and unsuitable for the plaintiff's use. In the course of trial, the court heard the evidence of a number of world-class freestyle skiers who had performed on this and other equipment. All of them affirmed that this equipment was reasonably safe. It is established to my satisfaction that landing on the air bag is safer than landing on snow, the usual landing surface for acrobatic ski stunts. The air bag provided a reasonably soft landing and it was predictable. The ramp in its elevated position provided sufficient time to complete this stunt so as to land in a proper manner.

It also provided time to make corrections to errors which may have been committed in the takeoff or preliminary parts of the jump. The risk associated with the use of the ramp in the elevated position and the air bag as it was used by the defendant was lower than the risk routinely encountered and accepted by acrobatic skiers in outdoor competition. In these circumstances, it cannot be said that the equipment was inadequate and unsuitable.

In arriving at this conclusion, I have considered the evidence of Mr. McLean, a stuntman who testified that he would not have used the air bag as a landing surface for falls. While I recognize Mr. McLean is an expert in the field of movie and television stunts, I do not find his evidence of great assistance in the circumstances of the case at bar. There is a critical difference between falling in the course of performing stunts and jumping in the course of performing acrobatic manoeuvres. The stuntman must fall in such a way as to depict how an untrained person might fall. For this use a landing surface providing absolute safety is required. The acrobatic skier by virtue of his training and the discipline of the sport executes certain controlled manoeuvres and lands in a controlled fashion. For this quite different use, a relatively hard landing surface is accepted as normal and adequate. In the circumstances of the case at bar, the jumpers were trained athletes approaching, if not at, world calibre. For their use, this equipment was entirely suitable.

The suitability of the equipment for use by expert acrobatic skiers was underlined by the evidence of the Bowies that in their estimation over 40,000 jumps were performed on the equipment while they were using it, without any mishaps of a serious nature. The plaintiff's injury appears to be the only injury of any gravity sustained by a performer on this type of equipment.

The principle which I discussed earlier in connection with the duty of care on Messrs. Bartsch and Phillips is applicable here. No duty is owed to participants in an activity such as this to guard against risks recognized and accepted as inherent in the activity. The danger of neck and other injuries in the event of an improper landing was recognized by those who engaged in freestyle skiing, including the plaintiff, regardless of whether the landing surface was a snow-clad slope or an air bag. In the absence of a special undertaking or assumption of responsibility, it cannot be said that Messrs.

Bartsch and Phillips owed the plaintiff a duty of care to provide equipment which would eliminate a risk which was recognized and accepted in freestyle skiing.

3. Was the plaintiff improperly trained, supervised or instructed?

The plaintiff had received extensive instruction in freestyle skiing prior to performing for Messrs. Bartsch and Phillips. He had been trained, as he readily admitted, in the proper techniques of avoiding injury. Messrs. Bartsch and Phillips provided adequate supervision of the event in which the plaintiff was injured. It was reasonable in the circumstances to permit the plaintiff to perform a double back flip on this equipment. On his own estimate, he had performed this "trick" approximately 300 times. Other expert skiers, such as Jim Sidorchuk and Peter Judge, considered him competent to perform it.

I conclude that the evidence does not establish the allegations that the defendants failed to properly train, instruct or supervise the plaintiff.

4. Summary of the cause of the plaintiff's injuries

The plaintiff's injuries were not caused by the improper assembly or use of the equipment. Nor can they be attributed to the use of equipment which was unsuitable or inadequate for the purpose for which it was used, or to improper training or supervision.

This accident arose from a recognized risk inherent in the activity in which the plaintiff was voluntarily engaging. It is obvious that the performance of aerial acrobatic ski manoeuvres comports by its nature an element of danger, a risk that if the skier makes an error in his performance, he may be seriously injured. This risk could not be eliminated even by the greatest care with respect to training, supervision and equipment. In this case, that risk tragically materialized. Notwithstanding the great sympathy I entertain for the plaintiff, I cannot hold the defendants responsible in law for his injuries.

D. Waiver and Assumption of the Risk

In the event I may be found to have erred in my conclusion that the defendants were not in breach of any duty owed to the defendants, I shall indicate my conclusions on the defences of waiver and assumption of risk.

I. Waiver

The night before the accident, after setting up the equipment in Toronto and practising on it, the plaintiff signed a waiver. This document had been drafted in Vancouver by Messrs. Bartsch and Phillips. They presented it to all the performers at a gathering in a motel room. They indicated to the performers that they had no insurance coverage and that consequently they could not accept responsibility for any of the risk involved in the performances. They indicated that unless a performer signed the waiver, he would not be allowed to perform. On passing out the document they said: "Read this. Understand it. Sign it." The plaintiff testified that he in fact did read it, understand it and sign it. The document reads as follows:

> I hereby release Rainbow Ski Shows, R & E Ski Shows, Ernie Phillips, Randy Bartsch, and all shopping malls, exhibitions, employees, management and/or agents or sponsors from all liabilities, costs, or damages incurred to myself or others due to my participation in ski shows or demonstrations. This applys [sic], going to, coming from, before, after or during actual performances.
>
> I realize aerial acrobatics is not a risk-free sport. However I am confident that I am qualified and very competent in the aerial maneuvers I am performing.

Several questions arise with respect to this document:

(a) Is it a valid contractual document?

(b) If it is a valid contract, to whom does it afford protection?

(c) What is the scope of the protection, if any, granted by this document?

(a) Is the document of waiver a valid contract?

(i) Did the plaintiff possess the legal capacity to enter into the contract?

The first question is whether the waiver lacks contractual force because the plaintiff, when he signed it, was 18 years of age. The plaintiff was a minor in British Columbia where the age of majority is 19 years. But in Ontario, where the age of majority is 18 years, he was an adult. The defendants Bartsch and Phillips were

aware of this, and expressly had this in mind when they decided to have the form signed in Ontario rather than in British Columbia.

The question is whether the plaintiffs capacity to sign the waiver is to be determined by the law of Ontario or the law of British Columbia, where the plaintiff was domiciled. The authorities submitted to me establish the following propositions:

(i-a) Domicile is relevant to determining the capacity to enter into a contract of marriage. However it is not the governing test for the capacity to enter into commercial documents: *Sottomayor v. De Barros* (1877), 3 P.D. 1.

(i-b) The court in determining the system of law which governs questions of contract formation and interpretation must have regard to the intention of the parties. The evidence is clear that Mr. Phillips intended the document to be signed in Toronto so that Ontario law would govern. The evidence of the plaintiff is that he did not consider the matter. However, he was aware that he was of the age of majority in Ontario (he had publicly drunk alcoholic beverages earlier in the day) and made no objection to signing the document in Ontario.

(i-c) In determining the system of law which governs a contract, the court also considers the question of what jurisdiction has the closest and most substantial connection with the contract. Following this rule, competency to contract depends in general on the law of the place where the contract is made: *Sottomayor v. De Barros,* supra, at p. 6; *Jorges Carpet Mills Inc. v. Bondar,* [19811 4 W.W.R. 470 (Alta. Q.B.).

The plaintiff contends that the proper law of the contract is that of British Columbia, alleging that it was entered into as a consequence of a series of discussions which took place within British Columbia for the most part and between residents of British Columbia. The plaintiff further submits that the place of performance cannot be used as an indicia of a connection with Ontario law, since the performances were to take place in Toronto, Calgary and Vancouver.

The evidence does not establish any discussions with respect to waiver of liability in British Columbia. The sole discussion of this subject was in Toronto. The waiver agreement is not the variation of an existing British Columbia contract but a new contract. From the point of view of where the performances were to be held, there was

as much connection with Ontario as with British Columbia. The domicile of the parties would not appear to be the governing factor in commercial contracts, although it does govern the capacity to enter into a contract of marriage. In my opinion, there are no other factors connecting the contract with British Columbia which offset the important fact that the contract was made in Ontario.

Considering all these matters, and in particular the intention of the parties and the substantial connection between the agreement and the laws of the province of Ontario, I find that the law of Ontario must govern the question of the plaintiff's capacity to contract. Accordingly, I conclude that he had the necessary contract capacity to enter into the waiver agreement.

(ii) Was there consideration for the waiver?

The plaintiff denies that the defendants gave any consideration for the waiver. He contends that the contract between Messrs. Bartsch and Phillips on the one hand and the plaintiff on the other was made in Vancouver and that the waiver agreement which the plaintiff subsequently signed in Toronto was an attempt to vary that agreement for which no new consideration was given. The defendants, on the other hand, submit that the waiver constituted an independent contract, the consideration for which was allowing the plaintiff to perform in the show.

The case is governed, in my view, by the decision in *Delaney v. Cascade River Holidays Ltd.* (1983), 44 B.C.L.R. 24, 24 C.C.L.T. 6 (C.A.). There the plaintiff responded to an offer by the defendant to take him on a white water raft excursion. After he had paid his fare, he and the rest of the passengers assembled in a parking lot and loaded their gear into a waiting van. As they did so, a representative of the defendant instructed them to sign a release exempting the defendant from liability for loss or damage. The passengers were told that unless they signed they would not be allowed to go on the trip. It was held by McFarlane J.A., Taggart J.A. concurring, that the consideration for the plaintiff's signing the release was permission to enter the van and carry on with the rafting excursion.

In that case, as in the case at bar, the parties had entered into a contract prior to the release being presented and signed (I cannot accept the distinction offered by

counsel for the plaintiff that *Delaney* proceeded on the basis there was no prior contract.). In that case as in this, the plaintiff was told that he would not be allowed to pursue the activity in question unless he signed the release. If permission to continue with the activity in question constituted consideration for the waiver in *Delaney, so must it in* the case at bar.

To put the matter another way, Messrs. Bartsch and Phillips owed no duty under the contract made in Vancouver to allow the plaintiff to perform (although they might have been obliged to pay him in any event). The plaintiff wanted to perform. He was allowed to perform in consideration for signing the release. That was not past consideration, as the plaintiff contends, but new consideration.

(iii) To whom does the waiver offer protection?

The waiver is a valid contract between the plaintiff and Messrs. Bartsch and Phillips. It does not constitute a contract between the plaintiff and any of the other defendants. Those defendants had no knowledge of the waiver and gave no consideration for it. Accordingly, it does not afford contractual protection to the other defendants, even if they should fall within the wording of the waiver as "sponsors" of the ski show in question.

(iv) Summary

I conclude that the waiver constitutes a valid and binding contract between the plaintiff and Messrs. Bartsch and Phillips.

(b) Interpretation of the waiver

It has been suggested that the waiver might not cover the accident which occurred because it does not specifically absolve Messrs. Bartsch and Phillips from negligence. In my view, this argument is relevant to volenti rather than to the question of waiver. If the waiver constitutes a contractual document, as I have found it does, then the term in it exempting Messrs. Bartsch and Phillips from "all liability, costs or damages incurred to myself or others due to participation in ski shows or demonstrations" clearly applies to these proceedings and may be invoked by

Messrs. Bartsch and Phillips in defence of the claim which the plaintiff makes against them.

(c) Conclusion as to the defence of waiver

I conclude that if Messrs. Bartsch and Phillips were negligent, the plaintiff's action against them cannot be maintained by reason of the waiver agreement which he signed on the eve of the accident.

2. Volenti

The defendants contend that the plaintiff accepted the risk of injury in using the ramp equipment as it was set up in Toronto, and is thereby precluded from making any claim against them on the basis of the doctrine volenti non fit injuria. The plaintiff submits that if he consented to bear any physical risk, this was only the risk necessarily engendered by the performance, that is, the level of risk existing while all prudent steps have been taken by the organizer to render the performance safe. The plaintiff submits that he did not consent to bear the risk that the defendants might negligently provide him with dangerous equipment.

The principle which must guide the court in considering whether the defence of volenti is established was set out succinctly in *Lehnert v. Stein,* [1963] S.C.R. 38 at 43, 40 W.W.R. 616, 36 D.L.R. (2d) 159 [Man.], where the court quotes from Salmond on Torts, 13th ed., p. 44:

> "The true question in every case is: Did the plaintiff give a real consent to the assumption of the risk without compensation; did the consent really absolve the defendant from the duty to take care?"

In *Schmidt v. Sharpe* (1983), 27 C.C.L.T. 1 at 18 (Ont. H.C.), Gray J. stated, quoting from Linden, Canadian Tort Law, 3rd ed., at pp. 496-97:

> "The operation of volenti has thus been limited to those situations in which there is an express or implied agreement by the plaintiff to exempt the defendant..."

In the same case, it was said that the requirements to establish the defence of voluntary assumption of risk are:

> 1. that the plaintiff clearly knew and appreciated the nature and character of the risk he ran; and

2. that he voluntarily incurred it.

Counsel for the plaintiff contends that the first requirement is not met. The plaintiff, he states, knew that there were risks attendant on the sport of aerial acrobatics. However, he did not know, and had no reason to suspect, that the equipment was defective or improperly assembled on the night in question. He consented to bear only the level of risk existing where all prudent steps have been taken by the organizer to render the performance safe, he says. He did not consent to bear the risk that the defendants might negligently provide him with dangerous equipment. Counsel for the plaintiff further submits that there is no evidence from which it can be concluded that the plaintiff accepted the *legal,* as opposed to physical, risk of injury.

I cannot accept these contentions. Assuming for the purposes of this argument that the equipment was defective or improperly assembled, it seems clear to me on the evidence that the plaintiff accepted that risk. When he signed the waiver in which he acknowledged his assumption of the risk, he had helped to set up and had performed practice jumps on the equipment in exactly the same configuration as it was at the time of his injury. He accepted the risk of injury in using the ramp equipment as it was set up in Toronto. This was put to him in cross-examination:

> Q. At the Toronto show you — well, first of all, when you signed this waiver you knew that it applied to or was intended to apply to the show that you were going to be performing the very next day? A. Yes.
>
> Q. That show was on the ramp equipment? A. Yes.
>
> Q. The ramp was elevated and you were landing on an airbag, is that correct? A. Yes.
>
> Q. You knew that there was a risk of injury if the jump was poorly executed? A. Yes.
>
> Q. You accepted the risk of injury in using the ramp equipment as it was set up in Toronto? A. Yes.

These answers establish that the plaintiff accepted the risk of performing on the equipment as it was actually assembled, negligently or otherwise.

The requirement that the assumption of the risk be tantamount to an agreement to absolve the defendants from legal responsibility is also met in this case, given the waiver agreement.

In these circumstances, were I to find the defendants in breach of a duty owed to the plaintiff, I would absolve them from liability on the basis that the plaintiff assumed the risk of the accident.

III. THIRD PARTY LIABILITY

The defendants having been absolved of liability, the question of third party liability does not arise. I have concluded that it would not be useful for me to express my opinion as to what third party liability might be in the event that my conclusion that the defendants are not liable is found to be in error, in that such an exercise would involve a great many hypothetical findings of fact on matters of considerable complexity. Should that eventuality arise, I shall be pleased to receive such further submissions as counsel may deem appropriate and render my decision on the claims made by the defendants against the third parties.

IV. ASSESSMENT OF DAMAGES

I received full submissions on the appropriate amount of damages which should be awarded to the plaintiff. Against the possibility that I may be found to be in error in dismissing the plaintiff's claim, I shall indicate my views on the amount of damages which would properly have been awarded had the plaintiff succeeded in establishing liability.

A. *The Facts*

The plaintiff suffered C-5 spared quadriplegia as a result of the accident. From the date of the accident to 11th November 1981 he was hospitalized in Toronto. He was then flown to Vancouver where he was admitted to the acute spinal cord injury unit of the Shaughnessy Hospital. On 1st December 1981 he was discharged to the G. F. Strong Rehabilitation Centre. On 30th July 1982 he was discharged to his home, where he remains to this date.

The plaintiff is left with a number of disabilities as a result of his injury, all of which can be regarded as permanent.

His most major disability is paralysis. Both legs are totally paralyzed. His trunk is totally paralyzed below the neck with the exception of the diaphragm. Muscular control of the shoulders is moderately impaired. In the arms, there is total paralysis of the fingers and thumb. He has a weak ability to extend both wrists, but cannot flex them. Flexion of both elbows is possible and is near normal in strength; extension, however, is severely impaired. The plaintiff has no sensation below mid-chest. He has some feeling in his arms and sensation to pinprick in his legs.

Jim Milina has suffered complete loss of control of bowel and bladder function. He uses condom drainage with intermittent catheterization to drain his bladder. His bowel is evacuated every second morning. While he has had occasional accidents, the medical evidence is that his bowel and bladder routines are sufficiently reliable that he will not suffer undue embarrassment or be prevented from partaking in educational or vocational activities.

Frequently quadriplegia is accompanied by complications such as skin breakdown, infection of the urinary tract, recurring infection of the respiratory system, and spasticity. Jim Milina has not experienced significant problems in any of these areas; although he has had some spasticity in the lower limbs, this is not severe enough to cause any additional handicap. His sexual functioning is impaired and it is unlikely that he will ever father a child.

Jim Milina has made a good adjustment to his injury. With the assistance of his family he has been able to attend college where he has completed a number of courses.

B. *General Principles Governing the Assessment of Damages in this Case*

The general principles governing the assessment of damages in cases such as this were laid down in the trilogy almost seven years ago: *Andrews v. Grand & Toy (Alta.) Ltd.,* [1978] 2 S.C.R. 229, [1978] 1 W.W.R. 577, 3 C.C.L.T. 225, 83 D.L.R. (3d) 452, 8 A.R. 182, 19 N.R. 50; *Thornton v. Sch. Dist. No. 57 (Prince George),* [1978] 2 S.C.R. 267, [1978] 1 W.W.R. 607, 3 C.C.L.T. 257, 83 D.L.R. (3d) 480, 19 N.R. 552;

Arnold v. Teno; J.B. Jackson Ltd. v. Teno; Teno v. Arnold, [1978] 2 S.C.R. 287, 3 C.C.L.T. 272, 83 D.L.R. (3d) 609, 19 N.R. 1. They have been refined and elaborated in other cases, most notably *Lindal v. Lindal,* [1981] 2 S.C.R. 629, 34 B.C.L.R. 273, [1982] 1 W.W.R. 433, 19 C.C.L.T. 1, 129 D.L.R. (3d) 263, 39 N.R. 361.

For the purposes of this case I would summarize them as follows:

1. The fundamental governing precept is restitutio in integrum. The injured person is to be restored to the position he would have been in had the accident not occurred, insofar as this can be done with money. This is the philosophical justification for damages for loss of earning capacity, cost of future care and special damages.

2. For those losses which cannot be made good by money, damages are to be awarded on a functional basis to the end of providing substitute pleasures for those which have been lost. This is the philosophical justification for awarding damages for non-pecuniary loss.

3. The primary emphasis in assessing damages for a serious injury is provision of adequate future care. The award for future care is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff.

4. The plaintiff, in addition to cost of future care, is entitled to an award for lost future earning capacity. The amount is determined, where evidence permits, by comparing what the plaintiff would have earned had he not been injured with what he will earn in his injured state. Where evidence is not available, statistics as to average earnings, adjusted as necessary for the individual situation of the plaintiff, may serve as the basis of the award for lost earning capacity.

5. Actuarial and economic evidence is to be used to determine the proper amounts of the award for future care and lost earning capacity. Inflation must be considered and deductions made for present payment.

6. In recognition of the fact that the future cannot be foretold, allowance must be made for the contingency that the assumptions on which the award for pecuniary loss is predicated may prove inaccurate. In most cases this will result in a

deduction, since the earnings and cost of care figures are based on an uninterrupted stream which does not reflect contingencies such as loss of employment, early death, or the necessity of institutional care. Where no evidence is available, courts have made a deduction for such matters in the range of 20 per cent. Where evidence is available, the deduction for contingencies may be increased, decreased, or eliminated according to the proof presented. Evidence on contingencies is to be encouraged.

7. The impact of future taxation is not be be considered in calculating the award for lost earning capacity. In Ontario it has been held that it can be considered in assessing cost of future care. In British Columbia, trial courts have refused to consider taxation under either head.

8. Deductions must be made as necessary to avoid duplication in the amount awarded for damages for cost of future care (which may include basic living expenses) and that awarded for loss of future earnings (a portion of which would normally be used by the claimant to provide such basic living expenses).

9. The plaintiff is entitled to damages for pain, suffering and loss of amenities. These non-pecuniary damages have as their purpose the provision of new amenities and pleasures in substitution for those which have been lost but cannot be replaced in se. The Supreme Court of Canada has determined as a matter of policy that the award for non-pecuniary loss should be moderate, and has limited the maximum award under this head to the current equivalent of $100,000 in January 1978 (the date of the decisions in the trilogy), barring exceptional circumstances.

These, as I perceive them, are the general principles which must guide courts in Canada in the assessment of damages for personal injuries. Having set them out, I turn to a consideration of each of the heads of damage.

C. *Cost of Future Care*

As noted above, the provision of adequate future care for the seriously injured plaintiff must be the court's prime concern in a case such as this. All parties in the case at bar recognize that damages sufficient to provide appropriate care must be awarded. However, they diverge on two questions

which affect the assessment of those damages: (1) the proper manner of making the calculation so as to avoid duplication; and (2) whether there must be medical justification of the cost of care.

1. Method of calculation to avoid duplication

It is established that overlap, or double compensation, must be avoided. The question is whether the court should proceed by first assessing the total cost of future care, including basic living expenses which the plaintiff would have incurred had he not been injured, and make a deduction from the award for loss of future earnings to reflect the fact that a portion of those earnings would have been spent on items included in the award for cost of care had the plaintiff not been injured; or whether, on the other hand, the court should proceed by awarding under the head of cost of future care only those expenses which the plaintiff establishes he will incur over and above what he would have spent for living had he not been injured. The plaintiff adopts the former position, the defendant the second.

I begin by making two observations. First, if the calculations are done correctly and account taken of all relevant factors, it should not matter which procedure is adopted. This leads to a second observation – that the goal of this aspect of an award of damages for personal injuries is restitutio in integrum – to restore the plaintiff in so far as possible to the position he would have been in had he not been injured. Restitution is accomplished by restoring to the plaintiff what he has lost. That must be the ultimate measure of damage, regardless of the particular approach adopted.

In *Andrews,* supra, and *Thornton,* supra, the Supreme Court of Canada followed the method of calculating the plaintiff's total cost of care, including basic living expenses, and deducting from the award for lost earnings the percentage which would have been spent upon such expenses. In *Arnold v. Teno,* supra, the third case in the trilogy, it proceeded by the second method of allowing for future care only the additional costs which arose from the injury, and allowing the full award for lost earning capacity.

It therefore appears that either method is acceptable, depending on the nature of the case and the evidence adduced. Cooper-Stephenson and Saunders in Personal Injury Damages in Canada (1981), stated at p. 279:

> This approach very much depends upon the evidence adduced at trial. Thus in *Arnold v. Teno* such evidence related only to additional costs beyond the norm … In a sense, no question of duplication arose and the plaintiff was awarded full loss of earnings from which she would then be able to provide for herself the basic necessities of life in the same way as if she had not been injured.

In the case at bar, evidence has been presented sufficient to permit calculation on either basis. The plaintiff has presented evidence of what it will cost to maintain him (and his dependents to some extent) in a home environment for the rest of his life. The defence has presented evidence of the additional living expenses which the plaintiff will incur because of his injury. The court must therefore decide between the two approaches.

In my view, the "total lifestyle" approach is appropriate where the plaintiff's entire future life has been radically changed because of his or her injury. In such a case, it is artificial to speak of "additional" costs resulting from the injury. The plaintiff needs a totally different environment and totally different care than he would have required had he or she not been injured. The simplest and fairest approach is to award him all these costs and make a deduction from loss of future earnings for what would have been spent on basic necessities.

The "additional expense" approach is preferable where the plaintiff will continue to lead basically the same life as he would have led had he not been injured, with the aid of additional assistance and physical facilities. In such a case, the simplest way of calculating the loss caused by the accident is by totalling the cost of the extra assistance and facilities which the plaintiff will require.

Cooper-Stephenson and Saunders, at p. 279, advocate this approach in such circumstances:

> ... in the large majority of cases no claim will be made in respect of basic necessities under the cost of care. If only limited or sporadic hospitalization is contemplated, it is likely that evidence will be adduced only as to the additional expense involved. This will be so particularly if the home environment remains substantially intact, and the post-accident income level relatively constant.

In the case at bar, the evidence suggests that the plaintiff, had he not been injured, would have attended university for some years. In all probability he would have lived in an apartment for these years. Later, when established in his career and enjoying a family, he looked forward to and would have probably attained a detached family home.

The plaintiff's post-injury scenario is remarkably similar. He has been attending college and is determined to continue his university studies. To date he and his wife have been living in specially constructed quarters in his parents' home. However, the evidence establishes to my satisfaction that there are suitable apartments available where, given sufficient resources, he and his wife may live while they continue their studies. At some time in the future, they will probably wish to acquire a detached home, just as they would have had the injury not occurred. The basic cost of such a home will be provided by the plaintiff's earnings, either actual or in the form of an award for lost future earnings. He will be hospitalized only a few weeks of each year and, unlike *Andrews,* supra, will not, even on the plaintiff's projections, require 24-hour-a-day care. There is considerable evidence, which I shall address in greater detail later, that he will find work in a full-time career. In this respect as well, his situation is not comparable to that under consideration in *Andrews,* supra, and *Thornton,* supra.

Without diminishing the seriousness of the plaintiff's handicap, it is thus seen that in its essential features the plaintiff's life in his injured state will parallel his life as he would have lived it had he not been injured. The simplest and most accurate way of measuring his loss under the head of future care in these circumstances is by awarding him the additional costs which stem from his injury. Whatever method is adopted, the court must be assiduous to ensure that the plaintiff's future care, the paramount issue in the assessment of damages in cases such as these, is assured.

2. *The standard of care*

The plaintiff submits that the consideration which must govern the award of damages for cost of future care is the "functional" consideration, which he interprets as requiring the award of "the cost of such items as may be used by the plaintiff in substitution for the pleasures of life taken from him by his injury." It is on this basis, he submits, that the cost of a house was awarded in *Thornton,* supra. The question is not

what will provide the plaintiff with adequate housing, but what will mitigate the misery of quadriplegia. To the extent that money can, within the bounds of reason, serve to increase the plaintiff's sense of happiness and well being, it may properly be awarded under the head of cost of future care, it is submitted.

The defendants' approach is quite different. The defendants submit that there must be *medical* justification or vindication of the award for cost of future care. To the extent that money can be used to sustain or improve the mental or physical health of the plaintiff, it should be awarded under the head of cost of future care. But in so far as it serves only as solace by providing substitute pleasures, it falls under the head of non-pecuniary loss, not cost of future care, the defendants submit.

The distinction is important, because damages for non-pecuniary loss, unlike damages for cost of future care, are limited by the so called "$100,000 limit".

The authorities support the defendants' position on this issue. In *Andrews,* supra, Dickson J. (as he then was) distinguished damages for cost of future care from damages for non-pecuniary loss in the following terms at p. 603:

> The money for future care is to provide physical arrangements for assistance, equipment and facilities directly related to the [plaintiff's] injuries. Additional money to make life more endurable should then be seen as providing more general physical arrangements above and beyond those relating directly to the injuries.

The physical arrangements to be used in assessing cost of future care are based on what is required to preserve and promote the plaintiff's health. In *Andrews,* supra, Dickson J. said at p. 586:

> ... to the extent, within reason, that money can be used *to sustain or improve the mental or physical health* of the injured person it may properly form part of a claim. [emphasis added]

In *Thornton,* supra, the court, in defining "optimal care" stated at p. 609:

> ... it is clear from the *medical evidence* that the term merely connotes an ongoing practical level of orderly care in a home environment. [emphasis added]

If there was any doubt as to whether the award for cost of future care must be justified on a medical basis, it was dispelled by *MacDonald v. Alderson,* [1982] 3 W.W.R. 385, 20 C.C.L.T. 64, 14 M.V.R. 212, 15 Man. R. (2d) 35 (C.A.), leave to appeal to the Supreme Court of Canada refused [17 Man. R. (2d) 180n, 45 N.R. 180]. In that

case it was suggested [p. 419] that the plaintiff, a quadriplegic, should be awarded sufficient funds to purchase and maintain his own house on the non-medical grounds that this would give him a greater sense of " `autonomy, privacy, financial stability and pride of ownership ... and greater opportunities for gardening, owning a pet, and more space for hobbies' ". The Manitoba Court of Appeal rejected this evidence as "subjective theorizing" and reduced the award made at trial. The test for determining the appropriate award under the heading of cost of future care, it may be inferred, is an objective one based on medical evidence.

These authorities establish (1) that there must be a medical justification for claims for cost of future care; and (2) that the claims must be reasonable. On the latter point, Dickson J. stated in *Andrews* at p. 586:

> An award must be moderate, and fair to both parties... But, in a case like the present, where both courts have favoured a home environment, "reasonable" means reasonableness in what is to be provided in that home environment.

This then must be the basis upon which damages for costs of future care are assessed.

It follows that I must reject the plaintiff's submission that damages for cost of future care should take into account the cost of amenities which serve the sole function of making the plaintiff's life more bearable or enjoyable. The award for cost of care should reflect what the evidence establishes is reasonably necessary to preserve the plaintiff's health. At the same time, it must be recognized that happiness and health are often intertwined.

3. The evidence

Having examined the basis of the assessment of damages for cost of future care, I turn to the evidence.

(a) Accommodation

The plaintiff and the defendants each presented a model of the plaintiff's future life and led evidence of the costs associated with their respective models.

Both models are based on the expectation that the plaintiff will attend university for some years and then engage in some form of active life (although the plaintiff submits that the prospect of his finding permanent employment is dim).

The plaintiff's model contemplates provision of a single-family detached residence and furnishings, as particularized in the design of Mr. Keith-King, an architect, and the cost estimates of Mr. Frizzell. The residence contemplated includes a double carport, swimming pool, and accommodation for live-in help and children. The total capital sum required to provide such a home and fund its operation for the remainder of the plaintiff's life is $379,051.06.

The defendants' model is based on the premise that the plaintiff's accommodation should, as closely as practical, and with due allowance for his disability, approximate that in which he would have been living had the accident not occurred. It contemplates that the plaintiff and his wife will lie in a two-bedroom apartment suitable for wheelchair-bound occupants for the next ten years while he completes his education. At that point, when he finds a job, he will move to a single-family detached house. The defendants led evidence that the cost of renovating an existing house to meet the plaintiff's special needs would be $50,000.

For the reasons discussed above, I find the defendant's model the most acceptable. First, accepting as I do that the plaintiff's occupations for the balance of his life will not be greatly altered by the accident, I find the defendant's approach of calculating the additional cost because of the injury to be preferable to the plaintiff's total care approach.

Secondly, the defendants' model follows more closely the style of life the plaintiff would have enjoyed had he not been injured, and thus indicates more accurately the loss which the plaintiff has suffered as a consequence of the accident. Had he not been injured, the plaintiff would have gone to university for a number of years. It is highly unlikely that he would have lived in his own detached single-family house for his university years or the first few years of his career. He would probably have lived in an apartment with his wife, similar to what the defendants' mode] proposes for those years.

Thirdly, the model proposed by the defendants will provide an environment which adequately meets the plaintiff's needs for the balance of his life in a fashion which is reasonable and fair to both the plaintiff and the defendants. It is common ground that the plaintiff should not be confined to an institution, but should enjoy a home environment. But "home environment" does not mean only a newly constructed single-family residence. "Home environment" may also include group homes, townhouses and condominiums, duplexes and apartment suites, as well as older houses adapted to the plaintiff's needs. Of the three

plaintiffs in the trilogy, *Andrews, Teno* and *Thornton,* only Thornton was awarded the cost of a house.

Which of these alternatives will be accepted by the court and the location thereof will depend upon a number of factors including the reasonableness of the proposal in the light of medical opinion and the availability of the specific type of accommodation considered. As Dickson J. stated in *Thornton* at p. 616:

> ... there should be evidence that proper care can be provided in the appropriate environment at a firm figure less than that sought to be recovered by the plaintiff.

In the case at bar, the defendants have adduced evidence that proper care can be provided in a "home environment" at a firm figure less than that sought by Mr. Milina. On the other hand, the plaintiff has adduced no evidence providing a medical justification for the single-family dwelling he proposes. The only medical evidence on the subject was that of Dr. Symington, a rehabilitation specialist with great experience in the care and assistance of the paralyzed. He testified that there was no medical necessity for Jim Milina to live in a single-family detached dwelling.

The evidence establishes that there are a variety of apartments affording suitable accommodation to the plaintiff available or under construction in the Vancouver area. Shortly before trial, the defendants apprised the plaintiff of an apartment designed for wheelchair-bound occupants in the Broadview development in the west side of Vancouver. The plaintiff's father inspected this apartment prior to trial. He testified that it was unsuitable because the bathroom was too small and it did not have a wheel-in shower. However, the development architect testified that the unit met both C.M.H.C. and city of Vancouver standards for accommodation for wheelchair confined persons. The evidence further established that the plaintiff could use a bathtub and that, in any event, the tub could be converted to a wheel-in shower at relatively minor cost. The suitability of this accommodation was confirmed by the evidence of Ken Fraser, a young man similarly disabled to the plaintiff who intended to reside in one of the suites in the same complex. While the Broadview suite was no longer available at the time of trial, evidence of similar projects underway in Vancouver establish that reasonable accommodation will be available for the near future at a sum considerably less than that proposed by the plaintiff.

The evidence suggests that the rental cost of such suites as the Broadview suite is similar to that for other suites in the city. I reject the plaintiff's contention that the fact that such units are subsidized by the taxpayer to some extent should prevent their being considered as a basis for cost of care.

For the long-term future, I accept that at some point after completing his studies the plaintiff would have probably moved to a single-family house, had he not been injured. He will probably do so in his injured state as well. The additional costs entailed by this move to adapt the house to the plaintiff's disability will be $50,000.

The defendants submit that the premises which they established in evidence and which I have accepted, lead to the conclusion that only the $50,000 renovation cost ought to be allowed for accommodation, since all the other costs on the defendants' model would have been incurred had the plaintiff not been injured. I am troubled by this result. It would leave the plaintiff with no award for the cost of accommodation for the next ten years, and at the same time, little by way of an award for lost earnings for the same period. It is true that had the plaintiff not been injured he might well have been faced with the cost of providing accommodation while attending university. But he would have enjoyed more means of meeting that problem than he now does. He might have worked nights. He might have found low cost accommodation in university residence (available for married couples as well as single persons). Such means of coping with the difficult problem students face of providing housing for themselves are not now available to him. Bearing in mind the Supreme Court of Canada's admonition that the paramount concern of courts when awarding damages for personal injuries should be to assure that there will be adequate future care, I am led to conclude that the plaintiff should be awarded the cost of rental accommodation for the next ten years. After that his earnings, supplemented by the award for lost earning capacity, should be sufficient to provide him with a home, just as they would have had he not been injured.

The evidence suggests a monthly rental cost of $600 is reasonable. I would add to this an additional $100 per month for furnishings and incidental household expenses, for a total cost of $700 per month, or $8,400 per annum.

In summary, the plaintiff is entitled to the following amounts for accommodation:

(i) the present value of $8,400 per annum for the next ten years, being $69,636;

(ii) $50,000 (It is assumed that this sum, invested properly, will keep pace with inflation and provide the sum necessary for renovations when it is needed.).

(b) Attendant care

The plaintiff's model contemplates attendant care for 12 hours per day, 365 days a year, for a total cost of $40,021.96 per annum, the present value of which ranges between $437,529.15 and $516,588.15.

The defendants offered several alternative suggestions for attendant care. Dr. Symington opposed full-time attendant care on the ground that it would reduce the plaintiff's independence. He recommended attendant care of three hours per day and an additional one to two hours of daily housekeeping assistance, supplemented by some part-time transportation and schooling assistance while the plaintiff is attending university. The defendants called no evidence as to the cost of this option. However, at the hourly rate proposed by the plaintiff for attendants, $9.80, the annual cost of three hours of care per day would be $10,731. The housekeeper's cost might not unreasonably be put at one third that amount, for a total annual cost of about $14,000, without considering help for transportation and getting around a university campus.

Jean Bernd, a rehabilitation expert called by the defence, was of the view that attendant-homemaker assistance should be available to the plaintiff at all times. For the next ten years while resident in an apartment complex such as Broadview where care is available, the cost would be $30 per day, or $10,950 per annum. Later, when living in his own home, a full-time live-in attendant homemaker would be available through the Handicapped Resource Centre at a cost of $57 per day or $20,805 per annum.

The question is what type of care is reasonably required for the plaintiff on the evidence. I state at the outset that the plaintiff's wife and family should not be expected to continue to provide attendant care for him, as they have been doing in the past. For the next ten years, while pursuing his studies and living in an apartment, the cost of home attendance may be less than it will be later when the plaintiff is established in a detached residence. However, the plaintiff may need additional assistance for the purpose of transportation and getting from class to

class while attending university. On the other hand, once established in a career where .his environment can be adapted to his needs, he will probably not need an attendant during his working day. I accept that in so far as possible, the plaintiff should be encouraged to do what he can for himself. At the same time, he must not be expected to expend all of his limited energy on the effort of providing for his basic needs.

I find the costs cited by the defendants to be preferable to those put forward by the plaintiff. Obtaining help through agencies organized to assist handicapped persons is not only less costly than the private rates suggested by the plaintiff, but preferable in that payroll deductions and other details of employment are looked after by the centre. Moreover, I see no justification for the allowance for food for the attendant which the plaintiff has included in his model, the wage rates in question being based on the assumption the attendant will pay for his or her own board.

Bearing in mind all these factors, I find that an appropriate allowance for attendant services is $20,000 a year for the remainder of the plaintiff's expected life.

(c) Medical costs and equipment

I accept the schedule of medical equipment presented by the plaintiff, subject to reduction of the amount allowed for the 17" E & J Sportsman wheelchair from $1,613.85 to $900, the price which the plaintiff paid for it. The initial cost of acquiring this equipment is $11,513.60. Annual repairs will be $975. Annual replacement reserve is $2,080.

I also accept the plaintiff's calculation of the cost of supplies at $1,666.74 per annum and of prescriptions at $253.79 per annum.

The total annual cost of medical equipment, supplies and prescriptions is $13,434.13.

(d) Special equipment

I accept the schedule of special equipment presented by the plaintiff except for the camera adaptations and skidoo and trailer, which I find not to be expenses directly related to the injury, but rather substitute amenities. I also decline to make an allowance for computer-assisted exercise equipment which may be developed in

the future since its usefulness is too speculative at present to be considered a realistic prospect.

The total cost of the special equipment allowed is $4,006.57. Its annual operating and replacement cost is $831.01.

(e) Transportation

I accept that the plaintiff should be provided with a van equipped to accommodate his wheelchair. This may reasonably be considered an expense occasioned by the accident, since in his injured state the plaintiff cannot use forms of public transportation available to others. I would not allow the fee for the mobile telephone, as it is not anticipated that the plaintiff will himself drive the van. I am not satisfied of the need for interior furnishing. I allow the plaintiff one half the annual cost of maintaining membership in the B.C.A.A., gasoline, maintenance, licence, registration and insurance; had he not been injured, the plaintiff would have incurred some expense for transportation in whatever form he chose. I allow nothing for equipment which would enable Jim to drive the van, as the evidence does not establish this as a reasonable possibility.

The total initial cost allowed for van and modifications is $18,092.79. I would allow the plaintiff the annual operating costs of $1,464.12 and an annual replacement reserve of $2,552.78.

(f) Education and employment expenses

The plaintiff would have incurred tuition and book expenses had he not been injured. These cannot be said to be caused by the accident and are not recoverable. I have allowed for transportation and attendant services while at university elsewhere.

The plaintiff is entitled however to any special educational expenses occasioned by his injury. In my view, a small home computer is such an expense. Because of his injury, the plaintiff can write manually only with great difficulty. He can, however, use a computer. Before the accident he wished to pursue a business career; it seems to me that a home computer with business programs and auxiliary spreadsheet programs may well assist him in accomplishing what he would have accomplished without a computer had he not been injured. To put it another way, the plaintiff's injury has made

it more difficult for him to achieve his study and career goals; in so far as special equipment can offset that difficulty, money to purchase it should be awarded. I would allow the plaintiff the amount claimed in this respect, $6,374.

(g) Personal expenses

I would allow the plaintiff $480 per annum for drycleaning, alterations and repairs to clothing, as well as an annual membership in the Canadian Paraplegic Association of $5. The other items claimed either would have been incurred had he not been injured, or fall under the heading of amenities. In the latter category, I refer particularly to the claim for the cost of an annual vacation in Hawaii.

(h) Summary of cost of care

Were liability established, the plaintiff would be entitled to damages in the following amounts for cost of care:

(1) Initial outlays (including $50,000 for the eventual renovation of a home)	$89,986.96
(2) The present value of $8,400 per annum for the next 10 years for accommodation	69,636.00
(3) The present value of $20,000 per annum for the balance of his life for attendant care	496,600.00
(4) The present value of $10,308.44 per annum for the balance of his life for annual expenses associated with health care, equipment, clothing, etc.	216,786.49
Total basic sum assessed for cost of care	$837,009.45

The above figures are based on actuarial discount rates presented by Mr. Karp in evidence. These discount rates are in turn based on the rates for future inflation fixed by the Chief Justice of the court under the Law and Equity Act of 2 1/2 per cent for wage-related items and 3 1/2 per cent for other items. I have used the 2.5 per cent rate for the cost of future attendant care, on the ground that this expense is more likely to increase in line with wages and salaries rather than inflation generally.

These figures include no allowance for contingencies, favourable or unfavourable. In the absence of evidence permitting a more precise determination of the contingencies, a deduction must be made: *Andrews y. Grand & Toy (Alta.) Ltd.,* supra. I would reduce the amount awarded for cost of care by 20 *per* cent on this account, for a net award for cost of care of $698,407.57.

The foregoing calculations make no allowance for the tax which may be payable on earnings on any sums invested. I accept the plaintiff's contention that such taxes are inevitable and that their effect will be to result in less being available for cost of future care than this court finds should be provided. In Ontario, allowance for taxation on the earnings of moneys provided for cost of care has been made: *Julian v. Nor. & Central Gas Corp.,* 31 O.R. (2d) 388 at 389, 11 C.C.L.T. 1, [1980] I.L.R. 1-1173, 118 D.L.R. (3d) 458 at 459 (C.A.); *Schmidt v. Sharpe,* supra. However, in this province it has been held that an allowance for taxation should not be made: *Malat v. Bjornson,* 24 B.C.L.R. 119, [1981] 2 W.W.R. 59, [1981] I.L.R. 1-1419 (S.C.). In *Leischner v. West Kootenay Power & Light Co.* (1981), 130 D.L.R. (3d) 373, Spencer J. declined to admit evidence as to the impact of taxation, noting that the trilogy clearly prohibited consideration of taxation in the award for lost earnings and concluding that it would be inconsistent to consider taxation under one head but not the other. Spencer J. also referred [p. 378] to the comments of Spence J. in *Teno* at p. 633 [D.L.R.]:

> "In view of this uncertainty and of the fact that future rates of income tax, certainly those applicable in particular circumstances, are only matters of speculation, I am of the opinion that this would not justify in assessing an amount to cover that possible income tax and for the purpose of these reasons I omit any such allowance."

In *Mandzuk v. Vieira* (1983), 43 B.C.L.R. 347, 34 C.P.C. 222, I concluded that the principle of judicial comity required that I follow *Malat v. Bjornson,* supra, and. *Leischner,* supra. The same constraints govern me now. Any change must be made by a higher court than this. Accordingly, I make no allowance for taxation.

D. *Loss of Earnings*

The plaintiff was 18 at the time of his injury. He planned to enter university shortly, and pursue a degree in business administration. He looked forward to a career in business. Given his aptitudes and interests, there is no reason to suppose that he would not have achieved these goals had he not been injured.

While there is little dispute between the parties as to the nature of the career the plaintiff would have enjoyed had he not been injured, they differ on the questions of what he would have earned in that career and on his prospect for earnings in his injured state. The plaintiff submits that he has suffered a total loss of ability to earn income as a consequence of his injury. The defendant takes the position that while the plaintiff's ability to earn income has been reduced, with the proper training he will find employment in a business-related field and earn substantial income.

1. *Principles*

Notwithstanding frequent references in reported cases to the abstract concept of lost earning capacity, the court's task in assessing damages under this head is usually seen as determining what earnings the plaintiff has lost and will lose in the future as a consequence of the plaintiff's injury: Cooper-Stephenson and Saunders, Personal Injury Damages in Canada, pp. 198-204. In any event, the distinction is immaterial in this case, since all the evidence indicates that the plaintiff is well motivated and will take the highest paying job his potential will allow, just as he would have had he not been injured. The question for determination, therefore, is the amount by which the plaintiff's earnings have been reduced as a consequence of the accident.

In assessing the amount of earnings lost by the plaintiff, courts typically proceed by comparing the most probable scenario had the plaintiff not been injured with the most probable outlook in his injured condition. However, the court must also take into account lost earnings which are established only as a possibility, making the appropriate discount for the likelihood that the possibility would never have been realized: *Clark v. Kereiff (1 983),* 43 B.C.L.R. 157 (C.A.).

A final question of principle concerns the use of actuarial evidence in assessing lost future earnings. Where the assumptions upon which the calculations are made are relatively certain, precise mathematical calculations of lost earnings may be possible. Where, however, they cannot be ascertained with some degree of precision, the court must take a more general approach and "assess such sum for loss of future income as may be determined from a reasonable appraisal of all the evidence": *Conklin v. Smith,* [1978] 2 S.C.R. 1107, 6 B.C.L.R. 362, 5 C.C.L.T. 113, 88 D.L.R. (3d) 317 at 323, 22 N.R. 140.

In the case at bar, where the plaintiff was not established in a settled career at the time of his injury, it cannot be said with precision what he would have earned for the balance of his life had he not been injured. However, it can be predicted on a balance of probabilities that he would have enjoyed a career in business and would have earned a salary within a given range. The plaintiff's earnings in his injured state can also, in my view, be predicted on a balance of probabilities. I therefore consider this an appropriate case for the use of actuarial evidence as a guide, bearing in mind that the results posited by such evidence are no more certain than the assumptions upon which they are based and that the trial judge must ultimately make the assessment from a reasonable appraisal of all the evidence.

2. *The evidence*

(a) Pre-trial loss of earnings

Prior to his injury, the plaintiff worked part-time. Had he not been injured he would have continued to do so, earning between $10,200 and $14,280 per annum. I assess his loss of earnings from the date of the accident to trial at $30,000.

(b) Earnings prior to 1st September 1987

In all probability the plaintiff would have continued to work part-time from 1984-87 while attending university, earning approximately $10,714 per annum. Now, because of his injury, he cannot work while attending university. He is entitled to the present value of these lost earnings, being $35,000.

(c) Earnings after Ist September 1987

It is probable that the plaintiff, had he not been injured, would have found employment in a business related field after graduation from university and continued to pursue such a career for the balance of his working life.

Mr. Karp gave evidence as to the capitalized value of the plaintiff's future earnings in three different business careers: sales, merchandising and systems analysis. After making deductions for the contingencies of death, disability and unemployment, he found the present value of earnings in these careers to be the following:

Sales $934,000

Merchandising 760,000

Systems analysis 858,000

I find these figures to be somewhat inflated for the following reasons: (1) Mr. Karp assumed the plaintiff would work in private industry, yet provided pensions enjoyed by only 5 per cent of employees in private industry; (2) Mr. Karp based his calculations of pensions on the assumption that the plaintiff would stay with the same employer for most of his working life, and conceded that the amounts allowed should be reduced by perhaps one half on this account; (3) Mr. Karp used Canada wide figures for unemployment rather than British Columbia figures, which he conceded were higher.

For purposes of calculation, I shall consider the plaintiff's loss of earnings on the basis that he would have worked as a systems analyst, with capitalized earnings falling between the high figure for sales and the lower figure for merchandising. Making a deduction for the factors referred to above and rounding off, I conclude that $800,000 fairly represents the capitalized value of the plaintiff's earnings from 1987 to retirement, had he not been injured.

The next question is what the plaintiff will earn in his injured state. The plaintiff founds his contention that he probably will earn nothing on the evidence of an industrial psychologist, Mr. Leonard. Mr. Leonard's evidence was successfully challenged in cross-examination and by other evidence on a number of points.

First, his opinion of non-employability was based on the assumption that the plaintiff would be expected to work in a normal workplace with no allowances made for his disability. In such circumstances, physical acts such as turning doorknobs or tearing off computer sheets would present problems. However, as attested by the attendance in court of witnesses suffering from paraplegia and quadriplegia, such as Mr. Parker and Mr. Fraser, employers can and do arrange working conditions to enable handicapped persons to function in the workplace.

Mr. Leonard agreed that none of the material considered by him relating to the employability of spinal cord injured persons gave details of age at onset, level of lesion, sex, educational level attained or geographical region. He appeared not to have an intimate knowledge of the abilities of handicapped persons to function, being unaware, for example, that Mr. Parker with whom he stated he had had conferences in the preparation of his report, was paraplegic, or that a computer centre for handicapped persons had recently been established at Pearson Hospital. He also made no mention of a study put to Mr. Parker in cross-examination which indicated that of 22 male quadriplegics considered, 10 were employed; that 11.2 per cent of spinal cord injured persons considered were earning between $2,500 and $3,000 per month; and that 71.4 per cent of those persons with university degrees were employed.

Finally, Mr. Leonard placed little emphasis on factors peculiar to the plaintiff – his high motivation, energetic personality and will to succeed. Dr. Symington testified that these factors are of prime importance in considering the prospect of rehabilitation and employment.

At the same time, the difficulties which the plaintiff will face in establishing himself in a career are great. He has been passing the community college courses he has taken since the injury, although not attaining high grades. There is a chance he may not finish his university degree, although in my view, the probabilities are that he will do so. Once in a position to seek work, he may find jobs in an environment where he can function to be scarce, as Mr. Fraser testified. Regardless of where he works, he will be more susceptible than others to absences due to illness or mishap.

Assuming the plaintiff finds work as a systems analyst after completing his university ten years from now, the capitalized value of his earnings for the balance of his working life would be $644,000 on the evidence of Mr. Collisbird. The defendants propose that this sum, discounted by 25 per cent to reflect special difficulties which the plaintiff may encounter, be deducted from the $800,000 he would have earned as a systems analyst had he not been injured, for a net loss of future earnings of $317,000.

In my view, a realistic assessment of the plaintiff's actual future earnings lies between the positions of the plaintiff and the defendant. I am satisfied that on a balance of probabilities the plaintiff will find steady, remunerative employment. However, given the difficulties which the plaintiff will face in his studies and the balance of his working life, fairness requires a deduction greater than 25 per cent from the maximum capitalized earnings he may expect. As noted earlier, the court in assessing loss of future earnings must consider not only probabilities but possibilities. In this case, while the probability is that the plaintiff will establish a successful career, the possibilities of failure are relatively high. In my view, an appropriate deduction from total possible future earnings is 35 per cent.

In the result I would calculate the plaintiff's loss of earnings from 1987 onward as follows:

Discounted value of pre-accident projected earnings		$800,000
Less discounted value of post-accident projected earnings	$644,000	
Less 35 per cent allowance for possibility of unemployment arising from disability	193,200	
	$450,800	450,800
Value of loss of future earnings		$349,200

I would make no further deduction for contingencies. Appropriate deductions for the contingencies of death, disability and general unemployment have already been made in the actuarial calculations provided, and I have taken the "positive" contingency that the plaintiff may not work for all of his working lifetime into account in my calculations.

Nor is it necessary to make a deduction for basic living expenses, since I have not awarded the plaintiff his basic living expenses under the head of cost of care.

(d) Summary of award for loss of earnings

Had the plaintiff established liability, he would have been entitled to damages in the sum of $30,000 for loss of earnings to trial, $35,000 for loss of earnings from trial to 1987 and

$349,200 for loss of earnings from 1987 onward, for a total award under this head of $414,200.

E. Non-Pecuniary Damages

Damages for pain, suffering, loss of amenities and other non-pecuniary losses are awarded for the purpose of providing substitute pleasures and amenities to make the life of the injured person more bearable. In assessing such damages the court must consider the individual situation of the plaintiff and the extent to which money can provide solace, as well as the limitations established by the Supreme Court of Canada in the trilogy.

It is abundantly clear that money can be used to purchase many amenities which will make Jim Milina's restricted life more bearable. At the same time, no factors were suggested which would justify damages under this head in excess of the limit established in the trilogy, which, updated for inflation, was $167,200 at the time of trial.

The plaintiff is entitled to damages for non-pecuniary loss in the sum of $167,200.

F. Investment Counselling

The plaintiff is a young man of above average intelligence. He plans to acquire a Master's degree in Business Administration and to pursue a career in business. In these circumstances, an allowance for investment counselling is not justified.

G. *Pre-Trial Expenses*

Mr. Milina Sr. gave evidence of the costs incurred by him in renovating his house to make it wheelchair accessible and provide a small suite for his son. That work was done for the benefit of the plaintiff. I would award the plaintiff the sum spent, $26,832.35, in trust for his father, Tony Milina.

Mrs. Milina Sr. and more recently the plaintiff's wife Rita have cared for the plaintiff since his injury, with some assistance from home care workers provided by the province of British Columbia. In these circumstances, the court may award the plaintiff a sum in trust for them as compensation for their work. I would award $10,000 to the plaintiff in trust for Joan Milina and a similar sum in trust for Rita Milina.

H. Summary of Conclusions on Quantum of Damages

Had I found liability, I would have assessed damages in the following amounts:

Cost of future care	$698,407.57
Loss of earnings	414,200.00
Non-pecuniary loss	167,200.00
Pre-trial expenses	46,832.35
Total	$1,326,639.92

The plaintiff would also have been entitled to interest on sums unpaid pursuant to the Court Order Interest Act, and in the event of a delay in payment, an order adjusting the amount awarded for that fact in accordance with *Laroque v. Lutz,* 29 B.C.L.R. 300, [1981] 5 W.W.R. 1 (C.A.).

Should I have made any errors in my calculations or omitted any matters which I should have considered, counsel have liberty to apply.

V. CONCLUSION

The plaintiff's action is dismissed. Counsel may speak as to costs and any other matters requiring the court's further consideration.

Action dismissed.

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