Janiak *v.* Ippolito, [1985] 1 S.C.R. 146

Kazimierz Janiak *Appellant*;

and

Samuel Ippolito *Respondent*.

File No.: 16792.

1983: December 12; 1985: March 14.

Present: Ritchie*, Dickson, Estey, Chouinard and Wilson JJ.
*Ritchie J. took no part in the judgment.

on appeal from the court of appeal for ontario

Torts -- Damages -- Refusal to undergo recommended surgery -- Procedure having 70 per cent success rate and 100 per cent chance of recovery if successful -- Whether or not uncertainty a factor to include in calculating award.

Respondent was disabled as a result of a traffic accident and could not return to work. The recommended surgical treatment entailed a 70 per cent chance of success, and if successful, a 100 per cent chance of recovery and the possibility of respondent's returning to work. Respondent, however, feared surgery of any kind and refused to undergo the operation without his doctors' assuring him of a 100 per cent

chance of success; he remains disabled and out of work. The action was limited, given appellant's admission of liability, to the issue of damages. The trial judge found respondent was not entitled to damages in respect of pain or suffering or loss of earnings consequent upon an unreasonable refusal to undergo the proper medical treatment. The Court of Appeal adopted a similar line of reasoning but adjusted the award for loss of income upwards to take into account the fact that recovery was not completely guaranteed.

Held: The appeal and cross-appeal should be dismissed.

The question of whether or not a person has been reasonable in refusing to accept the recommended medical treatment is for the trier of fact to decide. In making that finding, the trier of fact must take into consideration the degree of risk from the surgery, the gravity of the consequences of refusing it, and the potential benefits to be derived from it. If any one of several recommended courses of treatment is followed, a plaintiff cannot be said to have acted unreasonably. The trial judge committed no error of law here and there was no basis on which an appellate court could interfere with his finding.

Damages for aggravated injuries consequent on some pre-existing infirmity are recoverable even if the infirmity is of a psychological nature. A psychological "thin skull" that developed subsequent to the tortious act is not, however, a factor to be considered in relation to reasonableness. The analytical focus in each case is on the capacity to make a reasonable choice. A line must be drawn between those capable of making a rational choice and those who cannot due to some pre-existing psychological condition. A person capable of choice must bear the cost of an unreasonable decision

but a person incapable of making such a choice due to a pre-existing psychological condition should not bear the cost when wrongfully injured. The burden of proof of damages lies with the plaintiff but shifts once it is alleged that the loss should have been mitigated.

The principle that a plaintiff cannot recover damages which could have been avoided by the taking of reasonable steps underlies the duty to mitigate. Avoidable damages are to be determined by assuming that the plaintiff has agreed to an operation not yet performed rather than looking at what on the balance of probabilities would have happened had the operation taken place. The courts must therefore take into account any "substantial possibility" of failure and the amount by which full compensation would be discounted would represent the avoidable loss.

Cases Cited

Marcroft v. Scruttons, Ltd., [1954] 1 Lloyd's Rep. 395; *Elloway v. Boomars* (1968), 69 D.L.R. (2d) 605; *Morgan v. T. Wallis Ltd.*, [1974] 1 Lloyd's Rep. 165; *Buczynski v. McDonald* (1971), 1 S.A.S.R. 569; *Plenty v. Argus*, [1975] W.A.R. 155; *Selvanayagam v. University of West Indies*, [1983] 1 All E.R. 824, considered; *Steele v. Robert George and Co.*, [1942] A.C. 497; *Hay or Bourhill v. Young*, [1943] A.C. 92; *Bishop v. Arts & Letters Club of Toronto* (1978), 83 D.L.R. (3d) 107; *Love v. Port of London Authority*, [1959] 2 Lloyd's Rep. 541; *Gray v. Cotic*, [1983] 2 S.C.R. 2; *Malcolm v. Broadhurst*, [1970] 3 All E.R. 508; *Dulieu v. White & Sons*, [1901] 2 K.B. 669; *Blackstock v. Foster*, [1938] S.R. (N.S.W.) 341; *Smith v. Leech Brain & Co.*, [1962] 2 Q.B. 405; *McGrath v. Excelsior Life Insurance Co.* (1974), 6 Nfld. & P.E.I.R. 203; *Asamera Oil Corp. v. Sea Oil & General Corp.*, [1979] 1 S.C.R. 633; *British*

Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways Company of London, [1912] A.C. 673; *Banco de Portugal v. Waterlow and Sons, Ltd.*, [1932] A.C. 452; *Savage v. T. Wallis, Ltd.*, [1966] 1 Lloyd's Rep. 357; *McAuley v. London Transport Executive*, [1957] 2 Lloyd's Rep. 500; *Darbishire v. Warran*, [1963] 1 W.L.R. 1067; *Harlow & Jones, Ltd. v. Panex (International), Ltd.*, [1967] 2 Lloyd's Rep. 509; *Taylor v. Addems and Addems*, [1932] 1 W.W.R. 505; *Masny v. Carter-Hall-Aldinger Co.*, [1929] 3 W.W.R. 741; *Matters v. Baker and Fawcett*, [1951] S.A.S.R. 91; *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324; *Newell v. Lucas*, [1964-65] N.S.W.R. 1597; *Mallett v. McMonagle*, [1970] A.C. 166; *Davies v. Taylor*, [1972] 3 All E.R. 836; *Schrump v. Koot* (1978), 18 O.R. (2d) 337; *McCarthy v. MacPherson's Estate* (1977), 14 Nfld. & P.E.I.R. 294, referred to.

Authors Cited

American Jurisprudence, 2nd ed., vol. 22, Rochester, N.Y., The Lawyers Co-operative Publishing Company; San Francisco, Calif., Bancroft-Whitney Company, 1965.

Cooper-Stephenson, Kenneth D. and Iwan B. Saunders. *Personal Injury Damages in Canada*, Toronto, The Carswell Company Limited, 1981.

Dobbs, Dan B. *Law of Remedies*, St. Paul, Minn., West Publishing Co., 1973.

Fleming, John G. *The Law of Torts*, 6th ed., Sydney, The Law Book Company Limited, 1983.

APPEAL AND CROSS-APPEAL from a judgment of the Ontario Court of Appeal (1981), 34 O.R. (2d) 151, varying an award of damages made by Callaghan J. Appeal and cross-appeal dismissed.

Brendan O'Brien, Q.C., for the appellant.

William Morris, Q.C., Rhona Waxman and *Kim Carpenter-Gunn*, for the respondent.

The judgment of the Court was delivered by

1. WILSON J.--The central issue in this case is how damages for personal injury are to be assessed where the victim of the accident unreasonably refuses to undergo the recommended surgery.

1. The Facts

2. On March 31, 1976 the respondent sustained serious back injuries when his automobile was struck from behind by a vehicle driven by the appellant. Prior to that date the respondent had been employed for eleven years as a crane operator. Since the accident he has been disabled to such an extent that it has been impossible for him to return to work. Liability for negligent driving was admitted by the appellant and the trial was confined to the issue of damages.

3. The respondent's main injury, according to the medical evidence presented at trial, consisted of a disc protrusion of the cervical spine. Several medical experts testified to the effect that the recommended course of treatment for such an injury would be the surgical excision of the disc together with a spinal fusion. The trial judge accepted the evidence that this type of operation entails an approximately 70 per cent chance of success and that, if successful, could result in an almost 100 per cent recovery for the respondent who could thereafter return to work as a crane operator. The respondent, however, appears to have suffered from a great fear of surgery of any

kind and insisted on assurance of a 100 per cent chance of success before consenting to undergo the recommended procedure. As neither his family physician nor his orthopaedic surgeon was able to provide such an absolute guarantee for this or any other type of surgery, the respondent refused to heed the medical advice. Accordingly, his back injuries have not improved and he continues to be disabled and out of work.

2. The Courts Below

4. At trial, Callaghan J. found that the respondent (plaintiff in the original action) had acted unreasonably in refusing to undergo the recommended surgery. Having made this finding he went on to state that any individual claiming damages for personal injuries has "a duty to mitigate his loss by obtaining proper medical treatment" and that he is not entitled to damages in respect of "any pain, suffering, loss of amenities, or loss of earnings consequent upon an unreasonable refusal to undergo medical treatment or surgical operation". Taking into account the estimated period of convalescence from a spinal fusion operation, Mr. Justice Callaghan found that, had the respondent acted reasonably, he would have been able to return to work by the end of March 1978. Accordingly, he found the appellant responsible for the respondent's loss of income for the two years between the date of the accident and March 31, 1978, which loss amounted to a total of $33,000. In addition, he assessed general damages for pain and suffering in sustaining the injuries at $25,000. When these awards were reduced to reflect the insurance benefits the respondent had received, the total amount for which the respondent received judgment at trial was $47,900 plus interest from November 25, 1977.

5. In the Ontario Court of Appeal [(1981), 34 O.R. (2d) 151] Blair J.A. (with whom Goodman J.A. concurred) agreed generally with the line of reasoning pursued by the trial judge, but differed in his calculation of damages to the extent that he did not cut off the appellant's responsibility for lost earnings at the date when the respondent might have been expected to recuperate from the operation and return to work. Rather, he took into account the fact that the recommended surgery entailed only a 70 per cent chance of success and adjusted the award for loss of income upward in order to take into account the fact that, even if the respondent had acted reasonably in the circumstances, his recovery would not have been assured. After making a series of adjustments to reflect the contingencies entailed in the surgery and the respondent's future job prospects had he undergone the operation, Blair J.A. awarded damages for loss of earnings in the amount of $81,661. He then deducted the insurance benefits which the respondent had received and added the $25,000 representing general damages for pain and suffering. This produced a total award of $103,651.

6. A strong dissent in the Court of Appeal was voiced by MacKinnon A.C.J.O. based on his analysis of the English case law on the issue of the refusal of a tort victim to seek medical care. The principle he elicited from the English authorities is that a tort victim's unreasonable refusal to undergo medical treatment constitutes an intervening cause which effectively cuts off the liability of the initial tortfeasor. Accordingly, as applied by MacKinnon A.C.J.O., this principle has the effect of barring the respondent from any claim for loss of income beyond the date on which he might reasonably be expected to have returned to work had he undergone the surgery and the surgery had been a success. While MacKinnon A.C.J.O. was prepared to take account of the approximately 30 per cent chance of the operation's failure in assessing the reasonableness of the respondent's refusal of the surgery, he was not prepared to

factor this percentage into the *quantum* of loss awarded once the respondent was held to have acted unreasonably. Although he would have varied the damages calculation in some minor respects, the overall thrust of his dissent was to approve the approach taken by Callaghan J. at trial.

3. Unreasonable Refusal of Treatment

7. The single most noteworthy fact with which this appeal is concerned is that the trial judge found the respondent to have been unreasonable in his refusal to accept the recommended medical treatment. As noted by each of the member of the House of Lords in *Steele v. Robert George and Co.*, [1942] A.C. 497, this question is most appropriately left to the trier of fact to decide. There is no reason to conclude that Callaghan J. committed any error of law in determining this issue in the case at bar. Both the majority and the dissent in the Ontario Court of Appeal were of the view that there was sufficient evidence to support the trial judge's finding and, in the absence of any suggestion that he misdirected himself or applied the wrong test to the facts presented to him, there is no basis on which this Court can interfere with his finding. He alone had the opportunity to assess the evidence and determine the issue of the respondent's reasonableness at first hand.

8. It may, however, be opportune, since this Court now has the concept of reasonableness in relation to a refusal of medical or surgical treatment before it, to make reference to some of the difficult elements involved in a finding of unreasonableness before considering precisely how such a finding affects the legal principles otherwise applicable on an assessment of damages.

(1) Unreasonableness and the "Thin Skull" Doctrine

9. The first difficult issue which arises in assessing the reasonableness or otherwise of a plaintiff's refusal of medical treatment is the extent, if any, to which subjective attributes of the plaintiff may be taken into account by the court. In the case at bar it was submitted by the respondent that, whether or not his refusal of treatment was perceived as objectively unreasonable, its source lay in an innate fear of surgery which he could not be expected to overcome. Accordingly, he invoked a variation of the long accepted principle that "if the wrong is established the wrongdoer must take the victim as he finds him": *per* Lord Wright in *Hay or Bourhill v. Young*, [1943] A.C. 92, at pp. 109-10. It followed from this, he argued, that the injuries resulting from his inordinate fear, which might otherwise have been avoided if a reasonable decision regarding medical treatment had been made, were analagous to the type of aggravated injuries which might be suffered by a haemophiliac inflicted with a bleeding wound or any other victim with a predisposed physiological oversensitivity: *Bishop v. Arts & Letters Club of Toronto* (1978), 83 D.L.R. (3d) 107 (Ont. H.C.)

10. It is, of course, well established that damages for aggravated injuries consequent on some pre-existing infirmity of the plaintiff are recoverable even if the infirmity is of a psychological nature: see, *e.g. Love v. Port of London Authority*, [1959] 2 Lloyd's Rep. 541 (Q.B.); *Gray v. Cotic*, [1983] 2 S.C.R. 2. As Geoffrey Lane J. said in *Malcolm v. Broadhurst*, [1970] 3 All E.R. 508, at p. 511, "there is no difference in principle between an egg-shell skull and an egg-shell personality". Indeed, it would seem that the *locus classicus* of the "thin skull rule", the decision of Kennedy J. in *Dulieu v. White & Sons*, [1901] 2 K.B. 669, was in fact a case of

aggravated injuries which were triggered by the impact of the defendant's tortious act on the plaintiff's inchoate psychological hypersensitivity.

11. The key word, however, is pre-existing. Once it is acknowledged that there is such a thing as a "psychological thin skull", the inquiry shifts to (a) the timing and (b) the nature of the alleged psychological infirmity.

(a) Timing

12. With regard to timing, it would seem that the very concept of a thin skulled plaintiff embodies within it the notion that the oversensitive condition was pre-existing at the time of the injury. That is to say, where the ultimate consequence of which the plaintiff complains is not due to the impact of the defendant's wrongful act on some existing sensitivity of the plaintiff, but rather arises only subsequent to the injury and independent of any intrinsic physiological or psychological problem for which the tortious act has served as a catalyst, the ordinary rules of recoverability apply. By way of illustration, where a blow to the plaintiff's chest inflicted by the defendant ultimately results in the development of a malignancy, but there is no evidence of any pre-existing susceptibility to such a disease in the plaintiff, then the ordinary rules of causation apply: *Blackstock v. Foster*, [1938] S.R. (N.S.W.) 341. On the other hand, where the defendant's negligent act results in the plaintiff's lip being burned and, due to a rare pre-malignant condition of the plaintiff, this burn turns into a fatal malignant growth, then the pre-existing "thin skull" serves to displace the otherwise applicable rules of causation: *Smith v. Leech Brain & Co.*, [1962] 2 Q.B. 405.

13. The same dichotomy must presumably apply to cases of a psychological thin skulled plaintiff. A significant distinction has to be made between persons who subsequent to an accident develop an emotional or psychological infirmity and those who bring a pre-existing emotional or psychological infirmity to the accident. The question posed by the kind of case we have here is: do persons in the latter group have to meet the objective test of reasonableness when their refusal of medical help is being assessed by the trier of fact or are their subjective attributes to be given due consideration?

14. In *Marcroft v. Scruttons, Ltd.*, [1954] 1 Lloyd's Rep. 395 (C.A.), the plaintiff, a dock labourer, was unloading cargo from a steamship at the Liverpool docks when the wire of a derrick which was unloading cargo from part of the lower hold fouled the hatch beam. The hatch cover on which the plaintiff was standing was dislodged and he fell about ten feet into the hold. He suffered no physical injuries apart from bruises but anxiety neurosis and depression following the shock incapacitated him from work. Liability was not contested by the plaintiff; the only issue was damages.

15. The plaintiff saw his panel doctor who referred him to a psychologist. She saw him on several occasions and observed that he had tremors of the hand, mouth, eyelids, general shaking of the body, severe depression and lack of confidence. She recommended that he go to the Rainhill Mental Hospital for electric shock treatment. He refused to go because it was a mental hospital. The trial judge found that this was unreasonable. When the case went to appeal Lord Justice Singleton said it was one of the most difficult cases on the assessment of damages that he had encountered in a long time. He adverted to the fact that some of the doctors who gave evidence testified

"that this man was of a type who might be more readily affected by an accident of this kind than other men would be". He also referred to the medical evidence that many people have a natural antipathy to entering mental hospitals. He had to deal with the contention made by counsel for the plaintiff that the plaintiff's condition really was such that he could not make up his mind. Dr. Evans, one of the defendant's witnesses, said, at p. 398:

> I felt he was incapable of really coherent thought when I saw him. I did not think he was really capable of reasoning the thing out. I think it was just a matter of taking fright at the mere mention of mental hospital.

Lord Justice Singleton dealt with that in the following way, at p. 399:

> A man who is in an anxiety state may have difficulty in making up his mind, but on a question as to the treatment which he should have his mind is, or ought to be, made up for him by his own medical advisers. That is one of the purposes of having medical advisers. The patient would not know what he ought to do; the patient takes medical advice, and the patient ought to be guided by his medical advisers.

His Lordship concluded at the same page and at p. 400:

> I do not wish to say anything that would hurt the feelings of a plaintiff in a case of this kind, but I believe it to be the duty of this Court to say that if a man is recommended by his own medical advisers and by others to undergo a course of treatment, he ought to undergo it; if he is advised that it gives him a reasonable chance of recovery, and if the treatment is reasonable, he ought to undergo it; if he will not, and does not, he must see that it is a little hard upon the defendants if they are to be asked to pay damages in respect of a period extending afterwards. If the general opinion is that treatment would cure him, or, at least, render him in a much better state in every way, then he ought to undergo the treatment.

16. It is interesting to note that Lord Justice Denning in his concurring reasons indicates, at p. 401, that the plaintiff had "unbeknown to him, a constitutional weakness which made it very serious for him, because the accident operating on that weakness produced in him a very severe nervous shock, trembling from head to foot". He nevertheless found that this factor had to be disregarded. He said at p. 401:

> Viewing the matter objectively, he was quite unreasonable in refusing to follow their advice; but viewing the matter subjectively, the man's attitude was quite understandable. He was an uneducated, ignorant man who did not realize that a mental hospital nowadays is very different from what it was 30 or 40 years ago; and, moreover, owing to his anxiety neurosis, he was not in a fit state to make reasonable decisions. The difficult question in the case is whether we are to admit this subjective condition of his as a reason for refusing medical treatment. I think not. We should do great harm if we allowed him to go on receiving compensation for the rest of his life because of his refusal to accept medical treatment. Persons who suffer from an anxiety state have more chance of recovery if they are treated as responsible human beings and are expected to behave reasonably, rather than as weaklings who can give way to their weakness and expect to get paid for it. [Emphasis added.]

17. The Court in *Marcroft* clearly refused to permit subjective attributes to enter into the question of the reasonableness of the plaintiff's refusal of medical treatment. Their Lordships' conclusion that the plaintiff was more vulnerable than most prior to the accident to the effects of shock does not appear to have affected the outcome either in terms of the reasonableness of his refusal of medical treatment or in relation to aggravated damages.

18. By way of contrast, in *Elloway v. Boomars* (1968), 69 D.L.R. (2d) 605 (B.C.S.C.), the plaintiff who suffered minor injuries in an automobile accident developed a psychosis of a schizophrenic nature which by the time of trial was largely disabling. McIntyre J. found on the medical evidence that the plaintiff suffered from a pre-existing condition which predisposed him to schizophrenic illness and that the

accident, operating on that predisposition, brought about the full schizophrenic illness. The plaintiff had been advised to take treatment for his condition but he refused. McIntyre J. concluded, however, that his psychosis was itself a factor in his refusal and he could not therefore be held responsible for the worsening of his condition. Damages must be assessed on the basis that he had not wilfully failed in his duty to mitigate.

19. In *McGrath v. Excelsior Life Insurance Co.* (1974), 6 Nfld. & P.E.I.R. 203 (Nfld. T.D.), the plaintiff, an unskilled labourer, injured his back while working as a painter's helper. He was in continuous pain. One specialist recommended a spinal fusion to alleviate the pain. Another said it wouldn't help. The plaintiff decided not to have it and the insurance company discontinued his disability benefits. Higgins J. said, at p. 208:

> The position therefore is that Dr. Shapter and Dr. Russell, both specialists in their respective fields, are in complete disagreement as to the benefits which might result from surgery. Faced with this conflict of expert opinion, it is not to be wondered at that the patient, an unlettered man, would be reluctant to agree to an operation. I do not regard his refusal, in these circumstances, as unreasonable. [Emphasis added.]

20. In *Morgan v. T. Wallis Ltd.*, [1974] 1 Lloyd's Rep. 165, the plaintiff, aged 33, was employed by the defendants as a lighterman on the River Thames. In January 1970, a stevedore employed by the defendants on the ship *Cymric* threw some wire rope on to an adjoining barge on which the plaintiff was working. While trying to avoid this the plaintiff fell into the hold and injured his back. There was no dispute as to liability. Special damages were agreed. General damages were disputed on the ground that the plaintiff unreasonably refused to undergo tests and an operation out of a genuine, though misplaced, fear. The evidence indicated that the fear was beyond his

control. Mr. Justice Browne found that the plaintiff's refusal to undergo the tests and the operation was unreasonable. Quoting from his reasons at p. 170:

> Everybody agrees, and I emphasize strongly, that the plaintiff in the present case is not in the slightest degree a malingerer, and is a completely honest man who genuinely holds the beliefs and fears about which he has told us in evidence. But in deciding whether the defendants have proved that he has unreasonably refused to have the investigation and operation in question here, it seems to me clear from the authorities to which I have referred, that I must apply an objective test, in this sense, would a reasonable man in all the circumstances, receiving the advice which the plaintiff did receive, have refused the operation? I think this question must be considered as at the times when his decision was made and on the basis of the advice he then received. If the plaintiff preferred and prefers to go on as he is rather than to have the operation no-one can blame him. But the question I have to consider is not, "Is the plaintiff to blame for refusing the operation?" but, "Is it fair and reasonable to make the defendants pay for his refusal?" [Emphasis added.]

21. It is, however, of interest to note that at p. 173 Browne J. states:

> As I have said several times, I entirely accept that the plaintiff's fear and his inability to bring himself to agree to the operation are absolutely genuine. But in my view there is no evidence that this is due to any physical or mental or psychological disability which existed before the accident and which would entitle the plaintiff to say that the defendants must take the plaintiff as they find him. [Emphasis added.]

22. He concluded at the same page:

> As I have said, I think one must decide the question whether the plaintiff's refusal was unreasonable by the objective standard of the reasonable man, and the fact that this particular plaintiff has got himself into an emotional state where he finds it impossible to agree to the operation is, in my view, no ground for saying that his refusal was not unreasonable.

23. It would appear then on the English authorities that a psychological "thin skull" developed subsequent to the tortious act is not a factor that can be considered

in relation to reasonableness: the objective test prevails in the absence of any pre-existing condition.

(b) Nature

24. The other element that has to be considered in determining whether the objective test of reasonableness applies to the decision made by the alleged thin skulled plaintiff is the nature of the pre-existing psychological infirmity. It is evident that not every pre-existing state of mind can be said to amount to a psychological thin skull. It seems to me that the line must be drawn between those plaintiffs who are capable of making a rational decision regarding their own care and those who, due to some pre-existing psychological condition, are not capable of making such a decision. As pointed out by Professor Fleming, a plaintiff cannot by making an unreasonable decision in regard to his own medical treatment "unload upon the defendant the consequences of his own stupidity or irrational scruples": Fleming, *The Law of Torts* (6th ed. 1983), p. 226. Accordingly, non-pathological but distinctive subjective attributes of the plaintiff's personality and mental composition are ignored in favour of an objective assessment of the reasonableness of his choice. So long as he is capable of choice the assumption of tort damages theory must be that he himself assumes the cost of any unreasonable decision. On the other hand, if due to some pre-existing psychological condition he is incapable of making a choice at all, then he should be treated as falling within the thin skull category and should not be made to bear the cost once it is established that he has been wrongfully injured.

25. I believe that Lord Justice Singleton's concern in *Marcroft v. Scruttons*, *supra*, stemmed from his doubt as to whether the plaintiff in that case was capable of

making a rational decision. Not only that, there was some indication in the medical evidence that his incapacity may have been itself a consequence of the trauma induced by the accident. If this is so, it would appear manifestly unjust to cut off his recovery for failure to mitigate his damages through a rational decision as to treatment. The reasons of Lord Justice Denning are even more baffling. He attributes the plaintiff's traumatic state after the accident to a pre-existing constitutional weakness and says it rendered the plaintiff incapable of making reasonable decisions. Yet he concluded that this was a subjective factor that could not be considered. This would appear to be carrying the objective test too far in that it overrides the "thin skull" principle altogether.

26. The position in the United States would appear to be that a great number of personal attributes falling short of a constitutional incapacity to act reasonably can be taken into account in evaluating the plaintiff's post-injury behaviour. This position is best summed up in Dobbs, *Law of Remedies* (1973), p. 580 as follows:

> In such cases the courts have spoken of "the reasonable and prudent man," or "reasonable care" by the plaintiff as a test, but this term is probably too narrow. Personal preferences of the plaintiff, personal finances of the plaintiff and even irrational fears of the plaintiff are given due weight in deciding what he is expected to do to minimize damages. The standard, then, is not so much the objective standard of the hypothetical reasonable man as it is the subjective standard based on what can be reasonably expected of the particular plaintiff.

In their text on *Personal Injury Damages in Canada* (1981) Professors Cooper-Stephenson and Saunders point out that no clear position has emerged from the Canadian jurisprudence in this area although cases such as *Elloway*, *supra,* and *McGrath, supra*, suggest that a plaintiff in Canada may not be held to an objective standard of reasonableness which it is beyond his capacity to attain. This position

would appear to most appropriately complement Fleming's assertion that where a plaintiff does not suffer from a constitutional incapacity to act reasonably he cannot make the defendant bear the burden of his unreasonable behaviour. Thus, the analytic focus in each case is on the capacity of the plaintiff to make a reasonable choice.

(2) Unreasonableness and Conflicting Medical Opinions

27. Another problem trial judges face in assessing the reasonableness of a plaintiff's decision whether or not to have medical or surgical treatment is the way in which he is expected to handle conflicting medical opinions.

28. In *Asamera Oil Corp. v. Sea Oil & General Corp.*, [1979] 1 S.C.R. 633, Estey J. stated at p. 649 that "A plaintiff need not take all possible steps to reduce his loss". He is only bound to act like "a reasonable and prudent man": *British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways Company of London*, [1912] A.C. 673 (H.L.) The steps he takes, Lord Macmillan said in *Banco de Portugal v. Waterlow and Sons, Ltd.*, [1932] A.C. 452, at p. 506, "ought not to be weighed in nice scales".

29. What guidance, if any, do these very general observations afford an injured plaintiff confronted with conflicting medical advice and varying prognoses for the outcome of treatment? In *Savage v. T. Wallis, Ltd.*, [1966] 1 Lloyd's Rep. 357 (C.A.), the doctors disagreed as to whether a slight operation would get rid of the plaintiff's headaches. It was held that the plaintiff in refusing the surgery had not failed in his duty to mitigate. In *McGrath v. Excelsior Life Insurance Co., supra*, medical opinion was divided as to whether a spinal fusion would reduce the plaintiff's pain. It was held

that the plaintiff did not fail in his duty to mitigate by refusing to have the surgery. In *Steele v. Robert George & Co.*, *supra,* Viscount Simon said, at p. 500:

> It may in some cases be quite reasonable for a man to decide not to undergo an operation if his own doctor advises against it, for it is the conclusion reached by his doctor which governs his decision much more than the logic by which his doctor has reached the conclusion.

As to the possibility of medical opinions conflicting with that of his own doctor Viscount Simon said, at p. 501:

> that where the workman has been advised against the operation by a skilled medical man in whom he has confidence, it would be necessary to bring home to the workman an extremely strong body of expert advice to the contrary before the onus which rests on the employer of proving that the refusal was unreasonable should be regarded as discharged.

These cases are, however, to be contrasted with cases such as *Marcroft v. Scruttons*, *supra,* and *McAuley v. London Transport Executive,* [1957] 2 Lloyd's Rep. 500 (C.A.), where the refusal of surgery was held to be unjustified. It would appear from the authorities that as long as a plaintiff follows any one of several courses of treatment recommended by the medical advisers he consults he should not be said to have acted unreasonably.

30. As a qualification to the general principle that a plaintiff's actions must not be subjected to an overly critical standard of review, the English courts have suggested that in determining what steps he ought to take the plaintiff should consider the defendant's interests as well as his own. In *Darbishire v. Warran,* [1963] 1 W.L.R. 1067 (C.A.), the court pointed out that, while the plaintiff may have acted reasonably as far as he was concerned, the true question was whether the plaintiff acted

reasonably as between himself and the defendant and in view of his duty to mitigate the damages: *per* Harman L.J., at p. 1072; Pearson L.J., at p. 1076. It should be noted that this rule has never been adopted in Canada, and the English courts in the context of the law of contracts have held that a plaintiff "is not bound to nurse the interests of the contract breaker": *Harlow & Jones, Ltd. v. Panex (International), Ltd.*, [1967] 2 Lloyd's Rep. 509, *per* Roskill J., at p. 530.

31. In making his finding as to the reasonableness or otherwise of a refusal of medical treatment, the trier of fact will also, of course, take into consideration the degree of risk to the plaintiff from the surgery (*Taylor v. Addems and Addems*, [1932] 1 W.W.R. 505 (Sask. C.A.)), the gravity of the consequences of refusing it (*Masny v. Carter-Hall-Aldinger Co.*, [1929] 3 W.W.R. 741 (Sask. K.B.)), and the potential benefits to be derived from it (*Matters v. Baker and Fawcett*, [1951] S.A.S.R. 91 (S.C.)).

(3) The Onus of Proof of Reasonableness

32. While a plaintiff has the burden of proving both the fact that he has suffered damage and the *quantum* of that damage, the burden of proof moves to the defendant if he alleges that the plaintiff could have and should have mitigated his loss. That this is the law in Canada has been clearly stated by this Court in *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324, and more recently reaffirmed by Estey J. in the *Asemara Oil* case, *supra*. In *Red Deer* Laskin C.J. said, at p. 331:

> If it is the defendant's position that the plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue, subject to the defendant being content to allow the

matter to be disposed of on the trial judge's assessment of the plaintiff's evidence on avoidable consequences.

33. Two Australian cases are instructive in this area. In *Buczynski v. McDonald* (1971), 1 S.A.S.R. 569, the plaintiff was shown to be suffering from a compensation neurosis as a result of personal injuries sustained in an automobile accident caused by the defendant's negligence. The report of the case deals only with a problem that arose in the assessment of damages as to the plaintiff's duty to mitigate his loss. It was proved in evidence that there is no treatment that would relieve the plaintiff's neurosis and it was therefore of the utmost urgency that his claim be tried since the chances of his recovery from his condition would "get less and less as the time from the date of his original injury increases". The trial was expedited accordingly. Quoting from the judgment of Walters J., at p. 573:

> I turn now to the question whether the plaintiff has done all that he could reasonably have done to alleviate his condition of compensation neurosis. The principle to be applied with respect to the mitigation of damages in the case of tort is clear. The plaintiff is "bound to act not only in his own interests, but in the interests of the party who would have to pay damages, and keep down the damages, so far as it is reasonable and proper, by acting reasonably in the matter" (*Smailes & Sons* v. *Hans Dessen & Co.* ((1905) 94 L.T. 492; on appeal (1906) 95 L.T. 809), per *Channel* J. at p. 493. And as *Mayo* J. said in *Fishlock* v. *Plummer* ([1950] S.A.S.R. 176, at p. 181): "If any part of his (the plaintiff's) damage was sustained by reason of his own negligent or unreasonable behaviour, the plaintiff will not be recouped as to that part." However, "the question what is reasonable for the plaintiff to do in mitigation of damages is not a question of law, but one of fact in the circumstances of each particular case, the burden of proof being upon the defendant" (*Halsbury's Laws of England*, 3rd ed. vol. 11, par. 477, p. 290). The authorities show that once the plaintiff has "made out a prima facie case of damages, actual or prospective, to a given amount", the burden lies upon the defendant to prove circumstances whereby the loss could have been diminished. Not only must the defendant discharge the onus of showing that the plaintiff could have mitigated his loss if he had reacted reasonably, but he must also show how and to what extent that loss could have been minimized (*Roper* v. *Johnson* ((1873) L.R. 8 C.P. 167), per *Grove* J. at p. 184: *Criss* v. *Alexander (No. 2)* ((1928), 28 S.R. (N.S.W.) 587; 45 W.N. 187), per *Street* C.J. at p. 596).

Walters J. then dealt with the defendant's submission that the plaintiff's duty to mitigate in a case of compensation neurosis included a duty to bring on the action for an early trial. He said, at p. 574:

> It cannot be disputed that the plaintiff could have taken earlier steps to expedite the trial of the action, but it was equally open to the defendant to have done so, at least by October 1970. Moreover, in the period between April 1970 and June 1970, there had been a delay of two months on the part of the defendant in answering the interrogatories delivered for his examination, and until the answers had been filed, application could not have been made for entry of the action for trial. And it is to be noticed that a summons for leave to enter the action for trial was issued three days following the filing of the answers to the interrogatories. Another matter which I am unable to overlook is the initial delay on the part of the defendant in filing his defence to the statement of claim.
>
> Looking at the conduct of the parties, I am unable to say that any blame lies with one side rather than the other, and I am not persuaded that any mischief done can be solely ascribed to the plaintiff. In any case, apart from the prognosis given in evidence by Mr. Schaeffer, there is not a great deal to show to what extent the plaintiff's neurosis might have been relieved if the action had been brought to trial sooner. I cannot speculate as to the extent to which the plaintiff might have minimized his loss by bringing on his action for an earlier trial. And in all the circumstances, I do not think that the defendant has persuaded me that the plaintiff has been unreasonable in failing to take steps to minimize his damages, or that it has been proved that he is responsible for consequences of his injuries which might have been avoided or materially lessened, so that his damages ought to be calculated at a time prior to the actual date of assessment. It seems to me that after looking to all that has happened, there can be no warrant for abating the award of geneal damages.

34. In *Plenty v. Argus*, [1975] W.A.R. 155, Jackson C.J. referred to the two aspects of the defendant's burden of proof. He said, at pp. 157-58:

> There can be no doubt but that upon this issue the onus was at trial upon the respondent to this appeal and the learned trial Judge so held. In the course of argument before us, however, it did appear that doubt did exist as to what was involved in the discharge of that onus. The question giving rise to that doubt can be posed by asking whether in such a case as this the defendant in order to discharge the onus that the plaintiff had

> failed to mitigate his damage must prove, on the balance of probabilities, that the plaintiff acted unreasonably in not submitting himself to the advised treatment, and in addition, and to the same standard of persuasion that the treatment, if carried out, would cure, or, to a certain degree cure the plaintiff's condition, or whether on the other hand, the issue to which the onus attaches is but the single issue, it being whether the plaintiff in refusing the treatment had failed to do something which in reason he ought to have done to mitigate his damage. In all the personal injury negligence cases so far reported, it appears to have been established on the balance of probabilities both that the plaintiff had acted unreasonably and that had the operation been carried out, the incapacity would have been removed or reduced to a certain degree. In such cases the onus is discharged on either view and with the result that damages are assessed "as they would properly have been assessable if he had, in fact, undergone the operation and secured the degree of recovery to be expected from it": McAuley v London Transport Executive [1957] 2 Lloyd's Rep 500 at 505 per Jenkins LJ. [Emphasis added.]

35. A recent English case which is hard to reconcile with the Canadian and Australian authorities and, indeed, with earlier English authorities, is *Selvanayagam v. University of the West Indies*, [1983] 1 All E.R. 824. In that case the Privy Council held that a plaintiff who rejects a medical recommendation in favour of surgery must, in order to discharge the burden on him to prove that he acted reasonably in regard to his duty to mitigate his damage, prove that his refusal was reasonable. The trial judge had placed the onus on the plaintiff (appellant) and the Court of Appeal had treated this as a basis for review. Lord Scarman said they were wrong. Quoting from his reasons, at p. 827:

> The rule that a plaintiff who rejects a medical recommendation in favour of surgery must show that he acted reasonably is based on the principle that a plaintiff is under a duty to act reasonably so as to mitigate his damage.

While this articulation of the duty to mitigate is obviously correct, Lord Scarman's placing of the burden of proof of mitigation on the plaintiff seems to be in sharp contrast to a long line of earlier English authority and, as has been seen, is contrary to

the general principles of mitigation of damages enunciated by this Court in *Red Deer*, *supra*, and *Asamera Oil*, *supra*.

4. The Consequences of an Unreasonable Refusal of Treatment

36. Turning now to the implication of a finding of unreasonableness for the plaintiff's recovery, it is clear that the so-called "duty to mitigate" derives from the general proposition that a plaintiff cannot recover from the defendant damages which he himself could have avoided by the taking of reasonable steps. As Pearson L.J. pointed out in *Darbishire v. Warran*, *supra*, it is not a "duty" in the strict sense. A breach of it is not actionable. Quoting from his reasons at p. 1075:

> ...it is important to appreciate the true nature of the so-called "duty to mitigate the loss" or "duty to minimize the damage." The plaintiff is not under any contractual obligation to adopt the cheaper method: if he wishes to adopt the more expensive method, he is at liberty to do so and by doing so he commits no wrong against the defendant or anyone else. The true meaning is that the plaintiff is not entitled to charge the defendant by way of damages with any greater sum than that which he reasonably needs to expend for the purpose of making good the loss. In short, he is fully entitled to be as extravagant as he pleases but not at the expense of the defendant.

37. Mitigation has to do with post-accident events. In this respect it should perhaps be contrasted with contributory negligence and perceived as more closely aligned with *novus actus interveniens*. It differs from the latter, however, in that the *novus actus* may be the act of a third party whereas mitigation (or its failure) is exclusively the act of the claimant. Overhanging all three concepts, mitigation, contributory negligence and *novus actus*, are the general principles of foreseeability and remoteness as they apply to post-accident events.

38. The appellant in the case at bar invoked some of these general doctrines of tort law. He submitted "that the majority in the Court of Appeal have failed to take into account the fact that the plaintiff's unreasonable refusal constituted a *novus actus* and, from the defendant's standpoint, such refusal was not reasonably foreseeable and the damages claimed are too remote". I do not find such an approach helpful in a case of this kind. It seems to me that by hypothesis the whole of the plaintiff's damages are reasonably foreseeable and would be recoverable were it not for the additional fact that a portion of them was reasonably avoidable by the plaintiff. I have difficulty in seeing how the failure to avoid what is a reasonably avoidable loss can in and of itself make the remaining unavoidable loss unforeseeable. Nor, it seems to me does the doctrine of proximate cause, also invoked by the appellant, elucidate the problem. References to "proximate cause" and "intervening cause", in my opinion, predetermine the legal issue but do not provide a rationale for it. I find the following passage from 22 Am Jur 2d, Damages § 30, at p. 52 more illuminating:

> Other courts have suggested that the doctrine of avoidable consequence is an extension of the proximate cause principle--that is, if the plaintiff could reasonably have avoided the damages which resulted, then the activity of the defendant can no longer be considered the proximate cause of those damages. While this statement can be accepted as theoretically valid (since "proximate cause" probably means nothing more than the cause which is recognized by law as the cause of the damages), it is not precise enough to express the idea contained in the doctrine of avoidable consequences. For example, if defendant's negligent activity caused plaintiff's broken leg and much of plaintiff's pain could have been avoided by consulting a doctor, it is unnecessarily ambiguous to state that the failure to consult a doctor prevented the negligent activity from being the proximate cause of a portion of the pain, but not from being the proximate cause of the rest of the pain. It is more precise to state that consulting a doctor would have avoided a certain portion of the pain and, thus, damages cannot be recovered for the avoidable pain.

Essentially the same point may be made with respect to *novus actus interveniens*. The concept does not advance the analysis in any helpful way. Obviously mitigation and

novus actus may coincide in cases such as the case at bar but talking in terms of *novus actus* is, in my view, of little assistance in defining the scope of the duty to mitigate.

39. What then counts as an unavoidable loss in a case like this where there has been found to be an unreasonable refusal of surgery? The answer given by MacKinnon A.C.J.O. is that one looks to what would have happened on a balance of probabilities had the operation in fact taken place. The majority approach, on the other hand, is to determine what damages are avoidable by assuming that the plaintiff has agreed to an operation which has not yet been performed. If the majority is correct, then the courts would normally take account of any "substantial possibility" of failure and the amount by which full compensation would be discounted--in this case 70 per cent-- would represent his avoidable loss.

40. There is a paucity of direct authority on this issue. The following passage from the judgment of Jenkins L.J. in *McAuley*, *supra*, at p. 505, may be viewed as support for the approach taken by the majority:

> If he receives medical advice to the effect that an operation will have a 90 per cent. chance of success, and is strongly recommended to undergo the operation and does not do so, then the result must be, I think, that he has acted unreasonably, and that the damages ought to be assessed as they would properly have been assessable if he had, in fact, undergone the operation and secured the degree of recovery to be expected from it. [Emphasis added.]

It seems to me not only to be implicit in the English authorities but also to be common ground between the majority and the dissent in the Court of Appeal in this case that, even after an unreasonable refusal of surgery, the plaintiff is still entitled to claim unavoidable losses assuming, of course, that they are otherwise recoverable.

MacKinnon A.C.J.O. would, it is true, deny all subsequent recovery in this case where on the balance of probabilities (70 per cent) surgery would lead to a full recovery, but if there was a 50-100 per cent chance of no more than an 80 per cent recovery at the outside, it seems to me that his approach would necessarily permit a plaintiff to recover the remaining 20 per cent of his damages as unavoidable loss.

41. As Blair J.A. points out, support is also to be found for the majority approach in a number of Australian cases, notably *Newell v. Lucas*, [1964-65] N.S.W.R. 1597. In *Plenty v. Argus, supra*, Burt J. seems to have adopted it in the following *obiter* statement at p. 159:

> And if a finding is made that a plaintiff in the face of an uncertain prognosis acted unreasonably in not submitting himself to surgery or treatment, then it would seem that his damages should be assessed having regard to his condition as it is, discounted by the evaluation of the lost chance, or as one would if the assessment were made in advance of the carrying out of the advised treatment.

42. In my view the majority approach is consistent with first principles as expressed by Lord Diplock in *Mallett v. McMonagle*, [1970] A.C. 166, at p. 176:

> The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.

See also Lord Reid in *Davies v. Taylor*, [1972] 3 All E.R. 836 (H.L.), at p. 838. This position is essentially the one adopted by Lacourcière J.A. in *Schrump v. Koot* (1978), 18 O.R. (2d) 337, which Blair J.A. cites in support of his position. MacKinnon A.C.J.O. attempts to distinguish this latter case on the ground that it applies only to assessing the risk or likelihood of future developments but, as the passage from Lord Diplock makes clear, the balance of probabilities test is confined to determining what did in fact happen in the past. In assessing damages the court determines not only what will happen but also what would have happened by estimating the chance of the relevant event occurring, which chance is then to be directly reflected in the amount of damages. The general rule stated by Lord Diplock would therefore seem to be applicable to this case, suggesting that the majority approach is at least *prima facie* correct. The issue then becomes, it seems to me, a question of whether there are any reasons to take this particular type of case outside the general rule.

43. MacKinnon A.C.J.O. suggests that the majority approach bypasses the trial judge's initial finding of unreasonableness. With respect, I think he must be in error in this since the respondent is precluded by that finding from claiming full compensation for the losses he has already suffered. The same response can be made to the appellant's submission that the uncertainty in the evidence results from the plaintiff's unreasonable conduct and that he ought not to be able to "profit" from it. The finding that his refusal to undergo surgery was unreasonable precludes the plaintiff from recovering his actual loss. To hold that his remaining compensation should be determined on the basis of principles higher than those normally applied in assessing tort damages would, it seems to me, be to punish him for not undergoing surgery. This would be contrary to the general judicial policy that "it is not the prerogative of the court to require that any person undergo surgery to any degree"

(*McCarthy v. MacPherson's Estate* (1977), 14 Nfld. & P.E.I.R. 294 (P.E.I.C.A.), at p. 297).

44. Nor am I swayed by the appellant's submission that a respondent may, because he is free to change his mind about the surgery, effectively be overcompensated. As long as he is *bona fide* in his present claim that he does not intend to have the operation and is not deliberately taking a calculated risk that he will come out ahead by recovering 30 per cent of his damages now and then later have the surgery with a 70 per cent chance of complete success (an intention which would amount to fraud on the court in any event), there does not seem to me to be any problem arising from the fact that he might change his mind in the future and be overcompensated in the result. The potential for over or under compensation is, it seems to me, a pervasive difficulty with the present "once and for all" method of awarding tort damages. The situation presented by this case is only one example of that more comprehensive problem; it does not, in and of itself, call for a special solution of any sort. It should also be kept in mind that, while it is true that if the respondent does decide to have the operation at some future time there is a 70 per cent chance that he will be somewhat overcompensated, it is also true that there exists a 30 per cent possibility that he will be very substantially undercompensated.

45. I would respectfully adopt the approach of the majority of the Court of Appeal to this issue.

5. Conclusions

46. The case law makes it clear that the question of whether a refusal of treatment is reasonable or not is for the trier of fact. Since the respondent (appellant by cross-appeal) did not in the Court of Appeal expressly impugn the objective test applied by the trial judge, the Court of Appeal was correct in refusing to interfere with the trial judge's finding. The respondent cannot be permitted to impugn the objective test for the first time in this Court.

47. For the reasons given I would dismiss the appeal. Counsel are agreed, however, that Blair J.A. made a mathematical error in his calculations and that the overall figure for damages, instead of being $103,651, should have been $96,146. The dismissal of the appeal is therefore subject to this variation in the Court of Appeal's order.

48. I would also dismiss the respondent's cross-appeal which was directed to Blair J.A.'s method of calculation of the appellant's damages. While it is not entirely clear from his reasons how he used the more detailed breakdown of possible results from the surgery to arrive at the second discount of one-third, I do not believe that this kind of determination is susceptible of precise calculation. It would, however, have been of assistance to the respondent on the cross-appeal if Blair J.A. had attempted to relate the percentage predictions of result to the discount.

49. Leave to appeal was granted in this case in terms that the appellant pay the costs of the appeal on a solicitor-client basis in any event of the cause forthwith after taxation thereof. Costs in the courts below were left to the disposition of this Court.

50. I cannot accept the submission of counsel for the respondent that the costs of the cross-appeal are covered by the order on the leave application. There is nothing in the order to indicate that a cross-appeal was contemplated although I do not doubt the respondent's right to proceed with one once leave to appeal was granted to the appellant. I would therefore dismiss the cross-appeal with costs. I would not interfere with the disposition of costs in the courts below.

Appeal dismissed and cross-appeal dismissed with costs.

Solicitors for the appellant: Phelan, O'Brien, Shannon & Lawer, Toronto.

Solicitors for the respondent: Morris and Lewis, Toronto.