COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Stapley v. Hejslet,***
2006 BCCA 34

Date: 20060126
Docket: CA031706

Between:

James William Stapley

Respondent
(Plaintiff)

And

Victor Lloyd Hejslet

Appellant
(Defendant)

Before: The Honourable Chief Justice Finch
The Honourable Mr. Justice Lowry
The Honourable Madam Justice Kirkpatrick

S.B. Stewart
M. Wilhelmson — Counsel for the Appellant

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Place and Date of Hearing: Vancouver, British Columbia
9 November 2005

Place and Date of Judgment: Vancouver, British Columbia
26 January 2006

Written Reasons by:
The Honourable Madam Justice Kirkpatrick

Concurred in by:
The Honourable Mr. Justice Lowry

Dissenting Reasons by:
The Honourable Chief Justice Finch (P. 39, para. 114)

Reasons for Judgment of the Honourable Madam Justice Kirkpatrick:

[1] The appellant, Mr. Hejslet, (defendant at trial) appeals from the February 13, 2004 order entered upon the verdict of the jury that awarded the respondent, Mr. Stapley, non-pecuniary damages of $275,000. The award arises from injuries sustained by the respondent in a motor vehicle accident that occurred on May 20, 2000.

[2] The jury's verdict is recorded in the order as follows:

1. The Plaintiff is found to be 7% contributorily negligent.
2. The Plaintiff is awarded damages against the Defendant, subject to apportionment of liability, as follows:

2.1	Non-pecuniary damages	$ 275,000.00
2.2	Gross Income loss to date of trial	$ 25,000.00
2.3	Loss of Future Income Earning Capacity	$ 305,000.00
2.4	Cost of Future Care	$ 13,000.00
2.5	Special Damages	$ 4,259.52
	Total:	**$ 622,259.52**

[3] The only issue is whether the jury's verdict as to the respondent's non-pecuniary damages is inordinately high and a wholly erroneous estimate of those damages such as to warrant interference by this Court.

[4] The appellant asks that the award be adjusted to an amount in the range of $80,000 to $100,000.

BACKGROUND

[5] Because the trial order appealed from is from a jury trial, it is necessary to review some of the more salient evidence in order to place the issue on appeal in context.

[6] The respondent, James Stapley, was born on November 15, 1952. He was 51 years of age at trial. He was raised on his grandmother's farm. He completed high school and attended university for one year. He did not carry on with his university studies because of lack of funds and because he wanted to work outdoors. As he testified: "I was more into physical labour than I was into mental labour."

[7] Mr. Stapley took a pre-apprenticeship heavy duty mechanics course. After working in various shake, pulp and lumber mills and logging, in 1979 he secured full-time salaried employment as a heavy duty mechanic at the Coldstream Ranch near Vernon, B.C. He is married and he and his wife have raised their three children on the ranch.

[8] A central issue on this appeal concerns, at least from the respondent's perspective, the primary importance to Mr. Stapley of his employment on the ranch. In his factum, the respondent summarized the evidence in this regard as follows:

> One of the most glaring omissions from the Appellant's factum relates to the tremendous importance of Mr. Stapley's job on the Coldstream Ranch to almost all aspects of his life. The job not only provided Mr. Stapley with an income and the satisfaction of doing work he loved and was good at; it provided Mr. Stapley and his family with their home, community and very lifestyle. This is an unusual and important feature of the case, on which the jury heard the following

evidence from Mr. and Mrs. Stapley, as well as neighbours and co-workers from the ranch.

Mr. Stapley had been living on the Coldstream Ranch since 1979. Like other resident employees, he was supplied with a house at nominal rent and given the freedom to use the ranch's extensive facilities and many thousands of acres of land. The evidence concerning ranch "culture" was to the effect that the resident employees within the ranch formed a small, close-knit community where people don't lock their doors and everyone feels like family and pitches in where needed. Mr. Stapley testified that most of his activities centred around the ranch. He described his love of the place, its features and the unique lifestyle it had afforded him and his family, saying he would not choose to live anywhere else. Before the Accident, he had intended to stay there for the rest of his working life, which he had hoped and expected would extend well past the age of 65.

The evidence indicated that if Mr. Stapley had to leave his job and seek less physically demanding work, he and his family would also be forced to leave their home on the ranch and all that this had afforded them - the unique ranch lifestyle, the sense of community, the wide-open spaces and 8,000 acre backyard. Mr. Stapley's boss, Mr. Osborn, testified that it was very unlikely there would be any way for Mr. Stapley, as a non-employee, to remain on the ranch, even at a substantial rent. There was no evidence to suggest that Mr. Stapley could hope to secure anything like a similar place and way of life elsewhere, either at his own expense or as an adjunct to the less physically demanding employment he would be forced to seek.

[9] The respondent's submissions are amply supported by the evidence.

Mr. Stapley testified in chief:

Q.: And did you gain, you know, from your point of view is there any benefit to living on the ranch as opposed to somewhere else in terms of where you live?

A.: Oh, yeah. It's a great place to bring up a family. I wouldn't live anywhere else. Everything is accessible there. You've nobody around. You've got the whole ranch as your basic backyard so you can go hunting and fishing and anything on the ranch.

. . .

Q.: I've asked you what your physical state of well-being was before the tractor accident. I want to ask you what your mental or emotional situation was before the tractor accident, Jim. How was life treating you or how were you treating life?

A.: Life was great. I enjoy it. I was having fun, doing what I wanted to do. And I had a great family and a great life that let me do what I wanted to do and so it was perfect.

. . .

Q.: Now, what in the year -- let's just take the year 1999, the year before the tractor accident. What did the future hold for you? Did you have any specific plans about what you were going to do with your life, or how things were going to go in the future?

A.: Basically I figured I'd just keep on working at the ranch until I couldn't work there any more. And we never talked about retiring or anything. The ranch is a great place to live, so we figured we had it made.

Q.: Sometimes wives aren't entirely accepting of their husbands' view of the world. What was Wendy's approach to, you know, what the future was going to hold at that time, 1999?

A.: Oh, she thought it was great. She figured we'd be still at the ranch, too. She loves it at the ranch. Because she's sort of an old farm girl, too, so she likes the wide open spaces and not in town stuff.

Q.: And how are the kids doing in that period of, you know, within a year or two before the tractor accident?

A.: They were doing great. Grades were up. They played sports. Nothing wrong with them at all.

And in cross-examination:

Q.: Now, earlier we discussed, and you've indicated, that one of your benefits of living at the ranch was the cheap auto parts that you say you get?

A.: Yes, I get them at ranch price.

Q.: And the children's schools are quite close to the ranch?

A.: Yes, they are.

Q.: Most of your activities take place around the ranch?

A.: Yes.

Q.: Most of the things that you do recreationally are done around Vernon or the Lumby area?

A.: Yes, they are.

[10] The general manager of Coldstream Ranch, Edward Osborn, testified:

Q.: Okay. Prior to the accident, what did the future hold for Jim at the ranch in terms of how long he could work there?

A.: Well, it would be similar to any other person working at the ranch. His stay could -- as long as they could maintain their ability to do the work that was necessary, given the ranch's operations -- it changes over time, and be able to change with the time to new techniques, new requirements. As long as you're able to keep that, the future looked good in terms of the prospects for him.

Q.: So, from your point of view, as long as he was able to continue doing quality mechanics work and continue being able to help out during the -- if necessary, in the field work, as long as he could do those things, he had a job.

A.: Yes, and as long as we were along the same lines of a business, and I don't see anything on the horizon to change the significant nature of our business. So his ability to keep up to date in terms of troubleshooting the machinery problems and the new machinery over time, as required, he had a good -- good opportunity to work at the ranch until retirement as long as he could perform the work that was necessary.

Q.: Now, prior to the accident, did the ranch have any mandatory retirement at age 65?

A.: No.

Q.: If a person was able to meet the standards that you've just expressed, would they have been able to continue working past 65?

A.: Yes, if they so wished to do, so wished to, on their behalf, and also if we felt it was safe for them to do it.

[11] Mr. Stapley's wife, Wendy Stapley, testified:

Q.: In the period of time before the tractor accident, as I'll, you know, just use the 1990's as a -- as a period of time to think about, what was the relationship between your family and the other families on the ranch?

A.: Pretty close-knit, you know. There -- we go through barbecues together or Christmas parties or -- there's a few of us that actually camp all the time together and hunt. It's -- it's very close and even the people that we don't know very well, you care about, you know. It's a little community-type thing.

Q.: In the period of time before the tractor accident, take a period of say five years before the accident, what was the social -- what -- what kind of things did you and Jim do socially, as opposed to your own personal relationship? And I'll get to that in a minute.

A.: Did we do socially? Well, we would go out to friends' places or have barbecues or go out. Maybe a group of us would go out to -- back when they used to have those western bars, we'd go dancing or something like that together. Basically, socializing with friends.

Q.: Did -- and what -- and did you have a lot of friends or just a few or …?

A.: We have quite a few in town. We've lived her[e] a long time.

Q.: Okay. When you say "in town", where are you talking about?

A.: Well, between Lumby and Vernon.

Q.: Out in the Valley?

A.: Yeah, we do have some people that live right in town but --

Q.: Okay.

A.: -- our closest friends are where we are.

. . .

Q.: What was it like being on the ranch and having him working just kind of around the corner? Did that -- did that interfere with how the family ran or -- or …?

A.: No, and it was -- it was pretty nice because when he was out in the fields and stuff like that, I'd get to go out and take his lunch out to him and spend a few minutes together. Or he -- you know, if he was in the shop and having a lunchtime, he could come home and we could have some time together. You know, I'd get to see him regularly.

Q.: What was his attitude towards work prior to the tractor accident?

A.: We enjoy it. He -- he loves to -- he loves to monkey wrench, being a mechanic, and he -- as much as he loved that, he loved to be out in the field because getting being in the shop all the time and you're constantly working on things and people are talking at you and when he's out in the field he's got time away from that. So he had a little bit of variety. He wasn't stuck in the same old, same old.

. . .

Q.: What did the future hold for you, as far as you were concerned? What did the future hold for the family in the year 1999? What was -- you know, what -- what did the next ten, 15, 20 years look like?

A.: I figured we'd probably be on the ranch until Jim retired and that was fine with me. Once the kids were out of the house, we probably would have had to move to a smaller home, but we -- we were set. We had a house over our -- or a roof over our heads, meat on the table; we were kind of secure, as far as I was concerned.

[12] The evidence put before the jury portrayed Mr. Stapley as an extremely hard-working, independent man who loved his work and the unique opportunities that his work on the ranch allowed him to enjoy.

[13] Coldstream Ranch is situated on about 8,000 acres. It employs between 12 to 25 staff, most of whom live in subsidized housing on the ranch at extremely favourable rents. Ranch employees are able to purchase meat and produce from the ranch at cost. Mr. Stapley is able to purchase automotive parts for his own vehicles at reduced cost. He has access to the ranch shop. He and his family take advantage of the many recreational amenities of the ranch.

[14] Mr. Stapley described the nature of his work prior to the motor vehicle accident as "really physically demanding." His work included maintenance of the ranch vehicles, as well as seasonal field work. Indeed, he was driving a tractor that was pulling a corn planter to a field when the tractor was hit from behind.

[15] The accident occurred at about 3:00 a.m. on May 20, 2000. Mr. Stapley heard a loud bang. He thought a tire had blown. He managed to bring the tractor to a stop. The tractor's axle housing was broken, one of the seeders was smashed, and the hitch was bent.

[16] Mr. Stapley carried on working that day, although he noticed that his neck and arm were sore. He developed a headache, sore back and shoulder pain. The headache increased. The following day, a Sunday, he was unable to work more than an hour because of back and neck pain and a "pounding headache."

[17] Mr. Stapley was off work for four weeks. He saw his family doctor, Dr. Henderson, on the Monday following the accident. Dr. Henderson prescribed massage therapy and, when that did not help, physiotherapy.

[18] Mr. Stapley experienced numbness in his fingers. He had pain from his forearm, upper arm and across his back. By the fall of 2002, his hand was numb most of the time and he had decreased strength.

[19] In May 2001, Mr. Stapley received treatment from a pain clinic in Kelowna and at Vernon Jubilee Hospital.

[20] On October 2, 2002, he was diagnosed with thoracic outlet syndrome. Dr. Nelems performed a rib resection to relieve the pressure. Mr. Stapley was off work until March 15, 2003, at which time he was cleared to work his regular hours of 45 to 50 hours per week. The surgery relieved Mr. Stapley's arm pain and numbness to the extent that he feels it is "80 per cent improved."

[21] However, following that surgery, Mr. Stapley continued to have residual complaints of pain in his mid-back, right side neck pain, a "constant burning" between his shoulder blades, stiff neck and back, and a constant headache. He consumes a great deal of pain relief medicine. In the month before trial he was taking, on average, five to eight Tylenol No. 3 per day and Flexeril at night which he acknowledged "can't be good for me."

[22] There was a considerable body of medical evidence tendered at trial.

[23] Dr. Robert Hillis, Mr. Stapley's current family physician, provided an extensive medical/legal report dated October 21, 2003, in which he described Mr. Stapley's injuries:

> The nature of Mr. Stapley's injuries resulting from the motor vehicle accident of May 20, 2000 include:
>
> a. myofascial pain syndrome, more commonly labelled "whiplash", affecting his neck.
>
> b. strain of the ligaments along the back of his 4th and 5th vertebrae in the thoracic region (T4 - T5 posterior interspinous ligamentous strain).
>
> c. aggravation of right sided thoracic outlet syndrome; resolved surgically with resection of his right first rib.
>
> d. chronic pain syndrome.

[24] Dr. Hillis' prognosis was described, in part, as follows:

> With respect to prognosis it is important to reflect that at this time it is more than three years since the motor vehicle accident. Mr. Stapley has had significant rehabilitation efforts through massage therapy, physiotherapy, surgical intervention, various medications, and continued work activities. In my opinion the following symptoms are therefore likely to be permanent in nature, causing permanent partial disability:
>
> a. mid back pain
>
> b. shoulder blade pain
>
> c. headaches
>
> . . .
>
> The likelihood of further problems or disabilities arising in the future as a direct consequence of these injuries relate mainly to the quality of life of Mr. Stapley. In particular his chronic pain renders him more at risk for psychological stress or even depression. His inability to fully participate in recreational and work activities that he was capable of before the accident certainly lead to the psychological

> distress. Finally, potential for side effects from ongoing use of pain killers or muscle relaxant medication must be considered as well.

[25] Dr. Hillis noted the wide range of activities Mr. Stapley is expected to undertake at the ranch as part of his employment. Although Mr. Stapley remains able, in Dr. Hillis' assessment, to perform the work expected of him, "he does so at the expense of finishing his workshift in considerable pain … [leaving] him unable to participate in any further activities of daily living or recreational ventures when he returns home."

[26] Dr. Duncan Laidlow, a physical medicine and rehabilitation specialist, provided a report dated November 3, 2003, which largely echoes the conclusions of Dr. Hillis. Like Dr. Hillis, Dr. Laidlow is of the view that Mr. Stapley's pain will not significantly improve. Dr. Laidlow concluded that Mr. Stapley had problems with a musculoligamentous strain to the cervical and thoracic spine and a thoracic outlet syndrome that had resolved. He stated:

> With regard to the musculoligamentous strain, this man developed significant pain in the neck and mid back fairly shortly after the accident. Subsequent investigations have shown no evidence of any bony injury or disc injury. He has, however, continued to have ongoing problems with muscle tenderness and tightness in the neck and mid back area. Over the course of time he has tried to keep things active, in the course of his work as a mechanic. The therapy tends to be more modality oriented and acupuncture oriented. He did show some improvement over what he was initially but over the course of time he has continued to have ongoing neck pain and back pain. There are days when it is worse than others but he continues to have symptoms, nonetheless. Given the fact that he has continued to have symptoms this long after the accident, it is likely that he will continue to have some ongoing symptoms in the future.

[27] Dr. Laidlow did not foresee escalating physical difficulties for Mr. Stapley, but recognized that Mr. Stapley will not be able to carry on his employment at the ranch as before. As Dr. Laidlow noted:

> … At this point in time he is capable of carrying out the work of a mechanic but does not tolerate the jarring and vibration that goes in operating a tractor, in addition to the heavy mechanic job. This tractor work used to serve as a form of overtime for him and he was involved in doing it during planting and harvesting seasons. At this time, when he tries to do this, his pain is greatly worsened and as such he cannot do it. I do believe that he will be able to carry on as a mechanic in the fashion that he has up until now but I would suspect that he will not improve to the point where he would tolerate the jarring and high vibration that goes with operating a tractor in the way that he did before. I do not believe that there is anything that is likely to deteriorate as a result of this musculoligamentous strain so I would anticipate that if he is able to do his job at the present time, to his employers satisfaction, he will continue to be able to do that. Given the fact that this has been his work for many years, he really is not very well set out to look at other work. I do not believe he is causing himself harm by doing the work he does, which he enjoys.

[28] Thus, from a medical perspective, Mr. Stapley's medical condition seems to have plateaued. There seems little doubt that he will continue to experience ongoing pain and discomfort for the remainder of his life.

[29] Notwithstanding Dr. Hillis' prognosis that Mr. Stapley has a permanent partial disability and chronic pain, the evidence before the jury also established that Mr. Stapley is able to continue to work as a mechanic on the ranch. He is regarded as a valued employee and is keeping up with his work. He no longer performs field work but, as Dr. Laidlow observed, that was a form of overtime work and did not form part of his regular duties.

[30] As well, he has continued to actively participate in recreational pursuits. Since the accident, Mr. Stapley continues to play slo-pitch softball. His position has changed from left field to the pitching mound. He resumed curling in the fall of 2003 (having last played in the early 1990s). He plays third and can play the entire game. He participated in a bonspiel three weeks before the trial. He can buck 10 to 15 blocks of firewood. He continues to play ice hockey. He testified that, "I'm not bad for two periods, and in the third period then I start getting sorer and sorer and I'll miss a couple of shifts here and there or don't even go out in the third period sometimes." Mrs. Stapley said that he "doesn't go into the corners anymore" when playing hockey. He fishes and boats, but not as often as before the accident. He golfs, but with pain. He continues to hunt, but his friends say that he is more of a hindrance than a help.

[31] However, the unique and central loss to Mr. Stapley is the potential loss of his employment on the ranch and the concomitant loss of the lifestyle that living on the ranch provides.

[32] As can be seen from the medical evidence reviewed above, the physicians did not state that Mr. Stapley will be unemployed by reason of his ongoing pain. Indeed, both Drs. Laidlow and Hillis believed that he would continue to be able to do the work he has always done and which he enjoys. In addition, Dr. Hillis believed that, with modifications to his work regime as a mechanic, Mr. Stapley would be able to receive increased enjoyment from his recreational pursuits.

[33] However, the jury also heard compelling evidence from Mr. Stapley and his wife as to his ability to continue working on the ranch.

[34] Mr. Stapley testified:

Q.: What does the future hold for you as far as your work goes?

A.: To tell you the truth, I don't know.

Q.: Well --

A.: And I just don't know if I'm going to be able to last very much longer, or Ted's going to come up to the point where my production is down and they're not getting what they want out of me, then I'll probably be let go; a whole different bunch of scenarios. But I know one thing, I just -- the way I've been going on the last couple of years, I just don't know how much longer I'll be able to do it.

Q.: Tell us what it is that raises that doubt in your mind about "how much longer I can do it"? What's going on that's creating that concern?

A.: Well, I'm a person who's always given 110 percent, it didn't matter what I've done, and I don't like giving less than 110 percent. And I know at the ranch I'm giving way less than 110 percent what I done before. And like I say, every day waking up in pain and going home in pain and not spending time with my family and not being able to do anything like I used to do it is starting to work on me quite a bit.

. . .

Q.: Forgetting for a moment about Ted Osborn and the ranch and the possibility that they may lay you off, just ignoring that for a moment, how much longer are you going to carry on working at the ranch?

A.: I really couldn't tell you for sure, but I don't think it would be too much longer, in the near future that I'm just going to have enough and have to quit.

Q.: What are you going to have to quit? What is it that's going to push you over that point?

A.: Just getting to the point where the pain's never going to go away and I've got to try and deal with it. But it's just getting that everything I do is in pain, and it's just not worth it.

Q.: Okay. Now, you've used the term "near future" and I -- none of us can predict the future, but, you know, are you able to give us any idea about how long you can hang in?

A.: The way things are going the last little while, I'd say maybe two years if I'm lucky.

[35] Mrs. Stapley testified:

Q.: Okay. What does the future hold for you in terms of -- do you think that's on the ranch?

A.: I don't believe he can.

Q.: Why not?

A.: I told you that we -- I was able to get him to come and spend some time out at the lake with me. I told you that I was able to just, you know, suggest that he stay on an extra couple of days and he did it. He has been taking more time off work and he's come to realize that no matter what he's doing, whether he continues with his physio and he's taking all these stupid drugs and he's doing everything he's been told to do, he's not getting any better.

And it doesn't matter how proud or strong he thinks he is, he -- he knows that he's probably not going to be there much longer. And I don't -- I don't see any business keeping a man on who's not able to fully do the work that he's been hired to do, no matter how loyal they are or how long he's been there.

Q.: Do you have any idea what -- what he might do as an alternate to the ranch?

A.: I have -- I have no idea. He's -- neither one of us is -- up until this summer, I didn't even consider it. I -- we just always assumed that that's where we would be. And if we chose to go somewhere, it's something we'd do as a family and -- you know, something that we wanted to do. I don't know how much longer he has that choice.

Q.: So how does the future look today to you?

A.: I have no idea. I don't know what we're going to do.

[36] It is significant that, among the other heads of damage, the jury awarded Mr. Stapley $305,000 for loss of future income earning capacity.

[37] The evidence was that Mr. Stapley earned $12 per hour. His total income for income tax years 1999, 2000, 2001 and 2002 was, respectively: $38,828; $36,601; $38,706; and $34,639. The average income over the period was $37,194. An economist's report was tendered in evidence to, in part, assist the jury in assessing Mr. Stapley's future loss of income. Although it is impossible to know how or if the jury made use of the report, the $305,000 amount awarded closely approximates the income loss multiplier that assumes Mr. Stapley's loss of income will commence in 2007 when he will be 54 ($310,000).

[38] For our purposes, however, the significance lies with the fact that it is obvious that the jury must have accepted that Mr. Stapley would, contrary to the belief held by the physicians, be forced, by reason of his injuries, to leave his employment at the ranch at some time in the near future. This must also mean that the jury accepted that, with that loss of employment, Mr. Stapley would also lose the lifestyle he had enjoyed for more than 25 years.

DISCUSSION

[39] The appellant concedes that the decision of this Court in ***Boyd v. Harris*** (2004), 237 D.L.R. (4th) 193 at para. 5, 2004 BCCA 146, accurately summarizes the process of appellate review of jury awards of damages. In ***Boyd***, Smith J.A., speaking for the Court, reviewed the recent authorities and the historical development of the comparative test that "this Court should not interfere with a jury

award of damages unless the award falls substantially beyond the upper or lower range of awards of damages set by trial judges in the same class of case" [emphasis added].

[40] Smith J.A. acknowledged that "[t]he difficult problem is how to identify the extent of permissible deviation from the conventional range of awards" (at para. 12). He took guidance from the decision in ***Foreman v. Foster*** (2001), 84 B.C.L.R. (3d) 184 at para. 32, 2001 BCCA 26, where Lambert J.A., speaking for the majority, said:

> [32] This Court cannot interfere with a jury award merely because it is inordinately high or inordinately low, but only where it is "wholly out of all proportion" in that "the disparity between the figure at which they have arrived, and any figure at which could properly have arrived must ... be even wider than when the figure has been assessed by a judge sitting alone." (See *Nance v. B.C. Electric Railway Co.*, [1951] A.C. 601 at 613-4, per Viscount Simon.) Among the reasons for this Court's reluctance to interfere with a jury award, perhaps the most important, is that we do not know the findings of credibility or of other facts which the jury may have reached on the way to their assessment. So the fact that the award may seem to this Court to be very much too high or very much too low will not be sufficient for this Court to change an award made by a jury even where it might be sufficient to change an award made by a judge alone. So it would be a rare case, indeed, where a jury award could be successfully appealed to this Court in order to make it consistent with awards in like cases. (See *Johns v. Thompson Horse Van Lines* (1984), 58 B.C.L.R. 273 (B.C.C.A.).

[41] However, deference to the jury must be balanced against the need for predictability. As Smith J.A. held in ***Boyd***, at para. 11:

> [11] On the other hand, while great deference must be afforded to jury awards, appellate courts have a responsibility to moderate clearly anomalous awards in order to promote a reasonable degree of fairness and uniformity in the treatment of similarly-situated plaintiffs. As well, outlier awards, if not adjusted, could lead to a perception that the judicial system operates like a lottery and to a consequent undermining of public confidence in the courts.

[42] The appellant initially argued that, in addition to the principles outlined in ***Boyd***, appellate review must also be consistent with the guidelines for the 'upper limit' for non-pecuniary damages established by the Supreme Court of Canada in ***Andrews v. Grand & Toy Alberta Ltd.***, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452; ***Thornton v. Board of School Trustees of School District No. 57 (Prince George)***, [1978] 2 S.C.R. 267, 83 D.L.R. (3d) 480; and ***Arnold v. Teno***, [1978] 2 S.C.R. 287, 83 D.L.R. (3d) 609 (collectively, the "Trilogy"). The appellant suggested that it was open to this Court to consider whether an award approaching the upper limit is fair in circumstances where a given plaintiff has not suffered injuries as serious as the plaintiffs in the Trilogy.

[43] The appellant sensibly resiled from that position at the hearing of the appeal. The authorities cited in ***Boyd*** at para. 29 negate the proposition that it is proper to compare injuries of a particular plaintiff to those of the plaintiffs in the Trilogy: see ***Lindal v. Lindal***, [1981] 2 S.C.R. 629, 129 D.L.R. (3d) 263; ***Penso v. Solowan***, [1982] 4 W.W.R. 385, 35 B.C.L.R. 250 (C.A.); ***Black v. Lemon*** (1983), 48 B.C.L.R. 145, [1983] B.C.J. No. 1389 (C.A.) (QL); ***Bracchi v. Horsland*** (1983), 147 D.L.R. (3d) 182, 44 B.C.L.R. 100 (C.A.); and ***Leischner v. West Kootenay Power & Light Co. Ltd.*** (1986), 24 D.L.R. (4th) 641, 70 B.C.L.R. 147 (C.A.), a decision of a five-judge panel of this Court.

[44] Thus, we are left to apply the so-called "horizontal" comparative approach outlined in ***Boyd*** at para. 41:

> [41] Our first task is to determine whether the decisions cited by the appellant are reasonably comparable to this case and whether they suggest a range of acceptable awards. Then, we must determine

> whether this award is within that range and, if not, whether it falls so substantially outside the range that it must be adjusted.

[45] Before embarking on that task, I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from ***Lindal v. Lindal****, supra*, at 637 is a helpful reminder:

> Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (*Thornton* at p. 284 of S.C.R.).
>
> [Emphasis added.]

[46] The inexhaustive list of common factors cited in ***Boyd*** that influence an award of non-pecuniary damages includes:

(a) age of the plaintiff;

(b) nature of the injury;

(c) severity and duration of pain;

(d) disability;

(e) emotional suffering; and

(f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

(g) impairment of family, marital and social relationships;

(h) impairment of physical and mental abilities;

(i) loss of lifestyle; and

(j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: ***Giang v. Clayton***, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[47] The cases cited to us by the appellant and the respondent are summarized below. I have approximated the awards in those cases to 2004 dollars to correspond to the award granted in the case at bar at the time the jury made the award.

Appellant's Cases

Mowat v. Orza, [2003] B.C.J. No. 577 (QL), 2003 BCSC 373

[48] This was a trial by judge alone. Ms. Mowat was awarded $50,000 in non-pecuniary damages, which is equivalent to $51,000 in 2004 dollars.

[49] Ms. Mowat's age is not given in the reasons for judgment, although reference is made to her completing teaching qualifications in 1999 and moving from her

parent's home in 2000. From this I would infer that she is significantly younger than Mr. Stapley.

[50] Ms. Mowat suffered flexion/extension injuries to the cervical spine as result of a motor vehicle accident. She was later diagnosed with mild post-traumatic thoracic outlet syndrome. She suffered from headaches, some numbness of the extremities and tongue, and back pain. She did not require surgery for her thoracic outlet syndrome.

[51] Ms. Mowat suffered emotional problems that had multiple sources, including the injuries she suffered. Melnick J. found Ms. Mowat to have "demonstrated a concern for tactical and financial advantage rather than exploring reasonable avenues to recovery." However, Melnick J. did not find the failure to mitigate "affected the bottom line of her entitlement to damages in a quantifiable way." He also relied on expert evidence that suggested that the prognosis was good for Ms. Mowat's symptoms to improve and for her to resume full-time employment as a teacher if she were to apply herself to her own recovery.

Dembowski v. Streliev, [1998] B.C.J. No. 1693 (S.C.) (QL)

[52] This was a trial by judge alone. Mr. Dembowski was awarded $60,000 in non-pecuniary damages, which is equivalent to $69,000 in 2004 dollars.

[53] Mr. Dembowski was 30 years old at the time of his accident. His initial injuries were more severe than Mr. Stapley's and consisted of bruising, inflammation of the kidneys, haematuria, a fractured vertebra, and a fistula-in-ano. He developed

numbness and tingling in the arms a year later and was diagnosed with thoracic outlet syndrome. His prognosis for recovery from thoracic outlet syndrome was poor, but his condition was not considered serious enough to warrant surgery. He had only intermittent lower back pain as a result of his other injuries.

[54] Williamson J. found this to be a mild to moderate case of thoracic outlet syndrome which did not interfere with Mr. Dembowski's ability to work long hours, but which did interfere with his family and social life.

Smyth v. Gill, [1999] B.C.J. No. 983 (S.C.) (QL), aff'd 2001 BCCA 650

[55] This was a trial by judge alone. Ms. Smyth was awarded general damages of $50,000, which is equivalent to $56,500 in 2004 dollars.

[56] There was no age given for Ms. Smyth in the reasons for judgment of Quijano J. As a result of a motor vehicle accident, Ms. Smyth suffered (at para. 50):

1. Moderately severe temporomandibular joint injury with associated migraine headaches.
2. Soft tissue injury to the neck and left shoulder area.
3. Thoracic Outlet Syndrome.

[57] Ms. Smyth suffered from a long list of complaints before the accident and did not follow her physicians' advice to return to a more normal lifestyle.

[58] There is no account in the reasons for judgment of impacts to Ms. Smyth's social or recreational life.

Heartt v. Royal, [2000] B.C.J. No. 1691 (QL), 2000 BCSC 1122

[59] This was a trial by judge alone. Ms. Heartt was awarded non-pecuniary damages of $60,000, which is equivalent to $66,000 in 2004 dollars. Ms. Heartt argued at trial that the appropriate range was $45,000 to $75,000.

[60] Ms. Heartt was 25 years old at the time of the accident. At the time of trial, she continued to suffer from chronic pain as a result of the accident. She had been diagnosed with thoracic outlet syndrome, but did not require surgery. Her ability to interact with her children and enjoy recreational activities was compromised. She was unlikely to return to her pre-accident condition despite following the treatment regimes recommended by her doctors.

[61] The trial judge considered that Ms. Heartt made valiant efforts to engage in normal activities with limited success. Dorgan J. awarded non-pecuniary damages at the higher end of the scale suggested to the court by Ms. Heartt.

Letourneau v. Min (2003), 9 B.C.L.R. (4th) 283, 2003 BCCA 79

[62] This was a trial by judge alone. Mr. Letourneau was awarded non-pecuniary damages of $40,000, which is equivalent to $43,000 in 2004 dollars, in the Supreme Court decision, the reasons for which are found at 2001 BCSC 1519.
Mr. Letourneau had asked for non-pecuniary damages in the range of $50,000 and $60,000. Non-pecuniary damages were not in issue on the appeal.

[63] At the time of trial, Mr. Letourneau experienced intermittent neck, shoulder and back pain that limited his recreational activities and sapped his energy levels. He still worked full time, but had abandoned plans to start his own business.

> ***Schellak v. Barr and Duplessis***, [2001] B.C.J. No. 5 (QL), 2001 BCSC 1323, var'd on other grounds 2003 BCCA 5, leave to appeal to S.C.C. dismissed [2003] S.C.C.A. No. 91 (QL)

[64] This was a trial by judge alone. Mrs. Schellak was awarded non-pecuniary damages of $80,000, which is equivalent to $85,500 in 2004 dollars. Mrs. Schellak had asked that damages be assessed in the range of $75,000 to $110,000.

[65] Mrs. Schellak was 50 years old at the time of the trial. She experienced chronic pain, shaking and numbness as result of soft tissue injuries sustained in a motor vehicle accident. The symptoms “waxed and waned”. The chronic pain resulted in cognitive difficulties including trouble concentrating and memory loss. Mrs. Schellak made several concerted efforts to return to work, but they were unsuccessful. She became addicted to the pain-killers she had been prescribed to help her control her pain. Mrs. Schellak described the inability to return to her career as “devastating” to her. The expert evidence tendered in the case suggested, and Martinson J. noted, that there was little objective confirmation of Mrs. Schellak’s injuries.

> ***Munro v. Faircrest***, [1985] B.C.J. No. 322 (S.C.) (QL)

[66] This was a trial by judge alone. Mr. Munro was awarded non-pecuniary damages of $60,000, which is equivalent to $100,000 in 2004 dollars.

[67] Mr. Munro was 71 years old at the time of the trial. He had suffered a badly broken wrist and ankle in a motor vehicle accident. He was left with considerable disability and pain in the wrist and ankle and the wrist was deformed. The accident also exacerbated an existing rheumatoid arthritis condition. Low J. (as he then was) found that the life of Mr. Munro and his wife had been drastically altered by the accident. He had limited ability to partake in his usual recreation activities after the accident.

[68] Of some interest in the instant case, Low J. noted at para. 29:

> [29] The defendants have not suggested that Mr. and Mrs. Munro should give up their home. That requirement would be an unreasonable demand upon them. They are entitled to enjoy the surroundings which they chose and improved for themselves.

[69] In addition to non-pecuniary damages, Mr. Munro received a considerable future care award and special damages that enabled him to purchase the boat accessories he required to resume fishing, an activity he had greatly enjoyed before the accident.

> ***Nuttall v. Thunder Bay (City)***, [2001] O.T.C. 94, [2001] O.J. No. 545 (Sup. Ct. J.) (QL), aff'd [2002] O.J. No. 2387 (QL)

[70] This was a trial by judge alone. Ms. Nuttall was awarded non-pecuniary damages of $40,000, which is equivalent to $43,000 in 2004 dollars.

[71] Ms. Nuttall was the victim of a slip and fall accident. She was 60 years old at that time. She suffered injuries to her knee that prevented her from working in the capacity to which she was accustomed. In *obiter*, at para. 50, McCartney J. stated

that the upper limit of non-pecuniary damages for a knee replacement where "the person's whole way of life is permanently disrupted" is $75,000. This conclusion is inconsistent with British Columbia law insofar as it sets tariff-like limits based on the nature of the injury.

[72] McCartney J. referenced his conclusion to ***Farrell v. White Rock Players' Club***, [1997] B.C.J. No. 507 (S.C.) (QL). In that case, however, there was only the potential for knee replacement surgery in the future. Ms. Farrell was limited in her recreational activities and had to take on a more sedentary job as a result of her injuries.

> ***Corkum v. Sawatsky*** (1993), 126 N.S.R. (2d) 317, [1993] N.S.J. No. 490 (C.A.) (QL)

[73] This was a trial by judge alone. Mr. Corkum was awarded non-pecuniary damages of $60,000, which is equivalent to $74,000 in 2004 dollars.

[74] Mr. Corkum, a landowner, logger, sawyer, farmer and businessman, suffered whiplash as a result of a motor vehicle accident. He was 53 years old at the time of the accident.

[75] Mr. Corkum's life revolved around his work. The whiplash injury had serious physical, emotional and psychological implications. He was significantly disabled. He was going to be forced to sell much of his land. However, he did not engage in many recreational activities before the accident.

Kumlea v. Chaytors, [1993] 4 W.W.R. 277, [1993] B.C.J. No. 530 (C.A.) (QL)

[76] This was an appeal of a decision of a trial judge. An award of non-pecuniary damages of $40,000, which is equivalent to $51,000 in 2004 dollars, was upheld on appeal.

[77] Mrs. Kumlea suffered a severe break of her right wrist that resulted in pain, loss of function and deformation. She was no longer able to assist her husband in pursuing the rural and self-sufficient way of life they formerly enjoyed together. Mrs. Kumlea's age is not readily apparent from the decision.

Meyer v. Wadsworth, [1995] B.C.J. No. 1558 (S.C.) (QL)

[78] This was a trial by judge alone. Mrs. Meyer was awarded non-pecuniary damages of $30,000, which is equivalent to $36,000 in 2004 dollars.

[79] Mrs. Meyer was 69 years old at the time of the trial. She had received injuries as a result of two motor vehicle accidents: the first in 1990; and the second in 1993. She suffered injuries to her spine that resulted in long-term pain and disability. There is little information about her change in lifestyle from pre- to post-accident. Much of her time, it seems, was taken up before the accident working in partnership with her husband operating a group home for the developmentally disabled.

Baker v. Manion, [1997] B.C.J. No. 1018 (S.C.) (QL)

[80] This was a trial by judge alone. Mr. Baker was awarded non-pecuniary damages of $85,000, which is equivalent to $99,000 in 2004 dollars.

[81] Mr. Baker was 34 years old at the time of the trial. He had suffered serious injuries to his left knee and foot in a motor vehicle accident. He was a highly regarded carver. The injuries he sustained made it difficult for him to sit for extended periods and so reduced his carving output. He experienced pain, his range of activities had been reduced and his leg had been disfigured. Future degeneration was likely. Mr. Baker had lived on the Squamish reserve all of his life and planned to continue to do so. While carving had been "his whole life" prior to the accident, he was limited to recreational carving after the accident.

Respondent's Cases

Lindal v. Lindal, *supra*

[82] This was a decision by the Supreme Court of Canada upholding the decision of this Court to reduce the trial judge's award of non-pecuniary damages from $135,000 to $100,000. The final award was the equivalent of $220,000 in 2004 dollars. The award was initially made four months after the decisions in the Trilogy and the Supreme Court refused to adjust the cap for inflation.

[83] Mr. Lindal suffered extensive brain damage as a result of a motor vehicle accident. His injuries caused severe physical and mental impairment including serious speech and mobility problems. Mr. Lindal's injuries also resulted in personal and emotional disorders, leaving him extremely depressed with suicidal tendencies.

Alden v. Spooner (2002), 6 B.C.L.R. (4th) 308, 2002 BCCA 592, leave to appeal to S.C.C. dismissed [2002] S.C.C.A. No. 535 (QL)

[84] This was an appeal of a jury damage award for non-pecuniary damages of $200,000, which is equivalent to $214,000 in 2004 dollars. This Court upheld the award.

[85] Ms. Alden was injured in a series of four motor vehicle accidents over a span of five years. She was 17 at the time of the first accident. Ms. Alden suffered soft tissue injuries as a result of the accidents that developed into chronic pain syndrome and serious depression. There was conflicting evidence over the extent of her injuries, resulting disabilities, and prognosis for recovery. She was still able to run competitively as she had before the accidents, but was unable to work in real estate because of the long hours and her apprehension about driving. There was evidence that Ms. Alden was motivated in her attempts at recovery.

Boyd v. Harris, *supra*

[86] This was an appeal of a jury damage award for non-pecuniary damages of $225,000, which was equivalent to $234,000 in 2004 dollars. This Court upheld the award.

[87] Mr. Boyd was 36 years old at the time of the accident. He suffered injuries to his spinal cord. These injuries caused pain and mild disability and could potentially lead to degeneration of the spinal cord and other complications. He could no longer engage in physical activities that he previously enjoyed, could no longer play guitar

as frequently as he used to, and had difficulty with basic tasks such as dressing himself and opening jars.

Dilello v. Montgomery (2005), 250 D.L.R. (4th) 83, 2005 BCCA 56

[88] This was an appeal of a jury award of $362,000 for non-pecuniary damages. The award was reduced by the trial judge to the then-present value of the Trilogy cap of $281,000. Both parties on appeal agreed that the award was excessive. This Court further reduced the award to $200,000, an amount that the plaintiff agreed was reasonable.

[89] Ms. Dilello was 19 years old at the time of the accident. She suffered significant spinal injuries. Finch C.J.B.C. summarized her symptoms as follows at para. 11:

> [11] The plaintiff has experienced headaches daily, neck pain, emotional lability, depression, fatigue, anxiety, altered sensation in her hands, upper limb weakness, increased reflexes, scalp hypersensitivity, temperature sensation, decreased manual dexterity, cognitive deficits and memory difficulties, dizziness, and low back pain. Some consequences are permanent, and others may improve over time. Her vertebral joint fractures and facet joint injuries will cause degeneration within five to ten years, resulting in arthritis and increased pain that will limit her neck movement.

The injuries were characterized as resulting in mild, long-term disabilities.

[90] The specific injuries and impacts are less instructive than is the Court's overall approach to the consideration of a jury award for non-pecuniary damages. Finch C.J.B.C. said at para. 49:

> [49] Non-pecuniary awards are inherently arbitrary and, because of this, the jury members' subjective appreciation of the plaintiff's pain, suffering and loss of amenities is not necessarily wrong if the award does not fall into the range of awards that have been made by trial judges in similar cases.

Bob v. Bellerose (2003), 227 D.L.R. (4th) 602, 2003 BCCA 371, leave to appeal to S.C.C. dismissed [2003] S.C.C.A. No. 408 (QL)

[91] This was an appeal of a jury award of $575,000 for non-pecuniary damages. The award was reduced by the trial judge to the then-present value of the Trilogy cap of $281,000. This Court further reduced the award to $275,000, consisting of $200,000 for pain and suffering and $75,000 for aggravated damages. The pain and suffering component has a value of $205,000 in 2004 dollars.

[92] Mr. Bob was gravely injured in a carjacking incident in which he was dragged under the front tire of his own van for one city block. He was 50 years old at the time of the incident. He suffered chronic pain and disfigurement as a result of his injuries; lost the ability to ride horses, which was his primary source of recreation since childhood; and, was no longer able to provide for his family, which is what gave his life a sense of purpose.

Courdin v. Meyers, [2005] B.C.J. No. 266 (QL), 2005 BCCA 91

[93] This was an appeal from a jury award of $950,000 in non-pecuniary damages. The jury award was reduced to the then-present value of the Trilogy cap, $292,823, by the trial judge. This Court further reduced the non-pecuniary damage award to $200,000. The appellant suggested that the appropriate quantum was

$110,000. The respondent, Ms. Meyers, argued that the jury made no palpable or overriding error that justified further reduction of the award.

[94] Ms. Meyers was 43 years of age at the time of trial. She and her husband operated a landscaping business and a video game rental business together before her accident.

[95] Ms. Meyers was involved in a multiple vehicle accident that ultimately resulted in myofascial injuries and fibromyalgia. The injuries were described by this Court in its reasons as have "crippling effects on her" (at para. 11). Ms. Meyers and her husband separated shortly after her accident. She blamed the separation in part on her injuries and resulting emotional effects. Before she was injured Ms. Meyers was physically active and enjoyed a wide range of sports and recreational activities in which she was no longer able to participate. Although she was still involved in a landscaping venture in a reduced capacity at the time of trial, she did not believe she would be able to continue working in that industry as a result of her injuries.

[96] As I have noted at para. 39, the comparative approach suggested in ***Boyd*** is that this Court should not interfere with a jury award of damages unless the award falls substantially outside the upper or lower range of awards set by judges in comparable cases.

[97] The cases provided by the appellant are all from trial judge decisions in somewhat comparable cases. As can be seen, none of the cases reveal circumstances identical to Mr. Stapley. However, there will rarely be such identical comparators and the best that can be expected is a revelation of rough similarity of

injuries and their consequent impact on the plaintiffs. It is doubtful that identical comparator cases can ever be produced. All the ***Boyd*** analysis calls for is "similarly situated" plaintiffs in order for there to be a degree of fairness in the award of damages as between plaintiffs who have suffered similar injuries and similar losses.

[98] The appellant's cases generally disclose plaintiffs who, like Mr. Stapley, suffered a mild to moderate whiplash injury and who, as a result, lost a degree of enjoyment of life's amenities. The range suggested by the appellant's decisions is from $36,000 to $100,000.

[99] The respondent has, with the exception of ***Lindal***, provided us with appellate decisions that have reviewed juries' awards of damages. Of those, only the awards in ***Alden v. Spooner*** and ***Boyd*** were not modified by this Court. In my opinion, the decisions featuring jury awards are of limited assistance in determining the appropriate comparator for an acceptable award in this case. First, the decisions (with the exception of ***Lindal***, ***Alden*** and ***Boyd***) dealt with substantial moderations of jury awards and are thus not truly representative of the jury's view in the particular case. Second, the injuries and consequent losses experienced by the plaintiffs in those cases were generally more serious than those experienced by Mr. Stapley.

[100] Following the approach outlined in ***Boyd***, the conventional decisions cited to us by the appellant that seem to most closely approximate Mr. Stapley's non-pecuniary loss are ***Heartt v. Royal***, ***Schellak v. Barr and Duplessis***, ***Munro v. Faircrest*** and, perhaps most particularly, ***Corkum v. Sawatsky***. They disclose a range from $66,000 to $100,000.

[101] However, none of the cases provided to us by counsel have as part of their factual matrix the unique position that Mr. Stapley enjoyed for 25 years on the ranch and the jury's evident acceptance that he would lose that employment and all the tangible and intangible benefits of his life on the ranch. It was, for Mr. Stapley, far more than simply a job and a means of supporting his family; and those are traditionally regarded as essential components of self-worth and emotional well-being: ***Reference Re Public Service Employee Relations Act (Alberta)***, [1987] 1 S.C.R. 313, 3 W.W.R. 577 (S.C.C.).

[102] Mr. Stapley faces the loss of his long-term employment and the attendant loss of his home, community and chosen lifestyle. The depth of that loss was poignantly described by Mr. Stapley and his wife. Although Mr. Stapley may not in fact lose his employment on the ranch, we must accept the jury's evident finding of that eventuality.

[103] It is clear that Mr. Stapley suffered some negative impacts in all of the enumerated factors that are considered in an award of non-pecuniary damages, including his physical well-being, work, home, relationships and recreation.

[104] The appellant concedes, and indeed it seems impossible to deny, that the jury was most favourably impressed by Mr. Stapley. The jury, drawn from the local community in which Mr. Stapley lives, undoubtedly had a keen perception and understanding of the loss that Mr. Stapley would incur if forced, by reason of his injuries, from the Coldstream Ranch. It was open to the jury to conclude that Mr. Stapley's loss of employment on the ranch and all that that entailed, coupled with

the other impairments he has and will continue to experience, constituted a profound loss, and generated a substantial need for solace.

[105] The appellant was critical of the respondent's counsel's use of the word "catastrophic" in his description to the jury of Mr. Stapley's loss. Although another adjective might well have been used, I doubt that the jury assigned to that adjective the legal significance that lawyers and judges would attach to it. Nevertheless, in layman's terms, the loss suffered by Mr. Stapley might well be regarded as catastrophic. I think that must have resonated with the jury in the context of all of the considerable body of evidence they had to consider.

[106] We are obliged to consider Mr. Stapley's case in the most favourable light reasonably possible. As I have said, the jury evidently accepted that Mr. Stapley would lose the way of life he and his family have enjoyed. The jury's appreciation of that and Mr. Stapley's other losses need not correlate with the seriousness of his injuries. It need only reflect the specifics of his particular circumstances.

[107] The jury assessed Mr. Stapley's non-pecuniary damages award without reference to other such awards: ***Brisson v. Brisson*** (2002), 213 D.L.R. (4th) 428, 2002 BCCA 279. However, we are obliged to consider whether the jury award in this case is clearly anomalous in the context of other similarly situated plaintiffs. It must be recognized that the jury accepted that Mr. Stapley would lose the lifestyle afforded to him by reason of his employment on the ranch. However, that is only one component of his non-pecuniary award, *albeit* a significant one. It must also be recognized that Mr. Stapley continues to work and is capable of supporting his family, a matter that means much to him. Furthermore, he is able to enjoy

recreational pursuits and is not, as with some other plaintiffs referred to above, incapacitated in that regard.

[108] If, as Smith J.A. noted in ***Boyd***, non-pecuniary awards should reflect a reasonable degree of fairness between similarly situated plaintiffs, then the jury's award in this case must, in my opinion, be moderated.

[109] I accept that the $100,000 non-pecuniary damage award made in ***Munro v. Faircrest*** represents the high end of conventional awards for a somewhat similarly situated plaintiff. However, as I have noted, Mr. Stapley's unique loss deserves to be compensated. In my view, that loss must be reasonably balanced with the other impairments (and relative abilities) that Mr. Stapley has and will experience. The loss of his work and lifestyle on the ranch, while not catastrophic in the legal sense of the term, are nevertheless very significant.

[110] In other words, Mr. Stapley is able to work, support his family, and participate in recreational activities. The chronic pain he experiences has not and, according to the medical evidence, will not in the future preclude those activities. In ordinary circumstances, an award of non-pecuniary damages for those losses would not exceed $100,000.

[111] What, then, is reasonable compensation for the additional potential loss of lifestyle? In my opinion, it cannot reasonably exceed an additional $75,000. In saying this, I am mindful of the difficulty in ascribing to Mr. Stapley's loss an amount that will provide solace to him for that loss. However, I am driven to conclude that the jury award of $275,000, which represents additional compensation of $175,000

above the highest conventional award for a similarly situated plaintiff is clearly anomalous and a wholly erroneous estimate of Mr. Stapley's loss.

[112] In my view, based on the evidence before the jury and having particular deference to the jury's assessment of Mr. Stapley's loss, a reasonable award for non-pecuniary damages at the highest level would be $175,000.

[113] I would therefore allow the appeal and substitute an award of non-pecuniary damages of $175,000.

"The Honourable Madam Justice Kirkpatrick"

I Agree:

"The Honourable Mr. Justice Lowry"

Reasons for Judgment of the Honourable Chief Justice Finch:

[114] I have had the advantage of reading in draft form the reasons of Madam Justice Kirkpatrick, and find myself, with respect, unable to agree in her proposed disposition.

[115] This is yet another appeal where the defence challenges a jury's award for general damages for non-pecuniary losses as inordinately high, and a wholly erroneous estimate of the appropriate compensation to provide the plaintiff with substitute amenities for that which he has lost. The appeal again presents the issue raised in so many recent such appeals as to the standard by which an award is to be judged inordinate, out of all proportion, or wholly erroneous. Some of those cases are referred to in ***Dilello v. Montgomery***, [2005] B.C.J. No. 177 (QL), 2005 BCCA 56.

[116] For many years, this Court has used the approach of comparing the award under appeal with the awards made by judges when sitting alone, examining the latter awards to see if a pattern or range could be determined for similar cases. This approach is exemplified by the judgment of this Court in ***Cory v. Marsh*** (1993), 77 B.C.L.R. (2d) 248 (B.C.C.A.), and re-examined more recently in ***Boyd v. Harris*** (2004), 24 B.C.L.R. (4th) 155, 2004 BCCA 146.

[117] In my view, recent experience has shown that comparing jury awards to those made by trial judges is no longer a useful exercise. To begin with, juries, unlike trial judges, do not give reasons for their verdicts. It is therefore impossible to know what facts the jury found as proven to support their awards. Consequently, it is

impossible to compare the factual basis of the jury's award with the facts found by trial judges in "comparable" cases.

[118] Secondly, since 1978, when the Supreme Court of Canada limited awards for general damages in the most serious cases to $100,000, all trial judges, either consciously or unconsciously, will have had that upper limit in mind when assessing damages in the cases before them. (See ***Dilello****, supra* at paras. 23 to 26.) While the $100,000 upper limit has been adjusted for inflation over the years (to an amount now said to be approximately $281,000 for the purposes of this case) that upper limit has not been adjusted in any other way to reflect current community values.

[119] That adjustment, historically, was supposed to be facilitated by reference to jury awards, and the "valuable corrective" they were meant to provide. (See ***Cory v. Marsh****, supra* at para. 10, and the cases there cited, and ***Boyd v. Harris****, supra* at para. 42.)

[120] In fact, the corrective effect of jury awards on awards made by judges alone has been substantially, if not entirely, negated by the imposition of the 1978 $100,000 limit. Awards by judges alone do not reflect what juries have awarded in recent cases. To the contrary, to the extent judge alone awards are used to test the reasonableness of a jury's award, the informative process is reversed. This Court is asked to accept that the jury's award is wrong because it is too far outside the range established by trial judges; whereas if jury awards were given their corrective function, the process would be for judges to adjust their awards so that they would approximate what a jury might give in a similar case.

[121] Judging from the number of recent cases in this Court where the jury's award is challenged as excessive, there is in my view a substantial basis for believing that non-pecuniary awards by judges alone, which are inevitably a reflection of the $100,000 upper limit, as adjusted for inflation, are now in a number of cases significantly out of touch with community values as reflected in jury awards.

[122] That this is so can be amply demonstrated in this case by referring to the authorities relied on by the appellant, and fully canvassed in my colleague's reasons at paras. 48 to 81. The appellant says these cases demonstrate a range of general damages in similar cases of between $40,000 to $80,000. On this basis, the defendant seeks a reduction in the award to an amount of between $80,000 to $100,000.

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

[124] If then, the “range” of awards made by judges sitting alone is not a proper basis for testing a jury award the question is, by what other standard should the reasonableness of the jury’s award be judged.

[125] In this case, counsel for the appellant in oral submissions, expressly disavowed the upper limit as a proper yardstick. Counsel for the appellant told us that the upper limit had “no relevance” in this case, and that this Court should not try to scale the appropriate award to the upper limit. He then of course relied on the “judge alone” comparables, which I have already said I do not find a helpful guide. (I have not overlooked the submission in the appellant’s factum at paras. 54-55 which seems to suggest that this Court should “consider whether an award approaching the upper limit is fair” where the plaintiff has not suffered injuries approaching those at issue in the ***Andrews*** trilogy.)

[126] I remain of the views I expressed in ***Dilello***, *supra*, that the upper limit is not a helpful guide in cases such as this, and is moreover, an impermissible restriction on the function of the jury as triers of fact, and a fettering of the proper principles of appellate review.

[127] Having the view that awards by judge alone, and the upper limit, are both inappropriate standards, it seems to me the only remaining guideline by which to measure jury awards, are the decisions of this Court (or other appellate courts) made on review of jury awards. In such cases, this Court is asked to decide whether the jury’s award is a wholly erroneous estimate, having regard for the evidence adduced in that case. In other words, the question is whether the appellant can

meet the test of showing that the award is a palpable and overriding error of fact, such as will permit appellate intervention. My colleague has fully summarized the appellate decisions that fall in this category of cases at paras. 82 to 95 of her reasons. These cases are not a perfect guide because some of them are the result, in part, of comparison to awards made by judges sitting alone. However, even as adjusted by this Court, the results are in my view a better reflection of community values. The upper range of these awards is in excess of $230,000.

[128] The question then is, whether this jury's award of $275,000 for general damages is so far beyond that range as to meet the standard for appellate intervention. In my view, it is not. The award is a deviation from the range of about 20%, which is well within an acceptable limit, applying appropriate deference to the jury's award as a finding of fact. (The appellant concedes that an award of $100,000 would not be wrong even where it says the upper limit is $80,000.)

[129] My colleague has provided, if I may say respectfully, a very full and fair summary of the evidence in this case. The case was heard by eight local citizens residing in or near Vernon, British Columbia. The defendant asked, and the plaintiff did not object, to having the issues tried by a jury of the parties' peers. The jury obviously accepted the case for the plaintiff on the footing most favourable to him, and believed what he had to say about the impact of his injuries on his life. The jury applied their common experience and judgement to the questions put to them. I am not persuaded that any proper basis has been shown for substituting for their

verdict, what I might have considered an appropriate award had I been hearing this case as a judge alone.

[130] I would dismiss the appeal.

"The Honourable Chief Justice Finch"