C.A. No. 115766

NOVA SCOTIA COURT OF APPEAL

Chipman, Jones and Flinn, JJ.A.

Cite as: Hubley v. Woods, 1995 NSCA 173

BETWEEN:		
BRENDA HUBLEY and MICHAEL HUBLEY		Murray J. Ritch, Q.C. and
	Appellants	W. Augustus Richardson for the Appellants
- and -		
JANICE WOODS		Colin D. Bryson and
	Respondent	Phillip S. Gruchy for the Respondent
		Appeal Heard: September 28, 1995
		Judgment Delivered: November 7, 1995

THE COURT: The appeal is allowed as per reasons for judgment of Jones, J.A.; Flinn, J.A. concurring and Chipman, J.A. dissenting in part.

CHIPMAN, J.A.: (Dissenting in Part)

This is an appeal by the defendants from a judgment in the Supreme Court setting aside the settlement of a bodily injury claim, denying the appellants' defence

based on the Statute of Limitations and fixing the respondent's damages resulting from bodily injury sustained in a motor vehicle collision.

The respondent was a passenger in a motor vehicle driven by her mother which was struck in the rear by a vehicle owned by the appellant Brenda Hubley and driven by the appellant Michael Hubley. The collision occurred at approximately 2:45 p.m. on July 6, 1989. As a result of the impact, the respondent's vehicle was driven forward into a vehicle in front of it. Liability for the collision was admitted by the appellants.

The collision resulted in minor damage to the vehicles although the driver's seat of the respondent's vehicle was twisted. The respondent immediately noticed the onset of a headache which she attributed to her teeth banging together. Although she was wearing a seat belt she experienced a jolt to her back. On the day following the collision she noted pain across her lower back but did not seek medical aid as she thought that her discomfort would subside.

By July 17, 1989, the respondent experienced such pain in her back and legs that she could hardly move and, as a result, she consulted her family doctor, Dr. F.R. Spicer. He found right sacroiliac pain, especially with lumbar extension, and mildly restricted straight leg raising. He diagnosed a severe lumbar muscle sprain. He prescribed painkilling medications and later a muscle relaxant. When these efforts failed to bring relief, Dr. Spicer referred the respondent to Dr. D. S. Malloy, a neurosurgeon. Dr. Malloy first saw the respondent on August 16 and found she had symptoms compatible with a lumbar strain. He stated in a reporting letter to Dr. Spicer dated August 16:

> ". . . She tells me that she has had long standing problems with intermittent back ache. This has been aggravated by a recent motor vehicle accident."

(e m p h a s i s a d d e d)

Dr. Malloy saw the respondent again on September 27. He noted that over the previous week or two she had developed quite severe right leg discomfort radiating down to the ankle. He found her to be very histrionic and anxious. There was generalized decreased power in the right lower extremity, secondary to pain. He arranged for a CT scan through L4-5 L5-S1 of her spine. This revealed a disc protrusion at the L4-5 level on the right side. Dr. Malloy recommended lumbar disc surgery which was performed on November 20, 1989. In the period leading up to the surgery the appellant continued to feel uncomfortable. She found it painful to move around and requested a strong medication for her pain.

On November 14, 1989, six days before the surgery was performed, the adjuster for the appellants' insurer contacted the respondent by telephone. She advised him that she was scheduled for surgery the following week. They discussed settlement. On the following day, November 15, 1989, she accepted the sum of $3,500 offered by the adjuster and attended at his office and signed a release.

As time went by the respondent's discomfort increased. She consulted counsel who advised the appellants' insurers that the respondent was seeking to set aside the release. On March 18, 1993, the respondent commenced an action in the Supreme Court against the appellants for damages arising out of the collision.

The proceeding came to trial over a six day period in January 1995 and by his decision dated March 23, 1995, the trial judge awarded the respondent damages totalling $483,625, together with prejudgment interest and costs.

The trial judge addressed three issues: the validity of the release, whether the appellants should be denied a defence based on the statute of limitations, and the quantum of the respondent's damages.

As to the first issue, the trial judge found that the transaction resulting in the release was so unconscionable as to require the intervention of the court. He held that the settlement and release were void and unenforceable.

As to the defence based on the Statute of Limitations the trial judge, pursuant to s. 3(2) of the **Act**, disallowed the defence based thereon and allowed the action to proceed.

On the issue of damages, the trial judge allowed damages under five separate headings, totalling $483,625.

On the appellants' appeal to this Court the same three issues arise for consideration and I will deal with them in the same order as did the trial judge. The appellants also contend that the trial judge erred in awarding costs on Scale 4 of the Tariffs. The respondent filed a notice of contention claiming that the trial judge allowed too much interest in giving credit for the settlement made in 1989 and that his assessment of punitive damages was inordinately low.

Issue One - Release

The trial judge reviewed the evidence surrounding the settlement of the respondent's claim and the taking of the release by the insurer on November 15, 1989. This consisted of testimony from the respondent, her mother and the adjuster, together with the contents of the adjuster's file.

The trial judge reviewed the adjuster's file first. On June 13, 1989, a work sheet was prepared indicating a total reserve of $2,500 for out-of-pocket costs and general damages. The estimate of damage to the vehicle of the respondent's mother was $612.79. On September 8, 1989, the respondent's mother settled her claim for injuries for $1,500 and executed a final release. A medical report from Dr. Spicer dated October 10, 1989 states that the respondent told him she had long-standing back problems. On examination he found

marked para spinal spasm. In August she had been seen by Dr. Malloy who diagnosed lumbar sprain. A CT Scan disclosed possible L4-L5 disc protrusion on the right. She was currently wait listed for surgery. There was evidence of prior injury or disease, namely, partial sacralization of L5, scoliosis. Dr. Spicer's report indicated that the disability of the respondent was the sole result of the injury in question and not related to complaints before the accident. He indicated that permanent disability was possible and was unable to predict when she might return to work.

The respondent said that she spoke on the telephone to the adjuster who advised that he would pay no more than $3,500 and she could take it or leave it. When she told him she required surgery and wanted to know what the situation would be if the result was not satisfactory, he said that it would be her problem. She had no prior experience in settling legal claims and knew nothing about the legal system. She stated that she believed what people, particularly those in authority, tell her. She believed the adjuster. She did not need money at the time. She had asked for $15,000 but the adjuster told her the offer was $3,500, take it or leave it, and that she would get no more even if she got a lawyer. He told her not to get a lawyer. She was in pain and taking medication, but she accepted the $3,500 because, although no one was forcing her, she believed that that was all she could get.

She believed she discussed the matter with her mother and her fiancé but neither gave her any advice.

On the following day she attended at the adjuster's office, signed the release and received the money.

The respondent's mother had received a whiplash injury in 1984, had hired a lawyer and negotiated a settlement through him. She was not impressed with lawyers. Her daughter was aware of the settlement. When the mother spoke to the adjuster about a lawyer respecting her own claim he responded that it was entirely up

to her. She told her daughter that she did not know whether she should hire a lawyer. She knew that her daughter had been offered $3,500 and it was she who had suggested that the settlement might be larger, perhaps $15,000.

The adjuster, Stelios Ninos, had considerable on-the-job experience but had received very little formal training. He had no independent recollection of the claim and used the file to refresh his memory. He spoke of his usual practice with respect to discussions with claimants about lawyers. He never brought up the subject, but if the claimant said that a lawyer had been retained, he would have advised that the dealings must be with the lawyer. If claimants inquired about the need for a lawyer he would tell them that it was their prerogative, but that if they did retain a lawyer his offer would stand. This was to show strength in negotiations. He referred to the reserve of $2,500 which was set up at the beginning of the file. He could not recall whether he ever adjusted it upward or downward.

With respect to the respondent's injuries, Ninos considered that the delay in obtaining treatment indicated they were minor, and that the notation of long-standing back problems tended to cause him to reduce his estimate as to the value of the claim. On cross-examination he indicated that he did not keep himself constantly updated regarding court awards for bodily injuries. He did not carry out any independent research and obtained most of his information on the subject from lawyers. He acknowledged that the damage to the seat in the respondent's vehicle indicated that the impact had been substantial. He had set up the reserve prior to receipt of the medical report. He never spoke to the respondent in person until he negotiated with her on the telephone. He regarded the injury as a minor soft tissue one for which $3,500 would be fair compensation. As to the disc protrusion, he knew that surgery was pending but did not know the purpose of it. He did not speak to Dr. Spicer or any other medical adviser.

On this evidence the trial judge found that as between the respondent and the insurance adjuster the former was the weaker party. He found she was ignorant by reason of an incomplete formal education, her limited work experience, her tendency to rely upon persons in authority and her unfamiliarity with the legal system. She was in distress as a result of four months of continual, severe, debilitating pain and of facing imminent surgery. There was an inequality of bargaining position.

The trial judge found that the adjuster deceived and misled the respondent and prevented her from having a fair opportunity to consult a lawyer. Knowing that she had not done so he insinuated that there was no need to. He effectively dissuaded her from seeking the services of a lawyer, thereby taking advantage of her ignorance and her need. The reserve and offer of settlement were not based upon the medical reports or other facts and "therefore were shams". The trial judge said there was no indication that the adjuster had any knowledge of or cared what amount was appropriate compensation for her injuries. He either did not understand or was wilfully blind to the nature of the severity of the injuries and the medical condition. The adjuster unconscientiously used a position of power to achieve an advantage in obtaining a settlement which was "advantageous for his employer but disastrous for the claimant".

Finally, the trial judge found that the normal range of general damages for injuries as described by Dr. Spicer in his medical report would have been at the time "substantially in excess of the $3,500 settlement figure". He further found that had the respondent had a fair opportunity to consult a lawyer prior to executing the release, she would have been advised to delay settlement until after the results of the surgery were known, in which case the compensation might ultimately have been greater. The settlement was sufficiently divergent from community standards of commercial morality both in the manner in which it was reached and the amount of the compensation

involved, that it should be set aside.

In coming to these conclusions the trial judge was guided by the summary of principles enunciated by Hallett J. (as he then was) in **Stephenson v. Hilti (Canada) Ltd.** (1989), 93 N.S.R. (2d) 366 at 370-1:

> "To summarize the principles set out in the foregoing cases, it seems to me that a transaction may be set aside as being unconscionable if the evidence shows the following:
>
> > (1) That there is an inequality of bargaining position arising out of ignorance, need or distress of the weaker party;
> >
> > (2) The stronger party has unconscientiously used a position of power to achieve an advantage; and
> >
> > (3) The agreement reached is substantially unfair to the weaker party or, as expressed in the **Harry v. Kreutziger** case, it is sufficiently divergent from community standards of commercial morality that it should be set aside.
>
> To put it even more succinctly, is the transaction so unconscionable that it requires the intervention of the court considering all the circumstances surrounding the making of the agreement."

The findings of fact made by the trial judge when tested by the relevant principles warrant setting aside the transaction. The appellants submit that the evidence calls for the drawing of different inferences. A number of cases were referred to in argument. While the test to be applied in determining whether a transaction is unconscionable has been expressed in a number of ways, I am of the opinion that the summary by Hallett J. is a fair summary of the law and is appropriate for application here. It has been said that the law is easy enough to state but its application is frequently difficult. It appears from many of the cases that once it appears that there is an inequality of bargaining power and a substantially unfair agreement, the burden shifts to the party supporting the transaction to show that the superior power was not used. Some cases express the position in terms of a burden which falls upon a more

powerful party of showing that an agreement with the appearance of unfairness was indeed fair and reached without the use of power. In my opinion once the first and third elements set out by Hallett J. have been established, the effect is, **prima facie**, to establish the second as well. See comment by B. E. Crawford (1966), 44 C.B.R. 142. The burden would then fall upon the party defending the transaction to show that the superior power was not used to attain the advantage. This would be a difficult task indeed in most cases.

In approaching the trial judge's findings, we are restrained by the rule which does not allow us to set them aside unless they are palpably wrong. An examination of the record convinces me that the findings which I have detailed are substantially and in the main correct. Where there is a difference between the adjuster's testimony and the respondent's - whether or not the adjuster actually told her not to get a lawyer - the trial judge appears to have accepted the evidence of the respondent. In any event it is not a significant difference.

While the respondent testified that she did not need money at the particular time it is apparent from her circumstances as a person with no income and dependent upon her fiancé for support, who had little money to spare and who quickly used up the money to buy comforts for her hospital stay and a vacation trip after her surgery, that she was in fact in need of money. She was ignorant of the legal system, not well educated and as we shall see later, a person of limited accomplishments for her age (then 25). In my opinion she was no match for the adjuster who appears to have had considerable practical training and a degree of sophistication in bargaining with people over numbers. The inequality of their respective positions is clear.

Counsel for the appellants has strongly urged that the agreement reached was not substantially unfair. He emphasized that the time for testing the value of the claim was at the time of settlement and not at the time of the trial when it was obvious

that the respondent's condition had deteriorated substantially, leaving her in a position of permanent disability. He referred to a number of cases where injuries somewhat similar to those of the respondent in the fall of 1989 attracted court awards not significantly higher than $3,500.

While I agree with counsel for the appellants that the relevant time to evaluate the bargain is the time of the settlement, I do not agree that it is a useful exercise here to look at cases dealing with injuries similar to those described in the medical reports in the adjuster's file. To anybody with the slightest experience in dealing with claims, it would be clear that on November 15, 1989, the respondent was facing an uncertain prognosis. While an early and complete recovery was a possibility, chances of long-term problems were so high that the only sound advice to the respondent would be to not settle the claim at an early stage. Only when the true extent of the disability was finally measured by expert medical persons after the effect of the operation and the progress of convalescence became known could one seriously entertain the possibility of settlement. It is really for this reason that the bargain was improvident, substantially unfair and divergent from community standards of commercial morality. No informed person would countenance settlement at such an uncertain stage.

I am satisfied therefore that it has not been shown that the trial judge was wrong in finding that the first and third elements listed by Hallett, J. were established. As to the second, I am of the opinion that the burden fell upon the defence to establish that the bargain was not brought about as a result of the unconscientious use of the power to achieve the advantage. It is apparent to me on reading the record and the trial judge's findings that the adjuster did not overtly pressure the respondent. However, he must have been well aware of the complete folly of anybody in settling so uncertain a claim at that early stage, let alone for such a modest amount as $3,500.

He certainly used tactics designed to make her think that $3,500 was all that she would ever get. The implication was that she might as well take it now rather than later. While not overt, it was clearly pressure which meets the test. The appellants fail to rebut the burden cast on them in this respect.

I have concluded that the trial judge has not erred in his finding that the bargain was unconscionable and should be set aside. However, I am unable to share the trial judge's view that the reserve set up and the offer which was made and accepted, not being based on the medical reports or other facts, were therefore shams. That the adjuster was unwise in letting the respondent settle at this stage as he did, is beyond doubt. I am unable to attribute to him, however, any dishonesty such as the word "sham" tends to imply. There is no suggestion that the adjuster deliberately set up his records to deceive, or specifically that he ever did deceive the respondent or make any false statement to her. However, deceit is not a necessary ingredient in the establishment of an unconscionable transaction. The adjuster was obviously thoughtless or indifferent to the position of the respondent and the high risk she was taking in settling her claim at the time she did. See **Hilti, supra**, p. 371. Acting short of dishonesty or fraud, a party still may be found to have unconscientiously used a position of power to obtain from a weaker party a substantially unfair bargain. As Denning, M.R. said in **Lloyd's Bank v. Bundy,** [1974] 3 All E R 757 at 765:

> ". . . When I use the word 'undue' I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other."

Issue Two - Statute of Limitations

By s. 2(1)(f) of the **Limitation of Actions Act**, an action for the recovery of damages for bodily injury occasioned by the operation of a motor vehicle must be commenced within two years after the cause of action arose. Apart from cases where

the injury might not readily be apparent, this means two years from the date of the accident which in the present case would be July 6, 1991. The action was not in fact commenced until March 18, 1993. The respondent persuaded the trial judge that he should disallow a defence based on the limitation period on the basis of s-ss. (2), (4) and (6) of s. 3 of the **Act**:

> "**Application to proceed despite limitation period**
>
> (2) Where an action is commenced without regard to a time limitation, and an order has not been made pursuant to subsection (3), the court in which it is brought, upon application, may disallow a defence based on the time limitation and allow the action to proceed if it appears to the court to be equitable having regard to the degree to which
>
> (a) the time limitation prejudices the plaintiff or any person whom he represents; and
>
> (b) any decision of the court under this Section would prejudice the defendant or any person whom he represents, or any other person.
>
> **Factors considered**
>
> (4) In making a determination pursuant to subsection (2), the court shall have regard to all the circumstances of the case and in particular to
>
> (a) the length of and the reasons for the delay on the part of the plaintiff;
>
> (b) any information or notice given by the defendant to the plaintiff respecting the time limitation;
>
> (c) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought or notice had been given within the time limitation;
>
> (d) the conduct of the defendant after the cause of action arose, including the extent if any to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the

> plaintiff's cause of action against the defendant;
>
> (e) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
>
> (f) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
>
> (g) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.
>
> **Jurisdiction of court restricted**
>
> (6) A court shall not exercise the jurisdiction conferred by this Section where the action is commenced or notice given more than four years after the time limitation therefor expired."

After reviewing the factors set out in the **Act** as they applied to the circumstances of the case, the trial judge found that the respondent was prejudiced by the time limitation and the appellants were not prejudiced by the allowance of the action to proceed.

As the trial judge stated, the remedy thus provided by the statute is equitable in nature. It involves the balancing of the various factors set by the Legislature for consideration. These amendments to the **Act** have been in place now since 1982 and the resulting jurisprudence that has developed in this province provides a well trodden path.

A review of all of the cases suggests to me that the amendments give a trial judge a very substantial discretion to virtually do away with limitation defences, subject only to the limit imposed by s. 3(6) of the **Act**.

In exercising his discretion the trial judge rightly rejected the contention

that the power to extend should only be exercised in favour of those plaintiffs who act in a sufficiently timely manner that they miss the limitation through misadventure or oversight, and only in circumstances where the defendant knew or reasonably should have known of the claim before the limitation expired. As the trial judge points out, the **Act** does not specify such a test. The length of delay is a factor to be considered (s. 4(a)), but s-s. (6) fixes a maximum delay period. The court has freedom to exercise the discretion within that time range. The trial judge reviewed all of the circumstances. He recognized that the length of delay was twenty months past the two year limitation. The settlement would operate to deprive the respondent of knowledge of her rights until she had obtained legal advice. The extensive delay appears to have resulted from the fact that the respondent had made a settlement which the court already found to be unconscionable. The finding of the trial judge that the respondent acted promptly and reasonably once she knew that she might still have the right to pursue her remedy is significant.

I agree with the trial judge that it was not shown that there was prejudice sustained by the appellants' insurers by reason of the fact that they were not aware that they might have to follow and investigate the claim between November 14, 1989 and October 13, 1992. While the insurer did not have the opportunity to monitor the claim during that period, there is no indication that such inability prejudiced the conduct of the defence at trial.

This Court should not interfere with the discretion of a trial judge unless it is shown to be based on some erroneous principle or to work a manifest injustice. Such has not been shown here.

Issue Three - Damages of the Respondent

The trial judge awarded damages under various headings as follows:

(a)	General damages (net)	$88,000
(b)	Lost past wages (including pre-judgment interest)	$17,700
(c)	Lost future wages or earning capacity	$157,700
(d)	Cost of future domestic duties (including tax gross-up)	$60,225
(e)	Cost of future medical care	$150,000
(f)	Punitive damages	$10,000
Total		**$483,625**

Before addressing each of these items comprising the award, it is appropriate to review the circumstances of the respondent prior to the collision, the nature of her injuries and subsequent progress.

The respondent was born in 1964. She never knew her father. She quit school at age 17 before having completed Grade 10 because she could not cope with school work and home problems. Her stepfather was an alcoholic and her mother and he fought considerably. She was asked by her stepfather to leave the home and she lived thereafter with other relatives. She never got a driver's license. Whenever she did find work it was low paying and sporadic. She was either laid off or quit shortly thereafter. When she married she did not work, as her husband supported her. Her income from employment or other sources from 1983 to 1993 is:

Year	**Nature of Income**	**Income**
1983	beauty salon	$343.00
1984	Narwal Marine	$881.00
1985	Daily News	$657.00
1986	Aerobics First	$386.00
1987	Innova	$923.00
1988	unemployed	0

1989	unemployed	0
1990	unemployed	0
1991	unemployed	0
1992	Social Assistance	$8,753.00
1993	Social Assistance	$8,753.00 (approximately)

Dr. Spicer testified that the respondent: "has had long-standing problems with very low self-esteem, significant depressive episodes and what appeared to be some ongoing problems with poor concentration, poor memory".

The respondent's relationship with the man she married after the accident appears to be characterized by turmoil. It ended in divorce about two years later. She commenced a relationship with another man but this quickly disintegrated.

At the age of 11, a growth was found on the respondent's right ovary. The ovary was subsequently removed. A diseased ovary can be the cause of back pain. Its removal, according to Dr. Spicer, almost always relieves the associated back pain. In 1977 a consult note from Dr. Corkum indicates pain in the back and left leg, a symptom of ovarian disease. He also noted that the respondent had a low pain threshold. Dr. Spicer opined that these symptoms could result from the incorrect position of the left ovary. In October, 1991, Dr. Spicer diagnosed her as having had a prior left ovarian cyst and endometriosis.

In November, 1980, the respondent was involved in a motor vehicle accident while a passenger in a car that rolled off the road. She suffered bruising, stiffness and soreness that lasted roughly a week.

In September, 1981, the respondent was hit by a motorcycle. Her leg was swollen and bruised and she was hospitalized. She appears to have fully recovered from this.

The respondent consulted a psychiatrist, Dr. C.E. Taylar in 1981. His

report to the family doctor referred to her troubled home life and inability to cope at school. He referred to the fact that she had taken an overdose of Tylenol and had thought about cutting her wrists. Dr. Taylar stated that she seemed to be generally handicapped, having difficulty communicating with people, moody, paranoid and having difficulty concentrating. He concluded:

> "Her lack of friends, her slightly paranoid attitude, her sensitivity and her general adjustment problems, make me wonder whether she is not bordering on the psychotic . . . She does pose a vague suicidal risk but is not at the present time suffering from a true psychiatric depression but her unhappiness seems to be centered around her difficulty in coping."

On November 20, 1981, the respondent was admitted to the Nova Scotia Hospital with a history of an overdose. She gave a history of being unhappy at home and at school. She reported two previous overdoses. A consultation note by the adolescent service read "I'm very concerned about this young woman. I find her vague and confused. Her concentration especially in the academic area is poor, in spite of being in the general program which by most standards is easy..."

The respondent was discharged from the Nova Scotia Hospital on December 8, 1981 against medical advice. The discharge diagnosis was "depression, pre-schizophrenic illness".

The respondent cried when she testified about her breakdown in 1981.

In July of 1982 the respondent developed a cyst in her left ovary. The obstetrics and gynaecology consultant, Dr. T. P. Corkum advised the family physician that eventually surgery would have to be done to have the ovary freed from its adhesions and suspended. That treatment was not recommended at the time.

On December 8, 1982 Dr. Taylar reported to the family physician on a follow-up. He stated that the respondent continued to need a lot of direction and the

protection of an anti-psychotic drug. He referred to her as having a weak ego and limited coping skills, unrealistic expectations, a tendency to be impulsive and an inability to pursue constructive courses of action or maintain relationships.

On November 4, 1985 the respondent was admitted to the Dartmouth General Hospital with a history of depression and an overdose of Tylenol No. 1.

On August 28, 1986 Dr. Brewer Auld reported to the family physician respecting the respondent's complaints "severely of low back pain, low mid bilateral back pain, supra pubic discomfort, some frequency and recently mild haematuria. She has minimal dysuria and feels generally unwell". She had an urinary tract infection for which the doctor prescribed medication.

In August of 1987 the respondent first saw her present family physician, Dr. Spicer. He noted that she was unemployed and was bored at home and was fighting with her boyfriend over nothing, such as a ruined vacation. She reported that she had occasional suicidal thoughts, had poor sleep with early waking and crying spells. She had almost no social life. Dr. Spicer thought that the respondent had a major depression and recommended that she see Dr. Taylar again. There is no evidence that she ever did so. She testified that her life was "all messed up" in the period between leaving school and the accident.

On June 14, 1988 the respondent pressured Dr. Spicer for medication which he felt she did not need. He described her in his record as "whining" for medication.

Dr. Spicer saw her on four subsequent occasions prior to her first visit to him following the accident on July 17, 1989.

In the meantime, however, the respondent was also seeing another family physician, Dr. S.N. Bhatia, practicing at Porter's Lake. Dr. Bhatia did not testify at the

trial as he had retired to India. His notes of office visits by the respondent were in evidence and appeared in the record before this Court. The handwriting was not easy to read but in many instances it was interpreted by Drs. Spicer and Malloy when they testified. Some of what is written was quite obvious. The significant entries relate to visits in 1989. After the accident the respondent told Dr. Spicer on July 17 about her visits to Dr. Bhatia. Dr. Spicer said:

> "What she reported to me is that she had been in a car accident on July 6th and that she had had back problems since she was staying at her stepfather's in Chezzetcook and saw the doctor there and she said she had two bones growing together and has had x-rays taken."
>
> (emphasis added)

Dr. Bhatia's notes of a visit on May 4, 1989, referred to "back problems times 4 to 5 months. Pain getting worse. Pain around right knee ... funny feeling - ...right big toe". As Dr. Malloy said, this would seem to indicate that as early as May of 1989 the patient was experiencing symptoms which raised a possibility that she had had some nerve root irritation at that time. Dr. Bhatia's notes include a diagram. Dr. Spicer interpreted this to indicate tenderness in the lower legs, but no neurological involvement. Dr. Bhatia saw the respondent again on June 9. There was tenderness over the right S I Joint - the buttock area where much of the post-accident pain occurred. Dr. Spicer said that this was not related to the ovary condition. She was complaining of pain in the back. The pain was on the right side. He saw her again on June 15 and noted that she was not feeling good. She had pain in the back of the knee. She had back pain during her periods.

Dr. Malloy indicated that these notes were indications that Dr. Bhatia thought there was something wrong with her back. Dr. Malloy had previously thought that the leg pain following the accident was the first episode she had experienced. But

with the notes of Dr. Bhatia "it is obviously the second episode". Nevertheless, Dr. Malloy expressed the view that the disc protrusion and subsequent chronic lumbar strain were caused by the accident.

Dr. Spicer testified that he was not aware of Dr. Bhatia's visits until shortly before the trial. He did agree that he had made a notation on July 17 that she had seen the doctor when she was visiting her stepfather. It would appear that he had overlooked this notation. He agreed that Dr. Bhatia found right SI tenderness in June of 1989 which, being on the right side, was not related to her ovarian problems. On direct examination he stated that based on Dr. Bhatia's notes "if there was a mild pre-existing condition it was greatly worsened by the accident" (emphasis added).

An x-ray report dated May 10, 1989 from Dr. J.S.Manchester to Dr. Bhatia indicates that an x-ray of the lumbosacral spine was taken. The report reads in part:

> "Conclusion: Lumbosacral anomaly - partial sacralization on the left initiating a mild scoliotic curve."

Dr. Spicer concluded that normally one would not order a low back x-ray unless there were suspected problems with the boney structure that might be causing back pain.

I have made this rather extensive review of the respondent's pre-accident physical and mental conditions because the trial judge made virtually no reference to any of them in his decision. In the narrative at the beginning of the decision there is a brief medical history covering the ovary removal, the two previous accidents and a brief reference to Dr. Taylar's diagnosis in 1981. In dealing with the damages he referred to Dr. Spicer's lengthy report dated June 9, 1994 upon which his testimony at the trial was based. After extracting 48 entries therefrom, the trial judge referred to Dr. Spicer's description of the respondent in the report as "a virtual back cripple who can perform no gainful employment, no housework and she also claims to have no possibility of a

social life as a result of pain in her back". The trial judge then quoted the following diagnosis and prognosis as of the date of the report:

> "This would appear to be a clear cut case. A woman who was previously pain free has a motor vehicle accident, and subsequently suffers intractable back pain. I had some nagging fears that perhaps Janice had a hidden agenda with her pain complaints, and was not surprised when almost every treating physician and physiotherapist, none of whom knew her past psychiatric history, commented upon her depression or what they perceived as a psychological component to her pain. Dr. Purkis even told her as much. As her situation evolved, I realized that Janice had no hidden agenda. Certainly, individuals with a so-called normal affect (i.e. not depressed) can certainly become so as a result of chronic pain which cannot be controlled satisfactorily. There is also the factor of pain amplification syndrome, wherein the level of pain does not increase, but the individual's tolerance for pain decreases over time.
>
> It is noteworthy that every specialist that Janice saw found some concrete finding that could cause pain: she had muscle spasm, a disc prolapse, tendonitis, bursitis, all legitimate sources of pain which did not exist in this woman prior to her motor vehicle accident of July 6, 1989, yet were found at various times by all the specialists treating her. The failure of response to treatment is what is so perplexing in this case, frustrating for both Janice and all of the physicians involved in her care to date.
>
> I regret that I cannot accurately estimate the future health care costs for Janice, as we do not yet even have a firm diagnosis, and without a diagnosis treatment cannot be estimated. Certainly the complete lack of response to physiotherapy would make one reluctant to try much more of it, and there is a considerable risk of addiction if we simply let her fill herself full of narcotic pain medication. I believe that if anything is going to work it is the multi-disciplinary approach being attempted by the pain clinic psychiatrist."
>
> (emphasis added)

The doctor thus characterizes the respondent as "pain free" prior to the accident. When the respondent first consulted him after the accident on July 17, 1989 she told him that she had back problems when she was staying in Chezzetcook and saw the doctor there and was told she had bones growing together and that a back x-

ray was taken. In his physician's report provided to the insurance company on October 10, 1989, he responded to questions regarding history or evidence of pre-existing injury, disease, or physical impairment in the affirmative, specifying "slight scoliosis partial sacralization of L5".

When Dr. Spicer prepared his report of June 9, 1994 he was aware of the back x-ray taken at the request of Dr. Bhatia on May 10, 1989, but not Dr. Bhatia's notes. The condition revealed in the x-ray was partial sacralization of the fifth lumbar vertebra, meaning that it was partially merged into the adjoining sacral vertebra. It caused a mild scoliosis, or a mild twisting of the back. As I have said, Dr. Spicer said that the respondent had told him that she had had back problems when she had been staying with her stepfather in Chezzetcook. In his letter, he stated that this condition, however, would likely have remained dormant had there been no accident.

At the time he wrote the letter of June 9, 1994, he was not aware of the notes of the visits to Dr. Bhatia. He learned of this about a week before the trial. Had he known of them at the time he prepared his report, it is difficult to see how he would refer to the respondent as "a woman who was previously pain free". If he had remembered what the respondent had told him on July 17, 1989 when she first consulted him after the accident, it is hard to understand how he could describe her as "previously pain free". Had he reviewed the first report of Dr. Malloy to him dated August 16 he would have seen that she had been complaining of <u>long standing</u> back problems with <u>intermittent back ache</u> which had been <u>aggravated</u> by a recent motor vehicle accident. Dr. Spicer's notes of the respondent's first visit on July 17,1989 contained the following telling entry:

"Never mentioned back pain here but has always had."

In his direct testimony he said:

> "She states she has long-standing back problems but never mentioned it to me."

It is clear to me that Dr. Spicer has ignored or overlooked significant, uncontested evidence of major complaints of right hand side back pain emanating from the respondent herself, prior to the accident.

When Dr. Bhatia's notes are examined it can be seen that the respondent had consulted him off and on between 1981 and 1989. On September 17, 1984 she spoke of problems with her "nerves". She recited a stay in the Nova Scotia Hospital. She complained of inability to sleep off and on for months. She complained of pain in the legs. She complained of boyfriend problems. In 1986 she visited twice during the year and it is not evident from the writing that there were any complaints material to this matter.

On May 4, 1989 she complained of back problems for the past four or five months. The pain was getting worse. The pain was around the right knee. She mentioned also the right toe. This was preceded by lightheadedness and she was obliged to sit down in a chair. She complained of headaches which could be very severe. Her mother and father suffer from migraines. The history of her removed ovary and subsequent medication to treat the remaining ovary was noted.

On the 9th of May, 1989 she returned again. The doctor's notes contain a diagram giving indications of location of pain in her back and legs.

On June 9th another visit reveals that she was complaining of pain in the back and that the pain was on the right side. The right SI joint was tender. On June 15, 1989 she was not feeling well and she had pain in the back of the knee. Reference is also made to "sometimes back pain during periods".

In a portion of his testimony Dr. Spicer, who had by then learned of Dr. Bhatia's visits, took the position that her pain was in the left side, being referable to the

left ovary which was displaced, and could explain pain in the left leg at certain times of the menstrual cycle. However the difficulty with this is that the visits to Dr. Bhatia clearly reveal right sided pain going into the right leg. This is not, however, to overlook or underestimate the significance of ovarian pain as a pre-accident disability. Dr. Spicer testified that as late as October, 1991, the respondent was in pain and she reported that she was not sure if it was the back pain or her ovary. She was found to be tender over the left lower quadrant and over her ovary.

In May, 1992 she was diagnosed with acute pylonephritis resulting in back pain, adnomal pain and high fever. This had previously occurred in 1982. In her testimony she spoke of urinary tract and kidney problems and paralyzing low back pain:

"When I have the pain, I'm keeled over with pain."

In his report of June 9, 1994 Dr. Spicer referred to the abnormalities shown on the x-ray taken at Dr. Bhatia's request on May 10, 1989. He points out that the abnormality there shown can exist without pain and he expressed the opinion that it would not have produced pain but for the accident. However, this statement is seriously undermined by the fact that this woman was suffering to such a degree that it necessitated three separate visits during which there were complaints of pain sufficient to prompt Dr. Bhatia to call for an x-ray.

The trial judge also referred to the testimony of Dr. David S. Malloy who performed surgery on the respondent on November 20, 1989. The surgery was designed to remove a disc protrusion at the L4-5 level on the right side. The purpose of this was to relieve pain in the leg. It was not intended to alleviate the pain she was suffering in her back. The leg pain was relieved for a time but in due course it returned.

When Dr. Malloy first saw the respondent he reported to Dr. Spicer on August 16:

> ". . . She tells me that she has had long standing problems with intermittent back ache. This has been aggravated by a recent motor vehicle accident. She was involved in a rear end motor vehicle accident on July 6th, 1989. . ."
>
> (emphasis added)

Dr. Malloy last saw the respondent in 1991. In his final report dated September 8, 1993, Dr. Malloy said:

> "In referring to my notes, I see that I did indicate that she had 'long standing problems with intermittent back ache'. Mrs. Woods is quite correct in stating that this was not a disabling problem with back pain and, in fact, was a back discomfort related to menstrual cycles. There were no structural pre-existing back problems prior to her motor vehicle accident. I think it is quite reasonable to state that her persistent back problems are directly related to that accident."

This paragraph raises concerns. It does not appear in any of the medical notes made at the time of her visits that the respondent stated that the previous back pain was not a disabling problem. Dr. Bhatia's notes indicate quite the contrary. Turning to the respondent's own testimony, she certainly did suffer pain due to urinary tract infections and kidney problems. She said:

> "A. Lower back pain all across the lower part of my back, around my stomach and weakness in my legs. When I have the pain, I'm keeled over with pain. It's really pretty painful."

She did not, however, testify that her other back pains were not a disabling problem. She was cross-examined about the visits to Dr. Bhatia in May and June of 1989. She simply stated that she remembered going in to see him, does not recall when, and does not recall the visit. She agreed, however, that she must have explained to him what her problems were. Contrary to Dr. Malloy's statement that there were no structural pre-existing back problems, is the finding on the x-ray of May 10th, to which I have already referred. In his testimony, Dr. Malloy agreed that scoliosis was

a lateral bending of the lumbar spine commonly seen in patients who do have muscle spasm in the paraspinous region.

When Dr. Malloy was confronted with Dr. Bhatia's notes he could not deny that they indicated a history of pain prior to the accident. The complaints to Dr. Bhatia made on May 4, 1989 raised a possibility that she may have had a slipped disk at that time. In about 80-85 percent of the patients who present with a slipped disk and leg symptoms, spontaneous resolution can be expected within four to six weeks. Dr. Malloy then stated that the first indication that he had that she had symptoms prior to the accident was these notes of Dr. Bhatia. To his knowledge, there was nothing else that suggested that the leg symptoms persisted or were present at the time of the accident. He therefore inferred that these symptoms had resolved. However, Dr. Malloy himself wrote on August 16, 1989:

> "She tells me that she has had long standing problems with intermittent back ache. This has been aggravated by a recent motor vehicle accident. . ."
>
> (emphasis added)

Dr. Bhatia's notes and the x-ray are consistent with what the respondent told Dr. Malloy on her first visit to him.

After referring also to a report from the Victoria General Pain Clinic by Dr. Mary E. Lynch dated June 22, 1994 the trial judge made the following findings:

> "I find that, as a result of the accident, the plaintiff suffered severe lumbar muscle strain, disc protrusion at the L4-5 level on the right side, mechanical back pain with right sciatica, and chronic pain. I find further that leg pain, which abated after the surgery, has returned. I find that back pain is constant.
>
> I find that the chronic pain is attributable to concrete findings that could cause pain: muscle spasm, disc prolapse, tendonitis, and bursitis. I find that there is also a psychological element to her pain.

> I find no evidence that her pain is simulated or deceitful. . .
>
> I find that, as a result of her pain and other injury, the plaintiff has been totally disabled from the date of the accident to the present time. . .
>
> I find a strong likelihood that her disability is, and will be, permanent."

(emphasis added)

These are key findings of the trial judge. They are obviously predicated on the basis that the respondent was, to use the words of Dr. Spicer, "previously pain free".

The trial judge then proceeded to assess the damages turning first to non-pecuniary general damages for pain, suffering and loss of amenities. After referring to a number of authorities he returned to the facts and said:

> ". . . Finally, while she is not totally physically impaired, her physical injuries together with psychological complications, all of which are attributable to the accident, have left her permanently partially disabled."

(emphasis added)

The trial judge assessed the general damages at $100,000 from which he deducted 5% or $5,000 for the respondent's failure to mitigate damages in that she did not, between November 27, 1992 and May 11, 1993, fully cooperate with her medical advisors by attending physiotherapy, doing her exercises and attending the pain clinic.

Notwithstanding the somewhat contradictory nature of the findings as to the exact extent of the respondent's disability there are clear findings that as a result of the accident she suffered severe lumbar pain, leg pain and back pain and that such is neither simulated nor deceitful.

These findings are very difficult for the appellants to overcome and I am not prepared to say that, standing alone, they are incorrect. However, apart from an

extremely brief excursus into the respondent's prior medical history consisting of only four paragraphs without reference to the complaints to Dr. Bhatia, the trial judge simply dismissed the respondent's pre-existing conditions:

> ". . . I do not accept that any pre-existing psychological and physical problems of the plaintiff would have the effect of reducing quantum of the plaintiff's claim for pain and suffering. I do not find that she would have experienced physical low back problems in any event."

I am unable to accept this finding because it overlooks a substantial body of uncontradicted evidence of physical and mental conditions suffered by the respondent prior to the accident. There was no credibility involved here. This evidence simply cannot be swept under the rug. It is there. It is uncontradicted. It raises serious concerns and suggests that probably the respondent would have suffered discomfort and loss of amenities had no accident occurred. The trial judge's failure to address this uncontradicted probability was a failure to consider an obvious material feature of the evidence and calls for some degree of intervention by this Court. He has left out of account a very relevant factor. We are addressing here the inferences that must be drawn from undisputed evidence. See generally **Tneguzzo - Norvell v. Burnaby Hospital** (1994), 110 D.L.R. (4th) 289 (S.C.C.) per McLachlin, J. at 292.

In **Greek and Hillier v. Ernst** (1980), 43 N.S.R. (2d) 191, Hallett, J. (as he then was) said at p. 200:

> "The difficulty in this type of case is that application of the principle that the wrongdoer takes the victim as he finds him really does not answer the question as to whether the victim's present complaint was caused by the defendant's negligence. In attempting to assess damages so as to arrive at a fair and reasonable compensation for pain and suffering and disability where there is a pre-existing condition, the court must first answer that question. On that issue, the victim must prove on a balance of probabilities that the present complaint was caused in whole or in part by the wrongdoer's negligence. To answer that question, the court will invariably have to consider the medical evidence to

> determine whether the victim, because of his pre-accident condition, would probably have suffered from the present complaint whether there had been an accident or not."
>
> (emphasis added)

In **Benson v. Jamieson** (1993), 117 N.S.R. (2d) 347, this Court spoke briefly about pre-existing injuries at p. 348:

> "A previously disabled plaintiff must prove the extent to which the disability has been aggravated or increased by the defendant's wrongdoing. The court's task of assessing this is usually far from easy. Mr. Justice Richard applied the correct principles and we are unable to conclude that he committed any palpable or overriding error in the fact finding process or that the damages awarded were either inordinately low or inordinately high."

In **Remedies in Tort** (Klar Linden, et al. consultants, Carswell), the authors say, Ch. 27-82 §45.1:

> "As a general rule, the defendant takes his victim as he finds him and is liable for the full extent of the plaintiff's injuries despite the particular plaintiff's pre-existing physical or psychological susceptibility to injury. Provided that the plaintiff's pre-existing condition is a latent weakness or susceptibility (a 'thin skull') which is made manifest only as a result of the defendant's conduct, apportionment between the two causes of damage is not appropriate. However, where the plaintiff suffers from a pre-existing condition which is an active source of damage prior to the defendant's tortious conduct, the defendant's conduct may be taken as an aggravating factor resulting in an apportionment of damages between the existing condition or source of damage and the second or aggravating source. Thus, where a plaintiff's condition was manifest and disabling prior to the injury inflicted by the defendant, damages should be assessed as if the plaintiff's condition at the time of assessment resulted from a single cause. The award should then be apportioned so that the damages payable by the defendant constitute only that portion of the total amount assessable in respect of the plaintiff's disability which is fairly attributable to the defendant's tortious conduct. Similarly, where the plaintiff's pre-existing condition was in a state of continuing detioration (a 'crumbling skull'), the defendant is liable only to the extent that his conduct has contributed to or accelerated the process of deterioration."

(emphasis added)

The authors then provide a number of interesting illustrations. See **Pryor v. Bains** (1986), 69 B.C.L.R. 395 (C.A.); **Martin v. Jordan** (1988), 31 B.C.L.R. (2d) 266 (C.A.); **Nygaard v. Gosling**, [1988] B.C.W.L.D. 3702 (S.C.); **Graham v. Rourke** (1988), 43 C.C.L.T. 119 (Ont. H.C.) - varied on other grounds 75 O.R. (2d) 622, 74 D.L.R. (4th) 1, 40 O.A.C. 301; **Hooiveld v. Van Biert** (April 29, 1992), Doc. No. New Westminster C900716 (B.C.S.C.), digested at [1992] B.C.W.L.D. 1448, varied (1993), 87 B.C.L.R. (2d) 160, 48 M.V.R. (2d) 315, [1994] 4 W.W.R. 143, 36 B.C.A.C. 19, 58 W.A.C. 19 (C.A.); **Shaw v. Clark** (1986), 11 B.C.L.R. 46 (S.C.).

In Munkman, **Damages for Personal Injuries and Death**, 9th ed, (Butterworths: London, 1993), the author says at p. 39:

> "Where a plaintiff has some pre-existing weakness which renders him more liable to injury than other persons - such as a thin skull or a tendency to bleed - the defendant is liable for such injuries (assuming he is liable at all) although their extent could not be foreseen. . .
>
> Similarly there is full liability where a particular injury has more serious consequences for a man because of a pre-existing disability . . . It is a ground for increasing damages rather than reducing them if a man suffers from ill-health which makes the injuries harder to bear. . .
>
> It is otherwise if a disability which would have arisen in any event is merely accelerated. Damages are then given for the period of acceleration, but cease at the point when the disability would have been present in any event. . .
>
> So also if additional damage is caused where pre-existing damage exists, the defendant is not liable for the pre-existing damage as such, but only for the additional damage. . . As indicated above, the additional damage may itself be more serious because of the pre-existing damage.
>
> Cases of this kind often involve uncertainties of fact (where precisely to draw the line) and medical evidence is likely to be obscure and conflicting."

(emphasis added)

I have concluded that the trial judge has reached his assessment of damages under all of the various headings on the assumption that only the accident has brought about the pain and disability mentioned by him. He has approached the respondent as a person totally without pre-existing problems - mental and physical. In reality the pre-accident history paints a picture of a person who, had no accident occurred, faced a bleak and pain filled future by reason of physical and mental handicaps, particularly the latter. What the trial judge should have done was measure the damage in terms of what the accident superimposed upon an already handicapped person. While this may be difficult to measure, it was for the respondent to establish the extent to which the accident has disabled her over and above that disability which she would have sustained had the accident not occurred. I am satisfied that the trial judge in completely overlooking this evidence has made material error and that this Court is obliged to interfere with his award of damages. While, ideally, a new trial would be the best way to see to the proper balance struck between the evidence the trial judge considered and that which he ignored, I believe this Court is in a position to set the award because the impact of this evidence has nothing to do with credibility. It is on the record. It is uncontradicted. The trial judge's findings on credibility matters must be accepted by us without reservation. See **Nance v. B. C. Electric Railway Company** (1951), A.C. 601 at p. 613; **Camerson v. Excelsior Life Insurance Company**, [1981] 1 S.C.R. 138; **Smith v. Stubbard** 117 N.S.R. (2d) 119 (N.S.C.A.) at p. 123 and 140.

1. <u>General damages for pain, suffering and loss of amenities</u>:

But for the trial judge's failure to take into account the evidence relating to the respondent's previous mental and physical disabilities, I would not disturb his gross award of $100,000 even though it strikes me as being on the high side. It is beyond dispute that these wrongdoers must take this victim as they found her. The

damages assessed against them must reflect the full extent of the damage done by the accident even though in another person less serious consequences would have ensued. However, we are not dealing with a person who has suffered all of this disability as a result of the accident. The respondent's kind of life that was reduced in quality by the accident was not what the trial judge assumed it to be. Had no accident occurred, in my opinion it is more probable than not that, based on the documented record as to previous back pain and her psychological makeup, she would not have been totally free of such pain and emotional agony and would not have enjoyed the same amenities of life as a healthy person would. Her extremely fragile emotional makeup would have operated to heighten the physical distress which appears from his testimony respecting ovarian pain and her statements to Dr. Bhatia, Dr. Spicer and Dr. Malloy about pre-existing back and leg pain. Doing the best anyone can to estimate the difference between what she now is and probably will be, and what she would have been but for the accident, I would reduce the gross general damage award to $75,000.

I accept the trial judge's assessment of a 5% reduction for failure to mitigate. The amount of $3,750 should be deducted, leaving a net award of $71,250.

The trial judge, in giving credit to the appellants for $3,500 paid pursuant to the settlement, allowed an additional $3,500 for inflation or interest. He said:

> "From this amount there must be deducted what was previously paid to the plaintiff on behalf of the defendants. This can be done in one of two ways: either add five years interest to the amount of $3,500, or adjust the 1990 figure of $3,500 for inflation in order to ascertain its 1995 equivalent. I believe that both methods will yield approximately the same result. . ."

The respondent contends that the increase of 100% over a period of slightly in excess of five years is too much. This is almost 20% a year, simple interest.

The trial judge had fixed pre-judgment interest for the period from June 1, 1992 to October 1, 1994 at 5.65%. I agree with the respondent that a rate of 6% is appropriate here so that the interest should be $1,100. The deduction should therefore be $4,600 which would reduce the award to $66,650.

2. Award for past lost earnings of $17,700:

In arriving at this figure, the trial judge referred to the actuary's report dealing with this aspect of the claim.

The actuary noted that the respondent was not working at the time of the accident. Some two years later she separated from her husband. It was reasonable, the actuary contended, to assume that she would then have sought employment. The average income of persons not in families with such an education as hers was, according to Statistics Canada data, 79% of the average income of all persons not in families.(in 1990 - $15,005.) Seventy-nine per cent of that figure in 1990 dollars was $11,929. Adjusting this for inflation, the equivalent in 1994 was $13,030. This income was on the assumption that the respondent's educational level at the time of the accident remained constant. If one was to assume that she upgraded her education, the data would suggest a higher income assumption. The actuary therefore assumed that, allowing for a job search of six months following the respondent's separation, she would have entered the work force on January 1, 1992 had there been no accident. The actuary then prepared a table adjusting the loss figure in 1994 to reflect inflation and pre-judgment interest at 5.65%. Using such calculation for each $1,000 of income lost, the multiplier was $2.951. With an income assumption of $13,030 and applying the multiplier of $2.951 per $1,000 the actuary submitted a past lost income claim of $38,452.

The trial judge referred to submissions for the respondent that her past

wage loss was in the range of $7,000 to $10,000 per annum and to the appellants' submission, based on her past earnings from 1983 to 1987 which averaged $638. He concluded that it was difficult to accept the assumptions of the actuary with respect to her income:

> ". . . I find it very likely that she would have eventually found full-time employment in a job in keeping with her education and experience. Thus, it is likely that her full-time earnings at the time of the accident would have been, in my opinion, approximately $6,000 per year."

Applying the actuary's multiplier he calculated the past loss of earnings at $17,700.

I consider the trial judge's assessment of these damages to be inordinately high. Although the trial judge referred to full-time earnings at the time of the accident, it is clear that he meant two years and six months thereafter, as assumed by the actuary. Such an assumption is not warranted by the probabilities that present themselves from the evidence. I have referred extensively to the respondent's pre-accident history. Her average wages from 1983 to 1987 were $638. Carrying forward to 1989 this average drops to $455. This is in keeping with the respondent's makeup as appears from the medical history. The psycho-social reasons that prevented her from obtaining higher earnings would have probably persisted. Dr. Spicer conceded on cross-examination that there was little likelihood that the psycho-social elements which kept her from working in the past would change in the future. She had attained the age of 25 years at the time of the accident. The picture presented by the pre-accident medical history is disheartening. Added to this are the difficulties with back pain. It is highly unlikely that the respondent could ever attain significant earnings even had there been no accident. I would accept the appellants' calculation that applying the actuary's methodology to her average pre-accident earnings, an award in the range of

$1,900 would be realistic and I would substitute that figure for that of $17,700 arrived at by the trial judge.

3. Lost future wages or earning capacity $157,700:

In arriving at this number the trial judge referred to the actuary's report. The capitalized value of each future loss of $1000 in 1994 dollars of annual earnings was calculated to the assumed retirement ages of 60, 65 and 70:

Assumed Retirement Age

60	65	70
$20,469	$22,529	$24,238

As an example of how the figures could be used if the respondent's income level, had there been no accident, was $13,030.94 and retirement age of 65 was assumed, is:

$13,030 ÷ $1,000 x $22,529 = $293,553

The trial judge then referred to the following from the decision of Dickson, J. in **Lewis v. Todd** (1980), 115 D.L.R. (3d) 257 (S.C.C.) at p. 123:

> "The evidence of Actuaries and Economists is of value in arriving at a fair and just result. That evidence is of increasing importance as the niggardly approach sometimes noted in the past is abandoned, and greater amounts are awarded, in my view properly, in cases of severe personal injury or death. If the Courts are to apply basic principles of the law of damages and seek to achieve a reasonable approximation to pecuniary restitutio in integrum expert assistance is vital. But the Trial Judge, who is required to make the decision, must be accorded a large measure of freedom in dealing with the evidence provided by the experts. If the figures lead to an award which in all the circumstances seems to the Judge to be inordinately high it is his duty, as I can see it, to adjust those figures downwards; and in like manner to adjust it upward if they lead to what seems to be an unusually low award."

In these circumstances, the trial judge took the correct approach in saying that it was necessary to make a reasonable assessment of the respondent's annual income or income earning capacity. He acknowledged that such an assessment was difficult to achieve. Her actual employment history was not the sole determining factor. This was the case, especially in young plaintiffs, who had not had sufficient time to establish a reliable record of employment and earnings. He stated that the respondent's modest employment history reflects her young age, immaturity, lack of experience, emotional problems from a difficult childhood and dependency upon her aunts and her husband. He said that but for the accident a combination of maturity and necessity would have compelled her to provide for herself, albeit at a modest level of jobs involving little skill and low wages.

In coming to this conclusion, the trial judge has failed to sufficiently take into account the serious physical disability that the respondent was suffering from - the pain caused on the left side by her ovarian condition and on the right by the back condition which led her to Dr. Bhatia and to an x-ray diagnosis of an abnormality in her spine. More serious is the underlying emotional disability described in the medical reports, further demonstrated by her poor employment track record. The visits to Drs. Bhatia and Spicer between 1987 and the date of the accident reveal little improvement over the picture painted by Dr. Taylar in his earlier reports. She will, in all probability, be a non-earner or extremely low earner.

For the purposes of assessing damages, the trial judge assumed an income level after October 1, 1994 of $7,000 per year. Applying the actuary's formula and assuming a working career to the age of 65, the number came out at $157,703 which was rounded to $157,700.

In my opinion the trial judge's reasoning is flawed, not only in selecting an

unrealistic income figure for the year 1995 and onward, but for assuming that a person with so many difficulties would work to the age of 65. A safer, but still very uncertain age for this respondent would be 60 years, with an appropriate annual figure of $650. This results in a figure of $14,643 which I would round to $15,000.

4. **Cost of future domestic duties (including tax gross up - $60,225):**

In this connection the trial judge said:

> "The plaintiff also claims loss of the expense of the performance of domestic duties. In support of the claim of the plaintiff in this regard, counsel for the plaintiff cites **Gerow v. Reid** (1988), 88 N.S.R. (2d) 34 (S.C.T.D.); and **Matheson v. Bartlett** (1993), 121 N.S.R. (2d) 373 (S.C.T.D.) as authority for the appropriateness of her claim for payment of future housekeeping expenses. Counsel for the plaintiff suggests that, by applying the multiplier and following the method set out in the actuarial report, this claim should be calculated to age 75 and should be quantified as between a minimum of $61,252 and a maximum of $76, 821, which latter figure, when grossed up by 47% to allow for the tax consequences of interest earned, would amount to $112,927."

The trial judge once again referred to the actuarial report, noting that the average separated or divorced female spends 2.1 hours per day at domestic activities. The average female, including all marital status groups, spends 2.5 hours per day at such activities. The average female spends one hour per day at shopping and travel and other services related thereto. The actuary said that as it was unclear as to the extent of the reduction in the respondent's ability to perform these various activities, he had calculated a multiplier based upon annual domestic activities with an associated cost of $1,000 in 1994 dollars. The multiplier is $25,607 per $1,000 of annual loss. Assuming that she might employ a one hour regular visit from Molly Maid at $46 per visit, this comes to $2,392 annually. The use of the multiplier brings about the following calculation:

$2,392 ÷ $1,000 x $25,607 = $61,252

The trial judge noted that since the accident the respondent had been unable to perform many domestic tasks required for independent living. The minimum figure claimed assumes regular weekly visits from Molly Maid of one hour per visit at a charge of $46. The trial judge accepted the actuarial assumption of an average of 2.5 hours per day expended on domestic activities and one hour per day in shopping and associated services, and the assumption that the respondent would require assistance with these tasks until the age of 75. There would also be the need for occasional additional services over and above normal housekeeping activities. However, as the respondent stated, she was unable to perform many, but not all, domestic tasks and since there was no evidence she would require regular assistance on a weekly basis, he was only prepared to assume a one hour visit every two weeks at an annual cost of $1,200 per year (rounded). To this there should be added occasional additional expenses of $400 a year for a total of $1,600 per year. Applying the actuary's multiplier appropriate for the age of 75 years, the loss would be $40,971 which when grossed up by 47% to allow for tax consequences of interest earned on a lump sum, the award should be rounded out at $60,225.

The trial judge's reasoning was flawed for two reasons. First, he assumes that money will be spent for Molly Maid or some other paid housekeeping service. The trial was held over five years following the date of the accident. There was no evidence that the respondent had even spent one penny on such services. The likelihood therefore that she would make the expenditures assumed by the trial judge is much too optimistic. Second, the trial judge has again overlooked the serious deficiencies in the respondent's mental and physical well-being that existed prior to the accident and would, in all probability, have haunted her throughout her life had the accident not

occurred.

In the face of these two factors it is not a useful exercise to plug any figures into an actuarial calculation. At best, an allowance, albeit pulled from thin air, is appropriate to deal with the chances that this woman will be spending more money for these services because she had had the accident than she would have done had the accident not occurred. Applying such a rough test - but the best approach in the circumstances - I would fix the sum of $10,000 to cover this item.

5. <u>Cost of Future Medical Care ($150,000)</u>:

In reaching this figure the trial judge referred to Dr. Spicer's medical report of June 9th:

> "It is likely that she will need extensive treatments from a private psychologist for a considerable time. This would be about $100 per hour and may involve four hours per month for many years. As she improves a further extensive course of physiotherapy or chiropractic will be in order. Chiropractors specializing in back rehabilitation usually see their patients three times a week for as long as it takes to get a good response, then taper down to one visit a week. It may take three years of thrice weekly visits at about $120 per week before a lifelong series of weekly chiropractic visits may be adequate. She may also require the services of a social worker and an occupational therapist at some point. Should she require ongoing anti-inflammatories, muscle relaxants and pain medications, these could easily add up to over $120 per month at 1994 prices."

The trial judge turned to the actuary's report which provided a multiplier based on future medical care items of $27,934 for each $1,000 per year for the remainder of the respondent's life. He then fleshed out Dr. Spicer's estimates for future expenses as follows:

1. A private psychologist for up to four hours per month for many years @ $100 per hour $ 3,000.

2. Chiropractic treatment - 3 times per week for 3

	years, followed by lifetime weekly treatments at $40 per treatment:	
	2 treatments per week for 3 years	$12,480.
	1 treatment per week for lifetime	$ 2,080.
3.	Ongoing medication (120 per month)	$ 1,440.

Using the multiplier for the cost of lifetime annual treatment of $6,500 the number comes to $181,571 and adding two years additional chiropractic treatments increases the amount to approximately $194,000. Since, however, Dr. Spicer's diagnosis was not firm and there was a great deal of uncertainty, he reduced the amount to $150,000.

Again the trial judge's reasoning is flawed. The same two considerations mentioned in dealing with the previous heading of damages applies here. There was no evidence that any money had been spent by the respondent in the five and a half years since the accident for any of the private services which formed the basis of this large award for future expenses. The evidence is clear that there was available to her a multi-discipline team of health care givers all paid for by the public system. Indeed, as the trial judge found, she did not fully avail herself of the opportunities for treatment and cure that that team offered. There is nothing on the record to show that she spent one cent on treatment or medicines from the private sector. After such a long time lapse from the date of the accident this is relevant in determining the probability that she would ever need to resort to those services.

Moreover, had she not had the accident it seems probable that if she were minded to depart from the services available in the public health care sector, she probably would have needed some private health care services in any event. Dealing with medication in particular, Dr .Spicer had cautioned on more than one occasion against over-medicating with its consequent risk of addiction or other side effects. This patient had been on a great number of medications prior to the accident for a variety

of things. She had taken overdoses on at least three occasions. She came to Dr. Spicer on August 20, 1987, almost in tears. He diagnosed a major depression and recommended that she consult Dr. Taylar. Apparently this did not happen. On November 13th she came to Dr. Spicer stating that she needed pills. This also happened on June 14, 1988. All of this presents a pre-accident picture which so blurs the superimposed effects of the accident that precise estimates are most difficult.

On the other hand, effect must be given to the substantial debilitating effect of the accident which I have recognized in the general damage award. As well, we must take judicial notice of the fact that public sector health care is apt, if anything, to offer less in the future rather than more. There is much uncertainty in fixing an award in this setting. Doing the best I can, I would award $30,000 under this heading.

6. <u>Punitive Damages ($10,000)</u>:

The trial judge, in awarding punitive damages, said:

> "The kind of conduct for which punitive or exemplary damages has been awarded in the past has been described with a wide variety of adjectives, none of which can be said to be definitive. In any event, such damages have only been awarded when the defendant acted otherwise than in good faith, deliberately exposed the plaintiff to risk without justification, showed contempt for the rights of another person, or was indifferent or worse to another person's injury. The plaintiff points to the finding that the insurer of the defendants unconscientiously used its superior bargaining power to extract an unconscionable settlement from the plaintiff. Counsel submits that the Court should express its displeasure with such conduct, and should discourage the repetition of such conduct in future.
>
> I accept this submission. I find that the adjuster for the defendants' insurer was indifferent or wilfully blind to the severity of the plaintiff's injuries and potential permanent disability, and his actions in arranging a settlement shortly before surgery which held out the prospect of improving only some of her symptoms were not in good faith, contemptuous of her rights and deliberately exposed her to a risk of suffering from increasingly severe symptoms without justification. I find that such actions offend the ordinary

> standards of morality or decent conduct in the community at large."

I have already expressed the opinion that I do not think that the adjuster's reserves and other behaviour amounted to shams. His conduct was not of a nature "harsh, vindictive, reprehensible and malicious" (**Vorvis v. I.C.B.C.** (1989), 58 D.L.R. (4th) 193 (S.C.C.) at p. 208). At best he was careless but I am unable to see how the evidence gives rise to the inference that he was guilty of such flagrant conduct involved in the following cases on which the trial judge relied: **Stevenson v. Vance** (1988), 87 N.S.R. (2d) 96 (S.C.T.D.); **Patterson v. Municipal Contracting Ltd.** (1989), 98 N.S.R. (2d) 259 (S.C.T.D.); **McIntyre v. Atlantic Hard Chrome Ltd. and Ferguson** (1991), 102 N.S.R. (2d) 1 (S.C.T.D.); and **Hill v. Church of Scientology of Toronto et al** (1992), 7 O.R. (3d) 489 (Gen. Div.) aff'd (1994), 18 O.R. (3d) 385 (C.A.).

Even if the adjuster's conduct was so egregious as to warrant an award of punitive damages, such an award should be made, not against the appellants who are insured under the Dominion of Canada policy but against the adjuster, and possibly the insurer for whom he was acting. They were not parties to this action. Ironically, if the appellants were saddled with an award for punitive damages, I do not see how under the terms of the standard automobile policy they would be entitled to indemnity therefor. Indemnity might lie on other grounds, but since the appellants were not parties to the alleged oppressive conduct and since there was no evidence that the adjuster was their agent, a number of difficulties arise. This award should be set aside.

Costs

I am unable to accept the appellants' submission that the trial judge erred in exercising his discretion as to costs by applying Scale 4 of the Tariffs rather than Scale 3 which is usually done.

General Comments

In dealing with the award of damages on the basis of built up items of claim it is important for the Court to step back and look at the position of the respondent overall in light of the grand total which is reached as a result. Leaving aside momentarily a specific analysis, the overall total awarded by the trial judge in this case appeared manifestly excessive. I refer to the following passage from the judgment of Gibbs, J.A. of the British Columbia Court of Appeal in **Kroeker v. Jansen** (1995), 4 B.C.L.R. (3d) 178 at p. 189:

> "There is much merit in the contention that the court ought to be cautious in approving what appears to be an addition to the heads of compensable injury lest it unleash a flood of excessive claims. . . It will be the duty of trial judges and this Court to restrain awards for this type of claim to an amount of compensation commensurate with the loss. With respect to other heads of loss which are predicated upon the uncertain happening of future events measures have been devised to prevent the awards from being excessive. It would be reasonable to expect that a similar regime of reasonableness will develop in respect of the kind of claim at issue in this case."

In summary then, I would substitute for the award made by the trial judge the following award of damages to the respondent:

1.	General damages for pain and suffering and loss of amenities	$ 66,650
2.	Past lost earnings	1,900
3.	Lost future wages or earning capacity	15,000
4.	Cost of future domestic duties	10,000
5.	Cost of future medical care	30,000
	Total:	**$123,550**

Pre-judgment interest should be added at the rates and for the times as specified by the trial judge.

Counsel may wish to make further representation on the issue of costs. I would delay the granting of the order for three weeks in order to give counsel on each side to make one submission on costs.

Chipman, J.A.

JONES, J.A.:

I have had the privilege of reading Mr. Justice Chipman's judgment and I agree with his reasoning and conclusions with respect to the release signed by the respondent and the issue relating to the **Statute of Limitations**.

I propose to deal with the matter of damages. After considering the

medical evidence the trial judge concluded:

> (b) Present Condition
>
> The plaintiff is now 31 years old. She is constantly in pain and, therefore, constantly in need of medication for pain relief. However, she must avoid taking too much medication for fear of addiction. She spends her days watching TV and, occasionally, visiting friends and family. She says that she is not physically capable of doing more and, on frequent occasions when she cannot do even that much, she stays in bed. She cannot care for herself or her household. Because of her pain, she is not available for employment. She is also not able to participate in many of the activities which she enjoyed prior to her injury.
>
> She has low self-esteem and is subject to depression. She has made suicidal gestures. She feels that recommendations to help her reduce or live with her pain will not work and, consistent with her pain syndrome, she is afraid to make the necessary effort to help herself.
>
> (c) Findings
>
> I find that, as a result of the accident, the plaintiff suffered severe lumbar muscle strain, disc protrusion at the L-5 level on the right side, mechanical back pain with right sciatica, and chronic pain. I find further that leg pain, which abated after the surgery has returned. I find that back pain is constant.
>
> I find that the chronic pain is attributable to concrete findings that could cause pain: muscle spasm, disc prolapse, tendonitis, and bursitis. I find that there is also a psychological element to her pain.
>
> I find no evidence that her pain is simulated or deceitful. Any doubt that I may have had in that regard was dispelled by evidence that she experienced chronic pain during the period of two or three years when she had no reason to believe that she was entitled to claim compensation for it by way of damages.

> I find that, as a result of her pain and other injury, the plaintiff has been totally disabled from the date of the accident to the present time. I find that she suffers from insomnia, low energy, poor appetite, poor concentration, irritability of mood, and depression. I find that she is unable to sit, walk or stand without pain for any length of time. I find that she is unable to do much of her housework, and is unable to enter the workforce.
>
> I find a strong likelihood that her disability is, and will be, permanent.

From 1987 to the time of the trial the respondent, Janice Woods was a patient of Dr. Finlay Spicer. He was familiar with her previous medical history. Dr. Spicer testified as follows:

> Q. Which refers to involvement which Ms. Woods had in a car accident on that date. Is there any indication in the file other than this record of Ms. Woods suffering any persistent or longer term back problems as a result of this car accident?
>
> A. Can I have a moment? No.
>
> Q. Sorry, the answer is "no"?
>
> A. The answer is "no".

He also stated:

> A. Most of her visits were for female on-going health evaluations and occasionally for some of the aspects of depression, turmoil, if you like. I would describe her as a fairly reserved quiet but not in bad health patient.

Following the accident she complained of back pain. Dr. Spicer referred to the cause of this pain in his testimony:

> Q. According to your notes, Ms. Woods had described some pre-accident back pain.
>
> A. Yeah.

> Q. Did Ms. Woods differentiate between that pain and the pain that she was experiencing when she saw you on July 17th?
>
> A. On that visit, no.
>
> Q. On subsequent visits?
>
> A. Yes.
>
> Q. What did you attribute the back pain to?
>
> A. I attributed the back pain to the motor vehicle accident.

He stated further:

> A. Her back pain was now worsening substantially. It has in my notes "still major back pain" and she described it to me as so severe that she couldn't walk, couldn't sit, could hardly go to the bathroom with the pain. The next few lines are not pertinent to her back. And then she felt the accident really laid her up. Heat was no help. The Parafon Forte was no help.
>
> Q. Parafon Forte.
>
> A. That was the medication I had given earlier for the pain relief and muscle relaxant. And she was to start physiotherapy on Wednesday. I'm not sure what day of the week July 31st was that day. And she reported that her right leg felt longer to her.

Despite extensive treatment including surgery her condition deteriorated.

Dr. Spicer described her condition:

> A. Yes, to me it was so patently obvious that I didn't bother writing it in every chart entry but she had what we call the antalgic gait where she would come in and stooped over, half twisted around based on which muscle group was causing her pain that day as she walked in. So whenever I describe an antalgic gait in any letter or chart entry, that incorporates the fact that there's these twists, bends, loss of

curves.

She was referred to a number of specialists but her condition did not improve. Dr. Spicer also stated:

> Q. Based on your treatment of Ms. Woods prior to the accident, review of the records and Ms. Woods, had Ms. Woods ever experienced the degree of leg pain and back pain prior to the accident that she's experienced since?
>
> A. The two and a half -- the two years between the time I first met her and the accident, she had no complaints to me whatsoever of back or leg pain. Now reviewing backwards in that time, I don't see any complaints except for that incident in 1982 where she had the acute kidney infection. Again, a whole different pain.
>
> Q. But for the accident, what back pain would you have expected Ms. Woods to have in future?
>
> A. Have had but for the accident?
>
> Q. Yes.
>
> THE COURT: Any objection to that?
>
> MR. RICHARDSON Well, My Lord, I think it's calling for speculation. We don't know what would have happened following the accident. I think he's entitled to give his opinion as to what he saw at the time.
>
> DR. SPICER Perhaps if I word it in my opinion had there been no trauma whatsoever of any kind and the back pain that she experienced up to that time which she had not experienced five years may never have occurred.

He summarized her condition as follows:

> Q. "At the moment, her situation remains the same as when I last saw her. Janice is a virtual back cripple and can perform no gainful employment, no housework..." I'll just stop there. No housework. What do you mean by

a "back cripple" or "virtual back cripple"?

A. A virtual back cripple refers to the fact that she has such severe back pain and disability that everything that we take for granted and don't think about our back being involved in for her is difficult. Sitting in a chair, standing, sitting on the toilet, reaching for things on shelves, brushing her hair, holding a pen, everything.

Q. What housework is there that Ms. Woods can do?

A. Can do?

Q. Yes.

A. I feel that based on my on-going observations that she's pretty much restricted probably to basic personal hygiene.

Q. How about in terms of employment?

A. I know of no job situation where a person doesn't have to either stand or sit or twist or even hold the phone. So I have racked my brain. I can think of no suitable employment for her in her current condition.

Q. Do you expect her condition to persist or continue?

A. Yes, the rule we have in medicine is as long as it takes you that you've been sick, it takes twice as long to get better. This is five and a half years now with no resolution or improvement. I would -- it's been my experience in other patients with similar injuries that any improvement now is going to be minimal, if any.

Dr. Spicer was extensively examined regarding the patient's prior health including notes made by Dr. Bhatia.

Janice Woods testified on the trial and she was extensively examined on her medical condition both before and after the accident.

Dr. Malloy is a neurosurgeon who treated the patient following the

accident. Dr. Malloy performed disk surgery on the respondent's back. Dr. Malloy testified as follows:

> A. Sure. I mean I wouldn't totally discount anything that's happened to her. But the key events that stand out in her history are the car accident and the subsequent operation.
>
> Q. Now the final paragraph, "I have not seen Ms. Woods since 1991. At that time, it was two years following her surgery. She was having persistent complaints of back and leg discomfort. This problem was not amenable to surgical intervention. From my experience, patients who have persistent complaints following back injury or back surgery as remote as two years from the time of the initial injury are unlikely to improve with further time and/or treatment". What are you saying there about Ms. Woods' injuries? I mean is she likely to improve?
>
> A. The likelihood is extremely small.
>
> Q. You say, "It's my opinion that Ms. Woods is most likely going to have permanent partial disability with respect to her ongoing back complaints." What do you mean by a "permanent partial disability"?
>
> A. Well, "permanent" meaning that she will have persistent ongoing complaints and impairment. "Partial" meaning that there will, obviously, be some things that she's capable of doing. She's not totally disabled. And that's -- again, assessment of impairment or disability is, again, a subjective thing. But, you know, for the purposes of total disability, she has a mind that works. Her upper extremities work. She's not totally disabled.
>
> Q. Physically, what can she do and what can't she do?
>
> A. Physically, she would have difficulty performing functions that required prolonged standing or sitting in one position, repetitive twisting or bending manoeuvres, repetitive flexion extension of the lumbar spine, lifting

> and carrying of objects, climbing ladders, persistently climbing -- you know, repetitively climbing stairs, things of that nature.

In Dr. Malloy's opinion the injuries resulted from the motor vehicle accident.

Dr. Mary Lynch is a specialist in psychiatry and pain management. She testifed as follows:

> A. Sure. With regards to my assessment and my opinion regarding information that I obtained directly from examining and taking a history from the patient, my impresison is that the patient does suffer from on-going chronic pain. That is, real physical pain. And when I say that, I mean chronic pain which has physical and psychological components.

She also stated:

> A. What I'm saying is that five years is certainly long enough and usually two years or even less than that, now there are follow-up studies to indicate that things don't change a whole lot after six months that appropriate treatment has been given. That is a long enough time to get an idea of what type of pain levels patients or people can expect to continue to experience.
>
> Q. So to answer the question, do you expect her to stay the same, get better, get worse?
>
> A. I expect her pain to remain the same.
>
> Q. Okay.
>
> A. Now I think it's also important to know that that does not mean the pain will not fluctuate. She may have periods of time where the pain is somewhat less. She may have periods of time where the pain is worse.

The trial judge had the opportunity of seeing and hearing the respondent on the stand. There were clear issues of credibility for the trial judge in assessing the

extent of the respondent's injuries and I am unable to say that he ignored or overlooked the evidence as to her previous condition in coming to his conclusions. With respect there was ample evidence to support his conclusion that Janice Woods suffered a serious injury in the accident which has left her permanently disabled and that the injury was caused by the accident. The measure of general damages was a matter for the trial judge and I would not disturb his general award of $95,000. I would adjust the award by deducting $4,600.00 as proposed by Mr. Justice Chipman to take into account the prior payment leaving a balance for general damages of $90,400.

With respect to the claim for lost earnings I agree with Mr. Justice Chipman that the evidence does not support the conclusions reached by the trial judge. On this issue the evidence of the respondent's prior physical and mental condition and work record is very relevant. I accept the figures which he has proposed of $1,900.00 for past lost earnings and $15,000.00 for loss of future earning capacity. I also accept the amount of $10,000.00 as reasonable for domestic assistance. On the cost of future medical care the appellant's counsel propose a figure of $26,520.00 and I would accept that figure rounded to $26,000.00.

I agree with Mr. Justice Chipman that there was no basis on the evidence for an award of punitive damages in this case. I also agree with him on the issue of costs in the court below and his proposal to accept further representations on the matter of costs on the appeal.

In summary I would allow the appeal on the matter of damages in part and award damages to the respondent as follows:

1. General damages pain and suffering	$90,400.00
2. Past lost earnings	1,900.00
3. Loss of future earnings	15,000.00
4. Cost of future domestic assistance	10,000.00
5. Cost of future medical care	26,000.00

Total	$143,300.00

Pre-judgment interest should be added as proposed by the trial judge.

J.A.

Flinn, J.A.