COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Aberdeen v. Zanatta,***
2008 BCCA 420

Date: 20081028
Dockets: CA035279, CA035292

Docket: CA035279

Between:

James Aberdeen

Respondent
(Plaintiff)

And

Joseph Zanatta, Ann Cassels and
Ann Cassels d.b.a. Nathan Creek Nursery

Appellants
(Defendants)

And

Township of Langley

Respondent
(Defendant)

- and -

Docket: CA035292

Between:

James Aberdeen

Respondent
(Plaintiff)

And

Township of Langley

Appellant
(Defendant)

And

Joseph Zanatta, Ann Cassels and
Ann Cassels d.b.a. Nathan Creek Nursery

Respondents
(Defendants)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Frankel
The Honourable Madam Justice Neilson

R.F. Hungerford M. Giles	Counsel for Joseph Zanatta, Ann Cassels and Ann Cassels d.b.a. Nathan Creek Nursery
A.A. Hobkirk P. Chan	Counsel for the Township of Langley
D.G. Cowper, Q.C. H. Brinton	Counsel for James Aberdeen
Place and Date of Hearing:	Vancouver, British Columbia September 2-3, 2008
Place and Date of Judgment:	Vancouver, British Columbia October 28, 2008

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Mr. Justice Frankel
The Honourable Madam Justice Neilson

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] The plaintiff Mr. Aberdeen, an experienced tri-athlete and bicyclist, was catastrophically injured in an accident on a steep and winding road in Langley on the morning of June 29, 2002. Proceeding on his triathlon-model bicycle downhill towards a blind curve, he veered to the right to avoid a "cube" van coming over the centre line, lost control of his bicycle, travelled through a gap between two barriers at the side of the road, and fell down a ravine. His spinal cord was injured at the C6-7 level, with the result that he has almost no sensation and almost no use of his body from his chest down and suffers chronic neuropathic pain. He does have use of his arms and of his diaphragm muscles. He has also been diagnosed with a mild traumatic brain injury. He was 50 years old at the time of the accident.

[2] After a trial of some 33 days, the trial judge below issued reasons dated July 6, 2007 and indexed as 2007 BCSC 993, in which he found the driver of the van, Mr. Zanatta, and its owner, Ms. Cassels (the "Zanatta Defendants") and the Township of Langley liable for Mr. Aberdeen's damages in the proportion of 25:75. Damages were assessed at $5,647,773 in total. The defendants appeal liability, including the finding that the plaintiff was not contributorily negligent, and the quantum of damages for future care costs, which were assessed at $4,151,504 plus $388,639 for the replacement of the plaintiff's house with one specially equipped for him.

[3] For the reasons that follow, I am of the opinion that the issue of contributory negligence must be remitted for retrial in the court below. In all other respects, I would dismiss the appeal.

THE ZANATTA DEFENDANTS' APPEAL ON LIABILITY

[4] At paras. 2 and 3 of his reasons, the trial judge described the plaintiff's basic allegations against the respective defendants:

> What happened in the steep and windy portion of the 6400 block of 272nd Street is one of the significant issues before the court. It is Aberdeen's evidence that a cube van negligently driven by Joseph Zanatta ("Zanatta") and owned by Anne Cassels ("Cassels") (collectively the "Zanatta Defendants"), crossed over the yellow centerline of the road, causing Aberdeen to take evasive action, and swing wide around a curve. He then encountered some gravel on the roadside, and without time to brake, he was propelled against a metal guard rail.
>
> Aberdeen also alleges negligence on behalf of the Township of Langley ("Langley") based on the fact that Langley constructed a roadside barrier on 272nd Street in July 1999 and in doing so, created a gap between the metal barrier initially encountered by Aberdeen and a cement no-post barrier which continued on the downward slope of 272nd Street once the metal guard rail ended. Aberdeen was directed along the metal guard rail, through the gap, and over a bank.

[5] At paras. 6–22 of his reasons, the trial judge summarized the parties' evidence as to how Mr. Aberdeen came to be "propelled" against the metal guard rail and through the gap (12–18 inches wide) between the two barriers. The evidence given by Mr. Aberdeen and his riding partner, Mr. McGee, was quite different from that given by Mr. Zanatta and Ms. Cassels (who was driving a car right behind the cube van) and another witness who testified on the defendants' behalf, Mr. Williams. Thus credibility was an important issue. The parties were cross-examined at length and in two instances, prior consistent statements were introduced to rebut inferences of recent fabrication.

[6] The trial judge made his findings of credibility at paras. 26–30. He found the evidence of Messrs. Aberdeen and McGee to be preferable to that of Mr. Zanatta, Ms. Cassels and Mr. Williams. Whereas Mr. Aberdeen's evidence was found to be clear and direct, and Mr. McGee a "straightforward believable witness", both Zanatta and Cassels were said to have "struggled with their evidence" and seemed "confused" at times and unable to recall details. The trial judge found that Mr. McGee's failure to mention the cube van to police immediately after the accident was explained by the stress of the circumstances and his concern for Mr. Aberdeen. Later at the hospital, Mr. McGee did mention the cube van to a friend of Mr. Aberdeen, Mr. Rose; and Mr. Aberdeen himself had told the ambulance attendant, Mr. Parks, that the accident had occurred because of a vehicle coming into his lane, which required him to swerve to the right. (At para. 27.)

[7] After considering all the evidence, the trial judge stated his conclusions as to how the accident occurred:

> I have concluded … that the balance of probabilities lies on this point in the plaintiff's favour. I have concluded that the Zanatta vehicle in approaching the sharp curve began to cross over into the traffic lane for oncoming traffic. The effect of this was to cause Aberdeen, who was approaching a tight corner, to swerve away from a vehicle he anticipated, rationally, would be coming into his lane. In doing so, he swerved sufficiently wide around the corner and, before he could brake, encountered gravel, the gravel lessening the effect of any braking. He encountered the metal guard rail and was directed along it. … [At para. 30.]

[8] The trial judge rejected the defendants' allegations of contributory negligence on the part of Mr. Aberdeen. These had been based on two arguments – first, that Mr. Aberdeen had been travelling too fast, and second, that a presumption of

negligence arose from the fact that he had left the travelled portion of the roadway. Both arguments were rejected. On the issue of speed, the trial judge said there was a "paucity of evidence" as to the speed at which Mr. Aberdeen had been travelling down 272nd Street; that there was no evidence to suggest he had been riding over the posted speed limit of 60 kmh; and that there was only a "limited amount" of evidence to suggest that he might have been riding over the advisory speed of 30 kmh. (Of course, as the experts at trial acknowledged, the posted speeds are intended for motor vehicles (as defined in the ***Motor Vehicle Act***), but 272nd Street was a designated route for bicyclists, and no speed signs were posted specifically for bicycles.) The trial judge reviewed the well-known decision of the Supreme Court of Canada in ***Canada v. Saskatchewan Wheat Pool*** [1983] 1 S.C.R. 205, which he said established that the "breach of a statute is neither negligence *per se* nor *prima facie* evidence of negligence. Rather, breach of a statutory provision is simply evidence of negligence." (At Para. 45.) He continued:

> In the case at bar, the evidence is that Aberdeen was traveling within the posted speed limit. While Aberdeen may have been traveling in excess of the advisory speed, he could not have received a ticket or fine for doing so. On its own, the possibility that the plaintiff was traveling above the posted advisory speed fails to establish that he was contributorily negligent.
>
> There is however evidence that Aberdeen was exercising caution as he drove his bicycle on 272nd Street. Aberdeen and McGee both testified to a conversation they had immediately prior to the accident, as they cycled beside each other, about the steepness and the danger associated with the descent on 272nd Street. Aberdeen exercised caution by agreeing with McGee to travel single file down the hill. Both Aberdeen and McGee testified to a circumstance of pumping brakes as a means of controlling speed and exercising caution as they descended the hill on 272nd Street. [At paras. 47-8.]

Accordingly, the trial judge stated, based on the evidence of Messrs. Aberdeen and McGee and on "the lack of any evidence to suggest significant speed, I have concluded that the argument in regards to contributory negligence as it relates to speed must fail." (Para. 49.)

[9] Similarly, the fact of Mr. Aberdeen's leaving the roadway was found not to support an inference of contributory negligence since the cause of his doing so, the trial judge found, had been Mr. Aberdeen's "observation" that Mr. Zanatta's van had crossed the (double) centre line. The trial judge found that the plaintiff took "the only action that he could in response to this real and perceived threat" and "veered his bicycle away from the oncoming vehicle and onto the side of the roadway, where he hit gravel and then went off the road." The Court concluded that negligence on Mr. Aberdeen's part had not been established on a balance of probabilities.

On Appeal

[10] Mr. Hungerford on behalf of the Zanatta Defendants alleges no fewer than 18 errors in the trial judge's reasoning on the questions of liability and contributory negligence. Five of these challenges concern out-of-court statements that were in evidence. The first was the statement made by Mr. McGee to Constable Carlson, a police officer who attended the scene immediately after the accident. The Zanatta Defendants submit that the statement, which took the form of answers to questions asked by the officer, was inconsistent with his testimony at trial. When asked the cause of the accident, Mr. McGee answered, "Too wide on the corner and loosing [*sic*] control". He made no mention of the cube van in his description of what had

happened, and said he and Mr. Aberdeen had been “going pretty fast, at least 30 mph.” At trial, he said the statement had been “accurate and truthful at that time” but was not asked to explain what he meant by this. Constable Carlson testified that Mr. McGee had given his statement after the two men had discussed the accident for about 45 minutes at the scene, and that Mr. McGee had seemed “very calm” and did not appear emotionally upset. The constable offered Mr. McGee a ride, but Mr. McGee declined and instead cycled home to Maple Ridge, attending later at the hospital to visit Mr. Aberdeen.

[11] Mr. McGee testified that as he and Mr. Aberdeen were proceeding single file down the hill coming into the final curve to the left, he saw (peripherally) that the front left corner of the van ‘came over’. Both bicyclists ‘moved over’, but Mr. Aberdeen “got on to the gravel”, lost control of the bike and went up against the guard rail. He “slid down, still in an upright position, down the guardrail … and he went through a gap in between [the] cement barrier and [the] guardrail.” In Mr. McGee’s words, it happened in a “split second.” He could not say whether the van was over the lines by “inches or centimetres or whatever you want to say.”

[12] In this court, the Zanatta Defendants contend that the trial judge “ignored” cogent evidence – Mr. McGee’s “adoption” of his earlier statement as truthful and accurate and his calm appearance when conversing with the police officer – that supported the statement (in particular, the absence of the van as a contributing factor in the accident) and in Mr. Hungerford’s submission, cast doubt on the witnesses’ testimony at trial. The trial judge, however, specifically considered Mr. McGee’s statement and the circumstances in which it was made. He accepted Mr.

McGee's testimony at trial that he had been under great stress following the accident, which was why he had decided to ride home before going to the hospital. It was for the trial judge to assess Mr. McGee's veracity and he did so. As the plaintiff argues in his factum, the trial judge decided that the weight to be given to Mr. McGee's testimony was not adversely affected by his earlier statement, and that his failure to mention the van had been explained satisfactorily.

[13] At the hospital, Mr. McGee saw Mr. Rose and described the accident to him in a manner consistent with his testimony at trial – i.e., referring to a vehicle "coming wide on the corner" and Mr. Aberdeen's reacting and sliding into the gravel along the side of the road. The Zanatta Defendants submit that the trial judge should have excluded this statement because Mr. McGee had already been in contact with Mr. Aberdeen at the hospital when he, Mr. McGee, spoke to Mr. Rose. Thus it is said Mr. McGee had had the opportunity to be "influenced" by the plaintiff. I know of no Canadian authority that supports Mr. Hungerford's argument that this is fatal to the admissibility of the statement, and indeed, the Supreme Court of Canada has recently emphasized that the main concern is "whether the witness made up a false story at some point after the event that is the subject of his or her testimony actually occurred." (***R. v. Stirling***, 2008 SCC 10, at para. 5.) As counsel for Mr. Aberdeen submitted, the "influence" factor goes merely to the weight to be given the statement.

[14] As mentioned earlier, the trial judge also admitted the evidence of an ambulance attendant, Mr. Parks, to whom Mr. Aberdeen spoke as he was being air-lifted to hospital. Mr. Parks testified that Mr. Aberdeen "told me that he was going down a hill, around a corner and had to go wide to avoid a vehicle and he hit gravel

on the road and lost control." On appeal, it is contended that since no allegation of recent fabrication had been made expressly by counsel for the defendants, the trial judge erred in admitting it. The law is clear that an inference of this kind need not be made expressly: see ***R. v. Campbell*** (1997) 38 C.C.C. (2d) 6, 17 O.R. (2d) 673 (C.A.), and J. Sopinka, S. Lederman and A. Bryant, *The Law of Evidence in Canada* (2nd ed., 1999) at 316–7. Again, this was a ruling the trial judge was entitled to make, and the imputation of recent fabrication clearly arose.

[15] In my view, therefore, the arguments concerning the out-of-court statements cannot succeed. The trial judge was clearly aware of the law regarding the admissibility of such statements. He applied the proper test to the prior consistent ones, and considered what weight should be given to Mr. McGee's statement in light of all the circumstances.

[16] The Zanatta Defendants also submit that the trial judge erred in ignoring, misapprehending or rejecting certain evidence they proffered at trial on the issue of liability. In particular, they submit that:

1) The learned trial judge ignored Aberdeen's evidence that the van's wheels were within its own lane.
2) The learned trial judge ignored the evidence as to the distance between Aberdeen and the van.
3) The learned trial judge misapprehended the evidence of Cassels, and, in the process, ignored relevant evidence given by Cassels, who had the best opportunity to observe the van's position, as it pertained to whether the van crossed the center line.
4) The learned trial judge rejected some or all of the evidence of Cassels without any legally acceptable articulated basis.
5) The learned trial judge rejected some or all of the evidence of Zanatta, Cassels and Williams on the basis of an irrelevant consideration,

namely that none of them reported to the police that Zanatta had witnessed the accident.

6) The learned trial judge drew an improper inference from the fact that Zanatta and Cassels left the scene of the accident, and ignored evidence that intended to refute that inference.

[17] Most of the force of these submissions falls away when it is remembered that the trial judge expressly preferred the evidence of Mr. Aberdeen and Mr. McGee over the evidence of the Zanatta Defendants and in particular rejected their testimony that their van "never reached the curve" prior to or at the time of the accident. The trial judge clearly found that the Zanatta vehicle was "approaching the sharp curve" and began to cross over into the other lane as Mr. Aberdeen approached the "tight corner" and that he swerved wide "around the corner" to avoid hitting the van. On this specific point and on their description of the circumstances of the accident generally, the trial judge rejected, rather than ignored, much of the Zanatta Defendants' testimony and as we have seen, gave his reasons for doing so. Again, it was his task to assess the evidence of all witnesses and to make findings of fact based on that assessment. This court must defer to his advantage in seeing the witnesses on the stand and assessing their credibility. None of the trial judge's findings has been shown to be clearly wrong.

[18] In support of their argument that the trial judge failed to apply the appropriate legal test and to give due consideration to causation, the Zanatta Defendants submit that the trial judge failed to consider "not only whether the absence of the Van would have eliminated the accident, but also whether the Van (even if over the centre line) was truly a proximate cause of the accident after it was seen by Aberdeen from 100

feet away. He did not perform that analysis at all." Again, the trial judge rejected the contention that the van was at least 100 feet away when Mr. Aberdeen perceived it coming over the line, and moved to avoid it. This is not consistent with the facts as found by the trial judge and in the absence of a clear error shown in those facts, it cannot succeed as a ground of appeal. I see no error in the Court's analysis of causation in this instance, which was consistent with the "but for" test affirmed by binding authority such as ***Athey v. Leonati*** [1996] 3 S.C.R. 458.

[19] The next group of submissions advanced by the Zanatta Defendants, those relating to the issue of contributory negligence on Mr. Aberdeen's part, are in my view more problematical. In general terms, they amount to an assertion that the trial judge did not apply his mind to the question of whether Mr. Aberdeen was taking reasonable care for his own safety as he proceeded down the hill (which had an 11% grade) and around the curve. Rather, the trial judge concerned himself with whether the plaintiff was exceeding the posted speed limit or the posted advisory speed, as indicated by paras. 44–8 of his reasons:

> In regards to the first issue, there is a paucity of evidence as to the speed at which Aberdeen was travelling on 272nd Street. There is no evidence to suggest that Aberdeen was driving over the posted speed limit. There is a limited amount of evidence to suggest that he may have been driving over the advisory speed.
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> The Supreme Court of Canada established in *Canada v. Saskatchewan Wheat Pool***,** [1983] 1 S.C.R. 205 that breach of a statute is neither negligence *per se* nor *prima facie* evidence of negligence. Rather, breach of a statutory provision is simply evidence of negligence.
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> The Court in *Saskatchewan Wheat Pool* concluded that the statutory formulation of a duty may afford a specific and useful standard of reasonable conduct. However, the Court also concluded that the concept of fault inherent in negligence law, rather than the

> breach of a statute *per se*, should govern the imposition of civil liability. Thus, where a defendant has taken all reasonable care, breach of a regulatory provision will not of itself suffice to hold the defendant liable.
>
> In the case at bar, the evidence is that Aberdeen was traveling within the posted speed limit. While Aberdeen may have been traveling in excess of the advisory speed, he could not have received a ticket or fine for doing so. On its own, the possibility that the plaintiff was traveling above the posted advisory speed fails to establish that he was contributorily negligent.
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> There is however evidence that Aberdeen was exercising caution as he drove his bicycle on 272nd Street. Aberdeen and McGee both testified to a conversation they had immediately prior to the accident, as they cycled beside each other, about the steepness and the danger associated with the descent on 272nd Street. Aberdeen exercised caution by agreeing with McGee to travel single file down the hill. Both Aberdeen and McGee testified to a circumstance of pumping brakes as a means of controlling speed and exercising caution as they descended the hill on 272nd Street. [At paras. 44-8.]

[20] There certainly was a “paucity” of evidence concerning speed from the plaintiff himself. He testified that he had “no idea” of how fast he had been going, that he had known there was a “nasty curve” in the hill, that he “formed the impression” the van’s left bumper was over the centre line, but had “no idea” how far over the line it was. Again, it had all happened in a “split second.” He commented that the advisory speed limit sign was “suggestive that you should do 30. It doesn’t state that you have to do so.” What evidence there was, however, indicated that the bicyclists were proceeding “pretty fast”, to quote from Mr. McGee’s statement to Const. Carlson, and that they had been going at least 30 mph (48 kmh), although he had not been looking at his speedometer. He did not suggest at any time that the statement had been inaccurate, but at trial, said his speed was approximately 40 kmh on the hill.

[21] Mr. McGee estimated that he was perhaps ten to 20 meters behind Mr. Aberdeen. The lane in which they were travelling was between ten and 13 feet wide and widened at the curve. Conditions were dry and sunny. The van, fully loaded with nursery materials, being driven by Mr. Zanatta up the hill, was described by Ms. Cassels as incapable of going at a fast speed. Mr. Zanatta testified that he was driving at approximately 20 kmh and the trial judge seemed to accept this evidence. (In discovery, Mr. Zanatta had estimated his speed was between 3 and 5 kmh, but the trial judge noted "in fairness" at para. 14 that Mr. Zanatta explained this discrepancy as "simple lack of knowledge as to what an effective speed was.")

[22] The trial judge did not make a finding as to what speed Mr. Zanatta or Mr. Aberdeen had been travelling at the time of the accident. He found that Mr. Zanatta had crossed the centre line but did not find how far he had crossed. Keeping in mind Mr. Aberdeen's own evidence that he did not see the van's wheels (as opposed to the bumper) cross the line, it is hard to disagree with the suggestion made by the Zanatta Defendants that if the van was over the line, it must have been only minimally so. (Mr. Aberdeen had "no idea" how far over it was and there was no evidence on this point other than Mr. Zanatta's, which the trial judge rejected.) Mr. Aberdeen testified that he "moved to the right" and encountered the gravel. He did not use the word "swerve" or "veer", but Mr. McGee answered affirmatively a question at trial as to whether Mr. Aberdeen had "veered" to the right. In addition, he acknowledged in discovery that he had "pumped" his brakes "a couple of times" on the hill before encountering the van. There was no evidence that Mr. Aberdeen

slowed as he prepared to round the curve. He agreed that although at one point he had been in the middle of the lane, "that could vary as [he] went down the hill."

[23] Counsel for the Zanatta Defendants referred us to two pieces of evidence not referred to by the trial judge in his reasons. First, Mr. Aberdeen testified that to accomplish the turn around the corner where the accident occurred, he would have steered the handlebars to the left but leaned to the right to retain his balance. Both Mr. Lisman, a road safety engineer, and Mr. Godfrey, an engineering consultant, however, testified that this would have led to an "upset" and that a cyclist needs to lean into the turn to compensate for the centrifugal force caused by the curve. Second, in a statement given to Constable Carlson immediately after the accident, Mr. McGee had been asked what he thought caused the accident. He had replied, "Too wide on the corner and loosing [*sic*] control." In a later statement, he was again asked what had caused the plaintiff to go off the hill on his bike. He replied:

> Jim went too wide on the corner in response to a cube van going wide on the same corner travelling in the opposite direction. The bike hit gravel on shoulder, Jim lost control and went through gap between barriers. [Emphasis added.]

[24] Bearing in mind that the plaintiff never saw the wheels of the van cross the line; that in the trial judge's words, Mr. Zanatta's crossing the line was a "momentary lapse in his attention", and that it is not unusual for a van to cross (or to appear to cross) a centre line when negotiating a curve or corner in the road, it seems to me that the trial judge was required to address whether in fact Mr. Aberdeen was taking reasonable care for his own safety and why he veered "too wide on the corner" in response to seeing the van. This would have involved determining, if only in an

approximate way, how far the van went over the line, how close Mr. Aberdeen was to the centre line, how fast he was going down the hill, and why, in a lane that was between ten and 13 feet wide, he "swerved so far over" that he skidded in the gravel (which was to be expected on the road and which the trial judge found had not contributed materially to the accident) and lost control. These questions were not, with respect, obviated by a finding that Mr. Aberdeen was travelling below the posted speed limit for motor vehicles. (In any event, the ***Motor Vehicle Act*** states at s. 144(2)(c) that "a person must not drive a motor vehicle … at a speed that is excessive relative to the road, traffic, visibility or weather conditions" (my emphasis), and s. 183(1) imposes on a bicyclist the same duties as the driver of a motor vehicle.)

[25] The question that the trial judge was required to address was whether in all the circumstances Mr. Aberdeen was taking reasonable care for his own safety as a bicyclist, going down a hill he knew to be "nasty" and approaching a blind corner. Did he use a wrong technique? Was he going too fast? Given that he was clearly exceeding the "advisory" speed for cars, was he creating an unreasonable risk of harm to himself as he rounded the curve? Was he driving too closely to the centre line? Should he not, if riding in a reasonably prudent manner, have been able to move to the right side of his lane, as Mr. McGee did, without losing control and going over the shoulder and off the road? The trial judge did not answer these questions but, with respect, was content to base his conclusion of no negligence largely on the finding that Mr. Aberdeen could not have received a ticket. As for the fact that the plaintiff and Mr. McGee had conversed, just before the accident, about the

steepness of the hill, that could take one only so far. As Lambert J.A. suggested in ***MacDonald v. Shorter*** [1991] B.C.J. No. 3714, 8 B.C.A.C. 179, it seems likely that "in the bulk of cases where negligence occurs, the negligent conduct is an exception to the general conduct of the person who is said to be negligent." (At para. 13.)

[26] In these circumstances, I am reluctantly driven to the conclusion that the trial judge erred in failing to consider specifically whether Mr. Aberdeen had been taking reasonable care for his own safety. (In addition, there was more than a "paucity" of evidence on the topic of speed, contrary to the trial judge's finding.) I would remit the issue of contributory negligence for retrial below.

THE LANGLEY APPEAL ON LIABILITY

[27] As mentioned earlier, when Mr. Aberdeen lost control of his bicycle, he encountered gravel which the trial judge found prevented him from applying his brakes effectively. (Para. 7.) Almost immediately, he was propelled up against the metal guard rail which had been there for many years. However, a cement "no-post" barrier had been erected along the road in July 1999 when Langley had carried out a reconstruction. A gap of between 12 and 18 inches had been left between the new barrier and the old one. Unfortunately, Mr. Aberdeen was propelled through that gap and down the cliff where he suffered his injuries. His claims of negligence against Langley were based on the presence of the gravel on the road – a factor the trial judge rejected as not material – and the existence of the gap between the two barriers.

[28] The trial judge described how the gap had come to exist:

> The reconstruction of 272nd Street in 1999 was undertaken because a leaking culvert had permitted water to leak into the road-base, causing it to become unstable such that portions of the bank had broken away. It was decided not to use more standard concrete lock block retaining wall because an engineering report stated that underlying soils in the area were too unstable to withstand extreme weight. A portion of the existing metal guard rail was removed to permit the bank stabilization project to proceed and, because of the method used to stabilize the bank, it was not possible to sink posts a sufficient distance into the ground to permit the metal guard rail to be replaced. Therefore, the cement no-post barrier was chosen instead. The decision was made not to extend the no-post barrier further because of concerns about the excess weight of the barriers on the bank when a detailed geotechnical report had not been prepared for the portions of the hillside extending beyond the project area. Additionally, due to space constraints, it was not possible to align the new barrier with the existing metal guard rail. These decisions were made by the project supervisor, his supervisor, and the construction foreman. [At para. 20.]

[29] Mr. MacPherson, the former Assistant Superintendent of Public Works for the Township of Langley, testified at trial. He had been the “management level supervisor” of the bank stabilization project on 272nd Street undertaken in 1999 by Langley when a section of the hillside had become unstable due to a leaking culvert, causing the “downside slope of the road” to break away. The original metal guard rail had been continuous along the side of the road but in 1999, was found “hanging in mid-air” due to the collapse of two supporting posts underneath the guard rail. An engineering firm retained by the Township to advise on the problem recommended two options, one of which was, in Mr. MacPherson’s words, to “excavate away the failed section of roadway, and to rebuild that section of sub-grade using gabion baskets.” The original guard rail was removed before construction began and Mr. MacPherson testified that a new no-post barrier had to be used because holes could not be created in the gabion baskets.

[30] Mr. MacPherson testified that there were two reasons why "the no-post was ended the way it was" – first, that the actual foot of the base of the concrete barrier is "quite wide" and "would have come into conflict with one of the support posts on the end of the W-guard rail, and would have caused us to align the concrete no-post closer to the shy line of the road." Second, he said, the extreme weight of the concrete barrier "could have caused subsidence and could have caused the remaining guard rail left in place to eventually fail." In summary, he testified:

> It's pretty difficult to actually bend a concrete no-post to get the [actual] curvature. Those things – each section will only allow about a half inch deflexion which doesn't give you much room to curve.
>
> The other reason the back of the no-post there, because of the steep bank, we've not got much room to play for aligning those no-posts.

A hazard marker was placed at the start of the concrete barrier – i.e., at one end of the gap.

[31] In cross-examination, Mr. MacPherson was asked why he had not put a "bull-nose" in as a temporary measure to extend the concrete barrier closer to the metal rail. His response was that it "would have extended beyond the end of the W-guard rail and the foot of the no-post would have … forced the alignment further out towards the shy line." When asked whether he had been unable to "figure out" some way to close the gap, his response was that at the time, the gap was not considered a "significant hazard".

[32] Notwithstanding Mr. MacPherson's testimony, the plaintiff adduced evidence that three months after Mr. Aberdeen's accident, the Township installed a continuous concrete no-post barrier at the curve at little cost, and that no apparent

stability or “environmental” concerns had arisen concerning that installation. Experts in highway construction and safety also opined that the configuration of the guard rails at the curve at the time of the accident did not comply with applicable design standards for such barriers, the purpose of which is to provide “continuity of protection for errant vehicles”. Mr. Godfrey opined that the installation of the concrete no-post barrier offset from the metal barrier was not “proper or adequate and violated the basic principle of safe roadside installations.” Mr. Lisman also considered the gap to be unsafe and wrote that “there are no circumstances in which such a discontinuous barrier alignment presenting a wide opening could be considered either appropriate or safe. Thus gaps are neither contemplated nor permitted. They are considered a defect to be remedied.” No expert evidence to the contrary was adduced at trial.

[33] The trial judge reviewed the by-now familiar law concerning the duty of care owed by a municipality or other highway authority to users of roads and concluded that Langley had breached its duty of care to Mr. Aberdeen, who was a “reasonably foreseeable user of the road operating a bicycle on a dedicated [*sic*; designated] bicycle route. As a result of the breach of the duty of care, Aberdeen was injured.” He continued:

> … I note that the guard rail configuration was a hazard put in place by Langley. It is something that with a relatively modest cost, approximately $1500 expended in July 1999, could have been avoided. Funds would have been available to eliminate this hazard, had it been properly identified as such. Even balancing environmental and financial constraints, Langley should not have left what two witnesses immediately described as an unsafe barrier configuration when the cost to remedy the situation was so low.

> In my view, Langley cannot rely on the line of cases which limit a municipal government's liability for negligence when they have a policy in place to regularly monitor their roads or facilities they maintain to check for hazards. Those lines of cases, for the most part, deal with hazards created by others or by weather or by wear and tear. Those cases do not apply in a circumstance where a municipality has actually created the hazard as is the case here. Further, Langley has not directly sought to argue that its decision as to how to place the concrete no-post barrier was a policy decision that should be exempt from tortious liability.
>
> As a result, I have concluded that Langley is liable to Aberdeen for the injuries he suffered. [At paras. 38–40.]

[34] The trial judge dealt with the question of apportionment of liability as between the two groups of defendants at paras. 54–78 of his reasons. He correctly described the relevant authorities concerning the meaning of "fault" in s. 1 of the ***Negligence Act***, R.S.B.C. 1996, c. 333, including in particular this court's decisions in ***Cempel v. Harrison Hot Springs Hotel Ltd.*** (1997) 43 B.C.L.R. (3d) 219 and ***Ottosen v. Kasper*** (1986) 37 C.C.L.T. 270. After describing the parties' submissions, he concluded that liability should be apportioned 75% to Langley and 25% to the Zanatta Defendants based on a "careful consideration of the nature and extent of each defendant's departure from the standard of care expected in all the circumstances." He summarized his findings:

> In relation to Zanatta's negligence, his crossing the centre line was a momentary lapse in his attention while driving. As Langley observes, many serious traffic accidents are caused by momentary lapses in attention. A fairly serious risk was created by the presence of a large cube van within the lane normally occupied by oncoming traffic on a steep hill with a sharp curve, and this risk could have been completely avoided had Zanatta exercised proper care while driving. However, Zanatta did not actually strike the plaintiff, and his fault was due to inattention, rather than being an intentional act. Therefore, I conclude that Zanatta's conduct represented a moderate departure from the standard of care expected in the circumstances.

> In contrast, I have concluded that Langley's departure from the standard of care was considerably greater than Zanatta's: while Langley did not intentionally create a hazard, it knowingly created a serious risk when it decided not to replace the entirety of the existing guard rail in 1999, or to take measures to ensure that cyclists or cars would not risk injury due to the existence of a gap between the two guard rails. Langley knew that 272nd Street was frequently used by cyclists, and in fact was a designated bicycle route. Langley had over three years to take action to avoid the risk of injury due to the barrier configuration. The cost was not prohibitively high, and money could have been allocated from the existing budget to remedy the situation. The gravity of risk created by Langley's decision was high, both for cyclists and for cars that might have been redirected by the metal barrier into a collision with the no-post barrier. The expert witnesses of both the plaintiff and the Zanatta defendants thought that this gap was obviously "unsafe" and "constituted a violation of basic traffic safety practices." The departure from the standard of care expected of a municipality in these circumstances was considerably higher than Zanatta's departure from the relevant standard of care. Accordingly, I would apportion liability for the plaintiff's injuries 25% to the Zanatta defendants and 75% to Langley. [At paras. 77-8; emphasis added.]

On Appeal

[35] On appeal, Langley advanced four grounds of appeal, one of which was that the trial judge had erred in finding that Mr. Aberdeen was not contributorily negligent. I have already dealt with this subject. The remaining grounds advanced by Langley were that the trial judge erred in finding that the Township had breached the applicable standard of care; that he had failed to consider the question of causation in connection with Langley's alleged breach of duty; and that he erred in apportioning liability on a 75:25 basis between it and the Zanatta Defendants.

[36] On the topic of standard of care, Langley emphasizes the fact that the standard is not one of perfection; that 272nd Street was not a "dedicated" bicycle route but a "designated" one shared with motor vehicles; that longitudinal barriers

are designed for motor vehicles rather than for bicycles; and that to the extent the gap was a hazard, it had been clearly marked as such. The trial judge was entitled, however, to accept the experts' uncontroverted evidence that the existence of the gap constituted a departure from applicable highway safety standards. As for the contention that difficult engineering and environmental considerations had dictated the configuration, the trial judge appears to have rejected that evidence in light of the fact that the post-accident repair was accomplished without difficulty and at nominal expense. While it would have been better if he had explained his reasons for rejecting Mr. MacPherson's explanation of why the barriers had been left unconnected, there was no evidence to corroborate this witness's "concerns" at the time (evidently, his file was missing), or to substantiate the notion that the gap was unavoidable. It is my view that on balance, the trial judge's conclusions on this point have not been shown to be clearly wrong.

[37] On the question of causation, Langley submits that Mr. Aberdeen failed to prove that Langley's breach of duty caused his injuries "in the sense that they would not have otherwise occurred." The Township suggested that even without the gap, Mr. Aberdeen "likely would have been seriously injured in any event as a result of colliding with the guard rail, capsizing onto the roadway, somersaulting over the barrier or being hit by a vehicle." Again, this argument cannot succeed in light of the trial judge's findings that the barrier served its intended purpose, directing Mr. Aberdeen along the side of the highway, but that he was then "propelled" through the gap down the cliff below. He did not somersault or "topple over" the rail, and what would have happened if he did was entirely irrelevant. Obviously, the trial

judge said at para. 12 of his reasons, “rather than keeping Aberdeen on the road, as clearly would have been the intention of a guard rail, the existence of the gap propelled Aberdeen down the gap and into the gulley, projecting him into the hazard the guard rails were intended to prevent.” Again, the trial judge here properly applied the “but for” test and I see no error.

[38] The question of apportionment of liability, which is one of fact, may be moot given my conclusions concerning the necessity for a retrial of the issue of contributory negligence. Aside from that, Langley says that if it was negligent, its breach of duty was minor in comparison to that of the Zanatta Defendants, and that the trial judge’s apportionment therefore constituted a palpable and overriding error. Accepting, as the trial judge did, that the degree of blameworthiness of each defendant’s conduct (which includes an assessment of the degree of risk created by each defendant), is determinative, Langley emphasizes that it was Mr. Zanatta’s conduct that set in train the chain of events leading to the accident and that the gravity of the risk created by a van crossing the centre line on the blind corner was great – certainly greater than leaving a small gap, clearly marked as a hazard, on a country road which the Township had tried to repair some years earlier and which had been the subject of no previous difficulty.

[39] I acknowledge that based on a comparison of the relative blameworthiness of the defendants’ breaches of duty, I might not have apportioned liability in the same way as the trial judge did. However, as Langley notes in its factum, an appellate court may reapportion liability only if the appellant has shown a “palpable and demonstrable error in the appreciation of the legal principles to be applied or

misapprehension of the facts by the trial judge." (*Per* Dickson J., dissenting on other grounds in ***Taylor v. Asody*** [1975] 2 S.C.R. 414, 49 D.L.R. (3d) 724, at 423.) In this case, it is not necessary for me to decide this point finally, since the question of the plaintiff's contributory negligence and hence the respective proportions of the defendants' negligence will be the subject of a new trial.

QUANTUM OF DAMAGES

[40] By far the majority of the trial judge's reasons dealt with the quantum of damages in this catastrophic case. He began by noting the parties' disagreement as to the meaning of "full" compensation, as that term was used by the Supreme Court of Canada in ***Andrews v. Grand & Toy Alberta Ltd***. [1978] 2 S.C.R. 229. Beginning at para. 87, he described the debate in various older English authorities between the concept of *restitutio in integrum* as a goal of damage awards for personal injuries, as opposed to the concept of "fair and reasonable" compensation, which considers both the plaintiff's and the defendants' perspectives. Although in ***Andrews*** the Supreme Court of Canada clarified that "full compensation" is the governing principle, the trial judge here stated that Dickson J.'s judgment still retained "the qualification that compensation must be moderate and fair to both parties." In the trial judge's words (at para. 114):

> … While stating that there is no duty to mitigate, in the sense of accepting less than a real loss, he [Dickson J.] emphasized that "there is a duty to be reasonable," and that there cannot be "complete" or "perfect" compensation (at ¶ 26). Later, he clarified that fairness to the defendant was to be achieved by ensuring that the claims against him are "legitimate and justifiable" (at ¶ 33).

[41] ***Andrews*** was interpreted by McLachlin J. (then of the Supreme Court of British Columbia) in ***Milina v. Bartsch*** (1985) 49 B.C.L.R. (2d) 33, a judgment that has withstood the test of time. It concerned a plaintiff who had suffered paralysis from his neck down with the exception of his diaphragm. McLachlin J. summarized the principles relating to the assessment of damages for future care costs as follows:

> 1. The fundamental governing precept is *restitutio in integrum*. The injured person is to be restored to the position he would have been in had the accident not occurred, insofar as this can be done with money. This is the philosophical justification for damages for loss of earning capacity, cost of future care and special damages.
>
> 2. For those losses which cannot be made good by money, damages are to be awarded on a functional basis to the end of providing substitute pleasures for those which have been lost. This is the philosophical justification for awarding damages for non-pecuniary loss.
>
> 3. The primary emphasis in assessing damages for a serious injury is provision of adequate future care. The award for future care is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff. [At 78; emphasis added.]

[42] McLachlin J. then considered two specific questions that affect the assessment of future care costs, namely the proper manner of making the calculation so as to avoid duplication; and second, whether there must be "medical justification" of care costs. On the latter issue, she noted the plaintiff's argument in the case before her that the award for future care should encompass the costs of items that could be used by the plaintiff "in substitution for the pleasures of life taken from him by his injury." The defendants on the other hand contended that medical justification must be shown for all components of the award, and that insofar as it serves only as solace by providing "substitute pleasures" it falls under the heading of

non-pecuniary loss rather than future care costs. McLachlin J. concluded that the authorities supported the defendant's position. She quoted in this regard from ***Andrews*** and its companion case, ***Thornton v. School District No. 57 (Prince George)*** [1978] 2 S.C.R. 267, and continued:

> If there was any doubt as to whether the award for cost of future care must be justified on a medical basis, it was dispelled by *MacDonald v. Alderson*, [1982] 3 W.W.R. 385, leave to appeal to the Supreme Court of Canada refused. In that case it was suggested that the plaintiff, a quadriplegic, should be awarded sufficient funds to purchase and maintain his own house on the non-medical grounds that this would give him a greater sense of " 'autonomy, privacy, financial stability and pride of ownership … and greater opportunities for gardening, owning a pet, and more space for hobbies' ". The Manitoba Court of Appeal rejected this evidence as "subjective theorizing" and reduced the award made at trial. The test for determining the appropriate award under the heading of cost of future care, it may be inferred, is an objective one based on medical evidence.
>
> These authorities establish (1) that there must be a medical justification for claims for cost of future care; and (2) that the claims must be reasonable. On the latter point, Dickson J. stated in *Andrews* at p. 586:
>
> > An award must be moderate, and fair to both parties … But, in a case like the present, where both courts have favoured a home environment, "reasonable" means reasonableness in what is to be provided in that home environment.
>
> This then must be the basis upon which damages for costs of future care are assessed.
>
> It follows that I must reject the plaintiff's submission that damages for cost of future care should take into account the cost of amenities which serve the sole function of making the plaintiff's life more bearable or enjoyable. The award for cost of care should reflect what the evidence establishes is reasonably necessary to preserve the plaintiff's health. At the same time, it must be recognized that happiness and health are often intertwined. [At 83-4; emphasis added.]

[43] The trial judge in the case at bar noted that as in ***Milina***, the plaintiff was urging a "functional approach to replacing what has been lost to make full compensation", while the defendants were urging a "medical justification approach to urge that awards not be made for certain items that the plaintiff is unlikely to use … or that are experimental." In the trial judge's view, the principle of full compensation set out in ***Andrews*** did not provide a "complete answer" to this problem. In his analysis:

> *Andrews* clarified the law by making clear that "fair and reasonable" compensation should not be used to reduce pecuniary compensation, nor to make the plaintiff make do with care at a level lower than that indicated by the medical evidence simply because that would be cheaper for the defendants. However, Dickson J. made clear in *Andrews* that the Court had been forced by counsel to choose between 24-hour home care and institutionalization – an unacceptable alternative. He did not address how choices are to be made between acceptable alternatives to make full compensation.
>
> Thus, I think the solution is to consider "full" compensation espoused in *Andrews* in the context of the more pragmatic and widely-followed test set out in *Milina***,** namely that there should be medical justification for a cost of future care expense, and the expense must be reasonable. In this sense, the inquiry is more directed to the fact-based determination of whether each individual item is medically justified, rather than approaching the question from a purely functional analysis of whether a particular item will make the plaintiff whole again. The difference is in many respects semantic, but the former question maintains the focus on the pecuniary loss aspect of the cost of future care, and helps to prevent the Court from extending the award to fulfill the non-pecuniary goal of providing solace for what has been lost. Even in *Andrews*, Dickson J. recognized that *restitutio in integrum* was not possible (at ¶ 25). If the plaintiff fails to demonstrate that a particular future care item is medically justified, the plaintiff in essence has failed to prove his damages, and therefore cannot receive compensation on that ground. That said, the analysis of what is "medically justified" is not as narrow as what is "medically necessary," and all of the parties agree with this proposition. [At paras. 119-20; emphasis added.]

[44] At para. 122, the trial judge summarized the evidence of various doctors and other experts who gave evidence concerning Mr. Aberdeen's condition and future needs. The latter included Ms. Baptiste, an expert in rehabilitation science and "life care planning", which the trial judge noted is a highly specialized area of study focussing on the comprehensive needs of individuals following traumatic injury. Ms. Baptiste had conducted approximately 800 assessments of persons requiring "care plans" and she provided a detailed report on the cost of future care that might be anticipated by Mr. Aberdeen. At para. 139 of his reasons, the trial judge quoted a long passage from the report, which was the subject of much cross-examination and argument at trial. In that passage, Ms. Baptiste stated in part:

> … Mr. Aberdeen will require significant supports, which will include a range of personal care services, i.e. assistance with bowel and bladder routines, bathing, skin-care, complex meal preparation, and generally looking after his health. He will require driving assistance for longer distances, and possibly, local driving from time-to-time. He will require assistance getting equipment in and out of his car and with some transfers. He will require assistance with laundry, shopping, and errands. At times of illness or complications, he may require a second worker; however, this has been considered in providing the nursing services. In order to ensure his optimal function and safety, 24-hour care is recommended. From time-to-time, there will be hours in the day when Mr. Aberdeen could be left alone, and may prefer this; however, he will require assistance with most aspects of community access and household management, and therefore access to such care, especially with ageing, is critical. … [At para. 139.]

[45] At trial, Ms. Baptiste acknowledged that Mr. Aberdeen is able to drive and to do certain tasks (with difficulty) but testified that her concern was with "community integration and that level of quality life and not with the medical issue *per se* of the transfer [in and out of a vehicle] itself." She explained that her report was geared to allowing Mr. Aberdeen to participate again in the community in a meaningful sense

and to have a sense of "social involvement and social meaningfulness in what he is doing day to day, which is not the case now." She was also taken through various items in her report which she had recommended for Mr. Aberdeen, that were arguably overlapping or that might be obviated or reduced by the new fully-equipped house for which damages were being sought.

[46] The trial judge described Ms. Baptiste as an impressive witness with particularly impressive credentials and noted that in giving her testimony she did not appear to be an advocate. In this he found that she contrasted sharply with another expert witness, Ms. Norton, who was qualified as an occupational therapist specializing in costs of future care. The trial judge noted that her report on Mr. Aberdeen was the first one she had prepared on future care costs since expanding her training as an occupational therapist. The trial judge continued:

> It is fair to say that Ms. Norton was reluctantly qualified as an expert. No doubt due to her limited experience in this area her evidence at times was weak and not convincing. She seemed strident in her views and unable to see any weaknesses in her report.
>
> One could not help but be left with the impression that her approach to cost of future care was simply to look at what minimal standards Aberdeen has been existing on since the accident, and to price out those minimal needs for the future. There appears to be no detailed analysis of what medically justified expenses might be. [At paras. 169-70.]

[47] Ms. Norton's report recommended *inter alia* "attendant care support" only in the last five years of his life, or if he experienced a "significant functional decline". She estimated he would need such support daily, for two to four hours, as well as additional home-making assistance (four to six hours per week) at that time. In the meantime, she expected that he would need only some seasonal yard maintenance,

assistance with home maintenance and household cleaning and home-making services, all for a few hours per week or as needed.

[48] At trial, Ms. Norton testified that occupational therapists are concerned with determining the "right amount" of care for each individual, and that having too much care can have negative consequences for the patient. In her words:

> … it's really recognized if one puts in an excessive amount of care that's not required and so that somebody is doing all these things for somebody that's very, in fact, able and reasonably capable of doing these things for themselves, it can have [negative] consequences for that individual physically. In that if they're not doing these daily activities on a routine basis, you can actually lose the level of functioning that you already have and that you have gained through the rehabilitation process. And that can include losing your muscle strength. It could include losing the techniques, and it can include losing range of motion.
>
> Secondly … my opinion is that providing too much care can also have negative emotional or psychological impact on the client. In that if you're never given the opportunity …

At this point the trial judge interjected to ask counsel how Ms. Norton could "talk about emotional and psychological benefits" given that she is an occupational therapist. After hearing counsels' arguments, he ruled that he would not allow the witness to continue with the evidence she was giving. After further argument, he said that counsel could ask about "emotional" or "mental well-being" but not about "psychological" impacts. On resuming the stand, Ms. Norton again emphasized that it was important for patients "to access specialized spinal cord injury services so that they can truly reach their potential in terms of their functional abilities, and they can reach their potential in terms of independence."

[49] At paras. 200-208 of his reasons, the trial judge described his "significant concerns" with Ms. Norton's evidence. This witness, for example, "appeared to be of the view that the plaintiff would, with minimal assistance be in a much more active or advanced position in terms of assisting in his own care, than appears at present." The trial judge found that this was inconsistent with the entire medical evidence and with Mr. Aberdeen's experience to the date of trial. The Court dismissed as "hopelessly naive" Ms. Norton's assumption that Mr. Aberdeen is or will be able to do physical activities which he clearly cannot do. (Para. 203.) In summary, her report was rejected as based on "hopelessly naive assumptions about Aberdeen's abilities" and her summary of costs "woefully inadequate."

[50] Some of Ms. Baptiste's recommendations for Mr. Aberdeen's future care were also disputed by Dr. Anton, a specialist in rehabilitative medicine who prepared four reports in 2006. In the final one, he wrote:

> While a rehabilitation support worker might provide services for Mr. Aberdeen that would promote community reintegration, I think some more specific description of the goals of that type of support is required.
>
> Ms. Baptiste has recommended a personal support worker 24 hours per day. Based on the information I have at present, I do not think Mr. Aberdeen requires care on a 24-hour per day basis. He will need access to some care on a regular basis. He may require assistance outside the usual hours of scheduled services on a sporadic basis to deal with specific medical problems. As indicated in my earlier report, his need for assistance will increase as he ages.

[51] The trial judge adopted the cost estimates provided by Ms. Baptiste in her report dated June 29, 2006, but decided to "back out" certain items he found not to be medically justified or that were available elsewhere or unnecessary. In general

terms, he found that Mr. Aberdeen was "a person very much in need of personal support care assistance" and that four and a half years after the accident, he was "still in a circumstance where he is unable to care for himself without considerable support." (Para. 212.) He found that Mr. Aberdeen was unable to get in and out of a traditional vehicle on his own; unable to shop for groceries or to provide himself on his own with complex meals; unable to clean up after himself if he suffered a bowel or bladder accident (which the trial judge said were "relatively common occurrences"); that he could not maintain a home at the necessary level of cleanliness; and that he required someone to sterilize his catheters and indeed had suffered an injury when he tried to do so himself.

[52] Accepting Ms. Baptiste's recommendations (other than the disallowed items set forth at para. 218 of his reasons), the trial judge deducted from the total present value of the estimated costs of $5,021,538 the total of the deducted items of $1,130,000, resulting in future care costs totalling $4,151,504, including taxes. By far the largest amount – and the most contentious – in the items allowed was the cost of "personal support" workers which Ms. Baptiste costed at $22.10 per hour (stated to be the "regular rate" full-time or $188,822.40 per year) plus $33.15 per hour for statutory holidays, nine per days per year, or $7,160.40. The trial judge allowed three-quarters of this cost (i.e., workers present 18 hours, rather than 24 hours per day), explaining as follows:

> … I would allow 18 hours a day for a personal support worker. This would require Aberdeen to essentially be on his own for three hours in the morning and potentially three hours in the afternoon each day. It is crucial in my view that Aberdeen have assistance for evening times, particularly in light of his need to regularly adjust himself while

> sleeping. Although he is currently able to achieve this, it is in my view unlikely with aging that he could continue to do this. I would allow 18 hours a day of care for a personal support worker which would result in a reduction of $725,443 from the cost of the report. [At para. 219.]

[53] An additional, and very significant, item of future care allowed by the trial judge was the cost of replacing Mr. Aberdeen's home with one much more suited to his condition. The trial judge accepted the estimate of Mr. Galan in this regard, although again he eliminated certain items in this expert's estimate. After deducting the appraisal value of Mr. Aberdeen's current home and making certain other adjustments, the Court awarded damages for home replacement in the amount of $388,639.

[54] Various other items were of course also allowed by the trial judge, but need not be described here since they are not in contention. In the result, the Court assessed damages as follows:

1. Non-pecuniary loss: $311,000
2. Past wage loss (after applying *Hudniuk*): $153,249
3. Future wage loss: $502,381
4. Cost of future care: $4,151,504
5. Cost of care - Home replacement: $388,639
6. In trust claim: $96,000
7. Special damages: $45,000 [At para. 242.]

On Appeal

[55] In this court, both the Zanatta Defendants and the Township of Langley challenge the trial judge's award for the cost of future care. The Zanatta Defendants expanded the summary statement of their grounds of appeal in their factum to seven (obviously overlapping and even repetitive) grounds, namely:

1. The learned trial judge relied on an opinion based on a manifestly wrong assumption.

2. The learned trial judge relied on an opinion at odds with the authoritative literature.

3. The learned trial judge failed to apply the appropriate legal test of medical justification and relied on an opinion that demonstrably ignored that legal standard.

4. The learned trial judge ignored relevant evidence in assessing Aberdeen's need for attendant care, and drew improper inferences regarding that need.

5. The learned trial judge awarded items for future care without any evidentiary basis, or where such items would be publicly funded.

6. The learned trial judge effectively imposed a reverse onus on the defence to prove that a particular care item was unjustified.

7. The learned trial judge made an award for cost of future care that was so inordinately high that it is a wholly erroneous estimate of the damage.

For its part, Langley also challenged the approach underlying Ms. Baptiste's report and the trial judge's dismissal of Ms. Norton's evidence. The Township contended in more compendious terms that the trial judge had erred "by applying an incorrect test to the assessment of costs of future care, by basing that assessment on opinion evidence premised on a patently wrong assumption and in making an award that was inordinately high."

[56] With respect to Ms. Baptiste's factual assumptions concerning Mr. Aberdeen's medical condition, I am satisfied that she was not under any misapprehension. At trial, she confirmed that she had relied on the diagnosis given on Mr. Aberdeen's discharge sheet from G.F. Strong. That diagnosis would appear

to be consistent with the one provided by Dr. Anton in his report of May 23, 2006.

He wrote:

> Mr. Aberdeen has clearly had some neurologic recovery since his spinal cord injury. At the time of my assessment, he had a last completely normal motor level of T1 with no motor function demonstrable below that level. He has a last completely normal sensory level of T3 with some preservation of sensation below that level. Based on those findings, his injury would now probably be categorized as ASIA B (implying his injury is still "motor complete" but he has some preservation of sensation below the affected level).
>
> Mr. Aberdeen would now be considered to have paraplegia rather than tetraplegia (quadriplegia) because he has function in the first thoracic (T1) myotome. However, he has much more in common with a complete tetraplegic because he has little or no motor function below T1. That means he has reduced respiratory (breathing) function, reduced cough, absent abdominal muscle function, and reduced balance due to loss of function in the muscles that stabilize the trunk.
>
> In practical terms, the main difference between Mr. Aberdeen and most persons with complete tetraplegia is that he has good hand function.

[57] The basic premise of the Zanatta Defendants' appeal on quantum is that Ms. Baptiste's recommendations, particularly for a personal support worker 24 hours per day, arise not from medical justification but from what she called a "community-based" approach. At trial, she contrasted her approach with that taken by Dr. Anton:

> Q. You would agree that it was his view as expressed in his report, I believe it was dated July 13th, that Mr. Aberdeen does not require care on a 24-hour-per-day basis?
>
> A. I often meet with Dr. Anton, and I think we both have quite a mutual respect. <u>The issue is that he as a medical practitioner is not looking at the same issues that I'm looking at in the community and we work from different models</u>, and therefore I don't think he's sure how much time is needed. I think he was just thinking that this man can spend some time alone; he needs, you know, time alone. And I don't disagree with that. I think a person should be left alone.

> I'm not talking about somebody that's always hanging around as a shadow beside somebody, and that's why there is a separate room in the house, which is how many clients live -- and a separate room in the house where the person can go and you can have your private time. But they're there for those moments and those times, which occur quite a bit more often than I think people who don't go into people's homes and don't work on that side of it realize.
>
> Q. Dr. -- did Dr. Anton state that in his report, what you have just stated?
>
> A. I don't think so, because that's a community-based approach. That's my opinion. That's my experience in work. He's a physician. He diagnoses. [Emphasis added.]

and further:

> A. I think that was an earlier report. My focus would be on neuropsychological rather than neurological, because in community we start pulling away from the medical, and although the medical team is used for consultation and many times are required for documents and reports and input into a plan, because you want to ensure that something is not contraindicated, that you shouldn't be doing it, in general, a community plan is quite different. And it has to do with accessing your community, being -- participating in things that you did before, for example, getting back to swimming routinely, biking routinely, perhaps some productive activity, something meaningful to do with his life so that he has a sense of social involvement and social meaningfulness in what he's doing day to day, which is not the case now. [Emphasis added.]

Elsewhere, Ms. Baptiste acknowledged that her plan for Mr. Aberdeen was "a community care plan; this is not a medical plan."

[58] Ms. Baptiste was questioned about a report entitled "*Outcomes Following Traumatic Spinal Cord Injury: Clinical Practice Guidelines for Health Care Professionals*" prepared by a consortium including the American Paraplegia Society and the American Spinal Cord Injury Association, among others. (This report does

not appear to have been placed in evidence.) Ms. Baptiste acknowledged that the "Functional Outcomes" table for different levels of spinal cord injuries indicated that 24-hour care is needed only by persons with spinal cord injuries between C-1 and C-4. These patients generally require a ventilator to breathe and cannot move any part of their body except head and neck. For persons with spinal cord injury at level C-6, the report recommended personal care of six hours per day and home care of two hours per day. For persons with lower trunk paralysis (T-1 – T-9), independence in terms of meal preparation, light housekeeping, communication, driving, and loading and unloading a wheelchair into a car are "expected functional outcomes," with housekeeping assistance recommended for three hours per day. (Mr. Aberdeen has no motor function below T-1, as noted in Dr. Anton's report.)

[59] The defendants submit that in adopting Ms. Baptiste's report to the extent that he did, the trial judge failed to apply the legal principles referred to in ***Milina*** and ***Andrews v. Grand & Toy***, *supra*, – i.e., that by her own admission, Ms. Baptiste's recommendations were not concerned with medical justification but with enabling Mr. Aberdeen to participate in some way in the "community" or to optimize his levels of independence, enjoyment and convenience. In their submission, the advice of the other medical professionals who testified, including Dr. Anton and Dr. Reebye, should have been given greater weight and were consistent with the principle of medical justification. The trial judge noted, however, that each of these practitioners lacked knowledge of at least some aspects of the realities of Mr. Aberdeen's daily life and by implication, lacked the expertise of Ms. Baptiste to opine as to his future care needs.

[60] With respect to Ms. Baptiste's recommendation for a personal care worker during the night, the Zanatta Defendants note the trial judge's statement at para. 219 of his reasons that Mr. Aberdeen is "currently able" to "regularly adjust himself while sleeping". The trial judge said it was unlikely "with aging" that Mr. Aberdeen could continue to do so, but the Zanatta Defendants submit that given this finding, the trial judge should have made a contingent award for overnight support, increasing in likelihood as Mr. Aberdeen gets older. They also note the plaintiff's discovery evidence that on a "typical day", he did not receive overnight care or assistance from family members.

[61] The Defendants say further that the trial judge's awarding of all of the amounts listed in Ms. Baptiste's report less the "backed out" items, amounted to the application of a reverse onus that resulted in an award that is "so inordinately high that it must be a wholly erroneous estimate of the damage." (***Nance v. B.C. Electric*** [1951] 2 W.W.R. (N.S.) 665 (J.C.P.C.) at 675. Based on the reported decisions in this province, the defendants contend that the highest previous award for future care costs given to a paraplegic plaintiff prior to this case was $1,210,000: ***Terracciano (Guardian ad litem) v. Etheridge*** (1997) 33 B.C.L.R. (3d) 328 (S.C.). In that instance, the plaintiff was 16 years old at the time of her injury, whereas Mr. Aberdeen was 50.

[62] Not surprisingly, counsel for Mr. Aberdeen responds that the assessment of pecuniary damages, unlike the assessment of non-pecuniary damages, is not subject to a tariff or comparison between plaintiffs but is based on the facts of each particular plaintiff's case. An award that is vastly out of line with others, however,

may indicate that its underpinnings should be scrutinized carefully. Mr. Cowper on behalf of the plaintiff notes that although Mr. Aberdeen can perform many tasks, they take a great deal of time and often involve a degree of risk. In this regard, counsel referred to the comment of the Court in ***Milina*** to the effect that a plaintiff "must not be expected to expend all of his limited energy on the effort of providing for his basic needs." (*Supra*, at 88.) As for the night-time support worker, counsel notes that Mr. Aberdeen is at risk of developing pressure sores and that the trial judge was of the view that it was simply not appropriate, as a matter of health and safety, for Mr. Aberdeen to be left alone at night. On this point, Mr. Cowper cited para. 182 of the trial judge's reasons. There the judge found that the plaintiff required personal care assistance for 18 hours day, although he did not specify that this need necessarily covered the night-time hours. Elsewhere in his reasons (para. 219), he stated that Mr. Aberdeen was "currently able" to adjust himself at night (so as to avoid bedsores etc.) but that it was "unlikely with aging that he could continue to do this." The trial judge made no findings as to when the plaintiff was likely to become unable to adjust himself, and no contingency was reflected in the award the Court made. Presumably, however, this contradiction was more apparent than real, and the trial judge's "broad brush" approach to the award for personal care took into account his ultimate finding – that care was required for 18 hours. Finally, in support of other specific future care items such as computer learning and repair, counsel contended that some vocational or occupational therapy is necessary to permit Mr. Aberdeen to engage in volunteer work, which was recommended by several of the experts.

[63] Counsel's arguments raise squarely the debate encapsulated by ***Andrews*** and ***Milina***, *supra*, between the medical justification of pecuniary damages and the provision of "substitute pleasures for those which have been lost", for which non-pecuniary damages are awarded. The line between the two is often difficult to draw and as McLachlin J. noted in ***Milina***, "happiness and health are often intertwined." (*Supra*, at 84.) Again, it was for the trial judge in the first instance to draw this line. Having reviewed the reports of all the doctors, Ms. Norton, and Ms. Baptiste, and the evidence of members of Mr. Aberdeen's family, and having reviewed in particular the items in Ms. Baptiste's report that were allowed by the trial judge, I am not persuaded that he fell into the errors advanced by counsel for the defendants. The trial judge carried out a "fact-based determination" of what was required in fact by Mr. Aberdeen and he cut down by 25% Ms. Baptiste's recommended quantum of services to be provided by a personal support worker for Mr. Aberdeen. (I do note that the trial judge simply multiplied the present value of the hourly rates supplied by Ms. Baptiste by three-quarters, without considering the likelihood that two full-time persons would be hired on a salaried basis, perhaps with room and board included, thus saving a considerable amount. However, there was no evidence from the defendants on this point.) Considering also the high degree of deference owed by an appellate court to a trial court's assessment of damages, I conclude that there is no basis on which this court should interfere with the award of future care costs made by the trial judge.

DISPOSITION

[64] In the result, I would allow the appeal only on the issue of contributory negligence, and dismiss the appeal on the issue of quantum of damages. I would remit for retrial by the court below the question of contributory negligence.

[65] Counsel may wish to make written submissions on the question of costs, given that success on this appeal was mixed.

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Mr. Justice Frankel"

I agree:

"The Honourable Madam Justice Neilson"