

# Cuming & Gillespie

L A W Y E R S

**CANADIAN BAR ASSOCIATION: PERSONAL INJURY  
CASE COMMENT AND UPDATES**

**MAY 2012 – MAY 2013**

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# CANADIAN BAR ASSOCIATION: PERSONAL INJURY

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### **Eye Globe Perforation, Loss of Vision, Duty of Disclosure**

*Loyie v. Hennig* (2013), Carswell Alta. 380, 2013 ABQB 131, [2012] A.J. No. 229

The 75 year-old plaintiff, with vision in his right eye only, consulted with the defendant about blurriness in his right eye and was subsequently diagnosed with a cataract. The plaintiff submitted to cataract surgery to be performed by the defendant. During the administration of the anaesthetic by the retrobulbar method, injection by needle of the anaesthetic behind the eyeball, the plaintiff sustained a perforation of his eye globe. The plaintiff claimed he had not been properly informed by the defendant of the risks of the retrobulbar method of anaesthesia and not properly informed of other methods of anaesthesia and associated risks. Sulyma J. adopting a modified objective test framed the central question as, "...what the average prudent person in the patient's particular position have agreed to or not agreed to if proper disclosure had been made..." [para. 75]. On that basis, the issue before the Court was defined as whether the defendant had provided sufficient disclosure to the plaintiff of the reasonable alternate methods for anaesthesia and of the relative risks and benefits given the plaintiff's circumstances. The plaintiff had a very poor recollection of his visits and the details of any discussions with the defendant and the defendant's nurse. His evidence established that he was amenable to the defendant's recommendations, did not ask any questions about the procedure or the method of anaesthesia at office visits with the defendant or at the time the anaesthetist presented with the anaesthetic needle just prior to the surgery. The defendant produced his medical notes, which supported his testimony that the retrobulbar method of anaesthesia was most appropriate for the plaintiff, as he had observed the plaintiff to have significant eye movement and photophobia. The defendant's notes also supported that he had told the plaintiff about two types of anaesthesia application, freezing drops or a needle, he

had described the surgery to the plaintiff, including showing him where the anaesthetic needle would be inserted, he had advised the plaintiff that 95% of patients do well after surgery but it was not risk free, and he had disclosed specific serious complications to the plaintiff including the possibility of blindness. In dismissing the action, Sulyma J. concluded that the defendant had disclosed to the plaintiff the reasonable anaesthetic options a reasonable person in the plaintiff's situation would want to know about and had obtained the plaintiff's informed consent. [Sulyma J.]

### **Gastric Cancer, Misdiagnosis, Bereavement and Special Damages**

*Paniccia Estate v. Toal* (2012), 57 Alta. L.R. (5<sup>th</sup>) 124; 2012 ABQB 11, [2012] A.J. No. 31

#### Corrigendum to Trial Decision

At trial it was held that the plaintiff had died 6 months earlier from terminal gastric cancer had it not been for the defendant's negligence.

On this post-trial application, the parties sought to clarify a specific paragraph of the judgment speaking to the intent and operation of the Fatal Accidents Act legislation. The paragraph in question read in part as: "...this legislation does not operate where there is negligence and as a result a person dies for a certain cause, but at an earlier rather than a later date. ..." [para. 47, Trial Decision]. Based on this paragraph the defendant refused to pay the plaintiff Fatal Accidents Act s. 8 bereavement damages, notwithstanding the parties had entered into an agreement regarding damages, including an amount for s. 8 bereavement damages, at the outset of the trial. The central question before the Court was whether the trial decision required revision. Shelley J. invited and heard submissions from the parties, and referencing the requirement of Rule 1.2 to apply the Rules to achieve an efficient and cost-effective, fair and just, resolution of claims, invoked Rule 9.13(a), allowing the Court to vary a judgment before it is entered if there is good reason to do so. In concluding that the questioned paragraph of the judgment was incorrect, Shelley J. commented that the defendant's interpretation of s.8 of the Fatal Accidents Act as positing that death from

mechanism X at an earlier date does not cause death if mechanism X would have predictably led to death at a subsequent point would be an absurd result. The defendant's further argument that the Fatal Accidents Act s.8 bereavement claim, if allowed, would result in a windfall to the plaintiff was rejected as unfairly premised on evaluating the trauma of loss of a family member to only economic consequences of that loss. Shelley J. concluded that the application of Rule 9.13(a) to vary the trial judgment was appropriate, as the impugned paragraph is obiter and to maintain the incorrect statement of the law could confuse future judicial analysis and incorrectly bind lower courts.

A second issue before the Court in this post-trial application was the defendants refusal to pay the plaintiff the agreed upon amount for special damages for alternative therapies. The defendant argued it was "plain and obvious" the plaintiff would have pursued the alternative therapies in any event as his condition was terminal and that therefore the plaintiff had no claim to these special damages. Shelley J. was critical of defence counsel referencing that the parties had outlined a limited set of issues at the outset of trial and that the late introduction of the special damages issue was an example of litigation by instalment and an abuse of process, as well as, conduct inconsistent with defence counsel's obligations to the Court. Solicitor – Client costs were ordered against the defendants on the basis of misconduct during legal proceedings. [Shelley J.]

*Paniccia Estate v. Toal* (2012), 71 Alta. L.R. (5<sup>th</sup>) 411, 2012 ABCA 397, [2012] A.J. No. 1395

#### Appeal / Cross-Appeal

The defendant appealed the trial decision finding him negligent in his diagnosis of the plaintiff, and on the grounds that reduced life expectancy was not compensable by the Fatal Accidents Act s. 8 and the alternative treatments sought by the plaintiff were not linked to the defendant's negligence. The defendant's latter two grounds of appeal were the same issues the defendant raised post-trial, which issues were heard and disposed of by the trial judge for the reasons set out in the Corrigendum to Trial Decision. The plaintiff cross-appealed the trial decision that with proper diagnosis by

the defendant the plaintiff's life expectancy would have only been extended by 6 months. Both the appeal and cross-appeal were dismissed. [Cote, J.A.]

**Facial and Skull Fractures, Mild-Moderate Traumatic Brain Injury, Post-Concussion Syndrome, Post-Traumatic Stress Disorder**

*Calahasen v. Northland School Division No. 61*, 2012 Carswell Alta 1752, 2012 ABQB 611, [2012] A.J. No. 1058

The plaintiff confronted a group of individuals vandalizing his property, and was attacked and viciously assaulted by 15-20 people. He sustained significant injuries, including serious facial fractures, resulting in deformities and disfigurement, basal skull fractures, and a mild-moderate traumatic brain injury. He also developed post-concussion syndrome and symptoms of post-traumatic stress disorder, and suffered with depression, irritability and anxiety. Other symptoms and manifestations of his injuries included diplopia (double vision), shortened attention span and short term memory problems due to cognitive impairment, speech difficulties, decreased gross motor coordination, and many other debilitating symptoms and defects. The assault had a significantly negative effect on the plaintiff and his family. He was no longer able to participate in many of the daily activities he previously enjoyed, his sleep was interrupted by frequent nightmares about the attack, and he became reclusive. Finding that the plaintiff had suffered serious physical, emotional, psychological and cognitive injuries and significant compromise to his quality of life, as well as, a serious negative impact on his family, Park J. awarded general damages of \$135,000 and punitive damages of \$35,000. The plaintiff was awarded \$134,824.00 for past loss of income and \$325,262.00 for future loss of income, Park J. finding he was "competitively unemployable". Awards were also made for future cost of care, past housekeeping expenses, and travel expenses for medical attendances. The total award of damages was \$1,084,820.90. [Park J.]

## **Nasal Bone Fracture, Crushed Dislocation of Nasal Septum**

*Black v. Dugo*, 2012 Carswell Alta. 1514, [2012] A.J. No. 930, 2012 ABQB 553

The plaintiff and defendant became involved in a physical altercation outside a bar. The plaintiff had his attention diverted for a moment, when the defendant grabbed a glass beer mug and smashed it into the plaintiff's face. The plaintiff suffered a nasal bone fracture for which he underwent closed reduction surgery on his nose. Post-surgery the plaintiff was left with a culminated crushed dislocation of the nasal septum, a significantly displaced left nasal process and his nose shifted towards the right. Consultation with a specialist in rhinoplasty and facial rejuvenation confirmed further surgery might improve the nasal airflow and appearance but that his nose could not be restored to its pre-assault state. Burrows J. did not accept the plaintiff's claim that he also suffered a neck injury from the assault. The evidence showed that the plaintiff did not complain of neck problems in the immediate period after the assault, had pre-existing neck pain attributable to an accident when he was 13 years old, and only sought treatment for neck pain 16 months after the assault - noted to be related to a recent neck manipulation. General damages of \$14,000 and punitive damages of \$5,000 were awarded. No award for loss of income was made, as the plaintiff had not presented any evidence to calculate and support the claimed loss. [Burrows J.]

## **Fractured Sternum, Minor TMJ Injury, Depression & Anxiety, Aggravation of Prior Injuries**

*Minhas v. Hayden*, 2012 Carswell Alta. 1480, 2012 ABQB, [2012] A.J. No. 898

The plaintiff commenced this action in relation to injuries he suffered in a highway motor vehicle accident in 2003. The plaintiff had also suffered injuries and commenced an action for damages in relation to a motor vehicle accident in 1997 and for injury from chiropractic incident that occurred prior to 2003. The plaintiff was found not to be credible. He magnified his symptoms, which were found to mirror his injury complaints from the 1997 MVA. Clackson J. characterized the plaintiff's

presentation as one of “crumbling skull”. The plaintiff had significant degenerative changes in several areas of his body, which was discovered during injury diagnoses after the 1997 MVA. The plaintiff’s injuries directly attributable to the 2003 MVA were a fractured sternum, minor TMJ injury, and continuing but treatable driving anxiety and depression. The plaintiff also suffered aggravation of hip, spine and knee injuries he sustained in the 1997 motor vehicle accident that resolved within 2 years of the 2003 motor vehicle accident. General damages were assessed at \$60,000, inclusive of the claim for housekeeping expenses, an amount of \$10,000 for future psychiatric treatment, splints and physiotherapy, and special damages in the agreed upon amount of \$9,659, were also awarded. The plaintiff’s inconsistent and questionable work history did not provide sufficient evidence to calculate past or future income loss and consequently those claims were disallowed. [Clackson J.]

**Mild Traumatic Brain Injury, Post – Traumatic Stress Disorder Symptoms, TMJ Dysfunction, Knee Injury, and Chronic Pain**

*Chisholm v. Lindsay* (2012), 65 Alta. L.R. (5<sup>th</sup>) 257, [2012] A.J. No. 120, 2012 ABQB 81

The plaintiff, an energetic and highly motivated young woman was rear-ended while seated unbelted in her vehicle in a parking lot. A total of 3 impacts occurred due to the plaintiff’s vehicle colliding with other parked vehicles after the initial impact. The plaintiff was involved in a second less serious motor vehicle accident 5 years later and had since the accident borne and was raising two children as primary caregiver. These and other post-accident events and issues raised the issue of causation of the plaintiff’s injuries and symptoms, particularly in relation to the plaintiff’s complaints of ongoing cognitive difficulties. Kenney J. rejected the defendant’s assertion that the plaintiff presented with a “crumbling skull” profile and commented that at most she was a “thin skull” plaintiff. The plaintiff suffered a mild traumatic brain injury, exhibited symptoms of post-traumatic stress disorder, an injury to her right knee, TMJ dysfunction, fatigue, cognitive difficulties (attributable to the accident and other stressors) and chronic pain assessed at 10% whole person impairment. Aggravation of the plaintiff’s injuries due to the subsequent motor

vehicle accident resolved within 3 months. General damages were assessed at \$90,000, past and future housekeeping claims assessed at \$4,250 and \$35,000, respectively, future cost of care damages assessed at \$45,000, and out-of-pocket expenses as agreed between the parties were granted. Finding that the plaintiff would have stayed home with her children until school age, the claim for past loss of income was disallowed. Compensation for loss of earning capacity was awarded in the amount of \$125,000, rather than a specific amount for future loss of income. Kenney J. noted the Plaintiff is employable but is less capable as a result of her injuries sustained in the accident. [Kenney J.]

### **Failure to Diagnose, Fatal Accidents Act – Punitive Damages**

*Steinkrauss v. Afridi* (2013), Carswell Alta. 389, [2013] A.J. No. 275, 2013 ABQB 179

On appeal of a Master's decision allowing amendment of the Statement of Claim to substitute Mr. Steinkrauss' name for the deceased's name (Ms. Steinkrauss) and adding an allegation that the defendant altered the medical chart of Ms. Steinkrauss after her diagnosis with breast cancer. Gates J. granted that part of the appeal allowing as an independent cause of action allegations that the defendant altered the medical chart after Ms. Steinkrauss' diagnosis meriting an award of punitive damages. Gates J. found that damages under the Fatal Accidents Act must arise from the injury resulting from the death not the act that caused the death, and thus punitive damages for fraudulent changes to the medical chart would not be appropriate. Further, as the Survival of Actions Act bars the deceased's estate from claiming punitive damages, it would be inconsistent to allow the deceased's dependents to claim punitive damages for conduct affecting the deceased. Amendments to the Statement of Claim of factual allegations relating to the altering of the medical chart were allowed, as these facts were clearly relevant to the defendant's credibility, possibly relevant to whether the defendant met the requisite standard of care, and could be argued in support of a claim for solicitor-client costs. That portion of the prayer for relief in the Amended Statement of Claim claiming relief for punitive damages was struck. [Gates J.]