CITATION: Fiddler v. Chiavetti, 2010 ONCA 210
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COURT OF APPEAL FOR ONTARIO

Goudge, Cronk and LaForme JJ.A.

BETWEEN

Frederick J. Fiddler, Debbie A. Fiddler
and Ashley Fiddler

Respondents

and

Christian l. Chiavetti, Martin Tobler
and Challenger Motor Freight Inc.

Appellants

Todd J. McCarthy and Tara L. Lemke, for the appellants

Siona V. Sullivan, for the respondents

Heard: December 17, 2009

On appeal from the judgment of Justice L.M. Walters of the Superior Court of Justice, sitting with a jury, dated February 20, 2009.

H.S. LaForme J.A.:

[1] At trial, the jury awarded each of the respondents damages pursuant to s. 61 of the *Family Law Act*, R.S.O. 1990, c. F.3 after the death of Amanda Fiddler in an automobile

accident. The appellants contend that certain jury instructions were inadequate and that the damages awarded were excessive.

BACKGROUND

[2] Amanda Fiddler was killed when a transport truck she was riding in struck another transport truck on January 16, 2005. She was not wearing a seatbelt and her body was thrown from the truck, decapitated and dismembered. The respondents Frederick Fiddler and Debbie Fiddler are Amanda Fiddler's parents. The respondent Ashley Fiddler is her sister.

[3] At trial, the appellants admitted fault subject to the defence of contributory negligence. The jury awarded:

- Debbie Fiddler past wage loss, $22,000; future wage loss, $6,000 per year for 12 years; and damages for loss of care, guidance and companionship, $200,000;
- Fred Fiddler loss of care, guidance and companionship, $50,000; and,
- Ashley Fiddler loss of care, guidance and companionship, $25,000.

[4] After the jury verdict, the trial judge awarded Debbie $297,385.31, Frederick $37,982.60, and Ashley $10,852.17. She also awarded $1,457.96 for funeral expenses. The difference between the jury's awards and that of the trial judge arises out of deductions for payments already made and accrued interest. These amounts were calculated and agreed to by counsel for the parties.

Background of the appeal

[5] Counsel for the respondents made statements to the jury which the appellants object to as being inflammatory and designed to appeal to the jury's emotions. Counsel made reference to some of the injuries sustained by Amanda, and the fact that soft tissue was found down the side of the truck. The trial judge refused to provide correcting instructions.

[6] The trial judge found that her instructions were sufficient. Specifically, she held that she had turned the jury's attention to the relevant issues and made clear that compensation was to be awarded only for the losses suffered by the plaintiffs as a result of the accident.

ISSUES

[7] The appellants submit that there were effectively three errors in this trial. The first two, they say, are errors by the trial judge: first, she failed to provide a proper correcting instruction to the jury or order a new trial due to inflammatory opening and closing comments by trial counsel for the respondents; second, she allowed the jury to consider a loss of income claim. The third error, they argue, is that the jury awards for care, guidance and companionship are grossly excessive.

[8] As I will explain, I would allow the appeal on quantum in part and dismiss the remaining grounds. In my view, the $200,000 amount of damages awarded to Debbie Fiddler for care, guidance and companionship is grossly excessive and attracts appellate

intervention. Regarding the balance of the appeal, I conclude that there are no errors that would justify a new trial or that result in a substantial wrong or miscarriage of justice.

ANALYSIS

[9] A new trial in a civil case will only be ordered where the interests of justice plainly require it: *Arland and Arland v. Taylor,* [1955] O.R. 131 (C.A.) at 140-41. In a jury trial, a jury charge, in combination with any recharge, must contain errors, non-direction or misdirection such that it would justify a new trial in the interests of justice or would occasion a substantial wrong or miscarriage of justice: *Brochu v. Pond* (2002), 62 O.R. (3d) 722 (C.A.), at para. 68.

[10] The appellants argue that the cumulative errors in this case - failure to correct inflammatory opening and closing comments by trial counsel and allowing a loss of income claim - resulted in an unreasonable verdict by the jury such that there has been a miscarriage of justice that can only be remedied through setting aside the jury's verdict and ordering a new trial. In other words, they say the test in *Arland* has been met. I disagree.

I. Addresses to the Jury:

[11] It is frequently said that "[a] jury trial is a fight and not an afternoon tea.": *Dale v. Toronto Railway* (1915), 34 O.L.R. 104 (C.A.), at 108. However, as Molloy J. wrote for the majority in *Abdallah v. Snopek* (2008), 89 O.R. (3d) 771 (Div. Ct.) at para. 1, "a jury trial is a 'fight' that must be conducted within rules designed to ensure fair play,

including rules restricting counsel from resorting to inflammatory and irrelevant statements in their addresses to the jury."

[12] This court noted in *Brochu*, at para. 11 that the purpose of opening and closing statements differ, as do the limitations of each.

[13] The purpose of an opening statement is "to outline the story of the case, the issues and the evidence to be adduced to the jury in order that they will be better able to appreciate the significance of the evidence that follows and understand where it fits in with the overall case": Justice D. Ferguson, "The Law Relating to Jury Addresses", 16(2) Advocates' Soc. J. 19 (Summer 1997) at p. 21; see also *Brochu* at para. 12, citing J. Sopinka et al., *The Trial of an Action*, 2nd ed. (Toronto: Butterworths, 1998) at p. 74.

[14] The purpose of a closing statement is to persuade the trier of fact and "to present each party's case clearly and in a way that is of help to the court in the performance of its duty to decide the issues before it": see Linda S. Abrams and Kevin P. McGuinness, *Canadian Civil Procedure Law* (Markham: LexisNexis, 2008) at 932.

(a) opening statements:

[15] In *Burke v. Behan* (2004), 6 C.P.C. (6th) 207 (Ont. S.C.J.), at para. 7, Quinn J. set out some examples of what an opening statement should not include. While not exhaustive, I believe some of his examples are worth repeating:

- Counsel may not assert personal opinions on the facts or the law;

- Counsel should not make any comments that are inflammatory; i.e. they appeal to the emotions of the jurors and invite prohibited reasoning;
- Inadmissible or irrelevant evidence may not be mentioned; and,
- Counsel cannot argue his or her case.

[16] The reason for the exclusion of such comments by counsel is rooted in the purpose of an opening statement. As Cronk J.A. observed in *Brochu*, at para. 16:

> … [C]omments to a jury which impede the objective consideration of the evidence by the jurors, and which encourage assessment based on emotion or irrelevant considerations, are objectionable at any time. Such comments are "inflammatory", in the sense that they appeal to the emotions of the jurors and invite prohibited reasoning. If left unchecked, inflammatory comments can undermine both the appearance and the reality of trial fairness. [Citations omitted.]

[17] Trial judges have a wide discretion to control opening addresses. Where breaches occur, the trial judge may caution the jury, strike the jury and conduct the trial by judge alone, or declare a mistrial: *Brochu*, at para. 24.

[18] Generally courts are to be guided by the principle that clear improprieties in an opening or closing address by counsel are to be identified for the jury and coupled with an unambiguous direction that they are to be disregarded as irrelevant. In this way, the jury will know what statements by counsel are wrong or inappropriate and will be left in no doubt about the way in which it is to approach its task: *Landolfi v. Fargione* (2006), 79 O.R. (3d) 767 (C.A.), at paras. 106-07. This need not involve an admonishment of

counsel, although, in some cases, that may be appropriate in the exercise of the trial judge's discretion.

The impugned comments:

[19] The appellants contend that the respondents' trial counsel, in her opening remarks to the jury, erred in two specific ways. First, they say that she made explicit reference to the tragic circumstances of the accident in a manner that was inflammatory. Second, they argue that she misrepresented the purpose of compensatory damages.

[20] At the outset of the trial, and before the opening jury addresses of either counsel, the trial judge provided the jury with this clear instruction:

> You must not allow yourselves to be governed by sympathy or prejudice. You should decide this case fairly and impartially on the evidence presented to you in this courtroom.

[21] The trial judge next explained to the jury that the respondents' counsel would make the first opening statement "about what she says the case is about". She then went on to say:

> What she says is not evidence and if what she says to you is not borne out by the evidence or is contradicted by the evidence given by the witnesses in the witness box, you have to erase from your minds what she says. The sole purpose of this opening is to enable you to better follow the evidence as it is developed.

[22] The opening remarks by the trial judge and both opening addresses by counsel to the jury were completed by noon on the first day of trial. The afternoon was taken up

with matters in the absence of the jury. In the morning following the opening addresses and prior to hearing any evidence, the trial judge again reminded the jury as to its proper responsibility and approach:

> [Y]esterday I told you when counsel spoke with you those are their remarks. What they said to you is not evidence and so you must again, pay attention to the evidence that you hear from the witnesses or the exhibits that are filed, not what counsel said to you. That is their anticipation of what they hope the evidence is going to be but that is not the evidence.

[23] Thus, from the very beginning of the trial, the jurors were instructed that the remarks of counsel were not evidence and that their decision was to be based solely on the evidence. And, as I will explain, these instructions by the trial judge in reminding the jury of its duty were sufficient in this case and no further correcting instruction was necessary.

(i) Circumstances of the accident

[24] In her opening remarks, respondents' counsel made the following comments:

> [The police reconstruction expert] … will tell you that Amanda's hair was wedged in the frame where the window had been and there was soft tissue of Amanda down the outside of the passenger side door of the Volvo cab.
>
> Dr. Green will tell you that in his opinion, the force of the collision was such that Amanda's head was pushed out the smashed passenger window and hit hard by the slamming of the two transport trucks into each other. She died while seated in the transport truck. She was dead before her body was thrown up and out of the Volvo transport truck and caught under the wheels of the transport truck.

[25] We were advised that defence counsel objected to the opening, although there is no transcript of his submissions and no ruling by the trial judge that can be found in the record. Nevertheless, 15 minutes later defence counsel delivered his opening address to the jury, which included the following:

> … You will have an issue to determine as to whether or not Miss Fiddler's failure to wear a seatbelt contributed to her death. The evidence will show you that she was ejected from the vehicle and she died. The physical evidence will show you that she came into contact outside of the truck and ended up, unfortunately, deceased on the roadway.
>
> …
>
> … [An O.P.P. engineer's evidence] will explain to you that it is impossible for the seatbelted individual to get outside the vehicle the way Amanda Fiddler did. The O.P.P. will tell you that Amanda was partially ejected from the vehicle. She was already partially outside the vehicle at the time that she came in contact.

[26] On appeal – and presumably with the same arguments made at trial – the appellants contend that the opening by plaintiffs' counsel was improper in that it was inflammatory and designed to appeal to the jury's emotions. They say that the trial judge did not provide a correcting instruction to the jury, as requested by the appellants. As I have said, beyond the reminder the trial judge did give, no such correcting instruction was necessary.

[27] Read in context, the statements clearly demonstrate that counsel was merely setting out, as she was entitled to do, anticipated evidence that would contradict a finding

of contributory negligence. She correctly surmised that defence counsel would lead evidence of contributory negligence, arguing that Amanda had contributed to her own death by not wearing a seatbelt. To counter this argument, counsel for the plaintiffs led evidence to demonstrate that Amanda died before being ejected from the vehicle. If proven, this would make the question of whether Amanda was wearing a seatbelt irrelevant. In making this argument, counsel was not inviting the jury to decide the case based on emotion. Any emotional effect was a function of the unfortunate facts in this case and not the manner in which counsel addressed the jury.

[28] This trial was about a collision that caused Amanda Fiddler's body to be dismembered and violently destroyed. What happened to her body during the collision was horrific and an effort was made to limit the details that the jury would hear. At the same time, some of this evidence was necessary because it was crucial to address the issue of contributory negligence.

[29] The trial judge, in my view, properly exercised her discretion to control the opening addresses. She addressed counsel's concern before any evidence was called, and the instruction given was clear and thorough. In all the circumstances, this was an appropriate response to remedy any prejudice that may have arisen from the opening statement. I would dismiss this ground of appeal.

(ii) Purpose of compensatory damages

[30] In addition, respondents' trial counsel is alleged to have misrepresented the purpose of compensatory damages in the following passage:

> You and you alone have the power to give Debbie, Fred and Ashley Fiddler the treatment and access to treatment that you determine they require. You and you alone have the power to decide what wage loss Debbie Fiddler, Amanda's mother has suffered.
>
> …
>
> Finally, you and you alone will determine an amount in dollars for the loss Debbie, Fred and Ashley have suffered.

[31] The appellants contend that these statements were improper because they invited the jury to award damages to the plaintiffs for their pain and suffering instead of compensating for the losses they had incurred.

[32] I disagree. As I read this, counsel was, as a strategic matter, anticipating the obvious question in the jurors' minds: Why did her clients choose to self-medicate with alcohol and drugs instead of attending treatment and thus mitigating their damages?[1] This was a live issue at trial because of the defence strategy of minimizing the damages suffered by emphasizing Debbie and Fred Fiddlers' drug and alcohol abuse.

[1] Mitigation was a live issue, at least with respect to Debbie Fiddler. The trial judge notes in her charge: "I must also advise you that the plaintiff is under an obligation to mitigate or take reasonable steps to minimize her loss. That is, she must have made a reasonable effort to find work that she was capable of doing and must take reasonable steps to improve her medical condition."

[33] I read the above comments as part of Debbie and Fred Fiddlers' response to this defence argument. Counsel sought to emphasize that although the plaintiffs did struggle with alcohol and drug abuse, and although their family situation was often strained, the death of their daughter nonetheless caused them significant damages, both in lost income and care, guidance and companionship, for which they deserved to be compensated. As counsel explains elsewhere in her opening, "[Debbie] needs counselling, she needs transportation to get to counselling and she needs help coping"; "Fred doesn't want counselling. He hasn't been to a doctor in 30 years and prides himself on his manly strength. ... Fred needs help to overcome his loss and tremendous guilt"; and Ashley "wants counselling but she cannot afford it."

[34] The trial judge determined that no prejudice arose from these statements. This conclusion was reasonable and, in my view, does not warrant appellate interference. This is particularly so in light of the trial judge's comments, cited above, cautioning the jury not to accept statements from counsel for either side as evidence, but rather to take them as statements of what counsel hoped the evidence would demonstrate.

(b) Closing statements:

[35] Considerable latitude is afforded counsel concerning the permissible scope of a closing jury address in a civil trial, "even to extravagant declaration." *Landolfi*, at para. 76, citing *Dale*, at pp. 107-08. Counsel has the right to make an impassioned address on

behalf of his or her client and, in some cases, the duty to so do, provided it "does not offend in other respects." *Idem*.

[36] Thus, although counsel is given significant latitude to make their case as they see fit, there are also important limits on the bounds of a closing jury address. For example, counsel's personal opinions, beliefs or feelings regarding the merits of a case are to be excluded. Additionally, comments which impede the objective consideration of the evidence by the jurors, and which encourage assessment based on emotion or irrelevant considerations are objectionable. Such comments are "inflammatory", because they appeal to the emotions of the jurors and invite prohibited reasoning: *Brochu*, at para. 16.

[37] As with opening addresses by counsel, the trial judge has three options when faced with impermissible closing statements. The trial judge, in his or her discretion, may caution the jury, strike the jury and conduct the trial by judge alone, or declare a mistrial.

The impugned comments:

[38] After commencing her closing address, counsel for the respondents submitted to the jury that, "We are in this courtroom because we have the chance to right a wrong that was done to Amanda May Fiddler on January 16th, 2005". Sprinkled throughout counsel's closing address were these additional comments:

- I believe Debbie Fiddler has sustained the highest loss of care, guidance and companionship of any case I have ever read, or any person I have ever met.

- We are here to right a wrong ... You and you alone have the ability to right a wrong that has been done to these people.

- These people have been subjected to having the most intimate details of their life put out to hang on a line. They have been embarrassed, they have been humiliated and they have been hurt by this process.

- Please also say to them that all human beings are valued equally. The death of a poor child is not valued differently than the death of a rich child.

[39] Each of these portions of the respondents' trial counsel's remarks to the jury was objected to by defence counsel. Counsel argued that the remarks were improper expressions of counsel's personal views and improper appeals to emotions of the jury and amounted to an invitation to the jury to consider matters irrelevant to its task.

[40] In response to the objections, the trial judge ruled that the personal comments were improper but would largely be covered in her charge to the jury, namely: (i) the personal remarks were directed at "loss of care, guidance and companionship" and her charge would clear that up; and (ii) the "chance to right a wrong" would be covered in her charge with, "we are not compensating for Amanda's death".

[41] Before reviewing the impugned comments, I would note that the plaintiffs' close immediately followed that of defence counsel and was clearly intended to address the defence theory and strategy and references to it made to the jury. The theory and strategy

of the defence consisted of an all out attack on the character, intelligence and honesty of each of the claimants. Defence counsel submitted to the jury that the evidence revealed that each of the respondents was variously lazy, deceitful, a drug user and that together they formed a dysfunctional family.

[42] Regarding Amanda's relationship with her family, defence counsel submitted that the evidence revealed it to be very troubled and strained. Defence counsel emphasized the evidence that he submitted demonstrated that she was incapable of providing care, guidance and companionship to her parents or sister. For example, he said:

> She had an inability to control her temper … She had outbursts, violent outbursts. She had difficulty with the law. She required the police to intervene at home … Ashley indicated she felt threatened. …
>
> …
>
> [Amanda] had a significant disability, attention deficit hyperactive disorder which [was] described as one of the worst behavioural issues she had come across.

[43] Defence counsel thoroughly reviewed the evidence in connection with each issue the jury was to decide in detail and repeatedly submitted that the evidence did not support the plaintiffs' claims. He told the jury that the evidence in the trial was "clear proof that the plaintiffs' claims that the marriage broke down as a result of [Amanda's] death, have no basis in fact or what actually occurred".

[44] It is in this context that I have reviewed the impugned comments and the trial judge's response and remedy. Once again, as I will explain, I am satisfied that in all the circumstances no miscarriage of justice occurred.

(i) Counsel's opinion

[45] The belief expressed by counsel for the plaintiffs that "Debbie Fiddler has sustained the highest loss of care, guidance and companionship of any case I have ever read, or any person I have ever met" is problematic and contrary to the test set out by this court in *Brochu*.

[46] Counsel's expression of her personal opinion and knowledge regarding the magnitude of Mrs. Fiddler's loss of guidance, care and companionship damages was impermissible and inappropriate. Counsel's personal opinions, beliefs or feelings about the merits of a case have no place in either an opening or a closing jury address: *Brochu*, at para. 15; *Landolfi*, at para 78. Nevertheless, the trial judge was once again alive to this issue. During submissions on her jury instructions, she stated:

> The other thing that I was concerned about is in terms of [counsel] making a comment about her personal view. That is absolutely inappropriate in a jury address. You do not make any comments about your personal view. You indicated that this was the greatest loss that you had ever seen and I do not think there is room for that in a jury address. But having said that, in the course of the charge, many times, I say certain things are not compensable and they are not to be swayed by emotion. The issue is the loss of care, guidance and companionship. I think that is made very clear

> throughout my charge. So, I think that will take care of most of your concerns.

[47] The following passage was included in the trial judge's instructions to the jury:

> You must discard any notions or opinions of your own about the law or the views which counsel may have expressed about the law insofar as those views contradict what I say to you concerning the law applicable in this case.

[48] The trial judge thus not only turned her mind to the issue, but gave the jury explicit instructions to disregard the impugned comment. In my view, this was an adequate response to avoid any substantial wrong or miscarriage of justice that may have resulted from the comments. It was not necessary for the trial judge to go further and expressly admonish counsel. That was for the trial judge to determine. She was best placed to evaluate the atmosphere in the courtroom and what was needed to ensure that the jury understood its task and how that could best be achieved in a way that was fair to the parties. Her judgment in this respect deserves deference in this court.

(ii) Inflammatory comments

[49] The appellants also object to three comments made by counsel for the plaintiffs that they submit were inflammatory and invited the jury to decide the case based on emotion and not a reasoned analysis of the evidence. Specifically, counsel for the plaintiffs told the jury that they were there to right a wrong, noted that the plaintiffs had suffered a great deal of humiliation during the trial process, and stated that the death of a poor child was not valued any differently than that of a rich child.

[50] Liability was admitted in this case. Accordingly, the jury's only task was to determine the appropriate quantum of damages for the respondents' loss of Amanda's care, guidance and companionship and whether those damages should be reduced on account of Amanda's alleged contributory negligence due to her failure to wear a seatbelt. The suggestion that the jury's task was "to right a wrong" had the potential to mischaracterize the nature of the jury's duty and, in effect, improperly urge the jury to punish the appellants.

[51] The trial judge was alive to this possibility, as the following exchange with defence counsel illustrates:

> Mr. Evangelista: Well, I think specific reference at least has to be...
>
> The Court: The chance to right the wrong?
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> Mr. Evangelista: Absolutely.
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> The Court: All right. ... I think that is covered. We are not compensating for Amanda's death. I think that is made very clear in my charge.

[52] In her charge, the trial judge explicitly instructs the jury, "You are not righting a wrong." This was a proper exercise of her discretion and was, in my view, sufficient to remedy any prejudice caused by the comments.

[53] With respect to the remaining comments: inviting the jury to compensate the plaintiffs for the anguish suffered as a result of the trial process; a plea to the jury that

they render a verdict of which they were proud; and to "value" Amanda's life without regard to her financial circumstances, in my view they collectively go beyond the ambit of permissible advocacy. They had the potential to mislead the jury, for example by inviting them to compensate the plaintiffs for the anguish suffered as a result of the trial process.

[54] I am satisfied, however, that the trial judge's instructions would have corrected these errors and ensured that the verdict and damages were decided in accordance with the appropriate legal principles. These directions included the following comments:

- You must set aside all feelings of sympathy, prejudice or passion. Justice must be administered fairly and impartially.

- [Y]ou must not consider, nor should you make any allowance in your award to compensate any of the plaintiffs for the grief, sorrow or mental anguish suffered as a result of Amanda's death. Our law does not permit you to compensate the parties for grief, sorrow or mental anguish.

- [S]ympathy or prejudice for or against the plaintiff, or for or against the defendant must not affect your verdict.

- Again, you must not and cannot compensate Debbie, Fred or Ashley for the medical problems they suffer from, nor from the sorrow, anguish, anger, upset, guilt or any of the other emotions they suffer from the death of Amanda. There is no question that these family members suffered enormous grief and mental anguish by Amanda's death but these types of losses are not compensable by our law. Instead, what you are attempting to do is compensate these individuals for the loss of care, guidance and companionship they have, or will likely suffer by reason of Amanda's death. This assessment must be made in as objective and unemotional a manner as possible. You are not righting a wrong. You are not compensating the parents for the death of their daughter. You are not compensating the hurt they experienced. You are in no way attempting to put a value on Amanda's life. These things cannot be compensated in law. So, again I repeat, that what you are attempting to

> compensate for is the loss of care, guidance and companionship that they have suffered or will likely suffer by reason of Amanda's death.

[55] It is true that the trial judge did not specifically draw the jury's attention to the offending closing comments by the respondents' counsel, as recommended by this court in *Landolfi*, at para. 106. That is, the jury was not explicitly told that counsel's impugned remarks were wrong and inappropriate and, hence, were to be ignored. This was probably a case in which a brief and unambiguous caution in this regard should have been given.

[56] That said, the jury in this case was clearly, and repeatedly, told to base its findings on the evidence at trial, not on the comments of counsel or on those of the trial judge on the evidence. Further, and significantly, the trial judge's instructions directly responded, in blunt terms, to the most serious of the impugned comments by counsel. I am satisfied that, based on her instructions, the jury could have been left in no uncertainty that its assessment of the issues in the case was to be performed objectively, impartially and without regard to emotions.

[57] For the above reasons, I am not persuaded that "some substantial wrong or miscarriage of justice has occurred" as required before a new trial is warranted: see *Arland*, at pp. 140-141; *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 134(6).

II. Loss of Income Claim:

[58] Debbie Fiddler's claim is for direct financial loss resulting from Amanda's death consisting of loss of earnings or income because of her inability to work; this is distinct from the usual claim for loss of financial support under s. 61(1) of the *FLA*.

[59] The evidence adduced by Debbie Fiddler at trial consisted of her own testimony and that of several other lay witnesses. Each of them testified as to Debbie Fiddler's work history and earnings. None of their testimony in this regard was confirmed through records or other documentation. Both defence counsel and the trial judge reviewed this evidence in some detail in their closing remarks to the jury and told the jury of its frailties.

[60] Despite the lack of actuarial evidence, the jury awarded Debbie Fiddler $22,000 for past wage loss; $72,000 for future wage loss; and $200,000 for loss of guidance, care and companionship.

[61] The appellants submit that it was an error in law to allow the jury to consider the loss of income claim and argue that the verdict on this issue should have been directed. The error, they say, is not in her right to make the claim; rather, it is in her failure to provide expert evidence as to the necessary aspect of a future loss of income claim including contingencies such as working life expectancy or her ability to work in the future. They failed therefore to provide any basis on which a finding of a loss of income claim could be advanced.

[62] Again I disagree.

(i) Requirement for actuarial evidence

[63] There is no rule governing when actuarial evidence is required to establish a loss of income claim. For example, in *MacNeil Estate v. Gillis* (1995), 138 N.S.R. (2d) 1 (C.A.), the court held that actuarial calculations are necessary, whereas in *McKee v. Gergely*, [1986] B.C.J. No. 854 (C.A.), the court rejected the submission that the lack of actuarial evidence was fatal to a claim for future loss of earning capacity.

[64] There is no question that actuarial evidence is valuable in cases involving complex calculations, such as claims for future lost income or medical care which must be discounted for various contingencies. Nonetheless, the jurisprudence suggests that there is no requirement *per se* that a plaintiff obtain an actuarial assessment in every such case. Indeed, one could easily conceive of a situation in which the plaintiff did not have the resources to retain an expert, but had other persuasive documentary or testimonial evidence at their disposal. As a practical matter, I agree with the view expressed by J. Barry in "Actuarial evidence and the role of the actuary in personal injury actions" (Canada Bar Association: 1989) at p.6 and 14-15:

> A practitioner should give consideration to retaining an actuary in cases involving personal injuries of a serious nature; in other words, whenever a plaintiff has suffered physical injuries where there has been or will likely be some fairly serious permanent impairment which will affect either earning capacity or will require the plaintiff to purchase replacement services which they ordinarily did not need

> before the injury. Obviously a practitioner will have to use his or her own judgment vis-a-vis the seriousness of the impairment and the impact it will have on his or her client.
>
> Obviously, in cases of total or near total impairment or incapacity, the use of actuarial evidence will be crucial. However, in cases where the physical impairment is only partial, the decision of whether or not to retain an actuary becomes difficult.
>
> …
>
> As with personal injury claims, an actuary may not be necessary in all fatal accident claims. It is my practice, however, to always retain an actuary in those cases in which the deceased was an income earner and survived by dependents. ... For other situations, a practitioner will have to determine on the facts whether or not an actuary is necessary.

[65] Thus, Debbie Fiddler's failure to provide expert evidence in connection with her wage loss claim is not fatal. While it was open to Ms. Fiddler to adduce expert evidence, she chose to prove her loss of income without doing so and left it to the jury to make its own calculations. Although it is customary that expert evidence is called in this regard, I can find no reason to conclude that it is a legal requirement to do so. I would adopt the position expressed by Ferguson J. in *Buksa v. Brunskill*, [1999] O.J. No. 3401 (S.C.J.) at para. 5:

> The usual instruction to the jury is to suggest that if it finds that there will be a future loss of income it should determine the average annual loss and then consider the present value and then consider the various contingencies. These calculations are customarily explained by an expert witness but in my view the jury must make its own calculations whether or not there is expert evidence.

(ii) Directed verdict

[66] Regardless, the appellants argue that the trial judge should have directed the jury to disregard this head of damages. The test for a directed verdict in the civil context is, "whether, assuming the evidence to be true, and adding to the direct proof all such inferences of fact as in the exercise of a reasonable intelligence the jury would be warranted in drawing from it, there is sufficient [evidence] to support the issue": *Prudential Securities Credit Corp., LLC v. Cobrand Foods Ltd.*, [2007] O.J. No. 2297 (C.A.), at paras. 35-36, quoting *Parfitt v. Lawless* (1872), 41 L.J.P. and M. 68 at 71-72.

[67] The evidence adduced by Debbie Fiddler, while far from optimal, does constitute "evidence to go to the jury" that, if true, would be "sufficient to support the issue" of her pre- and post-accident earning capacity. Accordingly, I conclude that this ground of appeal must fail.

III. Loss of Guidance, Care and Companionship

[68] The appellants argue that the jury's awards for damages for loss of care, guidance and companionship in this case were grossly excessive and out of all proportion to what is permitted by law having regard to the evidence that was presented at trial. Indeed, they say that the amounts of the awards are so excessive as to constitute a miscarriage of justice and as such this court should exercise its discretion to set aside the jury's awards.

[69] As a further argument, the appellants assert that had the jury been provided with the proper range of damages for *FLA* claims in a fatal accident case, then it would not and could not have come to the awards it did based on the evidence presented at trial.

(i) Requirement to give range of damages

[70] The appellants argue that the trial judge erred in failing to provide the jury with a range of appropriate damages. In doing so they rely on s. 118 of the *CJA*, which states, "In an action for damages for personal injury, the court may give guidance to the jury on the amount of damages and the parties may make submissions to the jury on the amount of damages."

[71] The language of s. 118 is permissive rather than mandatory. Indeed, s. 118 is the product of common law reform; the traditional rule prevented a trial judge from giving such guidance: See *Foreman v. Foster* (2001), 196 D.L.R. (4th) 11 (B.C.C.A.) *per* Lambert J.A. at paras. 29-76 for a detailed discussion of the traditional rule, which still applies in some Canadian provinces.

[72] Accordingly, there is no general requirement that the trial judge give any particular guidance on damages; the appropriate instruction will depend on the circumstances and requirements of each individual case. As noted by Cara L. Brown in *Damages: Estimating Pecuniary Loss*, looseleaf (Aurora: Canada Law Book, 2004) at p. 13-50, "In a complex case, it will be an error not to summarize succinctly the evidence on

damages and to give explicit directions about essential findings of fact that must be made before damages can be assessed."

[73] In this case, the trial judge instructed the jury as follows:

> The position of the defendants is that the reality of Amanda's learning disability and personality were such that she could not really provide care and guidance to her parents, however, he conceded that Debbie has lost the companionship of Amanda and he has submitted that an appropriate award for Debbie's loss of companionship would be in the range of $40,000.00 to $50,000.00. [Counsel for the plaintiff] has not suggested a possible range other than to say that the defendants' numbers are unreasonably low. ... If you accepted the position advanced by the defendant, then the numbers he suggested might very well be reasonable. If, however, you accept the position as advanced by the plaintiff, then the number would be higher than that. But again, it is up to you to decide.

[74] The trial judge then reviewed in some detail how the calculation should be undertaken. There was nothing particularly complex about the evidence relating to guidance, care and companionship in this case. Juries frequently deal with the sort of testimony given by Debbie, Fred and Ashley. Accordingly, the trial judge was not required in this case to give any further guidance as to the appropriate range of damages.

[75] That said, although the trial judge did not err in declining to set out the upper limit of this head of damages in her instructions to the jury, in my view it may have been helpful to do so. The defence submissions on damages, combined with the judge's

instructions, established a lower limit for damages. As will be noted below, the jury clearly rejected this lower limit and decided to compensate on the high end of the permissible range. However, they had no instructions as to where this range might be, and settled on an amount that nearly doubled it. Although the trial judge was correct in instructing the jury that it was up to them to decide the quantum of damages, this may have been a case where it was appropriate to exercise the discretion set out in s. 118 and provide some guidance as to the upper range of such damages, thus aiding the jury in coming to this decision.

(ii) Appropriateness of amount of damages

[76] The "cap" established in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 for non-pecuniary general damages in personal injury cases does not apply to damages for loss of guidance, care and companionship: *To v. Toronto Board of Education* (2001), 55 O.R. (3d) 641 (C.A.), at paras. 28-30. Given the absence of a national guideline, the appropriate amount of such damage awards must be based on a range derived from an examination of like claims in like circumstances. That is, as Osborne A.C.J.O. expressed it in *To*, at para. 30:

> [E]ach case will be given separate consideration to measure what Krever J. viewed as "immeasurable" and "incalculable" in *Gervais, supra*, at p. 201. Judges and juries are left to do the best they can in each case where the assessment of damages for guidance, care and companionship is required.

[77] At the same time, in the absence of an error in the charge, “the jury's assessment must be so inordinately high (or low) as to constitute a wholly erroneous estimate of the guidance, care and companionship loss”: *To*, at para. 31. Each case must be considered in light of the evidence and circumstances and in light of the particular family relationships involved in that case: see *To*, at para. 31. An appellate court will not interfere merely because it would have come to a different conclusion.

[78] In *To*, the assessment of $100,000 for each of the parents of the deceased was viewed as being at the high end of an accepted range for guidance, care and companionship damages. That was in 2001 and I accept that as the high end amount. Thus, even with the deferential standard in mind, it is my view that the $200,000 awarded to Debbie Fiddler, some 8 years later, is outside the range and warrants appellate intervention.

[79] Osborne A.C.J.O. in *To* at para. 37 provided a method by which an amount that reflected the range of damages for guidance, care and companionship in past years could be adjusted for a current value. I would adopt this approach and allow that the jury would have awarded Debbie Fiddler damages at the high end of the range.

[80] In February 1992, (the month of the *To* accident) the consumer price index for Canada was at 83.3. In January 2005, the month of the deceased’s death, the consumer price index was at 105.3. Given that increase in the consumer price index, therefore, the damages in January 2005 equivalent to $100,000 in February 1992 are roughly $125,000.

That is, it would take approximately $125,000 in January 2005 dollars to purchase the same basket of goods purchased for $100,000 in 1992. I therefore find that the upper end of the acceptable range of damages in this case would be limited to approximately $125,000.

[81] It is clear that the jury was moved to award each of the respondents an amount that is at the mid to high end of the range. I do not wish to interfere or take issue with the jury's verdict in this respect. Consequently, I would not interfere with any of the awards given to the respondents save and except the $200,000 amount awarded to Debbie Fiddler. I do so because of the high end amount established by this court in *To*.

[82] In my view, an award that is effectively two times that of the high end of the permissible range is grossly excessive and out of all proportion to what is permitted having regard to the evidence that was presented at trial. Indeed, there was no evidence that would take this case out of the general range of guidance, care and companionship damages that have been awarded in cases involving the death of someone in circumstances similar to those of Amanda Fiddler. Appellate intervention, therefore, is appropriate.

[83] Pursuant to s. 119 of the *Courts of Justice Act*, this court has authority to vary the assessment in issue. Recognizing that the jury was moved to be generous, I would vary the assessment of Debbie Fiddler's guidance, care and companionship damages by reducing it from $200,000 to $125,000.

DISPOSITION

[84] For these reasons, I would allow the appeal in part, and direct that the assessment of guidance, care and companionship damages of Debbie Fiddler be reduced from $200,000 to $125,000. I would dismiss all the other grounds of appeal.

COSTS

[85] Success was divided. However, the respondents have achieved the greater degree of success. In the circumstances, I would grant the respondents 75% of their costs in responding to the appeal. I would fix that 75% portion of their costs in the amount of $15,000, inclusive of disbursements and GST.

RELEASED:

"MAR 19 2010"

"SG" "H.S. LaForme J.A."
"I agree S. T. Goudge J.A."
"I agree E.A. Cronk J.A."