Court of Appeal File No: C66803
Court File Nos. 35-2395487 and 35-2395481

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF NOTICES OF INTENTION TO MAKE A PROPOSAL OF 1732427 ONTARIO INC. AND 1787930 ONTARIO INC. BOTH OF THE CITY OF ST. THOMAS, IN THE PROVINCE OF ONTARIO

APPELLANT'S BOOK OF AUTHORITIES

MILLER THOMSON LLP
One London Place
255 Queens Avenue, Suite 2010
London, ON Canada N6A 5R8

Sherry A. Kettle, LSO #53561B
Tel: 519.931.3534
Fax: 519.858.8511
Email: skettle@millerthomson.com

Lawyers for the Appellant, Transit Petroleum Inc.

TO: **FELDMAN LAWYERS**
390 Bay Street
Suite 1402
Toronto, ON M5H 2Y2

Paul Neil Feldman LSO# 29469B
Email: paul@feldmanlawyers.ca

Tel: 416.601.6821
Fax: 416.601.2272

Lawyers for the Respondent, 1787930 Ontario Inc.

AND TO: **MNP LTD.**
111 Richmond Street West
Suite 300
Toronto, ON M5H 2G4

Sheldon Title
Tel: 416.323.5240

INDEX

Court of Appeal File No: C66803
Court File Nos. 35-2395487 and 35-2395481

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF NOTICES OF INTENTION TO MAKE A PROPOSAL OF 1732427 ONTARIO INC. AND 1787930 ONTARIO INC. BOTH OF THE CITY OF ST. THOMAS, IN THE PROVINCE OF ONTARIO

APPELLANT'S BOOK OF AUTHORITIES

TABLE OF CONTENTS

TAB
“1”

2004 CarswellOnt 2521
Ontario Court of Appeal

Boucher v. Public Accountants Council (Ontario)

2004 CarswellOnt 2521, [2004] O.J. No. 2634, 132 A.C.W.S. (3d) 15, 188 O.A.C. 201, 48 C.P.C. (5th) 56, 71 O.R. (3d) 291

SALLY ANNE BOUCHER, RANDOLPH BROWN, PAUL TURNER, DAVID VENN (Applicants / Appellants) and PUBLIC ACCOUNTANTS COUNCIL FOR THE PROVINCE OF ONTARIO, DOUGLAS J. WHYTE, ALASTAIR SKINNER, GILBERT H. RIOU, RALPH T. NEVILLE, RONALD W. MIKULA, BARRY G. BLAY, DAVID H. ATKINS, JENNIFER L. FISHER, JERALD D. WHELAN, PRISCILLA M. RANDOLPH, BRYAN D. MEYER, THOMAS A. HARDS and THE INSTITUTE OF CHARTERED ACCOUNTANTS OF ONTARIO (Respondents / Respondents in Appeal)

Abella, Armstrong, Cronk JJ.A.

Heard: December 15, 2003
Judgment: June 22, 2004
Docket: CA C40044

Proceedings: varying *Boucher v. Public Accountants Council (Ontario)* (2002), 2002 CarswellOnt 4142, 166 O.A.C. 281, 28 C.P.C. (5th) 25 (Ont. Div. Ct.)

Counsel: David E. Wires for Appellants
Michael D. Lipton, Q.C. for Public Accountants Council for the Province of Ontario
Cynthia Amsterdam for Douglas J. Whyte, Alastair Skinner, Gilbert H. Riou, Ralph T. Neville, Ronald W. Mikula, Barry G. Blay, David H. Atkins, Jennifer L. Fisher, Jerald D. Whelan, Priscilla M. Randolph, Bryan D. Meyer, Thomas A. Hards
Robert D. Peck for Institute of Chartered Accountants of Ontario

Subject: Civil Practice and Procedure; Family

APPEAL from judgment reported at *Boucher v. Public Accountants Council (Ontario)* (2002), 2002 CarswellOnt 4142, 166 O.A.C. 281, 28 C.P.C. (5th) 25 (Ont. Div. Ct.), awarding costs of abandoned application for judicial review.

***Armstrong J.A.*:**

1 This case is another chapter in the long simmering dispute between the Certified General Accountants and the Chartered Accountants concerning the practice of public accounting in Ontario. At issue in this litigation was the control of the licensing granting authority, the Public Accountants Council for the Province of Ontario, by a majority of members who were Chartered Accountants.

2 The appellants, who are Certified General Accountants, brought an application for judicial review against the Public Accountants Council. The appellants alleged reasonable apprehension of bias against the Council in its review of applications for licences to practise public accounting by members of the Certified General Accountants Association of Ontario.

3 Before the appellants' application was heard it was abandoned. The respondents then moved to have their costs fixed by a judge of the Divisional Court on a substantial indemnity basis. After a two-day hearing, Epstein J. fixed the respondents' costs, on a partial indemnity basis, at $187,682.51 inclusive of disbursements and Goods and Services Tax. The appellants now appeal from this costs order pursuant to leave granted by this court on May 22, 2003.

Background of the Proceedings

4 The judicial review application had its genesis in the prior proceeding of *Boucher v. Public Accountants Council (Ontario)*, [2000] O.J. No. 3126 (Ont. S.C.J.) before Lax J. of the Superior Court. In the earlier proceeding, the appellants and two other parties sought to have the court appoint disinterested persons to hear the appellants' applications for public accounting licences. The appellants claimed that the court could do so under the *Public Officers Act*, R.S.O. 1990, c. P.45. The proceeding was stayed by Lax J. on the basis that the court lacked jurisdiction under the *Public Officers Act* to make the order requested.

5 In granting the stay, Lax J. said in *obiter dicta*:

> The particulars of bias described by the applicants are sympathetic, compelling and disturbing. They are offensive to fundamental notions of fairness. They invoke a primordial judicial instinct to intervene and second-guess what appears to be a flawed legislative scheme and what is a flawed process.
>
> Professional discipline is not in issue here, but professional licensure by an apparently biased tribunal is. Although the Court lacks jurisdiction to grant the proposed remedy under section 16 of the *Public Officers Act*, there may be other creative ways for the applicants to have their concerns addressed.

6 Lax J. suggested that the appellants had other specific courses of action available to them which they could pursue.

7 The appellants then commenced their judicial review application, naming as parties the same respondents with the addition of the Institute of Chartered Accountants of Ontario who had been an intervenor before Lax J. In their application, the appellants sought a broad range of remedies, including a declaration that the Public Accountants Council is institutionally biased in its granting of licences to practise public accounting. Central to the appellant's allegations of reasonable apprehension of bias is the fact that the *Public Accountancy Act*, R.S.O. 1990, c. P. 37 authorizes the Institute of Chartered Accountants of Ontario to appoint 12 of the 15 members of Council.

8 At the request of the appellants, Lax J. made an order that the materials used in the application before her should be filed in the judicial review application in the Divisional Court. However, this judicial review application was not one of the courses of action suggested by Lax J.

9 The respondents moved to quash or stay the judicial review application as being premature on the basis that the appellants' applications for licence before the Public Accountants Council had not yet been adjudicated on the merits.

10 The appellants then brought a motion to consolidate the motions to quash with two pending statutory appeals arising from the Council's refusal to grant licences. The consolidation motion was dismissed.

11 The motions to quash were scheduled to be heard on May 27, 28 and 29, 2002. On May 8, 2002, counsel for the appellants advised by letter that they had received instructions to withdraw the application for judicial review and agree to the dismissal of the motions to quash on a without costs basis. The respondents insisted on the payment of their costs of the application and the motions to quash and advised that they would continue to prepare for the motions to quash pending resolution of the matter. The appellants served their notice of abandonment on May 17, 2002. The respondents then brought their motion to have their costs fixed.

12 The motions judge fixed the costs of the application for judicial review and the motions to quash on a partial indemnity basis including disbursements and GST as follows:

Public Accountants Council of Ontario	$ 88,896.45
Individual Respondents	$ 60,033.96
Institute of Chartered Accountants of Ontario	$ 38,752.10
Total	$187,682.51

Grounds of Appeal

13 The appellants raise the following grounds of appeal:

(i) the motions judge erred in fixing the costs of the abandoned application rather than referring them for assessment; and

(ii) the costs awarded are excessive in that they are approximately 178% of the costs awarded in the proceedings before Lax J. that involved substantially the same parties and issues without deduction for any amount claimed.

Did the motions judge err in fixing costs?

14 The appellants accept that the respondents are entitled to their costs of the abandoned application pursuant to rule 37.09(3) of the *Rules of Civil Procedure* which provides:

37.09(3) Where a motion is abandoned or is deemed to have been abandoned, a responding party on whom the notice of motion was served is entitled to the costs of the motion forthwith, unless the court orders otherwise.

However, the appellants submit that those costs ought not to be fixed by a judge in accordance with the costs grid established by rule 57.01(3). The appellants rely upon rule 57.01(3.1) which states:

Despite subrule (3), in an exceptional case the court may refer costs for assessment under Rule 58.

Rule 58 sets out a code of procedure for the assessment of costs by an assessment officer.

15 The motions judge concluded, correctly in my view, that there is now a presumption that costs shall be fixed by the court unless the court is satisfied that it has before it an exceptional case. The appellants submitted to the motions court and to this court that the case at bar is such a case. The motions judge, in deciding that this was not an exceptional case, said:

Only if the assessment process will be more suited to effect procedural and substantive justice should the Court refer the matter for assessment. There must be some element to the case that is out of the ordinary or unusual that would warrant deviating from the presumption that costs are to be fixed. Neither complex litigation nor significant amounts in legal fees will be enough for a case to be exceptional. The judge should be able to fix costs with a reasonable review of the work completed without having to scrutinize each and every docket. If that type of scrutinizing analysis is required, then perhaps, the matter would fall within the exception and be referred to assessment: *BNY Financial corp.-Canada v. National Automotive Warehousing Inc.*, [1999] O.J. No. 1273(Commercial List, Gen. Div.) (*BNY Financial*).

16 I agree with the motions judge that if a judge is able to effect procedural and substantive justice in fixing costs, she ought to do so. See *Murano v. Bank of Montreal* (1998), 41 O.R. (3d) 222 (Ont. C.A.), at 245 *per* Morden A.C.J.O.

17 The appellants argued before us that an abandoned motion falls into the category of an exceptional case because the judge fixing the costs does not have the benefit of a hearing involving the presentation of evidence and legal argument. While there is no doubt that the judge who has heard a case is in the best position to determine a just costs award, it does not follow, that in the circumstances which exist here, the motions judge was obliged to decline the task.

18 I also observe that rule 57.01(3.1) is discretionary. It provides that in an exceptional case, the trial judge *may* refer costs for assessment. It is not required that she do so. This is a somewhat complex case with several parties and a number of counsel, including one party with two senior counsel. Although another judge might have exercised his or her discretion under rule 57.01(3.1) differently, I see no basis upon which to interfere with the motions judge's discretion not to refer the costs for assessment.

Was the costs award excessive?

19 The motions judge's decision is entitled to a high degree of deference. The standard of review for interfering with the exercise of the discretion by a judge of first instance was articulated by Lamer, C.J.C. in *Canadian Pacific Ltd. v. Matsqui Indian Band*, 1995 CarswellNat 264 (S.C.C.) at p. 32:

> This discretionary determination should not be taken lightly by reviewing courts. It was Joyal J.'s discretion to exercise, and unless he considered irrelevant factors, failed to consider relevant factors, or reached an unreasonable conclusion, then his decision should be respected. To quote Lord Diplock in *Hadmor Productions Ltd. v. Hamilton*, [1982] 1 All E.R. 1042, at p. 1046, an appellate court "must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently".

20 In a more recent case, Arbour J. said in *Hamilton v. Open Window Bakery Ltd.* (2003), 2004 SCC 9 (S.C.C.) at para. 27:

> A court should set aside a costs award on appeal only if the trial judge has made an error in principle or if the costs award is plainly wrong (*Duong v. NN Life Insurance Company of Canada* (2001), 141 O.A.C. 307, at para. 14).

21 The appellants point out that the costs awarded in these proceedings are approximately 178% of the costs awarded in the proceedings before Lax J. that involved the same parties and similar issues. The respondents, on the other hand, argue that the proceedings before Lax J. were significantly different from the abandoned judicial review application. However, it is to be noted that the same record was used in the judicial review application. When pressed in argument, counsel for the respondents had some difficulty in explaining the extent to which the factual substrata of the two applications differed. At the heart of both applications is the assertion that the Public Accountants Council of Ontario is effectively controlled by the Institute of Chartered Accountants of Ontario.

22 Counsel for the appellants submitted that there was much duplication of the work done by the three sets of counsel for the respondents. They also drew attention to the fact that the Public Accountants Council retained another senior counsel to prepare their factum, resulting in a duplication of services. We were assured by counsel for the respondents that the bills of costs submitted to the motions judge were appropriately adjusted to take into account such duplication.

23 The respondents also submitted that the appellants were the authors of their own misfortune. The appellants said that they abandoned their application for judicial review because the Ontario Red Tape Commission recommended changes to the *Public Accountancy Act*; and a panel appointed under the Agreement on Internal Trade found that the Act offended provisions of the Agreement. The appellants claimed that the reports of these two bodies addressed the issues of concern to them, causing them to abandon their application for judicial review. However, the respondents observed that the report of the panel appointed under the Agreement on Internal Trade was released on October 5, 2001 and the Red Tape Commission report was released on December 10, 2001. It was several months later that the appellants abandoned their application. The respondents submit that the lion's share of the costs were generated in this period of delay, and particularly after February 2002 when the dates for the motion to quash were fixed for May 2002. Although this delay caused some concern to the motions judge, she concluded that:

> In the circumstances of this case I do not find that the timing of the events that took place in the spring of 2002 leading up to the abandonment of the application was in bad faith or amounted to an abuse of the process of the court.

24 The appellants submit that the motions judge accepted the bills of costs that were presented to her without any deductions. The bills were prepared in accordance with the calculation of hours times dollar rates provided by the costs grid. While it is appropriate to do the costs grid calculation, it is also necessary to step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable. This approach was sanctioned by this court in *Zesta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3d) 161 (Ont. C.A.) at para. 4 where it said:

> In our view, the costs award should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant.

See also *Stellarbridge Management Inc. v. Magna International Inc.*, [2004] O.J. No. 2102 (Ont. C.A.) para. 97.

25 *Zesta Engineering Ltd.* and *Stellarbridge Management Inc.* simply confirmed a well settled approach to the fixing of costs prior to the establishment of the costs grid as articulated by Morden A.C.J.O. in *Murano v. Bank of Montreal* at p. 249:

> The short point is that the total amount to be awarded in a protracted proceeding of some complexity cannot be reasonably determined without some critical examination of the parts which comprised the proceeding. This does not mean, of course, that the award must necessarily equal the sum of the parts. An overall sense of what is reasonable may be factored in to determine the ultimate award. This overall sense, however, cannot be a properly informed one before the parts are critically examined.

26 It is important to bear in mind that rule 57.01(3), which established the costs grid, provides:

> When the court awards costs, it shall fix them in accordance with subrule (1) and the Tariffs.

Subrule (1) lists a broad range of factors that the court may consider in exercising its discretion to award costs under s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43. The express language of rule 57.01(3) makes it clear that the fixing of costs is not simply a mechanical exercise. In particular, the rule makes clear that the fixing of costs does not begin and end with a calculation of hours times rates. The introduction of a costs grid was not meant to produce that result, but rather to signal that this is one factor in the assessment process, together with the other factors in rule 57.01. Overall, as this court has said, the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant.

27 In considering whether the amounts claimed in the bills of costs were appropriate, the motions judge said:

> Here there is another point of departure between the applicants and the respondents. The respondents take the position that they are entitled to claim reimbursement for all the time spent and disbursements incurred in responding to the application for judicial review and in preparing the motion to quash. Conversely, the applicants contend that the factual background and the issues raised in the judicial review and the motion to quash are the same, or at least nearly the same, as those fully argued before Lax J. As a result, the time necessary for the respondents to respond to the judicial review application and to prepare for the motion to quash was, [or] should have been, minimal. It follows that the costs fixed should similarly be minimal.
>
> While it is apparent that the various proceedings have centred on the same complaints about the same licensing regime, the issues in each proceeding have differed. For example, the relief claimed in the matter before Lax J. was different than that claimed in the judicial review application. This different perspective requires a different analysis and different research. In addition, the various proceedings were spread over time and each new matter necessitated new preparation even in respect to issues that were the same or similar as those raised in earlier challenges to the

licensing system. In these circumstances I do not consider it appropriate effectively to give the applicants a credit for costs ordered and paid in earlier proceedings .

I agree with what Nordheimer J. said in *Basedo v. University Health Network*, [2002] O.J. No. 597 (Sup. Ct.) that "it is not the role of the court to second-guess the time spent by counsel unless it is manifestly unreasonable in the sense that the total time spent is clearly excessive or the matter has been overly lawyered." As mentioned earlier, counsel for the respondents filed substantial material in support of the detailed bills of costs. In addition, they took me through the various entries, in a general fashion, to explain the nature of the work done and why it was necessary. I have conducted my own detailed review of the functions performed, time spent and amounts claimed. In my view, the amounts for fees and disbursements, on a partial indemnity basis, are appropriate.

28 With respect, I disagree with the motions judge. The total amount of $187,682.51 was not a fair and reasonable sum to award in the circumstances of this case, even given the respondents' separate bills of costs, which produced totals of $88,896.45, $60,033.96, and $38,752.10. It is my view that the costs awards in this case are so excessive as to call for appellate interference.

29 While I accept that the bills of costs accurately reflect the time spent by all of the lawyers in this matter, it is inconceivable to me that the total amounts claimed are justifiable. In this regard, I accept the submission of the appellants that:

(a) the record in this application was the same record filed in the earlier proceedings;

(b) the respondents filed no evidence;

(c) the respondents conducted no cross-examination of any witness;

(d) the notices of motion to stay filed by the respondents were substantially the same; and

(e) the arguments to be advanced on the return of the motions to quash were substantially the same.

30 In addition, I note that the amount claimed on a substantial indemnity scale, including disbursements and Goods and Services Tax, was in total only $14,528.86 more than the total partial indemnity award. In the result, the respondents received an award which is tantamount to a substantial indemnity award. This is significant in view of the fact that the motions judge expressly rejected the respondents' submission that they be awarded their costs on a substantial indemnity basis.

31 The similarity of the amounts claimed on a substantial indemnity basis and on a partial indemnity basis appears to arise because the hourly rates applied were not significantly different on either scale.

32 The Public Accountants Council employed four lawyers. One of the two senior counsel on the file charged three different hourly rates on a substantial indemnity basis -$350, $385 and $425. On a partial indemnity basis, he claimed $350 per hour. The time spent by the other senior counsel was listed at a rate of $300 per hour on both a substantial indemnity scale and on a partial indemnity scale. In addition, one of the two junior counsel charged the same rate on both a substantial indemnity basis and on a partial indemnity basis. The second junior counsel docketed only 17 hours and the difference between the two rates produced a total differential of only $295.

33 Counsel for the Institute of Chartered Accountants charged his time on the substantial indemnity scale at $400 per hour and at $350 per hour on the partial indemnity scale.

34 There were three counsel for the individual respondents. The senior counsel charged hourly rates on a substantial indemnity basis of $330 and $350. Her partial indemnity rate was $300. For the first junior, the substantial indemnity rate was $230 and the partial indemnity rate was $225. The second junior had minimal time on the file and her time was claimed at rates of $85 on a substantial indemnity basis and $60 on a partial indemnity basis.

35 In *Wasserman, Arsenault Ltd. v. Sone* (2002), 164 O.A.C. 195 (Ont. C.A.) at para. 4, this court referred to a judgment of the Superior Court in *Lawyers' Professional Indemnity Co. v. Geto Investments Ltd.* (2002), 17 C.P.C. (5th) 334 (Ont. S.C.J.), where Nordheimer J. observed at paragraph 16:

> As a further direct consequence of the application of the indemnity principle, when deciding on the appropriate hourly rates when fixing costs on a partial indemnity basis, the court should set those rates at a level that is proportionate to the actual rate being charged to the client in order to ensure that the court does not, inadvertently, fix an amount for costs that would be the equivalent of costs on a substantial indemnity basis when the court is, in fact, intending to make an award on a partial indemnity basis.

36 In my view, the granting of an award of costs said to be on a partial indemnity basis that is virtually the same as an award on a substantial indemnity basis constitutes an error in principle in the exercise of the motions judge's discretion, particularly when the judge rejected a claim for a substantial indemnity award. This court took a similar view in *Stellarbridge Management Inc.* at para. 96.

37 The failure to refer, in assessing costs, to the overriding principle of reason-ableness, can produce a result that is contrary to the fundamental objective of access to justice. The costs system is incorporated into the *Rules of Civil Procedure*, which exist to facilitate access to justice. There are obviously cases where the prospect of an award of costs against the losing party will operate as a reality check for the litigant and assist in discouraging frivolous or unnecessary litigation. However, in my view, the chilling effect of a costs award of the magnitude of the award in this case generally exceeds any fair and reasonable expectation of the parties.

38 In deciding what is fair and reasonable, as suggested above, the expectation of the parties concerning the quantum of a costs award is a relevant factor. See *Toronto (City) v. First Ontario Realty Corp.* (2002), 59 O.R. (3d) 568 (Ont. S.C.J.), at 574. I refrain from attempting to articulate a more detailed or formulaic approach. The notions of fairness and reasonableness are embedded in the common law. Judges have been applying these notions for centuries to the factual matrix of particular cases.

39 Turning to what the quantum should be in this case, I would give consideration to the fact that the costs in the earlier proceeding were fixed in the amount of $97,563 by Lax J. While I accept, as the motions judge did, that there were differences between the two proceedings, the foundation upon which the two applications were prosecuted was based on the control of the Public Accountants Council of Ontario by the Chartered Accountants. The fact that all parties were satisfied to have the same evidentiary record in both cases suggests that there was much in common between the two applications.

40 No doubt there was much more work to be done in respect of the second application. However, having expended partial indemnity costs of nearly $100,000 in response to the first application, I am confident that counsel were not starting *tabula rasa* when served with the application for judicial review. They would have been fully informed of the licensing application procedure, the make up and operation of the Public Accountants Council, the statutory regime and the issues that divided the Institute of Chartered Accountants for Ontario and the Certified General Accountants of Ontario. I simply cannot accept that counsel for the respondents did not take advantage of the work already done on the first application to better inform themselves in their approach to the second.

41 I also take into account the other factors referred to in paragraph 29 above, i.e. the respondents filed no evidence; conducted no cross-examination; and advanced substantially the same arguments in support of the motions to quash.

42 Finally, I consider that there is no proportionality between the costs claimed on a substantial indemnity scale and a partial indemnity scale.

43 These factors suggest that the amounts claimed on a partial indemnity basis call for a significant reduction. The appellants submitted that the award to each of the three groupings of respondents should be $2,500 for a total of $7,500. I do not accept that submission.

44 In my view, a fair and reasonable award, taking into consideration all the factors discussed above, would be:

Public Accountants Council of Ontario	$ 30,000.00
Individual Respondents	$ 20,000.00
Institute of Chartered Accountants of Ontario	$ 13,000.00
Total	$ 63,000.00

These figures are inclusive of disbursements and Goods and Services Tax.

Disposition

45 In the result, I would allow the appeal, set aside the costs award of the motions judge and in its place substitute the award set out in paragraph 44 above.

46 I would also order that the appellants are entitled to their costs of the motion for leave to appeal and the appeal, fixed on a partial indemnity basis in the total amount of $12,000, including disbursements and Goods and Services Tax.

Abella J.A.:

I agree.

Cronk J.A.:

I agree.

Appeal allowed; amount awarded varied.

TAB
“2”

2008 ONCA 489
Ontario Court of Appeal

K. (K.) v. G. (K.W.)

2008 CarswellOnt 3651, 2008 ONCA 489, [2008] O.J. No. 2436, 167 A.C.W.S. (3d) 310, 238 O.A.C. 282, 294 D.L.R. (4th) 202, 41 E.T.R. (3d) 21, 56 C.C.L.T. (3d) 165, 90 O.R. (3d) 481

K.K. (Respondent / Appellant by Cross-Appeal) and K.W.G. (Appellant / Respondent by Cross-Appeal)

K.M. Weiler, E.A. Cronk, R.A. Blair JJ.A.

Heard: December 14, 2007
Judgment: June 20, 2008
Docket: CA C45686

Proceedings: reversing in part *K. (K.) v. G. (K.W.)* (2006), 2006 CarswellOnt 4002, 40 C.C.L.T. (3d) 139 (Ont. S.C.J.)

Counsel: Lorne M. Honickman, Laurie Murphy for Appellant
Maia L. Bent, Cynthia B. Kuehl for Respondent

Subject: Civil Practice and Procedure; Torts; Estates and Trusts; Evidence

APPEAL by defendant from judgment reported at *K. (K.) v. G. (K.W.)* (2006), 2006 CarswellOnt 4002, 40 C.C.L.T. (3d) 139 (Ont. S.C.J.), finding her liable for damages for breach of fiduciary duty; CROSS-APPEAL by plaintiff from costs award.

E.A. Cronk J.A.:

1 After a fourteen-day civil trial, the appellant, K.W.G., was held liable to her daughter, the respondent, K.K., for damages for breach of fiduciary duty. The breach related to K.W.G.'s failure to protect her daughter from recurrent sexual abuse perpetrated by K.W.G.'s husband — K.K.'s father — when K.K. was an adolescent. The trial judge awarded K.K. damages of $230,000, comprised of $100,000 for general and aggravated damages, $100,000 for lost income and $30,000 for future care, plus prejudgment interest. He also awarded K.K. her costs of the action on a partial indemnity basis.

2 K.W.G. appeals liability and, in the alternative, the trial judge's damages awards for lost income and future care. K.K. cross-appeals on the issue of the scale of the trial judge's costs award.

3 For the reasons that follow, I would allow the appeal in part, by setting aside the trial judge's damages award of $100,000 for lost income and substituting an award of $20,000. I would dismiss the appeal in all other respects. I would grant leave to K.K. to appeal the trial judge's costs award and dismiss the cross-appeal.

I. Facts

4 The facts of this case are unusual and tragic in several respects.

5 In 1949, following their internment in a labour camp in the former Soviet Union, K.W.G. and her husband, P.G., immigrated to Ontario from Germany with their daughter, K.K., who was then eight years old. They settled in southwestern Ontario, obtaining work as farm labourers and sharegrowers on various tobacco farms. Their second

daughter, I.H., was born in October 1949. The birth of two more daughters followed: R.G., born on May 5, 1951; and E.N., born on January 6, 1955. [1]

6 The early years in Ontario were difficult ones for the family. Work became the focus of their life. The children assisted their parents with the tobacco farming. A particularly heavy burden fell on K.K. — the eldest child. She left school before completing her grade nine studies and began to work full time for her parents. Eventually, P.G. and K.W.G. succeeded in purchasing their own farm and tobacco quota. The acquisition of other farms followed in subsequent years.

7 There was evidence at trial that P.G. was often emotionally abusive towards his children, regularly yelling and swearing at them. According to K.K., he was also physically abusive to her, on occasion hitting her in the head and kicking her.

8 P.G.'s abuse did not end there. Commencing in about 1951, when K.K. was ten years old, P.G. repeatedly sexually abused K.K. His abusive acts toward K.K. included fondling, digitally penetrating her vagina, rubbing his penis between her legs, forcing her to rub his penis, and ejaculating on her and her nightclothes. The abuse did not stop until 1958, when K.K. turned seventeen and left home to marry S.K., another tobacco farmer.

9 Following their marriage, K.K. and her husband worked their own tobacco farm for a brief time, but then began to work as labourers or sharegrowers for K.K.'s parents. With some interruptions for other employment opportunities, they continued to work for her parents for more than twenty years, living on a property that belonged to P.G. and K.W.G. They also began their own family and had two sons.

10 P.G. and K.W.G. retired from active tobacco farming in the late 1970s. For P.G., retirement was short-lived. He died of a heart attack in 1982 at 61 years of age.

11 Following her parents' retirement, K.K. worked in a factory, then as a school bus driver and, ultimately, as a supervisor at an apple farm. Over the years, when her husband found work in various small towns in Ontario, K.K. and her children relocated with him.

(1) Events Following P.G.'s Death

12 K.K. did not disclose her father's sexual abuse to anyone prior to his death in 1982. She did not tell her mother or any of her siblings that P.G. had sexually abused her until the 1990s.

13 In 1991, nine years after P.G.'s death, K.K.'s younger sister, I.H., disclosed to some members of the family that she had a recalled memory of being sexually abused as a child by P.G. On the trial judge's findings, it was only after K.K. learned from her sister, E.N., of I.H.'s revelation of abuse that K.K. told E.N., in confidence, that she, too, had been sexually abused by P.G. When I.H.'s disclosure of incest was met with incredulity by family members, E.N. felt compelled to breach her promise of confidentiality to K.K. and she revealed K.K.'s claim of sexual abuse to other family members, including K.W.G.

14 According to K.K., after P.G.'s sexual abuse of her became known in the family, she experienced depression, anxiety, sleeplessness and panic attacks. She was unable to perform her job and experienced recurrent nightmares, flashbacks of the abuse and heart irregularities.

15 There was also significant conflict in K.W.G.'s family, usually relating to money. By the late 1990s, considerable tension had developed between K.K. and K.W.G. regarding K.W.G.'s treatment of K.K.'s family, and various resentments had grown up among K.K. and her sisters.

(2) The Litigation

16 Sometime in the summer of 2000, K.K. consulted a lawyer and decided to sue K.W.G. In September 2000, she disclosed P.G.'s sexual abuse to a physician and sought his referral to a sexual abuse counsellor. She began counselling

with a social worker in early October 2000. Shortly thereafter, on October 26, 2000, K.K. commenced an action against K.W.G. for damages for breach of fiduciary duty arising from K.W.G.'s failure to intervene to protect her from P.G.

17 K.W.G. defended the action and denied that K.K. had been assaulted or abused by P.G. in any fashion. She also denied knowledge of any sexually or physically abusive acts by her husband in respect of any of her children prior to his death.

K.K.'s position

18 K.K. maintained that her mother knew or ought to have known that P.G. was sexually abusing her. Relying on the fact that the abuse usually occurred at night in her bedroom in the family home, when her mother was likely alone in the bed that she shared with P.G., K.K. argued that her mother must have known or turned a blind eye to P.G.'s frequent absences from their bedroom. K.K. also asserted that K.W.G., who did the family's laundry over the years, must have noticed semen stains on K.K.'s nightgown or bedclothes at some point during the course of about seven years of abuse.

19 K.K. also relied on two specific incidents in support of her claim that her mother was aware or should have been aware of P.G.'s sexual abuse. The first incident occurred one night when K.K. fled to her mother's bed after escaping from her father following a particularly aggressive sexual encounter. Although her mother did not ask her why she had come to her bed, or inquire about P.G.'s whereabouts, K.K. believed that her mother either had knowledge of or willingly turned a blind eye to what had occurred.

20 The second incident took place one night when the family was staying at the home of K.K.'s maternal grandmother. According to K.K., her grandmother entered the room where K.K. had been forced to sleep between her parents, turned on the light and saw K.K.'s hand on her father's penis (referred to by the parties as the "grandmother incident"). The next day, K.K.'s grandmother allegedly confronted K.W.G. about the abuse. K.K. said that when this confrontation occurred, she left her grandmother's house, in shame, to walk the streets in the snow.

21 The grandmother incident assumed considerable importance at trial. According to K.K., a meeting among K.W.G. and three of her daughters — E.N., R.G. and K.K. — took place sometime in 1993, during which K.K. confronted her mother with P.G.'s sexual abuse and raised the grandmother incident. In their testimony at trial, E.N. and R.G. confirmed this aspect of K.K.'s testimony. K.K. said that her mother recalled and acknowledged the grandmother incident, thus effectively admitting her husband's abuse of K.K. E.N. and R.G. denied this acknowledgement by their mother.

Defence position

22 K.W.G. was examined for discovery in October 2001. On discovery, she vehemently denied that K.K. had been abused by P.G. in any manner. She also denied that the grandmother incident ever occurred. Importantly, contrary to the testimony of her daughters at trial, K.W.G. also said that she never discussed the grandmother incident with K.K. at any time.

23 By the time of trial in 2005, K.W.G. was legally incapacitated and unable to testify due to dementia. As a result, her interests were represented by her daughter R.G. as litigation guardian. K.K. was granted leave at trial to read-in K.W.G.'s discovery evidence as if it were her testimony at trial. The trial judge also admitted a memoir written by K.W.G., in which K.W.G. described her life experiences.

24 Both in her pleading and on discovery, K.W.G. denied that K.K. had been sexually abused by P.G. However, shortly before trial, the defence conceded P.G.'s sexual abuse of K.K. Nonetheless, the defence continued to assert that K.W.G. was unaware of the sexual abuse until it was disclosed to her decades later.

25 The defence also maintained at trial that: (i) because K.K. delayed until 2000 to sue K.W.G., her action was barred under the equitable doctrine of laches as a result of her alleged acquiescence in K.W.G.'s conduct; (ii) K.K.'s allegations of abuse were motivated by malice and a desire to seek revenge for what she believed was K.W.G.'s unfair treatment of

her family and for being written out of K.W.G.'s will; and (iii) even if K.W.G. had been aware of the abuse of K.K. when it was occurring, K.W.G.'s personal history and characteristics rendered her unable to intervene to protect K.K.

(3) Expert Evidence

26 Several expert witnesses testified at trial.

27 Dr. Peter G. Jaffe, a clinical psychologist, testified on behalf of K.K. He was accepted at trial as an expert on child sexual abuse and the effects of such abuse, including the "household dynamics and economic effects" of such abuse.

28 Based on psychological testing of K.K., Dr. Jaffe offered the opinion that K.K. suffers from significant tension, unhappiness, pessimism, depression, anxiety and stress to a degree that places her at risk of self-harm. He described the impact of K.K.'s sexual, physical, verbal and emotional abuse as "extensive" and stated that her resulting "lack of self-esteem and self-worth has impaired her functioning in all areas of her life", including her marriage, education, employment and social activities. In his opinion, it was "highly likely" that K.K.'s emotional difficulties are a result of the abuse. He stated that K.K. suffers from "post-traumatic stress disorder with long-term symptoms of intrusive thoughts, as well as severe anxiety and depression" and that her traumatic memories relate to P.G.'s abuse of her.

29 In respect of K.W.G.'s conduct, Dr. Jaffe stated that K.K. was "physically and emotionally abandoned by her mother when she did not protect her". As a result, in his view, K.K. "experienced the loss of both parents at a very young age" and this "impacted on all relationships in her life and her own perception of herself as a parent". Dr. Jaffe concluded:

> [The] fact that her mother did not protect her is responsible, not only for the extent of the abuse, but also for the many years that it continued.
>
> . . . . .
>
> The lack of validation of the abuse that she initially disclosed ten years ago has simply aggravated her symptoms and escalated the level of dysfunction in her life.

30 Dr. Phillip Klassen, a forensic psychiatrist, testified on behalf of K.W.G. on the psychiatric impact of sexual abuse on victims. In contrast to Dr. Jaffe, however, the trial judge ruled that Dr. Klassen could not offer opinion evidence on the economic consequences of sexual abuse.

31 In his report dated September 8, 2005, Dr. Klassen outlined the results of his psychiatric assessment of K.K. and of psychological testing of her conducted by Dr. John Arrowood, a forensic psychologist, in conjunction with Dr. Klassen's own work. Dr. Klassen diagnosed K.K. as suffering from dysthymic and anxiety disorders, the latter consisting of a mixture of panic symptoms, "free floating anxiety and periodic post-traumatic symptoms". He offered the opinion that K.K. "might be expected to have experienced moderately severe negative consequences of the alleged sexual abuse" and that it was reasonable to suggest that the sexual abuse played a "significant" role in her psychological distress. Overall, Dr. Klassen said, "[T]here is an identifiable negative outcome of the sexually assaultive behaviour ... which is moderately severe in its scope and intensity."

32 Dr. Klassen also indicated in his report that he was not positioned to comment on whether K.W.G. could, or should, have known about P.G.'s sexually assaultive behaviour; nor did he feel able to comment on whether K.W.G. "would have been able to deal, psychologically, with the notion that her daughter was being sexually assaulted by her husband".

33 Both parties also led expert evidence on damages. K.K.'s expert, Karen Dalton, a chartered accountant, testified as to the past and present value of K.K.'s lost income based on various quantification scenarios. As well, Yvonne Pollard, a life care planning expert, prepared a future therapeutic needs report on behalf of K.K., estimating K.K.'s future care costs. Errol Soriano, also a chartered accountant and a business valuator, was K.W.G.'s expert on damages.

II. Trial Judgment

34 The trial judge accepted K.K.'s assertion that she had been sexually abused by her father for seven years, holding that the substance of her evidence regarding the abuse was truthful and accurate. He also found that K.K. was subjected to regular episodes of physical and emotional abuse by P.G.

35 The trial judge found that K.W.G. knew of P.G.'s sexual abuse of K.K. He also found that she had not been prepared to intervene and that the evidence was insufficient to support a finding that she was unable to intervene to protect K.K. He held that K.W.G. breached her fiduciary duty to K.K. "when she failed to protect [K.K.] from the physical and sexual abuse that she knew was being perpetrated by P.G.". Finally, he held that the doctrine of laches did not apply to bar K.K.'s claim for equitable relief.

36 In the result, the trial judge awarded K.K. $100,000 for general and aggravated damages, $100,000 in damages for lost income from 1959 to 2005 (the first year of trial) and $30,000 in damages for future care, plus prejudgment interest. He denied K.K.'s claim for punitive damages. He also awarded K.K. her costs of the action on a partial indemnity scale, fixed in the total amount of $147,000.

III. Issues

37 I would frame the several issues on the appeal as follows:

1) Did the trial judge err by holding that the doctrine of laches did not apply in this case?

2) Did the trial judge err by finding that K.W.G. knew of P.G.'s sexual abuse of K.K.?

3) Did the trial judge err in his approach to the standard of proof concerning K.W.G.'s claim that she was unable to intervene to protect K.K. from P.G.?

4) Did the trial judge err by awarding K.K. damages for lost income and future care costs?

38 There is one issue on the cross-appeal:

5) Did the trial judge err by awarding K.K. her costs of the action on a partial, rather than a substantial, indemnity scale?

IV. Analysis

1) The Laches Issue

39 On K.K.'s evidence, the last incident of sexual abuse occurred in 1958, 42 years before she commenced proceedings against her mother in 2000. When K.K.'s action was initiated, the time for bringing a claim for breach of a fiduciary duty was not limited by statute in Ontario. Accordingly, no limitation period operated to bar K.K.'s action. As a result, at trial, K.W.G. invoked the equitable doctrine of laches as a defence to K.K.'s claim that she breached her fiduciary duty by failing to intervene to protect K.K. from P.G.

40 Since the landmark decision of the Supreme Court of Canada in *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 (S.C.C.), Canadian courts have accepted that parents owe a fiduciary duty to children in their care. In addition, the Supreme Court held in *M. (K.)* that incest is both a tortious assault and a breach of the parental fiduciary obligation.[2] Consequently, fiduciary obligation can serve as an independent head of liability in incest cases. See *M. (K.)* at pp. 68-69.

41 In *M. (K.)*, both a statutory limitation period and the equitable doctrine of laches were raised as defences. Justice La Forest, writing for the majority of the Supreme Court, accepted at p. 77 the following description of the equitable doctrine of laches set out in R. Meagher, W.M.C. Gummow and J.R.F. Lehane, *Equity Doctrines & Remedies* (Sydney: Butterworths, 1984) at 755:

> It is a defence which requires that a defendant can successfully resist an equitable (although not a legal) claim made against him if he can demonstrate that the plaintiff, by delaying the institution or prosecution of his case, has either (a) acquiesced in the defendant's conduct or (b) caused the defendant to alter his position in reasonable reliance on the plaintiff's acceptance of the status quo, or otherwise permitted a situation to arise which it would be unjust to disturb.

42 Given the considerable passage of time between P.G.'s last sexually abusive act and the commencement of K.K.'s action, it is important to underscore that mere delay, in itself, does not disentitle an applicant from equitable relief, even where the delay is extensive. In *M. (K.)*, La Forest J. stated at pp. 77-78:

> Thus there are two distinct branches to the laches doctrine, and either will suffice as a defence to a claim in equity. What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches under either of its two branches. Rather, the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine.

43 In this case, K.W.G. argues that the trial judge erred in his analysis of the doctrine of laches in two respects: (i) under the first branch of the doctrine, the trial judge erred by concluding that acquiescence by K.K. had not been established; and (ii) the trial judge erred by failing to hold that, "as a matter of justice as between the parties", the equitable relief claimed by K.K. should be denied. [3] I reject these submissions for the following reasons.

Approach to laches in an incest case

44 The fiduciary nature of the relationship between K.K. and K.W.G. must inform consideration of the doctrine of laches in this case.

45 In *M. (K.)*, also an incest case, the Supreme Court was concerned in part with a statutory limitation defence and the application of the delayed discovery rule. [4] Statutes of limitations serve as an incentive for plaintiffs to bring suit on a timely basis. In *M. (K.)*, however, La Forest J. held at p. 31: "[T]his rationale for a rigorous application of the statute of limitations is particularly inapposite for incest actions."

46 In La Forest J.'s view, several considerations support this conclusion. These include:

> (i) the fact that "many, if not most, of the damages flowing from incestuous abuse remain latent until the victim is well into adulthood" (at p. 31);
>
> (ii) "when the damages begin to become apparent, the causal connection between the incestuous activity and present psychological injuries is often unknown to the victim" (at p. 31);
>
> (iii) for many years, powerful social taboos surrounding sexual abuse "conspired with the perpetrators of incest to silence victims" and "maintain a veil of secrecy around the activity" (at p. 32); and
>
> (iv) also for many years, civil actions based on sexual assault were unknown in Canada and elsewhere, rendering it reasonable for a victim of sexual abuse not to have commenced such a proceeding (at pp. 33-34).

47 Similarly, in the context of equitable claims in an incest case — for example, where, as here, a breach of fiduciary obligation is alleged — *M. (K.)* holds that the fiduciary nature of the relationship between a parent and his or her child "supports a liberal application of the [delayed] discovery rule" (at p. 68). The rationale for this approach flows from the essential character of a parent's relationship to his or her child. As La Forest J. put it in *M. (K.)* at pp. 61-62:

> [T]he relationship between parent and child is fiduciary in nature, and ... the sexual assault of one's child is a grievous breach of the obligations arising from that relationship.

> Indeed, I can think of few cases that are clearer than this. For obvious reasons society has imposed upon parents the obligation to care for, protect and rear their children. The act of incest is a heinous violation of that obligation.

48 Subsequently, in *B. (K.L.) v. British Columbia*, [2003] 2 S.C.R. 403 (S.C.C.), McLachlin C.J., writing for the majority of the Supreme Court, explained the content of the parental fiduciary obligation in terms that stressed breach of trust (paras. 48-49):

> The traditional focus of breach of fiduciary duty is breach of trust, with the attendant emphasis on disloyalty and promotion of one's own or others' interests at the expense of the beneficiary's interests. Parents stand in a relationship of trust and owe fiduciary duties to their children. *But the unique focus of the parental fiduciary duty, as distinguished from other duties imposed on them by the law, is breach of trust. ...*
>
> I have said that concern for the best interests of the child informs the parental fiduciary relationship, as La Forest J. noted in *M. (K.) v. M. (H.)*, *supra*, at p. 65. But the duty imposed is to act loyally, and not to put one's own or others' interests ahead of the child's in a manner that abuses the child's trust. ... The parent who exercises undue influence over the child in economic matters for his own gain has put his own interests ahead of the child's, in a manner that abuses the child's trust in him. *The same may be said of the parent who uses a child for his sexual gratification or a parent who, wanting to avoid trouble for herself and her household, turns a blind eye to the abuse of a child by her spouse.* The parent need not ... be consciously motivated by a desire for profit or personal advantage; nor does it have to be her own interests, rather than those of a third party, that she puts ahead of the child's. *It is rather a question of disloyalty — of putting someone's interests ahead of the child's in a manner that abuses the child's trust.* Negligence, even aggravated negligence, will not ground parental fiduciary liability unless it is associated with breach of trust in this sense. [Underlined emphasis in original; italicized emphasis added.] [5]

49 In my view, just as the delayed discovery rule should be liberally applied to avoid too ready a recognition of a limitation period defence in an incest case, so too should the courts be reluctant to allow a defendant in an incest case — including the 'bystander' parent — to escape liability for breach of fiduciary duty by invocation of the doctrine of laches.

50 The considerations identified by La Forest J. in *M. (K.)* as arguing against a "rigorous application" of a limitations statute in an incest case, listed above, apply with equal force to consideration of a laches defence in an incest case. These considerations relate to the nature and effects of incest and sexual abuse. The policy considerations germane to such offences apply whether a limitation period or a laches defence is raised. Moreover, limitations statutes and laches defences are animated by "similar policy imperatives" and the requisite inquiries under both "very close[ly]" mirror each other. *M. (K.)* at p. 79. Finally, given the special character of the parental fiduciary duty and the especially "heinous" nature of the breach of trust and loyalty that incest represents, a strict application of the doctrine of laches in such cases is inappropriate. [6]

51 I conclude that the applicable jurisprudence and the policy considerations that underlie it tell strongly against a rigorous application of the doctrine of laches in an incest case, whether claims are advanced against the abusive or the 'bystander' parent.

Trial judge's finding of no acquiescence

52 The trial judge's finding that K.K. did not acquiesce in her mother's wrongdoing was based on his assessment of the whole of the evidence over a lengthy trial. Absent palpable and overriding error, this key factual finding attracts deference from this court: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (S.C.C.); *Stein v. "Kathy K" (The)* (1975), [1976] 2 S.C.R. 802 (S.C.C.).

53 The question of whether a plaintiff has acquiesced in the defendant's conduct in an incest case is a fact-specific inquiry that depends on the circumstances of each case. *M. (K.)* at p. 80. Thus, the operation of the acquiescence branch

of the doctrine of laches varies from situation to situation. However, in *M. (K.)*, La Forest J. issued this clear warning: "particularly compelling evidence [is required] to demonstrate that an incest victim ... 'acquiesced' in the sexual assaults made against her" (at p. 80). Similarly, in my opinion, cogent and compelling evidence is required to establish that an incest victim acquiesced in the failure of a 'bystander' parent to intervene to protect the victim from the abusing parent's wrongful conduct.

54 The plaintiff's knowledge of her rights is the critical element in the acquiescence branch of the doctrine of laches. As La Forest J. emphasized in *M. (K.)* at pp. 78-79:

> *It is not enough that the plaintiff knows of the facts that support a claim in equity; she must also know that the facts give rise to that claim.* ... However, this Court has held that knowledge of one's claim is to be measured by an objective standard ... [T]he question is whether it is reasonable for a plaintiff to be ignorant of her legal rights given her knowledge of the underlying facts relevant to a possible legal claim. [Citations omitted and emphasis added.]

55 Justice La Forest also offered this description of acquiescence: "[A]fter the deprivation of her rights and in the full knowledge of their existence, the plaintiff delays. This leads to an inference that her rights have been waived" (at p. 78).

56 Similarly, in R. Meagher, W.M.C. Gummow and J.R.F. Lehane's *Equity Doctrines & Remedies*, 4th ed. (Sydney: Butterworths LexisNexis, 2002) at 1031, the authors suggest that, as an element of laches, acquiescence "denote[s] a plaintiff's behaviour in refraining from seeking redress once he knows his rights have been violated ... *and to denote his acceptance of the fact that his rights have been violated*". [Emphasis added.]

57 What was required in this case for a finding of acquiescence was proof of K.K.'s delay and, further, proof of her knowledge that K.W.G.'s failure to intervene to protect her gave rise to a claim against K.W.G. Given that K.K.'s delay was manifest, the core question was whether it could reasonably be inferred that: (i) K.K. knew that her rights had been violated by her mother as well as by her father; (ii) K.K. also knew that her mother's violation gave rise to a claim; and (iii) nonetheless, K.K. refrained from seeking redress against her mother.

58 In my opinion, on the record before him, it was open to the trial judge to conclude that these inferences should not be drawn. I say this for four reasons.

59 First, the trial judge was alert to the centrality of the issue of K.K.'s knowledge in assessing K.W.G.'s laches defence. As he correctly observed: "Knowledge is fundamental to the operation of both the common law discoverability doctrine and the determination of acquiescence in relation to an equitable claim."

60 Second, the trial judge expressly considered and rejected K.W.G.'s contention that K.K., with full knowledge of her rights, delayed bringing suit until motivated to do so by a desire to seek retribution against her mother for conduct unrelated to P.G.'s sexual abuse, including the threat of disinheritance and other financial and family tensions.

61 In so doing, the trial judge took into account K.K.'s denial of any improper motive, as well as the evidence of the many family conflicts and tensions that K.W.G. said formed the real basis for K.K.'s lawsuit. He also noted the absence of any evidence that K.K. was aware, prior to the commencement of her action, that her mother had taken steps to alter the terms of her will. Indeed, as the trial judge pointed out, it was K.K.'s evidence that she knew that her mother would likely take action to disinherit her *if* she commenced legal proceedings.

62 Having considered this evidence, the trial judge concluded:

> I suspect the conflict that preceded the commencement of this action may have made it easier for the plaintiff to summon the resolve to proceed, but I do not accept the defendant's contention it was the reason.

Having reviewed the record, it is my view that this conclusion was available to the trial judge on the evidence.

63 Third, the trial judge accepted that K.K.'s only reason for commencing the litigation was "to force her mother to take some responsibility for what had happened". [7] At trial, when pressed for an explanation of the timing of her lawsuit, K.K. testified: "[I] was suffering a lot with the sexual abuse and I wanted my mother to realize exactly what I was going through. It was — I wanted her to know what my pain and suffering was". K.K. expressly denied that her lawsuit was precipitated by any improper motive relating to disputes or conflicts with her mother or her sisters about matters unrelated to the sexual abuse.

64 Having considered the entirety of the evidence, the trial judge reasoned:

> *In my opinion, it cannot be reasonably inferred that the plaintiff acquiesced in the defendant's conduct.* After escaping from the abuse, the plaintiff coped with the pain and shame by remaining silent. She had no reason to believe that disclosure after she left her parents' home would result in her receiving any more support than she had received when the abuse was occurring. Time and the broken confidence by [E.N.] eventually led to disclosure of the abuse, *but there was no acknowledgment of responsibility by the defendant and, in my view, never any acceptance by the plaintiff of her mother's denial of knowledge. I therefore, conclude that acquiescence is not demonstrated and the defence of laches is not established.* [Emphasis added.]

65 In *M. (K.)*, when discussing the application of the discoverability rule to incest, La Forest J. commented at p. 35:

> I am satisfied that the weight of scientific evidence establishes that in most cases the victim of incest only comes to an awareness of the connection between fault and damage when she realizes who is truly responsible for her childhood abuse.

66 Thus, in the context of a limitation period defence in an incest case, *M. (K.)* stresses that the question of when an incest victim became fully cognizant of "who bears the responsibility for her childhood abuse" is a pivotal consideration, for it is only "then that she realizes the nature of the wrong done to her" (at p. 45).

67 In my opinion, the trial judge was directing his attention to this factor when he said, "[T]here was no acknowledgment of responsibility by the defendant and, in my view, never any acceptance by the plaintiff of her mother's denial of knowledge." Although the trial judge referred to K.K.'s lack of acceptance of K.W.G.'s "denial of knowledge" of the abuse, rather than to her lack of acceptance of K.W.G.'s failure to intervene in the face of the abuse, he also said: "[I]t cannot be reasonably inferred that the plaintiff acquiesced in the defendant's conduct". I understand the trial judge to have concluded that when K.K. gained knowledge of her rights, she did not accept or condone her mother's failure to protect her or her mother's proffered explanation for that failure. This was tantamount to a finding that K.K. never accepted, waived or forgave her mother's breach of trust and violation of her rights.

68 Fourth, this critical finding is supported by the record. Other than not commencing proceedings earlier, there was no evidence at trial that K.K. knowingly did anything to signal a waiver, release or abandonment of a claim against K.W.G. Indeed, there is no indication on this record of knowledge by K.K. *at any time* prior to the summer of 2000 that she had a claim against her mother arising from her mother's failure to intervene to protect her from P.G. For instance, although the trial judge held that K.K. knew in 1993, as a result of the grandmother incident, "that her mother was aware of the abuse but was not prepared to intervene", there is no evidence that K.K. also knew that she had a right to sue her mother because of this failure to intervene. Nor is there any evidence of a decision by K.K. to refrain from suing K.W.G., knowing that she had a claim against her.

69 Absent such evidence, or evidence that it was unreasonable in the circumstances for K.K. to be unaware of a possible claim against K.W.G., it cannot be said that, by her conduct, K.K. waived, affirmed or released her mother's breach of fiduciary duty so as to bar equitable relief on the ground of acquiescence.

70 I conclude, therefore, that this record falls short of affording what La Forest J. termed in *M. (K.)* the "particularly compelling evidence" that would be required to demonstrate that K.K. acquiesced in her mother's failure to intervene to stop P.G.'s incestuous conduct.

Justice as between the parties

71 I am also not persuaded that justice as between the parties compels the application of the doctrine of laches in this case.

72 I observe first, as the trial judge noted, that K.W.G.'s laches defence at trial rested solely on the first branch of the doctrine of laches — acquiescence. K.W.G. did not argue at trial, as she does before this court, that "justice as between the parties" provides a discrete basis for the invocation of laches. It is therefore not surprising that the trial judge's reasons contain no explicit analysis of this issue.

73 I do not read *M. (K.)* as holding that the objective of achieving justice as between the parties is a third and independent component of the doctrine of laches. Rather, this objective informs the requisite inquiries under the first and second branches of the doctrine. Under either branch, equitable relief may be refused on the ground of laches in circumstances where the plaintiff's conduct would make it unjust to grant the relief sought. See *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221 (Ontario P.C.), at 239-40; and *Erlanger v. New Sombrero Phosphate Co.* (1878), (1877-78) L.R. 3 App. Cas. 1218 (U.K. H.L.) at 1279-80.

74 K.W.G.'s claim that justice as between the parties mandates the denial of equitable relief to K.K. is predicated on the assertion that K.K.'s delay in commencing or prosecuting her action irreparably prejudiced K.W.G. because she was unable to testify and instruct counsel at trial. In the unusual circumstances of this case, I disagree.

75 The evidence at trial indicated that K.W.G. was competent in 2000 when K.K.'s action was commenced and was still competent in 2001 when she was examined for discovery. It appears that 2003-2004 marked the onset of her dementia. There is no suggestion that her dementia was foreseeable. Nor, apart from the fact of K.W.G.'s advancing age, is there any evidence to support such a claim.

76 In particular, there is no assertion on K.W.G.'s behalf that K.K. knew or could have known, either before or when she initiated her lawsuit, that K.W.G. would become incompetent. Nor does K.W.G. contend that K.K. was responsible for any delay in bringing the action to trial.

77 Consequently, while K.W.G.'s mental disorder is most unfortunate, there is no basis on this record to visit the consequences of her illness on K.K., or to conclude that the timing of the commencement of her lawsuit or its pace after commencement was influenced by her mother's health. K.W.G. simply succumbed to an unforeseen mental illness — dementia — after the commencement of K.K.'s lawsuit.

78 This factor must be balanced against K.K.'s rights. To hold that K.W.G.'s unexpected illness bars any equitable relief for K.K. would be to deny all redress for an admitted incest victim on account of an unforeseen development that was entirely beyond her control. That outcome would scarcely serve the interests of justice.

79 Importantly, the record in this case is not silent as to K.W.G.'s history and version of events. As I have mentioned, although K.W.G. was unable to participate at trial due to her mental illness, the trial judge granted K.K. leave to read-in K.W.G.'s discovery evidence as if it were her testimony at trial. He also admitted K.W.G.'s memoir, which provided some insights into her background, life experiences and personality. The reception of this evidence is not challenged on this appeal.

80 In addition, contrary to K.W.G.'s submission, the trial judge's reasons indicate that he had the issue of alleged prejudice to K.W.G. well in mind. In his analysis of the defence assertion that K.K. acquiesced in K.W.G.'s conduct, the trial judge said this:

> I also reject the submission that acquiescence is established because of the prejudice that has resulted from age and infirmity intervening to prevent the defendant from testifying in her own defence. Such an argument might be sustainable if the action was delayed until after the defendant had succumbed to dementia, but that is not the case.

81 I would stress two additional factors. First, R.G. was appointed as K.W.G.'s litigation guardian over the objections of K.K. In her sworn affidavit materials filed in support of her motion to be appointed litigation guardian, R.G. essentially represented that, unlike other potential litigation guardian candidates, she was in an informed position to represent her mother's interest, she had been involved in K.K.'s lawsuit from the beginning, and she intended to try and settle the action. In his ruling allowing R.G.'s motion, the motion judge relied on this evidence to hold that R.G. was capable of properly assessing her mother's legal situation so as to "make appropriate decisions concerning this lawsuit". This finding, and R.G.'s evidence on which it was based, undercut the submission that K.W.G.'s personal inability to instruct counsel at trial deprived her of the opportunity to properly defend the action.

82 Second, and more generally, the fiduciary nature of K.W.G.'s relationship with K.K. must again be emphasized. The existence of a power imbalance, and the vulnerability of the beneficiary of the relationship to the fiduciary, is inherent to a fiduciary relationship. It is difficult to conceive of a fiduciary relationship that involves a greater inequality of positions, or a more overriding degree of dependency, than that which arises in a young child's relationship with his or her custodial parents. For this reason, the law imposes on the parent a duty to act loyally and to ensure that the parent's interests do not overtake those of the child in a manner that abuses the child's trust or constitutes an abuse of power. See *K.L.B.*, *supra*; and *G. (E.D.) v. Hammer*, *supra*. Where these duties are breached in the manner established in this case, it is my opinion that justice mandates that the denial of equitable relief to the aggrieved plaintiff should be rare.

Conclusion on laches

83 I do not accept that the timing of the initiation and prosecution of K.K.'s action worked a fundamental injustice on K.W.G. that should be charged to K.K. so as to justify the application of the doctrine of laches.

84 K.W.G.'s response to K.K.'s claims of abuse and breach of fiduciary duty was documented in her pleading and her discovery evidence. K.K.'s sisters testified for the defence. That K.W.G.'s litigation guardian was able to instruct counsel concerning her defence is evident from the defence decision, taken shortly before trial, to concede — at that late date — the fact of P.G.'s sexual abuse of K.K. In my view, K.W.G.'s litigation guardian was positioned to maintain her defence, to instruct counsel and, if so advised, to compromise K.W.G.'s defence.

85 K.W.G. was a passive bystander to P.G.'s abuse. However, this is not a case where the 'bystander' parent learned of the sexual abuse, for the first time, years after it occurred. This is a case where, on the trial judge's findings, the bystander parent knew of the abuse when it was ongoing but took no action of any kind to stop it or to obtain assistance for her victimized child. In so doing, K.W.G. breached her fundamental trust obligation to her daughter.

86 In all these circumstances, I conclude that the trial judge did not err in rejecting K.W.G.'s defence of laches.

(2) The Knowledge Issue

87 K.W.G. argues that the trial judge's finding that she knew of P.G.'s abuse of K.K. is unsustainable because the trial judge: (i) erred in "processing" the evidence bearing on this key issue, by disregarding or misapprehending relevant evidence and by making unsupportable findings regarding K.K.'s evidence; and (ii) further erred by providing insufficient reasons in support of the impugned finding. I will consider each of these complaints in turn.

88 First, the alleged "processing" error. K.W.G. faces a significant hurdle to succeed on this ground of appeal. A processing error occurs where a trial judge fails to appreciate the evidence relevant to a factual issue, either by disregarding or misapprehending that evidence. A processing error warrants appellate intervention if it taints that part of the trial judge's reasoning process that was essential to the challenged finding of fact. See *Keljanovic Estate v. Sanseverino*

(2000), 186 D.L.R. (4th) 481 (Ont. C.A.) at para. 30, leave to appeal to S.C.C. refused, (S.C.C.); and *Waxman v. Waxman*, [2004] O.J. No. 1765 (Ont. C.A.) at para. 334, leave to appeal to S.C.C. refused, (2005) (S.C.C.). That said, as I have already indicated, the factual findings of a trial judge attract a high degree of deference from an appellate court and, absent palpable and overriding error, appellate interference with such findings is precluded. See *Housen*, *supra*; *Waxman*.

89 Accordingly, to displace a factual finding on the basis of an alleged processing error by the trial judge, it is necessary to demonstrate both that the error occurred and that it was palpable and overriding. Neither requirement is met here.

90 The evidence said by K.W.G. to have been ignored or misapprehended by the trial judge consists of evidence by K.K. and/or her sisters of events surrounding K.K.'s and I.H.'s disclosures of P.G.'s sexual abuse; K.K.'s reactions to, and conduct after, learning of I.H.'s claim of abuse; and events at the 1993 family meeting when, according to K.K., K.W.G. acknowledged the grandmother incident. The evidence of K.K.'s sisters on these issues conflicted with that of K.K. in many respects. As well, there were inconsistencies between the testimony of each of the sisters concerning many events in the 1990s.

91 The trial judge's reasons indicate that he was aware of and considered the competing versions of events that took place in the 1990s advanced by K.K. and her sisters. In particular, he noted the contradictions between K.K.'s testimony and that of her sisters concerning the discussion of the grandmother incident at the 1993 family meeting, which I have earlier set out. Although the trial judge did not explicitly refer in his reasons to all the conflicting evidence on these issues, he was not obliged to do so. See *Waxman* at paras. 343-345. There is no basis on this record to conclude that he failed to consider, or that he fundamentally misapprehended, the evidence of K.K. or her sisters on the key factual issues in dispute. I am not persuaded, therefore, that the trial judge made the processing error alleged by K.W.G.

92 In any event, even if it is assumed that the trial judge so erred, it is far from clear that this error would have had any effect on his essential reasoning. In the trial judge's view, the conflicting evidence of the recollections of K.K. and her sisters on events in the early 1990s and on the issue whether K.W.G. acknowledged the grandmother incident at the 1993 family meeting was of little consequence. For example, with respect to the 1993 meeting, he stated:

> I do not see that this conflict in the testimony of the plaintiff and her sisters is critical in determining whether [the grandmother] incident occurred. I believe it did occur because of the convincing nature of the plaintiff's description of the incident. That event, like none other, must have had an enormous impact on the plaintiff. It was then that the plaintiff came to know for certain that her mother was aware of the abuse but was not prepared to intervene.

93 Thus, the impugned finding of knowledge by K.W.G. was firmly anchored in the trial judge's conclusion that the grandmother incident in fact occurred, as described by K.K. This conclusion was not dependent on resolution of the witnesses' conflicting evidence concerning K.W.G.'s alleged acknowledgment, years later, of the incident. K.K.'s evidence of the *fact* of the grandmother incident, once accepted by the trial judge, was sufficient to fix K.W.G. with knowledge of her husband's sexual abuse of K.K.

94 I also disagree with K.W.G.'s assertion that the trial judge's treatment of K.K.'s evidence is tainted by the failure to consider or to correctly apprehend critical evidence in any material respect. This argument, in effect, challenges the trial judge's weighing of the evidence of K.K. and her sisters and his appreciation of their credibility. One example will suffice to illustrate this point. In her factum on appeal, K.W.G. argued that the trial judge erred by characterizing certain of K.K.'s evidence as "extravagant" while also accepting that the substance of her evidence about P.G.'s sexual abuse was truthful and accurate. These are matters going to the heart of K.K.'s credibility, the assessment of which was squarely within the trial judge's domain. These findings attract great deference from this court. I see no basis on which to conclude that they are tainted by reversible error.

95 Finally, I would reject K.W.G.'s attack on the sufficiency of the trial judge's reasons. Those reasons are 26 pages and 90 paragraphs in length. Properly read, they reveal the trial judge's reasoning in support of his critical findings, including his key finding that K.W.G. knew of P.G.'s sexual abuse, and amply provide for meaningful appellate review.

Accordingly, they meet the sufficiency of reasons standard set out in *R. v. Sheppard*, [2002] 1 S.C.R. 869 (S.C.C.) and *R. v. Braich* (2002), 162 C.C.C. (3d) 324 (S.C.C.).

(3) The Standard of Proof Issue

96 K.W.G. next argues that the trial judge erred by holding that, in order to establish a defence to K.K.'s claim of breach of fiduciary duty, K.W.G. was obliged to prove with "absolute certainty" that she was powerless to intervene to prevent P.G.'s abuse.

97 This submission must be placed in context. The defence led evidence at trial that K.W.G.'s personal history and characteristics may have prevented her from acting in the face of knowledge that K.K. was being sexually abused. For example, the evidence indicated that while interned in a Russian labour camp, K.W.G. was herself subjected to repeated sexual abuse, as well as other atrocities. Dr. Klassen testified that this history of sexual trauma, combined with K.W.G.'s alleged fear of her husband and other factors, "*may* have contributed to a style of adaptation that *could conceivably* have caused problems for her in dealing with various problems in her family, including the sexual abuse of her daughters". [Emphasis added.]

98 In respect of this theory of an 'inability to intervene', the trial judge stated:

> Indeed, I have no difficulty in accepting that a mother who is unable to act should not be held in breach of the duty to protect. A fiduciary duty arises from the nature of the relationship and the ability to fulfill the duty is inferred from the relationship. It is an inference that may be rebutted, but the evidentiary burden for doing so rests with the person on whom the duty is imposed by virtue of the relationship. It is, therefore, incumbent upon the fiduciary to demonstrate that she did not have the ability, awareness and means to act.

99 The trial judge thus held that if K.K. established a breach of fiduciary duty by K.W.G., the onus of proof shifted to K.W.G. to establish any asserted defence to that breach, including a defence based on a posited inability to intervene to prevent the abuse that gave rise to the breach.

100 It is important to emphasize that K.W.G.'s challenge on appeal concerns the *standard* of proof allegedly applied by the trial judge. It does not concern the *burden* of proof. K.W.G. does not contest the trial judge's allocation of an evidential burden to her. To the contrary, K.W.G.'s counsel acknowledged before this court that K.W.G. bore the onus at trial to establish the defence contention that she was unable to intervene to prevent P.G.'s abuse.

101 Thus, this case does not turn on the issue of burden of proof. Rather, K.W.G.'s complaint is that the trial judge, in assessing her ability to intervene, applied too stringent a standard of proof by requiring proof to a standard of "absolute certainty". In my opinion, this ground of appeal fails.

102 The defence advanced the theory of K.W.G.'s inability to intervene in response to the allegation that she breached her fiduciary obligation to protect K.K. K.W.G., therefore, did not merely deny the breach but also advanced the substantive defence of an alleged inability to act. In these circumstances, while K.K. was obliged to establish the breach, K.W.G. bore an evidential burden to establish that her inability to act was a live issue, by either adducing sufficient evidence or pointing to other evidence on the record of her claimed inability to act. See John Sopinka, Sidney N. Lederman and Alan W. Bryant, *The Law of Evidence in Canada* (Toronto and Vancouver: Butterworths, 1992) at 56 and 60-65. If this threshold was met, the issue was whether the trial judge was ultimately persuaded on the evidence, to the requisite civil standard of proof, of K.W.G.'s alleged inability to act.

103 There is nothing in the trial judge's language or reasoning to explicitly suggest that he applied any standard of proof other than the civil standard of proof on a balance of probabilities in determining whether K.W.G. was powerless to intervene to protect her daughter from P.G.'s sexual abuse.

104 Nor do I think that the error alleged arises by necessary implication. The trial judge reviewed the expert evidence bearing on K.W.G.'s alleged powerlessness, including, especially, Dr. Klassen's evidence. On my reading of his reasons, he accepted this evidence — as far as it went — but concluded that it lacked sufficient cogency to support anything more than merely a theoretical possibility that K.W.G. had been powerless to protect K.K. The trial judge said:

> I accept that [K.W.G.'s] history and circumstances may have conspired to prevent her from acting in the face of knowledge that the plaintiff was being abused by P.G. However, a determination that the defendant *may* have lacked the personal resources to intervene, as Dr. Klassen suggests, is not sufficient to support a finding that she was unable to act. [Emphasis in original.]

105 When the trial judge's reasons are read as a whole, it is apparent that he viewed the expert evidence of K.W.G.'s asserted inability to intervene as too tentative and hypothetical to ground a finding that K.W.G. in fact experienced such powerlessness. In my view, this is a fair reading of the evidence. For example, as the trial judge noted, Dr. Klassen indicated that he was not in a position to comment on whether K.W.G. "would have been able to deal, psychologically, with the notion [that K.K.] was being sexually abused" or "on the extent to which [K.W.G.] ... may have ... lacked the personal resources, for reasons not of her choosing, to intervene". Instead, Dr. Klassen listed several "*possible*" circumstances, that he said "*may*" have rendered K.W.G. unable to intervene.

106 Two of K.K.'s sisters, R.G. and I.H., testified that K.W.G. feared P.G., as they did. The third sister, E.N., said that "maybe" K.W.G. was afraid of P.G. and, like her daughters, "did what [she was] told and everything was good". The trial judge indicated that K.K. testified that her mother was "unafraid" of P.G. In making this statement, the trial judge misapprehended the evidence. K.K. testified that while she did not know whether her mother feared P.G., she thought that K.W.G. "should have been fearful of him because I was". However, as I indicate below, it was not K.K.'s evidence but the evidence of K.W.G. herself on discovery from which the trial judge was entitled to conclude that K.W.G. was unafraid of P.G.

107 On discovery, K.W.G. said: P.G. was not "a tough guy" but, rather "a pussycat"; in their early years in Canada, she persuaded P.G. to give up a heavy drinking habit; when P.G. yelled at her, she "start[ed] laughing"; she would have left P.G. if he ever hit her; on one occasion when P.G. did strike her, she "packed her things" and threatened to leave him; when P.G. yelled at the children, she talked to him and told him that he "better shut up" and "Just leave them alone"; P.G. listened to her when she admonished him on that occasion; and, if she had seen P.G. hitting their children, she would have "took over for sure" and "Then I would be the boss".

108 Two parts of K.W.G.'s discovery testimony are especially telling. According to K.W.G., if she had ever witnessed her husband acting in a sexually inappropriate manner with their children, "I might be in jail because I might have killed him. Things like that wouldn't work with me if I would have seen this" and "If I would have seen something, you think I would let that happen? I would be in jail. I would have killed him." Then this exchange took place:

> Q. Would you say he's the head of the family or was that something you shared?
>
> A. No, we shared that. I had the same rights.

This is not the picture of a woman frozen into inaction by a domineering and abusive spouse.

109 In any event, the evidence of whether K.W.G. feared her husband was but one factor among many to be assessed by the trial judge in determining if K.W.G. was powerless to protect K.K. Other evidence at trial contradicted the defence hypothesis of an inability on the part of K.W.G. to intervene to protect K.K. This included K.K.'s evidence that her mother presented as strong, cold and self-assured and the evidence of K.W.G.'s long-standing solicitor — an independent witness — who described K.W.G. as a woman "who knows her own mind", "a dominant personality" and a "drama queen". This evidence also supported the conclusion that K.W.G. was not powerless to intervene against her husband.

110 I am persuaded that, in the end, the trial judge simply weighed the evidence that supported and countered the defence theory of K.W.G.'s inability to intervene and, while acknowledging the hypothetical possibility that she might have experienced such powerlessness, concluded on the evidence that this theory was unsustainable. I see no reviewable error in this assessment of the evidence.

(4) The Damages Issues

Damages for lost income

111 At trial, K.K. claimed damages for lost income from 1959 until March 2006 — when she turned 65. In support of this claim, she relied on Karen Dalton's evidence of various methods by which her economic loss might be calculated. On Ms. Dalton's evidence, K.K.'s total lost income for the years in question ranged from $178,200 to $622,902.

112 K.K. also relied on the evidence of Dr. Jaffe, who testified that the symptoms associated with child sexual abuse diminish the effectiveness of the victim at school or in the workplace. Dr. Jaffe offered the opinion that K.K. did not achieve to her potential and that "it was more likely than not that the abuse had adversely impacted her ability to do so".

113 K.W.G. responded with the evidence of her economic loss expert, Errol Soriano, and that of Dr. Klassen. As I have said, unlike Dr. Jaffe, Dr. Klassen was not accepted at trial as an expert qualified to give opinion evidence on the economic consequences of sexual abuse. Nonetheless, it appears that he did offer opinions on this issue during his testimony.

114 Dr. Klassen said that it was unlikely that P.G.'s sexual abuse was implicated in K.K.'s educational or occupational "trajectories". In his written report dated September 8, 2005, Dr. Klassen stated: "[I]t is not clear to me that [K.K.'s educational and occupational] course is referable to or predicated on the history of sexually assaultive behaviour." For his part, Mr. Soriano was critical of Ms. Dalton's analysis of K.K.'s economic loss. In his opinion, K.K. failed to adduce sufficient information to permit quantification of her claim for past lost income.

115 The trial judge rejected Ms. Dalton's analysis in its entirety and accepted Mr. Soriano's opinion that K.K.'s lost income claim "defie[d] calculation". He also accepted Dr. Klassen's evidence that factors other than P.G.'s sexual abuse affected K.K.'s educational and occupational achievements.

116 However, the trial judge also expressly held that P.G.'s sexual abuse did have an adverse impact on K.K.'s income earning capacity. With respect to K.W.G.'s conduct, he found that her failure to protect K.K. from P.G. not only exposed K.K. to "the physical trauma, humiliation and desperation of persistent abuse over many years" but also caused K.K. "psychological injury that has diminished her ability to function in virtually every aspect of her life" including "her effectiveness at school and in the workplace" and that this impediment was "significant".

117 The trial judge's conclusion concerning K.K.'s economic loss claim was expressed in these terms:

> Notwithstanding my concerns about the shortcomings of the evidence relating to the plaintiff's economic loss, I am satisfied that there is sufficient evidence for me to find that the defendant's failure to protect the plaintiff from her father's abuse diminished her effectiveness at school and in the workplace and thereby impeded her ability to achieve her full potential. In my view, this impediment had an adverse impact on her ability to earn income. Although the claim defies precision in quantification, I am satisfied the impedement was significant and award the plaintiff damages of $100,000.00 for loss of income to March 16, 2006.

118 Against this backdrop, K.W.G. advances two propositions. She submits that there was no evidentiary foundation: (i) for determining that K.W.G.'s breach of fiduciary duty impeded K.K.'s earning capacity; and (ii) for calculating any economic loss that she may have suffered.

119 K.W.G.'s first proposition is incorrect. Dr. Jaffe's and K.K.'s evidence supported the trial judge's finding that K.W.G.'s breach negatively affected K.K.'s ability to achieve her life potential, including her educational and occupational potential. For example, on Dr. Jaffe's evidence, K.W.G.'s failure to protect K.K. from P.G.'s abuse accounted for the extent and duration of the abuse and aggravated K.K.'s "level of dysfunction". A finding based on this evidence cannot be characterized as a finding without evidentiary support.

120 K.W.G.'s second proposition, however, is supported by the record and the trial judge's findings. Once Ms. Dalton's evidence of proposed scenarios for the calculation of K.K.'s lost income was rejected by the trial judge, there was no evidentiary foundation for quantification of this claim.

121 As the above-quoted passages from his reasons indicate, the trial judge recognized this important deficiency in the record. However, this evidentiary shortcoming did not mean that K.K.'s economic loss claim was to be rejected entirely.

122 In *Martin v. Goldfarb* (1998), 163 D.L.R. (4th) 639 (Ont. C.A.) at para. 34, leave to appeal to the S.C.C. refused, (1999) (S.C.C.), Finlayson J.A. made the point that a plaintiff should not be able to recover a higher damages award merely because his or her claim is characterized as a breach of fiduciary duty, as opposed to breach of contract or tort. Proof of damages is still required. See also *Waxman*, *supra* at para. 661. He further held that a plaintiff is not entitled to have damages assessed by guesswork when he or she fails to discharge his or her burden of adducing proof of damages (at paras. 67 and 74). In the absence of such proof, rendering it impossible to assess damages, a plaintiff is entitled to nominal damages at best. However, where there are complex contingencies, incapable of proof, a court must then do its best to assess the quantum of damages (at para. 75).

123 This is not a case where the absence of evidence makes it impossible to assess damages, thereby reducing K.K.'s entitlement to only nominal damages at best. In this case, unlike in *Goldfarb*, K.K. called evidence that assisted the court in proving and identifying the loss she suffered. The trial judge was satisfied that her loss was "significant". What the trial judge rightly rejected was the basis for the calculation of K.K.'s loss. What K.K. suffered was a lost opportunity to be in a safe environment that would have allowed her to continue her education at the time in her life when her career choices mattered most. This lost opportunity is distinct from the general damages that the trial judge awarded. See for example, *T. (K.A.) v. B. (J.H.)*, [1998] B.C.J. No. 1141 (B.C. S.C.) at para. 60.

124 While the trial judge did his best to assess K.K.'s damages for economic loss, the factors on which he based his award significantly overlapped with those pertinent to his assessment of general damages. Respectfully, the trial judge also failed to adequately consider the many other complex contingencies that had to be taken into account in assessing damages for the lost opportunity suffered by K.K.

125 Accordingly, the trial judge's award of damages for lost income cannot stand. In my opinion, on this record, $20,000 is a reasonable estimate of K.K.'s damages for her lost opportunity to maximize her earning potential.

Damages for future care

126 K.W.G. also challenges the trial judge's award of damages in the amount of $30,000 for future care on the basis that K.K. had been receiving and could continue to receive publicly-funded counselling services. As a result, K.W.G. maintains, the award of damages for future care amounts to "double recovery". I disagree.

127 Drs. Jaffe and Klassen agreed that K.K. would benefit from ongoing treatment and counselling to deal with the effects of the sexual abuse that she endured. Indeed, Dr. Jaffe recommended long term counselling on a weekly basis for up to ten years. The trial judge's reasons reveal that he considered the evidence regarding the publicly-funded psychological and psychiatric services in the community where K.K. resides and concluded that the availability of timely and accessible services was uncertain. He was also of the view that K.K. was entitled to "some reasonable choice in her selection of available therapeutic regimes" and that she should have the opportunity to access private psychological counselling.

128 In the result, he reduced K.K.'s claim for future care damages from the sum of $85,000 to $30,000, to take account of K.K.'s duty to mitigate her damages. This significantly reduced award, in the trial judge's view, was sufficient to meet K.K.'s "reasonable long term therapeutic needs". I see no basis on which to interfere with this assessment of damages.

(5) The Cross-Appeal

129 Prior to trial, K.K. made an offer to settle under Rule 49 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The offer was not accepted. When the offer proved to be more favourable to K.W.G. than the result at trial, K.K. sought recovery of her costs on a partial indemnity scale to the date of her offer and on a substantial indemnity scale thereafter, in accordance with rule 49.10(1). The trial judge declined to award costs on a substantial indemnity scale and, instead, awarded K.K. her costs throughout on a partial indemnity scale. K.K. cross-appeals from that decision.

130 A trial judge has a broad discretion regarding the awarding of costs in civil proceedings. A trial judge's costs determination is entitled to appellate deference. It will not be set aside on appeal unless the trial judge made an error in principle or the costs award was plainly wrong: *Hamilton v. Open Window Bakery Ltd.* (2003), [2004] 1 S.C.R. 303 (S.C.C.) at para. 27; *Murphy v. Alexander* (2004), 236 D.L.R. (4th) 302 (Ont. C.A.) at para. 55.

131 The costs consequences of a rejected offer to settle as enunciated in rule 49.10(1), while important to the conduct of civil litigation, are not automatic. The language of rule 49.10(1) expressly permits a trial judge to depart from a strict application of the rule. This court has held that the trial judge is in the best position to determine whether such a departure is warranted on an exceptional basis in a particular case. See *Orlando Corp. v. Dufferin Roofing Ltd.* (2004), 1 C.P.C. (6th) 144 (Ont. C.A.) at para. 14.

132 In this case, after considering the evidence and the issues at trial and the unusual circumstances arising from K.W.G.'s mental illness, the trial judge held that rule 49.10(1) should not be strictly applied. I cannot say that this discretionary decision was plainly wrong or tainted by an error in principle. Accordingly, I would not interfere with the trial judge's costs award.

V. Disposition

133 For the reasons given, I would allow the appeal in part, by setting aside the trial judge's award of damages for lost income and substituting an award of $20,000. I would dismiss the appeal in all other respects. Although I would grant leave to the respondent to appeal costs, I would also dismiss the cross-appeal. As success in these proceedings is divided, I would make no award of costs in respect of the appeal and cross-appeal.

K.M. Weiler J.A.:

I agree.

R.A. Blair J.A.:

Overview

134 I have had the opportunity to read the draft reasons of my colleague Justice Cronk. I agree with her reasons and her disposition with respect to the trial judge's award of $100,000 for lost income and with her decision to substitute an award of $20,000 in its stead. Like her, as well, I would grant leave to appeal the trial judge's costs award but would dismiss the cross-appeal.

135 Respectfully, however, my analysis leads me to a different conclusion concerning the appellant's liability. I would allow the appeal in that regard for two reasons. First, while I agree with the trial judge — and with my colleagues — that the appellant mother owed a fiduciary duty to her daughter to protect her from sexual abuse by her father if able to do

so, the trial judge erred in arriving at his conclusion that the appellant had the ability to do so in these circumstances. Secondly, he erred in failing to apply the doctrine of *laches* in favour of the appellant.

136 Both of these issues take their texture from the fact that the appellant, who was eighty-two years old at the time of trial, was by then suffering from dementia, had become legally incapacitated, and was unable to provide instructions, participate, or testify at the trial. Through no fault of her own she was not there to defend herself in a case that turned on issues of credibility.

Liability for Breach of Fiduciary Duty

137 I do not question that a fiduciary relationship exists between parent and child: see *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 (S.C.C.). I also do not question that a mother owes a fiduciary duty to protect a child from sexual abuse by the child's father where she is capable of doing so and fails to take reasonable steps to do so in the circumstances: see, for example, *J. (L.A.) v. J. (H.)* (1993), 13 O.R. (3d) 306 (Ont. Gen. Div.)); *T. (L.) v. T. (R.W.)* (1997), 36 B.C.L.R. (3d) 165 (B.C. S.C.); and *B. (P.) v. E. (R.V.)*, [2007] B.C.J. No. 2305 (B.C. S.C.). I also accept without hesitation the dreadful nature of the incestual abuse inflicted on the respondent by her father as well as its grave and enduring consequences.

138 Respectfully, however, the trial judge erred by concluding, in effect, that because the expert, Dr. Klassen, could only say that the appellant *may* have lacked the personal resources to intervene on behalf of her daughter, the appellant had not met the burden of establishing she was incapable of acting in furtherance of her fiduciary obligations. Two things concern me about this.

139 First, the appellant had no such burden. By conflating an "evidential burden" to show there is sufficient evidence of a fact to put it in play with an "ultimate burden" to establish a fact, the trial judge lost sight of the plaintiff's overall burden. The plaintiff's overall burden is to show, on a balance of probabilities, that the appellant had breached her fiduciary duty by failing to take reasonable steps to prevent the abuse. The trial judge erred by placing the onus on the appellant to demonstrate that she was incapable of acting.

140 Secondly, the trial judge's analysis of this issue is tainted by his failure to consider the argument of appellant's counsel at trial that it was the cumulative effect of the evidence of the father's dominance at home, the trauma from sexual and other abuse she had suffered while interred in a prison camp in the former Soviet Union, and the societal realities of the 1950's that affected the appellant's ability to respond. Although the trial judge acknowledged this argument, he gave it little — if any — consideration in his analysis, instead focusing primarily on the evidence of the expert witness Dr. Klassen.

The Onus Question

141 On behalf of the appellant, Mr. Honickman argued that the trial judge imposed an impossible standard on the appellant by requiring her to prove with "absolute certainty" that she was powerless to intervene. I am not able to find anything in the reasons of the trial judge that articulates or suggests such a standard. What the trial judge did do, however, was to infer a rebuttable presumption that the appellant had the ability to fulfill her fiduciary duty from the existence of the relationship itself. He also held that she had failed to meet the evidentiary burden of rebutting that inference. He said at para. 55:

> A fiduciary duty [between a mother and child] arises from the nature of the relationship and the ability to fulfill the duty is inferred from the relationship. It is an inference that may be rebutted, but the evidentiary burden for doing so rests with the person on whom the duty is imposed by virtue of the relationship. *It is, therefore, incumbent upon the fiduciary to demonstrate that she did not have the ability, awareness and means to act.* [Emphasis added.]

142 The trial judge cited no authority for the proposition that the existence of a fiduciary relationship creates a rebuttable inference that the person on whom the duty is imposed by virtue of the relationship has the ability to fulfill that duty. He nonetheless rejected the appellant's argument on this ground at trial because he concluded that Dr. Klassen's

evidence that the appellant *may* have lacked the resources to intervene was "not sufficient to support a finding that she was unable to act." In my view, the issue was not whether there was sufficient evidence to support a finding that she was unable to act, much less whether the defendant fiduciary had demonstrated that fact. Although such a finding would clearly result in the dismissal of the claim, it was not necessary that it be made. The question was whether the plaintiff had met her overall burden of demonstrating that the appellant had breached her fiduciary obligation by failing to take reasonable steps in the circumstances to intervene when she had the ability to do so.

143 Mr. Honickman conceded that there was an evidentiary shift in the burden in cases of this nature. Nonetheless, the ultimate or "persuasive" burden remains on the plaintiff. In law, the evidentiary burden is not a burden "to establish" anything. As Dickson C.J.C. pointed out in *R. v. Schwartz*, [1988] 2 S.C.R. 443 (S.C.C.), at 466-467:

> The party who has the persuasive burden is required to persuade the trier of fact, to convince the trier of fact that a certain set of facts existed. Failure to persuade means that the party loses. *The party with an evidential burden is not required to convince the trier of fact of anything, only to point out evidence which suggests that certain facts existed.* [Emphasis added.]

144 I agree with my colleague's view of the nature of the evidentiary shift, as expressed in para. 102 of her reasons:

> In these circumstances, while K.K. was obliged to establish the breach, K.W.G. bore an *evidential burden to establish that her inability to act was a live issue*, by either adducing sufficient evidence or pointing to other evidence on the record of her claimed inability to act. See John Sopinka, Sidney N. Lederman and Alan W. Bryant, *The Law of Evidence in Canada* (Toronto and Vancouver: Butterworths, 1992) at 56 and 60-65. [Emphasis added.]

145 Respectfully, however, that is not the test or standard the trial judge applied.

146 Justice J.S. Sigurdson accurately expressed that burden in cases of this nature, in my view, in *B. (P.) v. E. (R.V.)*, *supra*. At paras. 246-247 he said:

> However, in the circumstances, I have concluded that the evidence is not sufficiently clear and cogent to find liability on the part of [the mother].
>
> Although I prefer the evidence of [the daughter] generally over that of her mother, I find that insofar as the claim against her mother is concerned, there *is insufficient evidence to demonstrate that [the mother] was capable of and failed to take steps* that were reasonable in the circumstances to protect her daughter from [her father]. [Emphasis added.]

147 Sigurdson J.'s reference to "clear and cogent" evidence to support liability warrants some reflection as well, given the nature of the allegations. Courts have held that they are to take greater care in scrutinizing the evidence in civil cases when allegations of a serious nature — such as sexual misconduct or other conduct of a morally blameworthy nature — are made. Allegations that a mother has breached her fiduciary duty by failing to protect her daughter from sexual abuse by her father fall into a similar category, in my opinion. This view of the civil burden does not represent a change in the balance of probabilities standard, but merely the application of that standard "with careful scrutiny of the evidence in a manner that is proportionate with the serious claims being alleged": *B. (P.) v. E. (R.V.)* at para. 127. See *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164 (S.C.C.), at 169-171; *C. (R.) v. McDougall* (2007), 68 B.C.L.R. (4th) 203 (B.C. C.A.), leave to appeal to S.C.C. granted, (S.C.C.); and *W. (G.) v. Sisters of The Good Shepherd* (2000), 227 N.B.R. (2d) 16 (N.B. C.A.). See also Linda R. Rothstein, Robert A. Centa, and Eric Adams, "Balancing Probabilities: The Overlooked Complexity of the Civil Standard of Proof" (Paper delivered at The Law of Evidence Conference, June 2003) (Toronto: The Law Society of Upper Canada, 2004) 455.

148 The need for "careful scrutiny of the evidence" takes on significance in the context of the *laches* issue as well. I shall return to this point later in these reasons.

Application of the Burden

149 Here, the trial judge acknowledged the defence contention that the appellant was powerless to intervene given the cumulative effect of the father's dominance within the family, the historical trauma that the appellant had suffered while interred in a prison camp prior to immigrating to Canada, and the societal mores of the 1950's about revealing issues of familial sexual abuse. He also acknowledged the plaintiff's argument that the appellant's own evidence in a memoir she had written concerning her life experiences and on her examination for discovery was sufficient to show that she was not intimidated by her husband. But he did not analyse either of these positions.

150 After outlining these positions, the trial judge's reasons regarding the appellant's capacity to act consist of the following:

> [58] Dr. Klassen addressed the issue of the defendant's capacity to act in the following excerpt from his report of September 8, 2005:
>
> > In addition to being unable to comment on whether or not [the respondent's] mother may or may not have known about the alleged sexual behaviour, including its scope or duration, on a cognitive level, I am also not in a position to comment on whether or not [the respondent's] mother would have been able to deal, psychologically, with the notion that her daughter was being sexually assaulted by her husband. By means of example, one cannot rule out the possibility that [the respondent's] mother herself was traumatized in one or more ways, leading to extensive use of denial and repression to manage conflict. As well, there may have been a relationship dynamic between [the respondent's] mother and father that may have made it difficult for [the respondent's] mother to feel empowered to act on information that she may have had, given that [the respondent's] father was described as violent and domineering. In short, I believe that it is impossible for me to comment on the extent to which [the appellant] may have known of the sexually assaultive behaviour, and *it is similarly difficult if not impossible for me to comment meaningfully on the extent to which* [the respondent's] *mother, if she knew, may have engaged in wilful neglect of* [the respondent], *as opposed to having lacked the personal resources, for reasons not of her choosing, to intervene.* [Emphasis added.]
>
> [59] Notwithstanding the bravado displayed by the defendant in her memoir and on her examination for discovery, I accept that her history and circumstances may have conspired to prevent her from acting in the face of knowledge that the plaintiff was being abused by [the father]. However, a determination that the defendant *may* have lacked the personal resources to intervene, as Dr. Klassen suggests, is not sufficient to support a finding that she was unable to act.
>
> [60] I, therefore, conclude that the defendant breached her fiduciary duty to the plaintiff when she failed to protect the plaintiff from the physical and sexual abuse that she knew was being perpetrated by [the father].

151 The trial judge's analysis, then, focuses on Dr. Klassen's comment that the appellant *may* have lacked the personal wherewithal to intervene, from which he concluded there was not sufficient evidence "to support a finding that [the appellant] was unable to act."

152 This was considered insufficient to meet the *appellant's* onus, and therein lies the error regarding the burden of proof, in my view. The trial judge's discounting of the "bravado" displayed by the appellant in her memoir and on discovery, and his acceptance "that her history and circumstances may have conspired to prevent her from acting in the face of knowledge that the plaintiff was being abused by [the father]" were enough to make the appellant's inability to intervene "a live issue" — to adopt my colleague's phraseology. The question should then have become whether on all of that evidence, the *plaintiff* had met her onus of demonstrating that the appellant had breached her fiduciary duty by failing to take reasonable steps to prevent the abuse when she was able to do so. That is not the question the trial judge asked, however. Instead, he essentially asked only whether *the appellant* had demonstrated that she *did not* have

the ability, awareness and means to act; he did not direct his mind to determining whether *the plaintiff* had demonstrated in all the circumstances that the appellant *did* have the ability, awareness and means to act.

153 For example, considerable evidence was led at trial about the dynamics of the family and the father's role in it, and about the historical sexual and other abuse the mother herself was subjected to in the Russian prison camp. In addition, the appellant had attempted to deal with those issues in her memoir and she gave evidence about them on her examination for discovery. The trial judge did review some of that evidence earlier in his reasons. But except for his general reference to it in the passage from his reasons cited immediately above, he gives no indication how that evidence played into his determination about the appellant's ability to fulfill her fiduciary obligations.

154 Furthermore, the trial judge misapprehended a key piece of the respondent's evidence. The respondent has three sisters. The evidence of the sisters was that their father was the dominating force in the family and that they, *and their mother*, were afraid of him. He was the boss, they said, and everyone — again, including the appellant — did what he told them to do. In contrast, the trial judge said that the respondent described the appellant as "unafraid of her father". The respondent did volunteer that comment in the context of an answer to the effect that her mother would talk back to her father. However, it was not the thrust of the respondent's evidence that her mother was "unafraid of her father", a man whom she described variously as "cruel", "vicious" and a "monster". In fact her evidence on this issue was at least neutral and arguably was to the contrary. In cross-examination the following exchange took place:

> Q. When did your mother stand up to your father?
>
> A. *She would talk back to him. She wasn't afraid of him.*
>
> Q. *Well, I thought you said before that you agreed that she may have been fearful of him?*
>
> A. *Well, that — I thought that, but I don't know if she was. I just felt she should have been fearful of him because I was.*
>
> Q. And I wrote down different words that you've used at different times describing your father, cruel, correct?
>
> A. Yes.
>
> Q. Fault-finding?
>
> A. Yes.
>
> Q. Terrifying, humiliating, correct?
>
> A. Yes.
>
> Q. And you have absolutely no idea, I'm going to suggest to you, the scope, for example, of any abuse if there was any against your mother by your father, correct?
>
> A. No, I haven't.
>
> Q. You have no idea?
>
> A. No.
>
> Q. Could have been, verbally? Was he — he was verbally abusive in front of you to your mother, correct?
>
> A. Yes.
>
> Q. You don't know if he was physically abusive?

A. No, I don't.

Q. You have absolutely no idea of what when on, to use the vernacular, behind closed doors, behind the two of them, do you?

A. No, I don't.

Q. You don't know what level of trauma, if any, your mother may have experienced at the hands of your father, do you?

A. No.

Q. And — and you agree with me, you have no idea what was going on with your mother psychologically back then in the 1950's with respect to her own personal trauma and what she could do or couldn't do, correct? You have no idea, right?

A. I have no idea.

. . . . .

Q. *And was it your perception back then that your mother was fearful of your father at any time?*

A. *It wasn't my perception. I just felt she — she was possibly fearful of him, because I was fearful of him.*

[Emphasis added.]

155 The trial judge's view that the appellant was "unafraid of her father [the husband]" is troubling, and significant. The trial judge made no findings of credibility as between the respondent and her three sisters. Indeed, he went out of his way not to do so, taking the view that there were understandable inaccuracies in all of their testimonies and that it was unnecessary for him to make such findings. However, his disposition of the case can only be supported on the basis that he accepted the evidence of the respondent where he had to do so, and this, in turn, has implications for his acceptance or rejection of the appellant's version of events as set out on her examination for discovery, particularly when the appellant was incapable of presenting that version of events personally to the judge at trial. I shall return to this specific point in more detail when dealing with the issue of *laches*. For present purposes, it is sufficient to say that the trial judge misapprehended the respondent's evidence on a very key point.

156 The evidence of the respondent's three siblings was that they were all afraid of their father, including the appellant mother. The evidence of the respondent — at best — was that she did not know, but that she too thought that her mother was afraid of her abuser. Had that evidence been considered by the trial judge in the course of his analysis about whether the appellant had the ability to intervene to protect her daughter — along with the evidence of the other sisters and the appellant about her historical abuse, and with some recognition of societal mores in the 1950's at least discouraging the public disclosure of such events — it might well have affected the trial judge's decision on this issue. This might be so, particularly, had the trial judge concentrated, as he should have, on the *plaintiff's* overall burden to show that the appellant breached her fiduciary duty by failing to take reasonable steps to intervene when she had the ability to do so rather than placing the burden on the appellant to establish that fact. This is all enhanced by the trial judge's downplaying of the appellant's attempts in her memoir and on discovery to portray herself as a strong independent woman by dismissing them as bravado.

157 I would allow the appeal and, in other circumstances, would have ordered a new trial on this ground alone. Because of the view I take on the application of the doctrine of *laches* in this case, however, I am satisfied that the appeal should be allowed and the plaintiff's action dismissed. I turn to the issue of *laches* now.

The Doctrine of Laches

158 My colleague has outlined the principles governing the application of the doctrine of *laches*, as articulated by La Forest J. in *M. (K.) v. M. (H.)*. There are two branches to the doctrine, and it is well-established that mere delay — even extensive delay — does not, by itself, disentitle an applicant to equitable relief. For convenience, I repeat the statement of La Forest J. at pp. 77-78 of *M. (K.) v. M. (H.)* defining the doctrine:

> *Thus there are two distinct branches to the laches doctrine, and either will suffice as a defence to a claim in equity*. What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches under either of its two branches. *Rather, the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties*, as is the case with any equitable doctrine. [Emphasis added.]

159 For purposes of disposing of the appeal I need not accept the appellant's argument that the trial judge erred by concluding that acquiescence on the part of the respondent had not been established. I say that because I am satisfied that he did err in failing to hold that the equitable relief claimed by the respondent should be denied "as a matter of justice between the parties" because the inescapable reality is that, by the time of trial, the delay had resulted in a situation where it was unjust to find and impose liability on the appellant in the circumstances. The appellant was eighty-two years of age by then. She was legally incapacitated, unable to instruct her counsel, and incapable of participating or testifying at trial. This in a case that turned fundamentally on issues of credibility and involved an elderly woman who was herself a victim of abuse. The events in question had taken place almost fifty years earlier and the frailties of age had caught up with her. She did not have the capacity, or the ability, to defend herself at trial.

160 With respect to my colleague and the trial judge, I do not accept that the operative moment for the purposes of *laches* in these circumstances is when the action was commenced (the appellant was competent at that time). Nor do I take the existence of her memoir or the fact that she was able to be examined for discovery prior to trial to be particularly determinative of this issue. In circumstances such as these, the colour and texture of aids such as these depend very much on what the witness says about them at trial — and how the witness says it.

161 It is the *effect* of the delay that is critical. The appellant was elderly when the action was commenced. Indeed, the respondent had cared for her during a period of serious illness in the 1990's when she almost died. The fact that she might become incapacitated at any time was reasonably foreseeable. The effect of the delay is that she was incapacitated by the time of trial and the trial judge did not have the benefit of seeing her and listening to her testimony in relation to these issues. While no one can overlook — and I do not wish to minimize for an instant — the appalling abuse to which the respondent was subjected, it was in my view manifestly unfair to impose liability for that abuse on the non-committing parent who was incapable of defending herself and telling her story at the only time it counted in a case such as this: the trial. It was the respondent's delay in bringing her action that permitted this unjust situation to arise.

162 This view is consistent with the summary of the principles relating to *laches* cited by Justice La Forest in the passage immediately preceding the one outlined above from *M. (K.) v. M. (H.)* at p. 77:

> The rule developed in [*Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221] is certainly amorphous, perhaps admirably so. However, some structure can be derived from the cases. A good discussion of the rule and of *laches* in general is found in Meagher, Gummow and Lehane, *supra*, at pp. 755-65, where the authors distill the doctrine in this manner, at p. 755:
>
> > It is a defence which requires that a defendant can successfully resist an equitable (although not a legal) claim made against him if he can demonstrate that the plaintiff, by delaying the institution or prosecution of his case, *has either* (a) acquiesced in the defendant's conduct *or* (b) caused the defendant to alter his position in reasonable reliance on the plaintiff's acceptance of the status quo, *or otherwise permitted a situation to arise which it would be unjust to disturb...* [Emphasis added.]

163 Relying on statements contained in *M. (K.) v. M. (H.)* to the effect that the rigorous application of limitation periods is inapt in incest cases [8], my colleague concludes that "the applicable jurisprudence and the policy considerations that underlie it tell strongly against a rigorous application of the doctrine of *laches* in an incest case, whether claims are advanced against the abusive or the 'bystander' parent". I would prefer to leave for another day consideration of whether the same "rigorous" ethic that the courts have applied to limitation period defences in sexual assault and incest cases as between the victim and the direct perpetrator of the abuse should be extended to parties that are arguably more remote participants. For myself, I do not see the doctrine of *laches* as being the subject of either a "rigorous" or "non-rigorous" application. *Laches* is an equitable doctrine designed to be applied flexibly on the facts of each case to ensure, ultimately, that the case is "resolved as a matter of justice as between the parties."

164 My reluctance on this issue is driven partly by the fact that much is unknown about the relatively new concept of imposing liability for abuse on the parent — usually the mother — who did not perpetrate the abuse directly. This is particularly so in the context of historical incest or sexual abuse committed in a different social era, as is the case here. Elizabeth K.P. Grace and Susan M. Vella highlight some of these concerns in their article "Vesting Mothers with the Power They Do Not Have: The Non-Offending Parent in Civil Sexual Assault Cases: J.(L.A.) v. J.(H.) and J.(J.)" (1994) 7 Can. J. Women & L. 184-196. The following comments at pp. 186-187 are instructive:

> Non-offending mothers' role in and accountability for sexual abuse perpetrated against children by father figures raises many difficult and intractable questions. For instance, given the comparatively greater power that mothers as adults have vis-à-vis their children, under what circumstances should legal responsibility be pinned on individual mothers for failing to protect their children form sexual violence? Is it appropriate to use the civil courts to vindicate a survivor's feelings of anger and betrayal against her mother and to reduce her self-blame when the mother is essentially being blamed for her powerlessness? *The propriety of imposing liability on mothers must be considered in light of the gender inequality that permeates our social, economic, and political structures (including families)*, as well as the lack of publicly-funded shelters and treatment facilities for victims of sexual and physical abuse. Before more dangerous precedents like *J. (L.A.)* are set, there needs to be a process of debate and reflections, both within the broader feminist movement and among lawyers doing plaintiff-side sexual assault work, about the degree to which non-offending mothers should be made responsible *in law* for the sexual abuse suffered by their children at the hands of father figures.
>
> It may be too late and, indeed, undesirable to turn back the clock on recent advances in the law pertaining to sexual assault that have imposed private law duties of care and fiduciary obligations on persons and institutions in positions of power and trust. *However, there is a sad, if predictable, irony to these developments being used against one of the weakest links in the chain of child sexual abuse — namely non-offending mothers.* Unquestionably, mothers owe both a duty of care and a fiduciary duty to their children. The issue to be considered is whether, so long as they are denied viable choices and the power to prevent the abuse, mothers should be held to have breached their legal obligations. *Otherwise, an enormous gulf will continue to develop between a system of legal regulation that imposes partial, privatized solutions by vesting individual, non-offending mothers with power they probably did not have, and a society that refuses to provide the means by which real choices can be exercised.* [Emphasis added.]

165 The concerns expressed by Grace and Vella resonate in the context of the debate about the application of the doctrine of *laches* here, in my view. Their comments are directed at the problem of using modern day standards to inform a duty that existed in a different social era. These concerns evoke even more caution — and even more concern about *laches* in circumstances such as this — in the present context, in my view. We are dealing with family incest occurring almost half a century before the trial, in a societal era with quite different perspectives and coping mechanisms respecting such abuse than the era in which the case was tried. We are dealing, as well, with a family itself coming from an abusive post-World War II prison camp experience.

166 As previously noted, the trial judge acknowledged the argument of appellant's counsel at trial that it was the cumulative impact of her husband's dominance within the family, the trauma she experienced in the prison camp, and

the prevailing societal mores of the 1950's that led to the appellant's powerlessness to intervene. In the absence of the appellant's participation at the trial, however, the trial judge appears not to have assessed these matters in the context of the *laches* debate. Moreover, as noted above in the section of these reasons dealing with the burden of proof, the trial judge misapprehended the respondent's testimony on a key point going to the appellant's ability to intervene — concluding erroneously that the respondent's evidence was that her mother was "unafraid" of her father. The testimony of her siblings was to the contrary. The absence of the appellant's testimony at trial to provide the trial judge with some direct insight into this central issue only highlights the unfairness resulting from the delay between the underlying events and the trial.

167 Here, I recall again the need for "clear and cogent" evidence, and for "careful scrutiny" of that evidence, in cases of this nature. There is particular meaning to this in the *laches* context where — as here — a party is incompetent and cannot participate or testify at trial. The trial judge is deprived of the opportunity to weigh the evidence of that party in determining whether the burden of proof has been met. Although the proceedings can lead to a high stigma finding of liability and the evidence thus requires a high level of scrutiny, some of the most important evidence — the testimony of the appellant herself — was not available at trial and was therefore subjected to a much lower level of scrutiny.

168 Some reliance is placed on the fact that the appellant was able to testify at her examination for discovery and that over the course of that examination, and in her memoir, she portrayed herself as an independent woman able to stand up to her husband. Justice Cronk outlines some of this evidence at paras. 107-109 of her reasons. I do not doubt that parts of the memoir and the discovery evidence could be interpreted in that fashion. However, to the extent that this part of the record was referred to by the trial judge, as I have earlier observed, he appears to have discounted it as "bravado" on the part of the appellant. Whether the trial judge's reaction — had he been able to hear and see a competent appellant give evidence at trial — would have been to interpret the bravado as even greater bravado or to interpret it as something else is something we cannot know. Therein lies the unfairness in forcing the appellant to undergo a trial in which she could not defend herself in the most important of ways — by testifying — and in finding her legally responsible in such circumstances.

169 At paras. 77-78 of her reasons Justice Cronk states:

> Consequently, while K.W.G's mental disorder is most unfortunate, there is no basis on this record to visit the consequences of her illness on K.K., or to conclude that the timing of the commencement of her lawsuit or its pace after commencement was influenced by her mother's health. K.W.G. simply succumbed to an unforeseen mental illness — dementia — after the commencement of K.K.'s lawsuit.
>
> This factor must be balanced against K.K.'s rights. To hold that K.W.G's unexpected illness bars any equitable relief for K.K would be to deny all redress for an admitted incest victim on account of an unforeseen development that was entirely beyond her control. That outcome would scarcely serve the interests of justice.

170 In this respect I simply see the case differently than my colleague. While I do not suggest that either the commencement or the pace of the lawsuit by the respondent were influenced by the appellant's health, dementia in a person approaching or in her eighties is hardly uncommon or unforeseeable and it is not a situation that was "entirely beyond the [respondent's] control". She could have — and should have — started her action sooner. The trial judge found that it was during the discussion about the grandmother incident in 1993 "that the plaintiff came to know for certain that her mother was aware of the abuse but was not prepared to intervene." The respondent could have started her action at least by then. But she did not. Instead, she waited seven years, a period during which she knew — because she had cared for her mother at a time when she almost died — that the appellant's health was failing. In so doing she permitted a situation to arise where, "as a matter of justice as between the parties," it was unjust to make adverse findings against her and to impose liability.

Disposition

171 For the foregoing reasons, then, I would allow the appeal, set aside the judgment below, and substitute a judgment dismissing the action. I would award the appellant her costs of the appeal on a partial indemnity basis.

Appeal allowed in part; cross-appeal dismissed.

Footnotes

1 In the trial judge's reasons, K.W.G.'s daughters are identified by the initials of their maiden names. In these reasons, they are referred to by the initials used in K.W.G.'s factum on appeal.

2 See also the minority judgment of McLachlin J., as she then was, in *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 (S.C.C.), additional reasons at [1992] 2 S.C.R. 318 (S.C.C.).

3 In her factum on appeal, K.W.G. also invoked the second branch of the doctrine of laches by arguing that the trial judge erred by failing to consider whether the circumstances of this case rendered the prosecution of K.K.'s action unreasonable. This ground of appeal was abandoned during oral argument of the appeal.

4 This rule holds that a cause of action arises for the purpose of a limitation period when the material facts on which it is based have been or ought to have been discovered by the plaintiff by the exercise of reasonable diligence. See *M. (K.)* at pp. 33-34.

5 See also the companion decisions of the Supreme Court of Canada in *G. (E.D.) v. Hammer*, [2003] 2 S.C.R. 459 (S.C.C.) and *B. (M.) v. British Columbia*, [2003] 2 S.C.R. 477 (S.C.C.).

6 I find additional support for a relaxed application of laches in the incest context in the contemporary legislative approach to limitation periods and sexual assault. In Ontario, the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B. recognizes that, in the case of sexual assault, the passage of considerable time may be required before the claimant both appreciates the assault and its effects and is sufficiently empowered to advance a legal claim. Under the Act, the standard two-year limitation period does not run in respect of a claim based on sexual assault during any time in which the claimant is incapable of commencing the proceeding (s. 10(1)). Instead, a sexual assault claimant is presumed to be incapable of commencing litigation before his or her action is actually initiated, unless this presumption is rebutted by evidence of an earlier capability to sue (s. 10(3)).

7 In contrast to the facts in *M. (K.)*, there is no suggestion here that K.K.'s realization of her rights presumptively materialized upon the commencement of therapy. While K.K. began counselling for sexual abuse in October 2000, she acknowledged at trial that she had consulted a lawyer and decided to sue K.W.G. sometime in the summer of 2000.

8 Buttressed by the presumption in Ontario's current limitation legislation that victims of assault and sexual assault are incapable of commencing litigation sooner than they do.

TAB
“3”

2005 CarswellOnt 1124
Ontario Court of Appeal

Celanese Canada Inc. v. Canadian National Railway

2005 CarswellOnt 1124, [2005] O.J. No. 1122, 138 A.C.W.S. (3d) 23, 196 O.A.C. 60

Celanese Canada Inc. (Plaintiff / Respondent) and Canadian National Railway Company (Defendant / Appellant)

Borins, Feldman, Simmons JJ.A.

Heard: December 17, 2004
Judgment: March 30, 2005
Docket: CA C39868

Proceedings: varying *Celanese Canada Inc. v. Canadian National Railway* (2003), 2003 CarswellOnt 6532 (Ont. S.C.J.); and affirming *Celanese Canada Inc. v. Canadian National Railway* (2002), 2002 CarswellOnt 6049 (Ont. S.C.J.)

Counsel: Kenneth R. Peel for Appellant
William G. Scott, Christopher M. Hubbard for Respondent

Subject: Public; Civil Practice and Procedure; Torts

APPEAL by defendant railway of judgments reported at *Celanese Canada Inc. v. Canadian National Railway* (2003), 2003 CarswellOnt 6532 (Ont. S.C.J.) and *Celanese Canada Inc. v. Canadian National Railway* (2002), 2002 CarswellOnt 6049 (Ont. S.C.J.), with respect to action in negligence against railway.

***Borins J.A.*:**

I

1 This is an appeal by the Canadian National Railway Company ("CN") from a judgment in favour of Celanese Canada Inc. ("Celanese") for damages of $300,632.82 plus prejudgment interest. CN also seeks leave to appeal, and if leave is granted, appeals from the costs judgment against it in the amount of $191,124.42. The main issues in this appeal are whether the trial judge erred in the exercise of his discretion in his determination of prejudgment interest and costs.

II

2 By way of background, this case arose out of an accident that occurred on February 13, 1995 when ten railcars loaded with a component known as "TA" that CN had delivered to Celanese on February 7, 1995 and had placed on the Celanese siding, rolled down the siding and struck and damaged Celanese's plant as well as a high voltage power line. As a result, production at the plant was halted for twenty-four hours. Celanese claimed damages of $300,633, comprised of property damage of $174,481 and a business interruption loss of $126,152. One element of the business interruption loss was $63,210 for loss of profit on lost production.

3 This case was tried commencing on February 23, 2003 in Belleville, where the accident occurred. CN denied that it was negligent, but contended that if it were negligent then Celanese was contributarily negligent. CN also relied on a Siding Agreement entered into with a predecessor of Celanese, claiming that the provisions of clause 12 exempted it from liability for the damages sustained by Celanese. It relied, as well, on clause 10, contending that if it was negligent and Celanese was contributarily negligent, Celanese's loss should be borne by the parties equally. Of the amount claimed,

CN did not dispute that Celanese had incurred damages of $237,423. However, it contested Celanese's claim of $63,210 for loss of profit on lost production.

4 Following a six day trial, the trial judge found that it was CN's negligence that caused the accident of February 13, 1995 and awarded Celanese virtually the full amount of its claim, $300,632.82, together with prejudgment interest of 3.3 per cent per annum calculated from the date of the accident. Subsequently, the parties delivered written submissions with respect to prejudgment interest and costs. The bill of costs of the successful party, Celanese, was $191,124.42. This amount included disbursements and GST, as well as the costs of an unsuccessful motion for summary judgment brought by CN one week before the trial commenced. As Celanese had delivered an offer to settle on January 22, 2003 for $290,810 that was rejected by CN, subsequent to that date it calculated its lawyers' fees and its costs of the summary judgment motion on a substantial indemnity scale. After considering the parties' written submissions, the trial judge required counsel for the parties to attend to make oral submissions on prejudgment interest and costs.

5 On June 25, 2003, the trial judge released written reasons for fixing the prejudgment interest rate at the prescribed rate of 3.3 per cent per annum to be calculated from "the date of the accident". He fixed the successful plaintiff's costs in the full amount of its bill of costs. Giving effect to Celanese's rejected offer to settle, the trial judge awarded costs before that date on a partial indemnity scale and, thereafter, on a substantial indemnity scale.

III

6 CN raised a number of grounds of appeal, contending that the trial judge erred:

(i) In finding that the negligence of CN was the cause of the accident.

(ii) In failing to find that Celanese was contributarily negligent.

(iii) In assessing Celanese's business interruption loss at $63,210.

(iv) In failing to interpret clause 12 of the Siding Agreement as transferring the risk and responsibility for the railcars to Celanese subsequent to their delivery to the Celanese siding, thereby relieving CN of liability.

(v) In failing to apply clause 10 of the Siding Agreement.

(vi) In ordering that prejudgment interest on the entire amount of $300,632.82 awarded to Celanese be calculated from the date of the accident.

(vii) In fixing Celanese's costs in the amount of $191,124.42.

7 In respect to the trial judge's findings on negligence and damages, I am satisfied that he made no palpable or overriding error in his understanding and application of the evidence which, in my view, supported his findings. As for the trial judge's interpretation of clause 12 of the Siding Agreement, the trial judge correctly found that it does not exclude CN from liability for negligence. Had CN intended to contract out of liability for its own negligence, clear and unambiguous language to that effect was required. As the trial judge found no contributory negligence on the part of Celanese, clause 10 of the Siding Agreement did not apply.

8 However, I am satisfied that the trial judge erred in the exercise of his discretion in respect to the commencement date of the prejudgment interest and the amount at which he fixed the costs awarded to Celanese.

IV

9 CN appeals from the following formal order of the court in respect to prejudgment interest on the award to Celanese of $300,632.82:

2. THIS COURT ORDERS that the prejudgment interest rate shall be 3.3% per annum, to commence the date of the accident, February 13, 1995.

10 The following provisions of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*") are relevant to the award of prejudgment interest in this appeal:

127. (1) In this section and in sections 128 and 129,

. . . . .

"date of the order" means the date the order is made, even if the order is not entered or enforceable on that date, or the order is varied on appeal, and in the case of an order directing a reference, the date the report on the reference is confirmed;

. . . . .

"prejudgment interest rate" means the bank rate at the end of the first day of the last month of the quarter preceding the quarter in which the proceeding was commenced, rounded to the nearest tenth of a percentage point;

"quarter" means the three-month period ending with the 31st day of March, 30th day of June, 30th day of September or 31st day of December.

128. (1) A person who is entitled to an order for the payment of money is entitled to claim and have included in the order an award of interest thereon at the prejudgment interest rate, calculated from the date the cause of action arose to the date of the order.

. . . . .

(3) If the order includes an amount for past pecuniary loss, the interest calculated under subsection (1) shall be calculated on the total past pecuniary loss at the end of each six-month period and at the date of the order.

. . . . .

130. (1) The court may, where it considers it just to do so, in respect of the whole or any part of the amount on which interest is payable under section 128 or 129,

(a) disallow interest under either section;

(b) allow interest at a rate higher or lower than that provided in either section;

(c) allow interest for a period other than that provided in either section.

11 Under s. 127(1) of the *CJA*, as this action was commenced on July 21, 1997 the prejudgment interest rate applicable to the action is 3.3 per cent per annum. Section 128(1) provides that prejudgment interest is to be "calculated from the date the cause of action arose to the date of the order" that attracts the interest. The date of the order "that attracts the interest" is the date of the release of the reasons for judgment awarding Celanese $300,632.82, which is March 15, 2003. However, s. 128(1) is modified by s. 128(3) that applies to an award, as in this case, "for past pecuniary loss", whereby interest is to be "calculated on the total past pecuniary loss at the end of each six-month period and at the date of the order". Overall, under s. 130 the decision as to the date, rate and award of interest is a discretionary exercise by the trial judge, entitled to deference absent clear error.

12 Before the trial judge and this court, counsel for CN argued three points: (i) pursuant to s. 127(1) of the *CJA*, the appropriate rate of prejudgment interest is 3.3 per cent per annum; (ii) although it is common practice for the court to

average the prejudgment interest rate where there has been a significant fluctuation in the rate, as arguably there is in this case, Celanese's delay in bringing the case to trial should not be rewarded by averaging the prejudgment interest rate from when the action was commenced until the date of the order as requested by Celanese; and (iii) because Celanese's claim was for pecuniary damages, the accrual date for prejudgment interest is governed by s. 128(3).

13 Because the trial judge interjected at the commencement of counsel's submissions to state that "[the prejudgment interest rate is] going to be 3.3 [per cent] *from the date the cause of action arose*" [emphasis added], counsel for CN focused his argument on his third point. [1] He drew the court's attention to the fact Celanese had suffered no real loss on the date of the accident, February 13, 1995. Rather, the different components of Celanese's claims for the costs of repairing its building and its business losses were not known until they were quantified at different times many months after the accident. He referred the court to s. 128(3) of the *CJA*, stating, in effect, that the purpose of the provision is to ensure that a party is not rewarded through the accrual of prejudgment interest on a loss before it has been incurred. Counsel emphasized that until Celanese paid for the repair of the damage to its building and was able to quantify its business losses it had not lost the use of money "on which the interest is intended to provide some compensation".

14 The trial judge found it unnecessary to hear submissions from Celanese. He gave the following oral ruling in respect to prejudgment interest:

> *I think the Rule should be applied just the way it's worded*, unless there's some real substantial reason not to do it, and I don't see that in this case. I did the same thing on fixing the interest rate [at 3.3 per cent per annum]. So the Rule basically *says it's when you start your action; that's when the rate is fixed, and that's what I did.* I could have used some of the same arguments that counsel used - "Oh well, that's not fair. We should really put the higher rate because they were negotiating" and this and that.
>
> Once I start to get into the file, like that, and trying to figure out when the claim was actually paid and what parts of it were paid and when they got the proper invoices, I think that it's not appropriate for me in this case to do that.
>
> The *cause of action Rule* is there to avoid that necessity unless there's some real compelling reason, and I'm not in a position to say that there was some overwhelming delay in this case. *So the interest will run from the date of the action.*
>
> [Emphasis added]

15 Subsequently, in his written reasons fixing costs, the trial judge added;

> I am now to fix the costs in this case. In the course of the oral argument I fixed the interest rate at 3.3% and its commencement, *date to be the date of the accident.* As I have already said, one of the factors that influenced me to choose the lower rate was delay on the Plaintiff's side .
>
> [Emphasis added]

16 In reviewing the reasons given by the trial judge in resolving the prejudgment interest issue, it is apparent that he gave different reasons on different occasions. When, at the outset of oral submissions he fixed the rate of prejudgment interest at 3.3 per cent per annum "from the date the cause of action arose", it appears that he applied the provisions of s. 127(1) and s. 128(1) of the *CJA*. In his oral reasons delivered in the course of oral submissions, the trial judge ruled that the interest rate of 3.3 per cent per annum would accrue from "when you start your action" as that is "the way [the Rule] is worded". Presumably, by using the word "Rule" the trial judge meant s. 128(1) of the *CJA*. In his written costs judgment, the trial judge commented that in the course of oral argument he had "fixed the interest rate at 3.3% and its commencement date to be the date of the accident". It would therefore appear that the trial judge indicated three different dates for the commencement of prejudgment interest: (i) the date the cause of action arose; (ii) the date of the commencement of the action; and (iii) the date of the accident. In the formal order, from which this appeal is taken, the interest rate is fixed at 3.3 per cent per annum, with interest accruing from the date of the accident, February 13, 1995.

As the accrual date does not conform with either s. 128(1) or s. 128(3) of the *CJA*, I assume that in fixing the accrual date as he did the trial judge was exercising his discretion under s. 130(1).

17 The purpose of s. 128(3) is to achieve fairness in the payment of the prejudgment interest on pecuniary damages by ensuring that a plaintiff will not recover a windfall that would otherwise result were s. 128(1) to be applied. It does so by providing a formula for the accrual of interest on pecuniary damages as they are incurred, in lieu of requiring the court to conduct a series of individual calculations. Section 128(3) accords with the underlying compensatory principle for awarding prejudgment interest, which is to compensate a party for the loss of the use of its money: S. M. Waddams, *The Law of Damages*, 4th ed. (Toronto, Ont.: Canada Law Book, 2004) at 7-23. Two recent decisions of this court support the proposition inherent in the *Courts of Justice Act* that to avoid a windfall to the plaintiff, interest should not be awarded until an expense is actually incurred: *Tridan Developments Ltd. v. Shell Canada Products Ltd.* (2002), 57 O.R. (3d) 503 (Ont. C.A.) at para. 23; *Stellarbridge Management Inc. v. Magna International Inc.* (2004), 71 O.R. (3d) 263 (Ont. C.A.) at para. 81.

18 There is no doubt that under s. 130 of the *CJA* trial judges enjoy a wide discretion to allow prejudgment interest at a rate higher or lower or for a period other than what is prescribed by s. 128 where they consider it just to do so, and that an appellate court may interfere with the discretionary decision of a trial judge only where it is satisfied that there has been a wrongful exercise of discretion in that he or she has attached no weight, or insufficient weight, to relevant considerations. See, *e.g.*, *Stellarbridge Management Inc.* , *supra*, at para. 85. Although Prof. Waddams describes s. 130 of the *CJA* as providing the court with an overriding discretion in determining an award of prejudgment interest, he maintains that this discretion should be exercised in favour of calculating interest only from the date each loss was incurred, whether the loss be classified as general or special damages: *The Law of Damages*, *supra*, at pp. 7-25 to 7-26. Applying Prof. Waddams' opinion to this case, in the exercise of his discretion the trial judge should have given effect to s. 128(3) in his award of prejudgment interest on the pecuniary damages sustained by Celanese.

19 In my view, the trial judge erred in exercising his discretion under s. 130 of the *CJA* in ordering that the prejudgment interest on Celanese's pecuniary damages was to commence from the date of the accident. It would appear that in so ordering, the trial judge gave effect to s. 128(1) which speaks in terms of prejudgment interest accruing "from the date the cause of action arose". As Celanese's claim was for pecuniary damages, its entitlement to prejudgment interest under s. 128(1) was governed by s. 128(3). However, the transcript of the dialogue between counsel and the trial judge, as well as the trial judge's reasons, provide no indication that he considered the appropriate principles that apply to the function or purpose of prejudgment interest on pecuniary damages explained by the authorities and contained in s. 128(3). Consequently, it is appropriate for this court to interfere with his award of prejudgment interest.

20 As the various components of Celanese's claim were not determined until different dates subsequent to the date of the accident, it is possible that the award of prejudgment interest has resulted in a windfall to Celanese. As the trial judge declined to make a finding in respect to when the losses sustained by Celanese were known and quantified, I am not in a position to give specific effect to s. 128(3). Although I would not interfere with the statutory interest rate of 3.3 per cent per annum fixed by the trial judge, I would direct that it be calculated in conformity with s. 128(3) "on the total past pecuniary loss at the end of each six-month period and at the date of the order" awarding Celanese $300,632.82. If the parties cannot agree on the relevant dates and make the interest calculation, they should ask the trial judge to do so.

21 I would add the following observation. The statutorily prescribed prejudgment interest rate of 3.3 per cent per annum awarded by the trial judge appears to be below the average interest rate calculated from either the date of the cause of action, the date of the commencement of the action or the date of the accident. It was submitted by counsel for Celanese that as the low statutory rate of interest fixed by the trial judge effectively offset any windfall arising from the trial judge's failure to order that interest accrue in accordance with s. 128(3), this court should not interfere with the trial judge's order that interest accrue from the date of the accident. Although, on the surface, this argument appears attractive, given the absence of any findings by the trial judge necessary to test its validity, it is impossible to give effect to it.

V

22 The bill of costs that the trial judge approved was in the amount of $191,124.42. Excluding GST, $143,782.50 was claimed for lawyers' fees and $36,620.87 for disbursements. The significant elements of the fees were: pleadings - $7,000; examinations for discovery - $19,517; motion for summary judgment - $7,922.50; trial preparation to January 22, 2003 when Celanese delivered its offer to settle - $23,878; trial preparation after January 22, 2003 - $21,695; trial preparation during trial - $13,750; counsel fees at trial - $40,500.

23 I would note that in reviewing the bill of costs I have found two apparent mathematical errors in respect to the total amount claimed for fees. The amount claimed for pleadings omitted $2,944.50 for the work of two lawyers and a law student. [2] As well, the amount claimed for fees for preparation during trial omitted senior counsel's fee of $23,805. Including these amounts, lawyers' fees in the bill of costs amounted to $170,532 rather than $143,782 and the bill of costs, including disbursements and GST, would have been almost $220,000. It seems that these errors in addition escaped the notice of counsel for the parties and the trial judge. In fairness to Celanese, I have included these fees in re-calculating its bill of costs.

24 Subsequent to the examinations for discovery, Celanese was represented by senior counsel, Mr. Scott, and junior counsel, Mr. Hubbard. At the relevant times, Mr. Scott, a lawyer with experience of twenty years, calculated his counsel fees on a partial indemnity scale on an hourly rate of $350 and on a substantial indemnity scale on an hourly rate of $450, and calculated his *per diem* trial counsel fee on a substantial indemnity scale at the rate of $4,000 for each of the six days of trial. Mr. Hubbard, a lawyer with experience of two years, calculated his fees using hourly rates of $150 on a partial indemnity scale and $250 to $275 on a substantial indemnity scale and a *per diem* rate of $2,750 for the trial.

25 Turning to the costs grid in the *Rules of Civil Procedure*, for lawyers of Mr. Scott's experience, it prescribes for fees other than counsel fees, hourly rates of up to $350 and up to $450 on a partial indemnity scale and a substantial indemnity scale respectively. As well, it prescribes a block daily counsel fee on a substantial indemnity scale of up to $4,000 and a weekly block counsel fee at the same rate of up to $17,500. (On a partial indemnity scale, the costs grid prescribes a block daily counsel fee of up to $2,300 and a block weekly counsel fee of up to $9,500.) As for lawyers of Mr. Hubbard's experience, his respective hourly fees are up to $225 and up to $300. As block counsel fees at trial are not based on a lawyer's experience, he was entitled to claim the same daily and weekly counsel fees as Mr. Scott. However, as I will discuss, it appears that the costs grid does not provide for more than one trial counsel fee.

VI

26 Counsel for CN's major objection to the bill of costs before the trial judge and this court was that it is excessive. Anticipating the decisions of this court in *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (Ont. C.A.) and *Moon v. Sher*, [2004] O.J. No. 4651 (Ont. C.A.), he told the trial judge that the bill of costs was "beyond anything that would have been imagined by the parties as a proper cost at the time". In critically examining the bill of costs, counsel raised the following objections:

> (i) As Celanese's offer to settle of January 22, 2003 was delivered so close to the scheduled trial date and was only about $10,000 less than its claim, it did not constitute a serious attempt to compromise. Consequently, the trial judge should not have awarded costs on a substantial indemnity scale after the date it was delivered.
>
> (ii) As the real amount in issue was about $63,200 for production losses, costs claimed of $191,124.42 were excessive and disproportionate to the amount in issue.
>
> (iii) Senior counsel's fees for preparation and for trial exceeded the maximum amounts permitted by the costs grid.
>
> (iv) Costs of the motion for summary judgment should not be on a substantial indemnity scale as the motion judge found that the motion was not unreasonable.

(v) The costs grid should not apply to the lawyers' services prior to January 1, 2002 when it came into effect.

(vi) Preparation fees were excessive as the case was not complex. In particular, fees for preparation during the trial should not be allowed as the *per diem* block fee in the costs grid for counsel fees at trial is intended to encompass preparation time as well as trial time. However, there was no dispute that counsel for Celanese performed the services that were docketed.

(vii) A junior counsel fee should not be awarded as the case did not require two counsel.

(viii) Fees claimed for two expert witnesses totalling $26,289.83 were excessive.

VII

27 From the trial judge's comments in the course of oral submissions, it is clear that he was troubled by the amount of the bill of costs. (No doubt he would have been more troubled had the errors in addition to which I have referred been known.) For example, he commented:

> It's awful high. It's a lot of money... Maybe I'm a small town lawyer, or a small town judge, but I mean, that's an enormous amount for a $300,000 lawsuit.

Later, in commenting on the fees charged by large Toronto law firms [3], the trial judge added:

> Everybody knows how high the rates are in Toronto ... [I]t's scary. No average person can afford to litigate at this kind of level.

Further, in admitting that he was unfamiliar with bills of costs of this magnitude, the trial judge observed:

> I don't do a lot of these big costs bills. I usually just fix them [the costs].

28 Because the trial judge's costs reasons do not suggest that he engaged in a critical examination of the bill of costs, particularly given the specific objections raised by CN's counsel, it is helpful to return to the dialogue between counsel and the trial judge that took place during submissions where the trial judge made what appears to be conclusory comments in response to three of CN's objections. With respect to whether effect should not be given to Celanese's offer to settle, he said: "Well I think [the plaintiff] complied with the rule and you get your substantial indemnity costs from the time of the offer." Although the trial judge seemed to be very concerned with the fact that both parties had junior counsel, asking several times "what's the practice in Toronto about juniors", he acknowledged that both junior counsel "made a contribution" to the trial. [4] Expressing his concern about whether counsel were entitled to a fee for preparation while the trial was in progress, the trial judge observed, "[s]o some of your block fee trial time of necessity includes some preparation time ..." Later, he repeated that "the flat rate surely includes some preparation time".

29 The trial judge's reasons for fixing costs in the amount of the bill of costs are rather sparse. After observing that in the course of submissions he had ruled that Celanese was entitled to fees on a substantial indemnity scale after the date of the offer to settle that was rejected by CN, he concluded as follows:

> Defendant CN now complains about the total amount of the bill, the use of junior counsel, and the costs of the experts. At first blush the bill is enormous, mainly because of the high hourly rate of pay. Who can possibly afford to pay this much for a Lawyer?
>
> In a different case with different parties I could easily be persuaded that to charge almost $200,000.00 to collect $300,000.00 is simply unconscionable and is not to be condoned by the Courts.

However, these two parties decided to retain these two, downtown Toronto, expensive, Law Firms. They obviously could afford to pay them.

Surely the new costs grid is designed in part to recognize that in some cases the parties can pay higher fees and choose to do so, and surely it also recognizes that some cases, even cases where the amount of money at stake is not that great, need the kind of skill and experience that these Law Firms can bring to the table.

In my view, this was one of those cases.

CN's real position throughout this lawsuit was to say "prove it if you can", and it fought tenaciously over every detail. *CN made no serious attempt to settle this case and in the end the Plaintiff was completely successful.*

The experts were necessary and their fees were reasonable.

Only a Plaintiff with money to risk could have carried this case to completion, an average person simply couldn't afford it and CN would have won by default.

In my view, but for the skill and determination of both Mr. Scott and Mr. Hubbard, this case would not have been won at all. Their bill is a high one but they earned every penny of it and I allow it in full. [Emphasis added]

VIII

30 In my view, the trial judge made a number of errors in fixing costs that are sufficient to justify interference by this court. In the context of the principles discussed in *Boucher* , *supra* and *Moon* , *supra*, the trial judge erred in principle in concluding that the costs grid requires the losing party to pay the costs of a successful party who is able to pay the high fees charged by "downtown Toronto, expensive Law Firms", particularly where the losing party has "made no serious attempt to settle" the case. Rather, his concern should have been whether the amount of costs awarded reflected a fair and reasonable amount that should be paid by the unsuccessful party in the particular proceeding, rather than an amount that reflected the actual costs of the successful party. As Armstrong J.A. pointed out in *Boucher* at para. 37, "[t]he failure to refer, in assessing costs, to the overriding principle of reasonableness, can produce a result that is contrary to the fundamental objective of access to justice." As this court indicated in *Moon* at para. 35, the rejection of an offer to settle does not justify an unreasonable and excessive bill of costs. In addition, at para. 33 of *Moon* , this court said that while a client may enter into any financial arrangement with its lawyer that is acceptable to it, the client should not expect the losing party to compensate it for costs that the court finds are unreasonable. In fairness to the trial judge, he did not have the advantage of this court's articulation of the principles in *Boucher* and *Moon* .

31 Specifically, the trial judge erred in awarding Celanese substantial indemnity costs subsequent to the delivery of its offer to settle, in accepting the rate of senior and junior counsel's counsel fees, in accepting the total fee claimed for counsel fee at trial and in awarding costs for the motion for summary judgment on a substantial indemnity scale. However, I am satisfied that he did not err in allowing a junior counsel fee, in accepting the full amount of the fees paid to the two expert witnesses and in applying the costs grid to the legal services rendered before it came into effect.

IX

32 Turning first to Celanese's offer to settle for $290,810, that was delivered on January 22, 2003, about a month before the trial commenced. Relative to Celanese's claim for $300,633, this represented a compromise of about $10,000 or about 3 per cent. As the offer was rejected, under rule 49.10(1) of the *Rules of Civil Procedure*, Celanese was presumptively entitled to partial indemnity costs to the date the offer to settle was served and substantial indemnity costs from that date, "unless the court orders otherwise". Indeed, Celanese prepared its bill of costs on the premise that the court would apply the rule and award substantial indemnity costs subsequent to the delivery of its offer. As I have indicated, during the course of oral submissions the trial judge rather peremptorily ruled that because Celanese had "complied with the

rule" it was entitled to substantial indemnity costs "from the time of the offer". In ruling that Celanese had complied with the rule, the trial judge meant that it had obtained a judgment more favourable than the terms of its offer to settle.

33 Three decisions of this court have considered the circumstances in which it is appropriate for the court to depart from the application of rule 49.10(1) where a plaintiff is successful in recovering more than the amount contained in its offer to settle: *Niagara Structural Steel (St. Catharines) Ltd. v. W.D. LaFlamme Ltd.* (1987), 58 O.R. (2d) 773 (Ont. C.A.); *Data General (Canada) Ltd. v. Molnar Systems Group Inc.* (1991), 6 O.R. (3d) 409 (Ont. C.A.); *Walker Estate v. York-Finch General Hospital* (1999), 43 O.R. (3d) 461 (Ont. C.A.), aff'd [2001] 1 S.C.R. 647 (S.C.C.). These cases considered whether an offer to settle must contain an element of compromise to engage rule 49.10(1). As I understand these cases, they stand for the proposition that an element of compromise is not an essential feature of an offer to settle, but where fairness is a relevant consideration its absence can be a factor for the court to consider in deciding whether to order "otherwise" under rule 49.10(1).

34 *Walker Estate* was one of a number of lawsuits against the Canadian Red Cross Society ("CRCS") by persons who had received HIV-tainted blood from it. In *Walker Estate* , the parties agreed to damages and the trial proceeded on the issue of liability. The plaintiffs' offer to settle was for the amount of damages agreed upon, $800,791, minus $100. The plaintiffs were successful and were awarded damages of $800,791. Because the estate was in technical compliance with rule 49.10(1), it was awarded solicitor and client costs subsequent to the date of its offer. In reversing this award, this court observed that by reason of the agreement on damages, the plaintiffs' claim had become a liquidated claim at the time the offer was made. The court continued at p. 480: "We think it may fairly be stated that the reduction in the amount agreed upon (a reduction of less that 1/8,000th of this amount) was such that the offer did not reflect any real element of compromise."

35 After referring to both the policy of encouraging settlements inherent in Rule 49, and, as discussed in *Niagara Structural Steel (St. Catharines) Ltd.* and *Data General (Canada) Ltd.* , the policy of employing the Rule fairly where a settlement offer does not contain an element of compromise, this court concluded at p. 481:

> We are satisfied that the circumstances of the case before us bring it within the scope of the discretionary exception. There was no element of compromise in the offer — a discount of less than 1/8,000th of a liquidated claim so clearly falls short of what could amount to a compromise that it is not necessary to express an opinion on at what point there would be an element of compromise. The offer amounted virtually to a statement that if the full claim was not paid the CRCS would automatically be obliged to pay solicitor and client costs from the date of the offer.
>
> The absence of compromise is to be considered together with the fact that the CRCS was relying upon a defence of substance. The CRCS, in fact, was successful in defeating the claim based on a failure to warn and, with respect to the negligent screening issue, it had succeeded on this issue in the earlier case of *Pittman Estate v. Bain*, *supra*.
>
> Related to the foregoing is the consideration that to award solicitor and client costs in the circumstances of this case *could well inhibit defendants from agreeing to the amount of damages before trial, which has the effect of turning the claim into a liquidated one*. No doubt in the present case much additional trial time was saved by the CRCS's agreement on this issue. Such agreements should be encouraged. *If offers of the kind in this case are held by the courts to be a proper basis for solicitor and client costs, these agreements will be less frequent*. [Emphasis added]

36 Although the present case is not as extreme as *Walker Estate* , in my view the offer to settle for about 3 per cent less than the plaintiff's claim for $300,633 did not reflect a real element of compromise, particularly as the parties were in agreement as to damages of $237,423 and CN was relying on a defence of substance, notwithstanding that it was unsuccessful. Liability was very much in issue, as was the amount of $63,210 representing alleged production losses. Given these factors, in the circumstances of this case, a more significant element of compromise was required to encourage the defendants to agree to the amount of damages before trial and to entitle the plaintiff, who recovered damages that exceeded the amount of its offer, to have the benefit of the presumptive aspect of rule 49.10(1) entitling it to costs on a substantial indemnity scale.

37 From the trial judge's reasons, it is clear that as he did not consider that in the circumstances of this case the plaintiff's offer to settle failed to contain a true element of compromise, he did not factor this into his exercise of discretion as permitted by rule 49.10(1). However, in fairness to him, like the trial judge in *Walker Estate* , the *Data General (Canada) Ltd.* principles had not been brought to his attention. Consequently, Celanese is to have its costs on a partial indemnity scale throughout the proceedings.

X

38 In the bill of costs, Mr. Scott, who was senior counsel, calculated his fees at the rate of $350 an hour on a partial indemnity scale and $450 an hour on a substantial indemnity scale. As a lawyer of 20 years experience, the costs grid amounts that he was entitled to bill were "up to $350 per hour" and "up to $450 per hour", respectively. Thus, he applied the maximum rate permitted by the costs grid. It is to be noted, in this regard, that rule 57.01(3) requires the court not only to fix costs in accordance with the costs grid, but also in accordance with rule 57.01(1) which lists a number of factors that the court may consider in exercising its discretion as to costs and their amount. In this regard, it is now accepted that "the maximum rate is reserved for the most experienced counsel doing the most important cases": *Independent Multi-Funds Inc. v. Bank of Nova Scotia*, [2004] O.J. No. 1885 (Ont. S.C.J.) at para. 15; *Bakhtiari v. Axes Investments Inc.* (2003), 66 O.R. (3d) 284 (Ont. S.C.J.) at para. 38, varied on other grounds (2004), 69 O.R. (3d) 671 (Ont. C.A.). This case is not in that category. Considering the factors in rule 57.01(1), as well as the trial judge's opinion about the performance of counsel, in my view, a partial indemnity rate of $250 an hour is appropriate for Mr. Scott's fees.

39 Mr. Scott spent 107.3 hours on various matters including pleadings, examinations for discovery and trial preparation for which he claimed fees on a partial indemnity scale of $350 an hour. As this rate is to be reduced by $100, this results in a reduction of $10,730. He spent 81.1 hours on other matters, including trial preparation both before and during the trial for which he claimed counsel fees on a substantial indemnity scale of $450 an hour. As this rate is to be reduced by $200, this would result in a further reduction of $16,220. I will have more to say about the appropriateness of a counsel fee for trial preparation during the trial.

40 Given that the costs grid prescribes an hourly fee of up to $225 on a partial indemnity scale for a lawyer of Mr. Hubbard's experience, there is no reason to interfere with the hourly fee of $150 for trial preparation and other services that he rendered before Celanese served its offer to settle. However, for services that he rendered thereafter, he claimed substantial indemnity hourly fees of $250 and $275. As the costs grid provides for an hourly fee of up to $300 on a substantial indemnity scale, I would reduce Mr. Hubbard's hourly fees by $50 and $75 respectively to adjust them to the partial indemnity scale. This results in a reduction of $1,825 for trial preparation after service of the offer to settle, $2,750 for preparation during the trial and $600 for preparing costs submissions.

XI

41 Because they are related, it is convenient to consider the appropriateness of a fee for preparation during a trial together with the proper amount of counsel fees at trial. It is to be recalled that Celanese included in its bill of costs a fee of $13,750 for trial preparation during trial that, but for the mathematical error, was intended to be $37,555. This is in addition to the counsel fee at the six day trial in the amount of $40,500, which Mr. Scott claimed at the maximum substantial indemnity scale of "up to $4,000". Mr. Hubbard's daily counsel fee for the trial was claimed at $2,750 on the same scale.

42 The costs grid provides for a maximum daily counsel fee on a partial indemnity scale of up to $2,300 and a weekly counsel fee on the same scale of up to $9,500. Unlike other fees that may be claimed where the fee is based on a lawyer's experience, counsel fees at trial under the costs grid are block fees. Consequently, in theory, Mr. Hubbard, with two years' experience, could claim the same counsel fee as Mr. Scott, with 20 years' experience.

43 It was submitted by counsel for CN that because the counsel fee at trial is a block fee, it encompasses both the fees of senior and junior counsel as well as fees for preparation during the course of trial. He argued that on the basis

of a 5.5 hour court day, a block fee of $2,300, or about $420 an hour, is more generous than the maximum fee of $350 an hour for a person of Mr. Scott's seniority, and must, therefore, be intended to include out of court work performed during a trial, such as preparing witnesses, research and preparing closing argument. Counsel for Celanese disagreed and pointed out that it was necessary to engage in extensive preparation during trial as they had been caught short in their preparation, expecting that the case would settle.

44 Given the issues with respect to counsel fee at trial raised by counsel for CN, it is somewhat surprising that they have not attracted more judicial consideration. In *Buchanan v. Geotel Communications Corp.* (2002), 26 C.P.C. (5th) 87 (Ont. S.C.J.), where Ferguson J. was required to consider how the costs grid should be applied to a trial that lasted more than a week, whether the block fee applies no matter how many counsel appear and whether the block fee precludes a preparation fee during the trial, he expressed some frustration in reconciling daily and weekly fees, stating at para. 71: "I frankly don't understand the thinking behind the numbers in the Grid." After much analysis, he resolved the issues as follows:

> (1) The daily rate in the costs grid should be used for a one day trial, but for a longer trial the daily rate should be based on the weekly rate. Thus, as the trial with which he was concerned had lasted 8 days, the daily rate was calculated by dividing the weekly rate by 5.
>
> (2) The costs grid permits a separate counsel fee for each counsel reasonably attending at trial, based on the role played by counsel and his or her experience.
>
> (3) The costs grid allows for counsel fees for reasonable preparation throughout a trial.

45 In *Dybongco-Rimando Estate v. Jackiewicz*, [2003] O.J. No. 534 (Ont. S.C.J.), in a case where more than one counsel appeared for the successful party, J. W. Quinn J. understood the block fees in the costs grid "to be per counsel and not global amounts" and that they did not include a counsel fee for preparation during trial, which he allowed because he considered it to be appropriate.

46 However, in *Bakhtiari v. Axes Investments Inc.* , *supra*, being of the view that the costs grid takes into account that there may be more than one counsel, but does not include preparation time during trial which may be separately charged, Lane J. took a different approach to the calculation of counsel fees at trial. In fixing the costs of a lengthy trial in which costs were awarded on a substantial indemnity scale, at paras. 47-49, Lane J. stated:

> As to the amount chargeable for the two counsel actually attending at the trial, that is not governed by the hourly rate, but by the counsel fees at trial grid which allows "up to" $4,000 per day or $17,500 per week for substantial indemnity costs. *Here, again, the maximum is reserved for the most experienced lawyer in the most difficult and important case. In my opinion, there is but one amount available for all counsel representing the same party.* Is there authority under the grid system for two counsel fees? Under the former tariff there was a discretion to permit an additional fee for junior counsel where warranted, but the present tariff is silent on the point. I do not think that means that no fee for a second counsel is allowed; rather, the tariff limits the total amount. In considering what "up to" means in the counsel fee grid, the court can allow a fee to second counsel where that expense is warranted by the nature of the case, as it is here, subject to the maximum total counsel fee set out in the grid.
>
> This conclusion is supported by certain characteristics of the counsel fee. First, it is per day and a day in trial court is normally about 5 to 6 hours maximum; indeed the tariff for motions and appeals both declare a half day to be two hours, although the trial tariff does not. If the top hourly rate is $450, then a normal court day of, say, 5.5 hours, would be $2475. *Second, preparation for trial is not included in the counsel fee; it is specifically included among the matters to which the hourly rates are applicable.* While the situation may differ on a partial indemnity costs basis, on a substantial indemnity costs basis the hourly rates are therefore applicable to the time spent in the evenings and weekends during the trial preparing for the following days. Third, even assuming that the intention was to be more generous for time actually spent at trial, there is clearly room for a fee for more than one counsel. Fourth,

> the length and complexity of trials have increased significantly in recent years and second counsel are now more frequently seen than in the past. It makes sense to provide for this development, and it appears that the tariff does so. Finally, the weekly rate represents a significant discount on the rate for five days, reflecting either the notion that there is some economy involved in spending an entire week at the same trial, as opposed to appearing in five one-day trials, or, perhaps more likely, an effort to keep the cost of litigation within a more manageable range. This reinforces the point that the sum is a maximum.
>
> In the light of the above considerations, I can see no basis for refusing to allow fees for a second counsel in this case, but the fees should not be allowed at the docket rate. This is particularly so if the result would be to exceed the daily or weekly maximum. These considerations do not apply to students or law clerks for whom there is no separate rate for time at trial. *The proportion of the maximum counsel fee actually awarded is governed by the same considerations as govern hourly rates.* In my view the maximum is appropriate for the combination of Mr. Outerbridge and Ms. Sefton in the light of all the Rule 57 factors and other circumstances of the case. Counsel fees will therefore be awarded at $17,500 for each of the three complete weeks and $4,000 daily for the 24 other days, for a total of $148,500. *As noted, time spent on preparation during the trial is additional at the hourly rate.* Trial attendance by law clerks and students is allowed at their hourly rates. [Emphasis added]

47 Lane J.'s conclusion that the costs grid does not allow for a second separate counsel fee at trial has been followed by most trial judges: *Young v. Toronto Star Newspapers Ltd.*, [2003] O.J. No. 5092 (Ont. S.C.J.); *Genest Murray Desbrisay Lamek v. Furbacher*, [2004] O.J. No. 1568 (Ont. S.C.J.); *Manielly v. Moran*, [2004] O.J. No. 2128 (Ont. S.C.J.); *Russett v. Bujold*, [2004] O.J. No. 2433 (Ont. S.C.J.). These cases fall in line with Lane J.'s analysis by limiting the number of counsel fees at trial claimed, and their amount, on the principle that the daily counsel fee in the costs grid represents a maximum.

48 However, there are two cases that reject Lane J.'s approach and award multiple counsel fees for counsel appearing on the trial. In *Walker v. Ritchie*, [2004] O.J. No. 787 (Ont. S.C.J.), at para. 19, Brockenshire J. was unable to accept Lane J.'s conclusion "that the tariff...prevents two counsel from together billing more than the maximum allowed for 'counsel fee'" by the costs grid. He gave no reasons for his opinion. In the second case, *Andersen v. St. Jude Medical Inc.*, [2004] O.J. No. 3102 (Ont. S.C.J.) at para. 18 (S.C.), Cullity J. declined to follow the reasoning of Lane J. in *Axes Investments Inc.* . Like Brockenshire J., Cullity J. gave no reason as to why. However, he added that in other cases he had allowed a second reduced counsel fee where he believed that the attendance of two counsel was reasonable.

49 It is worthwhile to note that in *Independent Multi-Funds Inc. v. Bank of Nova Scotia*, [2004] O.J. No. 1885 (Ont. S.C.J.), Lane J. had the occasion to comment on Brockenshire J.'s views in *Walker* . At para. 16, Lane J. stated:

> As to counsel fee, the defendant had two counsel present much of the time. My attention was drawn to the decision of Brockenshire J. in *Walker v. Ritchie* to the effect that the grid permits two or more counsel and each has a separate limit. With great respect to my brother Brockenshire, I maintain the view, which I have expressed before, that the grid permits more than one counsel where the case makes a second counsel desirable, but only up to the limit set out in the grid.

50 In reviewing the authorities, and absent clarification or amendment of the costs grid by the Civil Rules Committee, I am prepared to follow Lane J.'s analysis and conclusion in *Axes Investments Inc.* that where it is appropriate for a party to be represented by more than one counsel the cost grid does not allow for a second separate counsel fee at trial. Although the language used in the costs grid does not clearly state that the daily fee is to be a maximum in cases where there is more than one counsel, the mathematics lend support to that proposition. Proceeding on the basis that a day in court is 5.5 hours, and using the substantial indemnity *per diem* counsel fee of $4,000, this would work out to an hourly fee of over $700, which significantly exceeds the top hourly fee provided by the costs grid. On this analysis, it seems that the *per diem* counsel fee rates make an allowance for a second counsel fee within the maximum, particularly when a discount is applied to any rate available to a second counsel. Given the language in the costs grid of a single "counsel fee", the principle applies equally for counsel fees at trial on a partial indemnity scale, although I concede that the mathematics are less compelling.

51 The analysis of Lane J. in *Axes Investments Inc.* has become the more common approach adopted by the Superior Court, albeit it is far from universal. I simply have not read in any of the contrary decisions any compelling reasons for allowing separate counsel fees at trial. In any event, as Armstrong J. stated in para. 37 of *Boucher* , in the final analysis the court must step back and consider the total amount of costs applying the "overriding principle of reasonableness".

52 Applying *Axes Investments Inc.* , to this case, I would adjust the counsel fee for this six day trial to $9,500 for the first week and $2,300 for the sixth day, for a total of $11,800. [5] Consequently, the amount claimed in the bill of costs for counsel fee at trial should be reduced by $28,700. However, I would add that given that historically a fee for a second counsel is awarded in an appropriate case and, in many cases, is abundantly deserved, the omission from the costs grid of a discrete fee for a second counsel at trial, as well as on appeal, likely reflects an oversight on the part of the Civil Rules Committee that should be corrected.

53 I turn to the counsel fee for preparation during trial. Counsel for Celanese docketed 107.9 hours, which amounts to about 18 hours a day for each trial day. This appears somewhat excessive at first glance, however, the time was divided between two lawyers. I am satisfied that it was necessary for counsel to engage in this mid-trial preparation and to claim costs for doing so. In paras. 30 and 31, I made reductions to Mr. Scott's and Mr. Hubbard's hourly rates.

54 As for the summary judgment motion, the motion judge found that it was reasonable for CN to bring the motion. Consequently, Celanese as the successful party is not entitled to costs on a substantial indemnity scale under rule 20.06(1). Consequently, I would reduce the costs claimed by $3,500.

55 As I have indicated, the trial judge did not err in allowing a counsel fee for junior counsel. As well, I agree with his conclusion that the expert witness fees paid by Celanese were reasonable and necessary disbursements. Nor did he err in applying the costs grid to legal services rendered before it came into force. As this court held in *Canadian Broadcasting Corp. Pension Plan v. BF Realty Holdings Ltd.* (2002), 166 O.A.C. 226 (Ont. C.A.), since the costs grid is a procedural enactment, it applies retroactively unless there is evidence of actual prejudice (beyond the fact that services were rendered before the costs grid came into force.)

XII

56 In its bill of costs, the total amount claimed for counsel fees by Celanese is $143,782.50. The total of the reductions that I have made is $64,812.50. However, I have added counsel fees of $26,749.50 to the bill of costs, not included as a result of a calculation error. The result is an adjusted counsel fee of $105,720, exclusive of disbursements and GST. I have summarized the adjustments made to the bill of costs in Schedule A that is attached to these reasons. As I have earlier indicated, I would not interfere with the disbursements.

57 It now remains to decide whether a counsel fee of $105,720 represents an amount that is fair and reasonable for CN, as the unsuccessful party, to pay in the particular circumstances of this case. In my view it does, and I do not propose to make any further reductions. Although only about $63,000 was in issue, this case had its complexities. Celanese was required to establish liability for the accident and to prove the disputed production loss. It was appropriate for Celanese to be represented by two counsel. There is no suggestion by CN that Celanese's counsel devoted excessive time to their preparation, except during the trial. This is not a case like *Moon* , *supra*, that was "over-lawyered". As the trial judge observed, it was through the skill and determination of Mr. Scott and Mr. Hubbard that the case was won. Although perhaps somewhat high, the adjusted costs award including disbursements and GST meets the reasonableness test.

XIII

58 In the result, I would grant leave to appeal costs and vary the amount of costs fixed by the trial judge to conform with these reasons. As well, I would allow the appeal from the award of prejudgment interest and vary the award in accordance with these reasons. Otherwise, I would dismiss the appeal. As success is divided, there will be no costs.

Feldman and Simmons JJ.A.:

59 We have read the reasons for decision of Borins J.A. and we agree with his conclusion that the appeal should be allowed with respect to the amount of costs fixed at trial. However, we do not agree fully with his reasons. In our view, the trial judge's error was in accepting the bill of costs of the respondent without conducting an analysis of the reasonableness of the amount awarded against Canadian National. We do not agree with our colleague that the hourly rate claimed by senior counsel should be reduced by $100. In our view he was entitled to claim the top rate of $350 per hour on the partial indemnity scale and the trial judge made no error in accepting the rate claimed. Finally, we do not agree with our colleague's disposition on the issue of prejudgment interest.

60 With respect to the partial indemnity rate for senior counsel, in our view the trial judge made no error in accepting the full $350 hourly rate claimed by senior counsel, Mr. Scott. As Borins J.A. noted, the trial judge specifically found that it was due to counsels' skill and determination that this case was won for their client.

61 Although there is case law from the Superior Court that suggests that the maximum rate in the costs grid is reserved for the most experienced counsel and the most important cases, we do not agree that only a small, elite group of lawyers in the province arguing the most financially significant cases is entitled to that rate. Instead, the trial judge is to assess the seniority of counsel and the significance of the case in monetary, jurisprudential and procedural terms, and to decide on a case-by-case basis the appropriate rate for senior and junior counsel on the applicable scale.

62 While we would not reduce the hourly rate for Mr. Scott, we agree with Borins J.A. that the counsel fee he calculated of $105,720.00 represents a fair and reasonable amount of costs for CN to pay in the circumstances of this case. While the calculated amount would have been higher after applying the increased senior counsel rate, we would reduce the total amount to accord with the result reached by our colleague.

63 On the issue of prejudgment interest, we see no basis to interfere with the disposition made by the trial judge in the exercise of his discretion. He chose the rate of 3.3 percent applied from the date of the accident instead of averaging the higher rates over the period and applying the averaged rate from the date each head of damage occurred. Even without doing a detailed calculation, it appears that by applying the lower 3.3 percent rate from the date of the accident, rather than the higher average rate from the latest date when Celanese's loss could have been determined, any potential windfall to Celanese by calculating from the date of the accident is offset. The trial judge was entitled to take this approach rather than prolong the process by requiring further evidence to determine the dates for the calculation of prejudgment interest. We would not interfere with the trial judge's disposition of prejudgment interest.

64 In the result, we would grant leave to appeal costs and vary the amount of costs fixed by the trial judge to $105,720.00 for the counsel fee on the partial indemnity scale. We would dismiss the balance of the appeal. We agree with Borins J.A. that, as success was divided, there should be no costs of the appeal.

Schedule A

	CLAIMED	REDUCTIONS	ADDITIONS
Pleadings	$ 7,000.00	$ 2,000.00 (S) 487.50	$ 2,944.50
Discovery of Documents	705.00	110.00 (S)	
Examinations of Discovery	19,517.00	4,870.00 (S)	
Pre-Trial Conference	4,720.00	110.00 (S)	
Trial Scheduling	195.00		
Summary Judgment Motions	7,922.50	3,500.00	
Trial Preparation to January 22, 2003	23,878.00	3,640.00 (S)	
Trial Preparation after January 22, 2003	21,695.00	5,240.00 (S)— 1,825.00 (H)	
Trial Preparation during trial	13,750.00	10,580.00 (S)— 2,750.00 (H)	23,805.00

Trial	40,500.00	28,700.00	
Reviewing trial judgment	450.00	200.00 (S)	
Bill of Costs and Submissions	3,450.00	200.00 (S)— 600.00 (H)	
	$143,782.50	$ 64,812.50	$ 26,749.50

Notes: (S) = Mr. Scott(H) = Mr. Hubbard

Counsel Fee	
Claimed	$143,782.50
Additions	26,749.50
	$170,532.50
Less Reductions	64,812.50
	$105,720.00

Appeal allowed in part.

Footnotes

1 Subsequently, in the course of argument, the trial judge rejected Celanese's request that the prejudgment interest rate be averaged from the date of the accident to the date of his order, which would have resulted in a higher rate.

2 Although I have added $2,994.50 for the preparation of pleadings to Celanese's bill of costs, in Schedule A which summarizes adjustments that I have made to it, I have reduced this amount by $487.50 as the lawyers involved in the preparation of the pleadings calculated their costs at the maximum partial indemnity hourly rate. See discussion in paragraph 29.

3 Each party was represented by "a large" Toronto law firm.

4 Each party was represented by senior and junior counsel.

5 In awarding counsel fees at the maximum daily and weekly rates permitted by the costs grid, I acknowledge that I have not reduced the fees to reflect that this is not an instance of the most experienced counsel doing the most important case. I have not done this out of fairness to counsel, recognizing that while a block fee of $2,300.00 a day may be adequate for one counsel, it is usually inadequate for two counsel. In my view, it would be helpful for the Civil Rules Committee to clarify precisely what is included in the daily and weekly block counsel fees at trial.

TAB
“4”

2005 CarswellOnt 49
Ont. S.C.J. [Commercial List]

Ferrelli v. Grilli

2005 CarswellOnt 49, [2005] O.J. No. 25, 136 A.C.W.S. (3d) 224

Ferrelli, Trombetta (Applicants) v. Grilli, Cantelmi (Respondents)

Lax J.

Heard:
Judgment: January 10, 2005
Docket: 04-CL-5422

Proceedings: additional reasons to *Ferrelli v. Grilli* (2004), 2004 CarswellOnt 5611 (Ont. S.C.J. [Commercial List])

Counsel: C.M. Gastle for Applicants
M.G. Emery for Respondents

Subject: Civil Practice and Procedure; Corporate and Commercial

***Lax J.*:**

Endorsement as to Costs

1 This was a dispute among second-generation family members, who were managing the business of Ferrell Builders Supply Limited, a very successful company that supplies materials to the construction industry. The dispute was ultimately resolved through a shotgun Buy/Sell mechanism on terms set out in my Order dated September 23, 2004. On November 5, 2004, the respondents elected to purchase the business for $11 million plus the repayment of the applicants' shareholder loans.

2 The applicants seek costs on a substantial indemnity scale in the amount of $206,485.63, or alternatively, on a partial indemnity scale in the amount of $195,911.89. The respondents seek costs on a partial indemnity scale in the amount of $203,265.01. The respondents take the position that if costs are to be awarded to the applicants, there is no basis for awarding costs on a substantial indemnity scale. I accept this submission. Costs on this scale are awarded in rare and exceptional cases as a form of chastisement and are not applicable to this case: *Mortimer v. Cameron* (1994), 17 O.R. (3d) 1 (Ont. C.A.). There were no Offers to Settle that attract the costs consequences of Rule 49.

3 The nutshell position of both parties is that they each made every reasonable effort to resolve the division between the Ferrelli/Trombetta families and the Cantelmi/Grilli families. Each side points to steps taken (or not taken) to explain conduct both before and after the commencement of the Ferrelli/Trompetta Application in May 2004. Both parties have filed comprehensive submissions to support their respective claims for costs and each provides great detail about why they behaved as they did and whether their responses to the other side were reasonable or unreasonable.

4 The applicants argue that, but for the commencement of the Ferrelli Application, the respondents would have dragged their heels as the Cantelmi Application merely sought to perpetuate an unacceptable situation. The respondents argue that the Ferrelli Application, based on section 248 conduct, was unnecessary and if the applicants had claimed relief under section 207 of the *Business Corporations Act* in the first place, most of the affidavit material, cross-examinations and examinations, could have been avoided.

5 The Ferrelli Application sought mediation between the parties, which was consented to by the respondents on the first return date on May 26, 2004. Mediation was attempted in July, but did not succeed. Later in July, the Cantelmi Group made an offer to purchase the interest of the Ferrelli Group for $11 million on terms, which were unacceptable to the applicants. The offers made by the applicants before the commencement of the Ferrelli Application did not provide a mechanism for the Cantelmi/Grilli families to be buyers and did not reflect the true value of the business. This was unacceptable to the respondents.

6 I have carefully considered the material and the positions put forward by both sides. Most of the narrative is irrelevant to the determination of the costs of the Ferrelli Application, but I think it important to say that I do not find anything particularly blameworthy about the conduct of either party. Each side, for its own reasons, acted or reacted as they did out of self-interest and in the context of an acrimonious family dispute. Both sides ultimately recognized that resolution lay in a corporate divorce, but they disagreed on how to achieve this. Not surprisingly, the nub of the dispute was an appropriate valuation for the business and an appropriate mechanism for determining this. The respondents were not prepared to accept a descending auction Buy/Sell mechanism, which the applicants had proposed. The applicants ultimately agreed to a shotgun style Buy/Sell.

7 By the time the matter came before me for hearing on September 23, 2004, only five issues remained for determination. The applicants were successful in persuading the court that both sides should be free to structure the transaction to their own benefit. I accept that this was an important stumbling block to an earlier resolution, as there was a significant tax benefit to the vendors if the shares were purchased personally and not through a corporation. The applicants characterize this as the key issue that drove the proceedings to a hearing. However, the determination of this point did not favour either side as it was not known who would be the buyer or seller. In any event, there were other issues that required a hearing for determination and the results were mixed.

8 Although the relief sought in the Application was not the relief ultimately sought on the hearing of the Application, it was reasonable for the applicants to bring the Application and to seek to have it heard on the Commercial List in Toronto. Arguably, the parties would have remained deadlocked if the Ferrelli Application had not been commenced, as the primary objective of the Cantelmi Application was to maintain the status quo.

9 Both sides claim to have been the proponent of the shotgun style Buy/Sell mechanism, which found its way into the Order made on September 23, 2004. However, it seems more accurate to say that this evolved as the parties considered and refined their own positions. Ultimately, they each agreed to a shotgun Buy/Sell. I do not think that either party can claim success on this point and as there was divided success on the matters that were determined by me, the appropriate Order is to have the parties each bear their own costs.

End of Document

IN THE MATTER OF NOTICES OF INTENTION TO MAKE A PROPOSAL OF 1732427 ONTARIO INC. AND 1787930 ONTARIO INC. BOTH OF THE CITY OF ST. THOMAS, IN THE PROVINCE OF ONTARIO

Court of Appeal File No. C66803
Court File Nos. 35-2395487 and 35-2395481

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at London

APPELLANT'S BOOK OF AUTHORITIES

MILLER THOMSON LLP
One London Place
255 Queens Avenue, Suite 2010
London, ON Canada N6A 5R8

Sherry A. Kettle, LSO #53561B
Tel: 519.931.3534
Fax: 519.858.8511
Email: skettle@millerthomson.com

Lawyers for the Appellant,
Transit Petroleum Inc.