SUPREME COURT OF YUKON

Citation: *Alfred v. Loblaws Inc.*, 2012 YKSC 95

Date: 20121128
S.C. No. 07-A0086
Registry: Whitehorse

Between:

MARY LUCY ALFRED

Plaintiff

And

LOBLAWS INC.

Defendant

Before: Mr. Justice L.F. Gower

Appearances:

Daniel S. Shier — Counsel for the Plaintiff
Kyle Carruthers — Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a slip and fall negligence action. On June 16, 2006, the plaintiff, Mary Alfred, came from Pelly Crossing, Yukon to Whitehorse with her husband, Roger Alfred, to do some shopping at the "Real Canadian Superstore", now owned by the defendant, which I will refer to as "Superstore". Immediately upon entering the store, the couple approached the customer service counter to have a purchase order form approved. Upon obtaining this approval, Ms. Alfred, who was then 61 years old, turned to her right, took one step and unknowingly placed her right foot on a four-wheeled dolly used to

move stacks of shopping baskets. The dolly rolled out from underneath Ms. Alfred and she fell to the floor, fracturing her right knee.

[2] In October 2007, Ms. Alfred sued the then owner of the Superstore for negligence in failing to ensure that the dolly was not in a hazardous location for shoppers. She claimed general damages for pain and suffering resulting from her broken right kneecap and the reduced range of motion throughout her right leg.

[3] On May 9, 2009, Ms. Alfred suffered a second fall while she was about to climb the steps to her house in Pelly Crossing. She claims that, as she was walking towards the house, she stepped on her right foot in a way which caused her right knee to buckle sideways. The resulting fall caused a fracture in Ms. Alfred's right leg, just above the ankle. She argues that her injury from the second fall would not have happened but for the weakness in her right knee from the first fall, and that she should therefore receive damages for both falls.

[4] Superstore does not strongly contest liability for the first fall, but argues that the injury from the second fall cannot be causally connected to the former. It also takes issue with the amount of general damages claimed by Ms. Alfred, and the presumptive interest rate for pre-judgment interest under s. 35 of the *Judicature Act,* R.S.Y. 2002, c. 128.

ISSUES

[5] The issues in this trial are therefore as follows:

1) Was Superstore negligent in allowing the dolly to be on the floor in the location where it was when Ms. Alfred stepped on it?
2) If so, was Ms. Alfred contributorily negligent?

3) Was Ms. Alfred's broken leg resulting from the second fall caused by her broken kneecap from the first fall?

4) What amount is appropriate for general damages?

5) Should I exercise my discretion under s. 35(7) of the *Judicature Act* to vary the presumptive interest rate in calculating the pre-judgment interest?

FACTUAL OVERVIEW

[6] The evidence in this trial consisted of the testimony of Ms. Alfred and her husband, a number of documents, and read-ins from the examination for discovery of the witness who was examined on behalf of Superstore. Superstore called no evidence at the trial.

[7] Ms. Alfred was born on March 4, 1945, and she is now 67 years old. Ms. Alfred and her husband are members of the Selkirk First Nation, and reside in Pelly Crossing. The couple pursue traditional aboriginal activities, such as camping, fishing, and the harvesting of big and small game.

[8] Ms. Alfred was employed as a receptionist at the Health Centre in Pelly Crossing for several years, retiring on July 31, 2011. Although she was required to take some time off work after each of the first and second falls, her employer continued to pay her salary during those periods.

[9] On June 16, 2006, Ms. Alfred and her husband made the three-hour drive from Pelly Crossing to Whitehorse in their pickup truck. They were going to Superstore to buy groceries for their son. As the son was on social assistance, they were going to use a purchase order to make the purchases. The couple entered the interior of the store more or less at the same time, and they eventually approached the customer service counter.

[10] There was a minor discrepancy between the evidence of Ms. Alfred and her husband about who approached the counter first. I find as a fact that Mr. Alfred did so for the purpose of presenting the purchase order to the clerk behind the counter for approval. At that point, Ms. Alfred was standing behind him and slightly to his right. While the clerk was reviewing the purchase order, Mr. Alfred perused some discounted merchandise on shelves to his left. When the purchase order was approved, Ms. Alfred came up to the counter, obtained the purchase order from the clerk and put it in her handbag. At that point, Mr. Alfred went to another area of the store to obtain a shopping cart.

[11] The customer service counter was about four feet high and had two walls below the counter-top which joined at an angle of approximately 135 degrees. There was a vertical light coloured strip of material along the apex of the angle where the two walls joined. While Mr. and Ms. Alfred were dealing with the clerk, they were generally to the left of this strip, facing the counter.

[12] To the right of the light coloured vertical strip were several stacks of green plastic grocery baskets. The stacks were of various heights, the tallest protruding just above the countertop. These grocery baskets were moved by Superstore staff to that location from the checkout tills with small four-wheeled metal dollies. The base (or deck) of each dolly was rectangular in shape, about 4 inches off the floor, with dimensions of approximately 1' x 1.5'. The longer sides were just wide enough to accommodate the width of the bottom of a shopping basket. Protruding above and along each long side of the dollies was a length of vertical and horizontal metal tubing, shaped in a manner to accommodate a basket being placed lengthways within the resulting opening. Presumably, this design is to provide some stability when a tall stack of baskets is being moved.

[13] It was Superstore policy that, once a staff person had finished moving stacks of baskets, the dolly was to be removed from the floor and placed either upon the customer service counter top or behind the customer service counter, so that shoppers would not slip or trip on them.

[14] Upon obtaining the purchase order approval from the clerk behind the customer service counter, Ms. Alfred turned to her right and took one step with her right leg, inadvertently placing her right foot on the edge or deck of a dolly. When the dolly went out from under her foot, she lost her balance and fell to the floor on her right knee. She was in significant pain for about five minutes and could not stand up. During that time, Mr. Alfred returned with a shopping cart and Ms. Alfred pointed out to him the dolly she had just slipped on. Another female shopper came up to assist Mr. Alfred in getting Ms. Alfred to her feet.

[15] Although Ms. Alfred was still in pain, she thought it would eventually go away and, using the shopping cart as an aid for her to walk, she and her husband continued to shop in the store for approximately the next hour. When paying for the groceries at the checkout till, Ms. Alfred realized that the severe pain was not subsiding. She noticed a female Superstore employee with whom she was familiar and reported her earlier accident. The female employee solicited the assistance of another male employee who, at 4 PM, began interviewing Ms. Alfred and completed an incident report. In that report, Ms. Alfred stated that she slipped and fell on a “basket dolly”.

[16] Photographs showing an example of such a dolly were produced in evidence and showed the vertical metal tubing on each of the longer two sides in the upright position. However, both Ms. Alfred and Mr. Alfred testified to the effect that the dolly Ms. Alfred

stepped on did not appear to have the vertical metal tubing pieces in place. I note that one of the photographs in evidence shows such a dolly upside down on the customer service counter top. Although the photograph is somewhat blurry, it appears that this dolly is in a collapsed condition, as it is not the same height as the dolly shown right side up with the vertical tubing in place. I conclude from this that the dollies were cable of being collapsed in some fashion, perhaps for easier storage. It is therefore more likely than not that Ms. Alfred stepped on a dolly with the vertical side tubing collapsed, which would account for the descriptions provided by her and her husband.

[17] A Superstore “Sweep Log” was produced in evidence. It shows that on June 16, 2006, a department entitled "Front End" was inspected at various times between 9:00 hours and 18:30 hours. However, it is not clear what area of the store the Front End encompassed, and there is no evidence about what these inspections entailed. Also, there is no clear evidence when the slip and fall actually occurred (apart from the evidence that it was approximately one hour before the completion of the incident report). Thus, the Sweep Log is of little relevance.

[18] Ms. Alfred left Superstore and went to the Whitehorse General Hospital, where it was determined that she had fractured her right kneecap. Ms. Alfred’s knee was initially bandaged and she was released from the hospital that same evening, with instructions to return a week later to have a leg cast applied. Ms. Alfred did so and wore the cast for six weeks. She also required the use of crutches for a total of about eight weeks. Ms. Alfred was able to walk on her own after she stopped using the crutches.

[19] As of August 4, 2006, about seven weeks after the slip and fall, the fractured kneecap had significantly healed and Ms. Alfred was back at work. She testified that, by

that time, “once in a while” her knee still hurt “a little”, but “not steady”, and that “it was kind of weak”.

[20] Ms. Alfred testified that, one year after the accident, she was in pain “sometimes”, but usually only when it was cold or when she walked too much.

[21] On August 25, 2008, just over two years later, Ms. Alfred was treated for sudden right-sided weakness in her arm and her leg. She testified that this included a certain “numbness”. The medical evidence suggests that this might have been related to Ms. Alfred's diabetes, combined with the fact that she was under stress at the time and that she was not being careful about following her diet and taking her medication. Ms. Alfred testified that this right-sided leg weakness lasted for “a week or so”. When asked about her right knee at that time, Ms. Alfred testified that the pain was "not that bad" and that it only affected her if she walked too much.

[22] On January 13, 2009, Ms. Alfred was treated for pain in her right hip and thigh, which she had experienced since early December 2008. There was no particular trauma giving rise to that pain. On February 3, 2009, Ms. Alfred was examined for this pain and no acute bone or joint abnormality was noted. Presumably, the examination of the joints on her right side included her right knee.

[23] On May 9, 2009, Ms. Alfred suffered the second fall, resulting in a broken right leg, just above her ankle. Another cast was applied, which she had to wear for a period of six weeks. She was not hospitalized for this injury. The medical records indicate that Ms. Alfred reported that she had “twisted her knee & ankle” and that she fell from a “standing height”. There is also a reference to “leg weakness”. Ms. Alfred testified that she was going towards the front steps on her house, crossing an area of ground covered with

gravel, when her right foot twisted sideways and she fell. When asked if she had any weakness in her right knee during the five minutes preceding the fall, she answered “my leg was kind of weak, yeah”.

[24] When examined on May 15, 2009, the medical records indicate that Ms. Alfred was also complaining of some knee pain which she thought caused her to twist her ankle in the first place. This prompted further x-rays of both her right ankle and right knee. The results of those x-rays were that the fracture from 2006 was noted to be essentially “completely healed” and that there was “no significant adverse change from 2006”.

[25] At present, Ms. Alfred says that she can “walk okay” on her right knee now, but that she is afraid to bend it too far. A written report from Ms. Alfred’s family physician for the last 12 years indicates that he sees her at least twice a year, mostly in the winter or during weather changes, and that Ms. Alfred continues to have complaints about “constant troubling pain, numbness and tingling in her right knee”. However, the physician also refers to Ms. Alfred having symptoms of “right knee osteoarthritis”, which appears to be a condition which has come on subsequent to the 2006 fall. In any event, I do not recall Ms. Alfred adopting this evidence in her testimony.

[26] At some time before leaving her employment at the Health Centre in July 2011, Ms. Alfred injured her left knee by bumping into something at work. She testified that her left knee now is worse than her right knee.

[27] Ms. Alfred is no longer able to participate in certain cultural activities, such as:

- walking the trap line to snare small game;
- snowshoeing;
- carrying water from the river to the family camp;

- carrying fish from where they are cleaned and processed to the drying racks;
- hanging moose meat to dry;
- turning meat on the drying racks; and
- gathering wood for the fire to dry the meat.

Ms. Alfred testified that the current limitations on her ability to pursue these cultural activities is due to the pain in her left knee, as well as her right leg. Further, she confirmed that, regardless of these limitations, she was still able to attend the annual family hunting trips, which last for approximately three weeks in the early Fall, both this year and last year, as well as in 2006.

ANALYSIS

Issue # 1: Was Superstore negligent?

[28] As a commercial invitor, Superstore owed a duty of care to its invitee customers, to take reasonable care to ensure that the customers would be reasonably safe in using the premises for the purposes for which they were invited, i.e. shopping: see *Burton v. Westfair Foods Ltd.*, 2003 YKSC 24, at para. 12. Putting it another way, Superstore was required to protect its customers from reasonably foreseeable hazards. Although the standard of care is one of reasonableness not perfection, conduct is negligent if it creates an objectively unreasonable risk of harm. The measure of what is reasonable depends on the facts of each case: *Etson v. Loblaw Companies Ltd*., 2010 BCSC 1865, at paras. 4 and 5.

[29] In this case, Superstore maintained a policy of requiring staff to remove the dollies from the floor when they were no longer being used to transport stacks of shopping baskets, and place them in a safe location on or behind the customer service counter. The inescapable inference is that this policy was the result of Superstore being aware of the potential slip or trip and fall hazard to its customers by allowing the dollies to remain on the floor: see also *Kemp v. Zellers Inc*., 2008 BCPC 267, at para. 25.

[30] The fact that Ms. Alfred stepped on a dolly which was on the floor in the area in front of the customer service counter is evidence that a Superstore staff person failed to comply with the store's policy of removing the dollies from the floor after usage. This was a breach of Superstore's duty of care to protect its customers from reasonably foreseeable hazards. There was no evidence or argument by Superstore to suggest otherwise. Therefore, I have no difficulty in concluding that Superstore's conduct in this regard was negligent.

[31] There was no dispute by Superstore that Ms. Alfred's fractured right knee was caused by this negligence.

Issue # 2: Was Ms. Alfred contributorily negligent?

[32] Notwithstanding that a defendant was negligent, a plaintiff has a duty to take reasonable care by keeping a reasonable lookout for her own safety. Although a plaintiff is not required to keep her eyes focused on the ground, a failure to observe something that is there to be seen may amount to contributory negligence: *Etson,* at para. 8.

[33] Superstore's counsel argued that Ms. Alfred should be found 25% contributorily negligent, as she had two opportunities to notice the dolly on the floor before her slip and fall. The first was when she and her husband initially approached the customer service

counter, after they first entered the store. The second was when Ms. Alfred made what was essentially a “blind” turn to her right, immediately before stepping on the dolly.

[34] In *Castillo v. Westfair Foods Ltd*., [1999] B.C.J. No. 1326 (S.C.), the plaintiff tripped over a 16-foot long display platform, with about a six-inch rise, that was positioned between the aisles of the grocery store. Immediately before tripping, the plaintiff was focused on a display of potato chips. The display platform was similar in colour to the floor, however it had metal edging with yellow price tickets which delineated the platform from the floor. The court held that had the plaintiff had shown a “modicum of awareness” in watching where she was going, she could have avoided her injury. Liability was apportioned 50/50 between the parties.

[35] In *Barnfield v. Westfair Foods Ltd*., 2000 ABQB 58, the plaintiff tripped over a U-shaped metallic object, approximately nine inches high, which was bolted to the floor at each corner of the produce bins and refrigeration cases in the grocery store. These objects protruded a few inches into the aisles where customers would travel. The court accepted that these polished metallic corners did not blend in with either the black coloured bins or the white tile floor, and were therefore reasonably noticeable. Further, the plaintiff admitted that she had probably noticed the metal corners at some time while shopping in the store on other occasions. The court concluded that the plaintiff was 25% contributorily negligent.

[36] In *Kemp*, cited above, the plaintiff tripped on the “end cap” of a platform at the end of an aisle. Contrary to the store's policy, the platform was not constructed, painted or otherwise marked to ensure that customers were given visual cues as to its location. The end cap sat seven inches off the ground and the court concluded it was “undoubtedly a

tripping hazard" (para. 25). It appears that the plaintiff approached the platform from some distance away, with the intention of asking a question of a store employee. At para. 28, the court concluded that the plaintiff had a duty to act in his own interests and to conduct himself in such a way as to protect his own safety:

> "… While it is true that Zellers could have done more to safeguard him against falling in the Zellers Premises, Mr. Kemp too could have maintained a better lookout than he did. The End Cap, and more particularly the horizontal platform portion of it, were not wholly invisible. He must bear some measure of responsibility for not fully discharging his duty to be properly aware of his surroundings as he made his way about the Zellers Premises."

The court found the plaintiff to be 25% contributorily negligent.

[37] In *Etson*, cited above, the elderly female plaintiff tripped and fell over the corner of a wooden pallet in the defendant's grocery store. There was a fairly long board that had splintered away from the pallet and was protruding into the aisle. The court found that the presence of the pallet was obvious, but the location and condition of the bottom corner was not. While the defendant was negligent, the court also found that the accident could have been avoided if the plaintiff had paid more attention to where she was walking. At para. 43, the court stated:

> "… Although she is not required to focus her attention at all times to the floor, she is required to be aware of her surroundings…Ms. Etson said that she was looking at the floor about three feet ahead. Had she looked down at her feet, even momentarily, before she began to turn the corner, she would have seen that she was too close to the corner of the pallet. Accordingly, I find that she did not take reasonable care for her own safety."

The court found the plaintiff to be 50% contributorily negligent.

[38] In the case at bar, I agree with Superstore's counsel that Ms. Alfred probably had an opportunity to notice the dolly on the floor when she initially approached the customer service counter with her husband. She testified that she stood behind Mr. Alfred and slightly to his right for a period of time while he was arranging to have the purchase order approved by the clerk. This presumably gave Ms. Alfred some period of time to look around and familiarize herself with her surroundings. However, as I have found that the dolly was in a collapsed position, the upright vertical tubing on either side would not have been so prominent. Further, the dolly may have been partially obscured from Ms. Alfred's sight if it was situated on the right-hand side of the apex of the 135 degree corner of the counter. Nevertheless, there is no evidence the dolly was wholly concealed or otherwise invisible. Thus, I agree that, had Ms. Alfred looked down at her feet, even momentarily, before turning to her right to walk away, she would have noticed the dolly. Accordingly, I find her to have been contributorily negligent to the extent of 25%.

Issue # 3: Was Ms. Alfred's injury from the second fall caused by the injury from the first?

[39] In *Clements v. Clements,* 2012 SCC 32, the Supreme Court recently clarified the distinction between the "but for" test for causation and the test based upon "a material contribution to risk". The Court noted that, almost invariably, causation must be established using the factual "but for" test. However the "material contribution" test may arise in an exceptional situation where it is impossible to determine which of a number of negligent acts caused the injury, providing that one or more of them did so. At para. 13, the Court stated:

> "To recap, the basic rule of recovery for negligence is that the plaintiff must establish on a balance of probabilities that the

> defendant caused the plaintiff's injury on the "but for" test. This is a factual determination. Exceptionally, however, courts have accepted that a plaintiff may be able to recover on the basis of "material contribution to risk of injury", without showing factual "but for" causation. As will be discussed in more detail below, this can occur in cases where it is impossible to determine which of a number of negligent acts by multiple actors in fact caused the injury, but it is established that one or more of them did in fact cause it…."

[40] In proving causation using the "but for" test, the plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. With this test, the defendant's negligence is a necessary precondition to bring about the injury. The "but for" test is to be applied "in a robust common sense fashion" and there is "no need for scientific evidence of the precise contribution the defendant's negligence made to the injury" (para. 9). The Court noted that a common sense inference of "but for" causation usually flows without difficulty from proof of negligence (para. 10). However, where "but for" causation is established by inference only, it is open to the defendant to argue or call evidence that the accident "would have happened" without the defendant's negligence; in other words, that the negligence was not a "necessary" cause of the injury (para. 11).

[41] The evidence supporting a possible common sense inference that the second fall was caused by the injury resulting from the first fall is minimal and weak. The medical report about this second fall on May 9, 2009 includes the following statement: "She was also complaining of some knee pain which she thinks caused her to twist her ankle in the first place." In her testimony, Ms. Alfred adopted that description of why the fall happened. However, the medical report following the subsequent x-ray of Ms. Alfred's right knee indicates that the old fracture "is essentially completely healed". Further, the

doctor's resulting impression was stated as follows: "Minimal degenerative change at the right knee. No significant adverse change from 2006." Ms. Alfred's testimony about what caused the second fall was equally sketchy. She said that, as she was walking towards the stairs of her house, "my feet kind of went sideways…I twisted my knee sideways". Ms. Alfred repeated this latter phrase in her cross-examination, but did not expand upon it. When asked whether there was any weakness in her right knee in the five minutes leading up to the second fall, Ms. Alfred replied "my leg was kind of weak, yeah". It is significant to me that she did not specifically identify weakness in her right knee, but rather she referred to her right leg. That is consistent with the reference to "leg weakness" in the Nurses Notes portion of the Ambulatory Care Form completed upon Ms. Alfred's admission to the Whitehorse General Hospital on May 9, 2009.

[42] It must also be remembered that one year after the first fall, Ms. Alfred testified that she only had occasional pain in her right knee. Further, there was the incident of right-sided weakness involving her right leg in August 2008, which does not appear to be in any way connected with the initial fracture of her right knee. Additionally, Ms. Alfred was treated for pain in her right hip and right thigh in early 2009, again without any particular complaint about her right knee. The medical examination in February 2009, which I have assumed must have included her right knee, noted no acute joint abnormality. Finally, as I noted above, the x-ray of Ms. Alfred's right knee following the second fall indicated that it had completely healed and that there had been no significant adverse change since the first fall in 2006.

[43] Thus, even taking a robust and pragmatic common sense approach to these facts, I am unable to infer that the defendant's negligence preceding the first fall probably

caused the injury resulting from the second. In short, the plaintiff has not proven a causal link between the first and second falls.

[44] The plaintiff's counsel expressly urged me not to consider the "material contribution" causation test in the alternative. That submission is not surprising, given that the Supreme Court in *Clements*, cited above, clearly said that the "material contribution" test should only be used in *exceptional* circumstances, where more than one tortfeasor contributed to the risk of the plaintiff's injury, and in fact globally caused the injury, but it is impossible to determine which tortfeasor did so. At para. 46 of *Clements*, the Supreme Court summarized the present state of the law in Canada on causation as follows:

> "…(1) As a general rule, a plaintiff cannot succeed unless she shows as a matter of fact that she would not have suffered the loss "but for" the negligent act or acts of the defendant. A trial judge is to take a robust and pragmatic approach to determining if a plaintiff has established that the defendant's negligence caused her loss. Scientific proof of causation is not required.
>
> (2) Exceptionally, a plaintiff may succeed by showing that the defendant's conduct materially contributed to risk of the plaintiff's injury, where (a) the plaintiff has established that her loss would not have occurred "but for" the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; and (b) the plaintiff, through no fault of her own, is unable to show that any one of the possible tortfeasors in fact was the necessary or "but for" cause of her injury, because each can point to one another as the possible "but for" cause of the injury, defeating a finding of causation on a balance of probabilities against anyone."

As there was only one defendant in the case at bar, the "material contribution" test is clearly inapplicable.

Issue # 4: General damages?

[45] Counsel referred to a number of case authorities in support of their respective submissions on the appropriate range for general damages. The plaintiff's counsel submits that, if I find the defendant liable for the first fall only, the range is generally from about $25,000 to $50,000, or, if I find the defendant liable for both the first and second falls, up to $60,000. Superstore's counsel submits that the appropriate range is $30,000-$35,000 for the injury resulting from the first fall, and potentially an additional $10,000 for the injury resulting from second, if the defendant is liable for both.

[46] In *Mason v. Moore,* [2005] O.J. No. 3799 (S.C.), the 51-year-old female plaintiff had been in a motor vehicle accident. She suffered injuries to both her knees, including a fractured left kneecap. The plaintiff also had injuries to her cervical and lumbar spine, as well as to her left shoulder and arm. She was not hospitalized, but received physiotherapy and chiropractic treatment, as well as arthroscopic surgery on her right knee about a year later. The plaintiff also had a pre-existing degenerative condition in both knees and this was expected to require future surgery. By the time of trial, she was able to do light housework and some gardening, but was no longer able to play golf or walk for recreation; nor was she able to stand for more than 10 minutes. The court awarded $90,000 in general damages.

[47] Superstore's counsel properly points out that the features of *Mason* which distinguish it from the case at bar are the spinal injuries, the injuries to both knees, the left shoulder and arm injuries, and the nature of the pain plaintiff was continuing to suffer at the time of the trial. The plaintiff's counsel also concedes that the injuries in *Mason* were more severe than those in the case at bar.

[48] In *Gray v. Ellis,* 2006 BCSC 1808, the 41-year-old female plaintiff was also in a motor vehicle accident. She suffered a knee fracture requiring surgery and the installation of metal wires and a screw. She was essentially immobile for several weeks after the surgery, then used crutches and later a cane. The plaintiff also suffered from severe headaches for approximately six months, and mild depression for about three months. Approximately six months after the accident, she was able to perform all her normal activities of daily life, although she still experienced occasional weather-related aches in her knee and there was a possibility of future surgery to remove the metal pieces within. The plaintiff also suffered a 12 centimetre scar on her knee which was noted to be "somewhat embarrassing" for her. The court awarded general damages of $50,000.

[49] In *Furness v. Guest,* 2010 BCSC 974, the male plaintiff (of unknown age) was struck by the defendant's tractor truck while he was walking across an intersection. His injuries included: a fractured right knee; a fracture of the right leg above the ankle which was described as "tiny"; soft tissue injuries in and around the right knee; pain in his ankle and hip; and other minor bruises and scrapes. The plaintiff also required arthroscopic surgery and suffered from nightmares, panic attacks and a fear of crossing streets. From time to time he still required the use of a cane and said that, because of the pain in his knee, he could not walk as far as he could before the accident. However, the court noted that the plaintiff had "substantially recovered" by the time of trial, three and one-half years after the accident. General damages for pain and suffering were assessed at $40,000, subject to a reduction for contributory negligence.

[50] In *Meunier v. Green Gables Food Stores Ltd.,* (1990) 109 N.B.R. (2d) 251 (Q.B.), the 50-year-old female plaintiff fell when she stepped into a hole in the defendant's convenience store parking lot. She fractured her left knee and was hospitalized for five days, following which she was in a cast for about four weeks. She required two surgeries to install and remove a metal screw and wires. The court noted that the quality of the plaintiff's life was "severely curtailed for at least a year". She continued to complain of soreness and stiffness and an inability to go on long walks or kneel, as she was able to do before the accident. However, approximately two years later the court noted that the plaintiff appeared to have made "a good recovery". General damages were assessed in the amount of $15,000, which counsel agree would currently be the equivalent of $25,500, using a calculation based on the Consumer Price Index.

[51] In *Hartlen v. Atlantic Wholesalers Ltd*., (1996) 155 N.S.R. (2d) 136 (S.C.), the 66-year-old female plaintiff broke her right knee when she slipped and fell in the parking lot of the defendant's mall. She required surgery and the operation left an eight inch scar on her knee. The plaintiff was hospitalized for six days, and wore a full cast for approximately three weeks. After the cast was removed, she required a knee immobilizer for a further three weeks. The plaintiff then used a cane for about a month and a half and required physiotherapy. In total, the plaintiff was disabled for approximately 12 weeks. At trial, she continued to complain of pain in her knee and difficulty in walking. The court awarded general damages in the amount of $18,500, which would currently be the equivalent of $27,200.

[52] In *Johnson v. Westfair Foods Ltd*., 2001 SKQB 571, the 70-year-old female plaintiff fell in the defendant's grocery store and fractured both kneecaps. She was

hospitalized for 10 days, was confined to a wheelchair for seven weeks, and was unable to walk unassisted for several months. A year and a half after the accident, she was continuing to experience pain and a lack of flexibility in both knees. General damages were assessed at $30,000, which currently would be the equivalent of $40,000.

[53] In *Jansen v. British Columbia Transit,* 2004 BCSC 722, the 52-year-old female plaintiff fell when the defendant's bus accelerated in an abrupt manner. She suffered a fracture of the tibial surface of her left knee. The court described her as "significantly disabled" as of the time trial, as well as noting that she would likely require future surgery because of pre-existing osteoarthritis. General damages were assessed at $40,000, which in today's terms would be $48,000.

[54] In *Stapley v. Hejslet,* 2006 BCCA 34, at para. 46 the British Columbia Court of Appeal suggested the following non-exhaustive list of factors may influence an award of general (non-pecuniary) damages for pain and suffering:

a) age of plaintiff;

b) nature of the injury;

c) severity and duration of the pain;

d) disability;

e) emotional suffering;

f) loss or impairment of life;

g) impairment of family, marital and social relationships;

h) impairment of physical and mental abilities;

i) loss of lifestyle; and

j) the plaintiff's stoicism (for which the plaintiff should not, generally speaking, be penalized).

[55] In the case at bar, the following circumstances are relevant to my assessment of an appropriate award for general damages:

a) The injury resulting from the first fall was limited to the fractured right knee cap. There were no other collateral injuries, as is the case in many of the authorities discussed above. However, Ms. Alfred's age (61 at the time of the accident) and her diabetic condition likely exacerbated the extent to which she has experienced pain and physical limitation as a result of that fall.

b) Ms. Alfred was not required to have any surgery for this injury.

c) Although Ms. Alfred has had to attend a number of sessions with medical professionals in Whitehorse as a result of the injury, she has never been required to spend a night in a hospital as a result of the injury.

d) Just under three years after the first fall, the fractured right knee cap was noted to be "essentially completely healed".

e) Ms. Alfred is no longer able to fully participate in certain aboriginal cultural activities relating to the harvesting of big and small game. However, she has nevertheless been able to attend recent annual family hunting trips, which suggests that she is not totally prevented from participating and enjoying other aspects of those activities.

[56] In my view, Ms. Alfred's pain and suffering is slightly less than that in *Gray* and *Furness*, and is generally more comparable to the circumstances in *Meunier* and *Hartlen,* keeping in mind that those latter two cases are now somewhat dated. I also have regard to the fact that it has been over six years since the accident. Had Ms. Alfred received her damage award in 2006, because of inflation between then and now, her award would not have the same purchasing power today. I therefore assess Ms. Alfred's general damages at $35,000. However, this will be reduced to $26,250 to reflect my finding that Ms. Alfred was 25% contributorily negligent.

[57] In addition, I understand that counsel are agreed that there should be a subrogated damage award, relating to the medical expenses incurred by Yukon Health and Social Services, in the amount of $1,941.60.

[58] There is no claim for loss of income.

Issue # 5: Should I vary from the presumptive pre-judgment interest rate under the *Judicature Act*?

[59] Superstore's counsel submitted that I should exercise my discretion under s. 35(7)(b) of the *Judicature Act* to set a rate of interest lower than the prime rate existing for the month preceding the month in which the action was commenced, which is the presumptive pre-judgment interest rate pursuant to s. 35(3) of the *Act*. In this case that rate is 6.25%. Counsel pointed to the fact that the average prime rate of interest from the date of the accident to the trial date is 3.85%, resulting in a difference between the two rates of 2.4%. While 2.4% may not appear to be substantial in absolute terms, counsel argued that this difference is significant, because it either represents a 38% drop from the presumptive rate of 6.25%, or an increase of 52% above the average rate, depending on

one's point of view. In this regard, Superstore's counsel attempted to distinguish the case at bar from two other Yukon cases which declined to apply the discretion to vary under s. 35(7): *Rogers v. Pierson Estate (Public Administrator)*, [1993] Y.J. No. 36 (S.C.); and *Trans North Turbo Air Ltd. v. North 60 Petro Ltd.*, 2003 YKSC 26, upheld on this point by the Yukon Court of Appeal at 2004 YKCA 9. Further, Superstore's counsel noted that the case authorities utilized for determining an appropriate award for general damages have already been adjusted for inflation using the Consumer Price Index calculations. Therefore, argued counsel, to use the higher rate of interest in the month before the action was commenced, in comparison with the significantly lower rates, since the global financial crisis in late 2008, would give rise to a windfall in the form of double recovery for the plaintiff.

[60] The provisions at issue read as follows:

> "35(1) In this section, "prime rate" means the lowest rate of interest quoted by chartered banks to the most credit-worthy borrowers for prime business loans, as determined and published by the Bank of Canada.
>
> …
>
> (3) Subject to subsection (7), a person who is entitled to a judgment for the payment of money is entitled to claim and have included in the judgment an award of interest thereon at the prime rate existing for the month preceding the month in which the action was commenced calculated from the date the cause of action arose to the date of judgment.
>
> …
>
> (7)(b) The judge may, if considered just to do so in all the circumstances, in respect of the whole or any part of the

> amount for which judgment is given…set a rate of interest higher or lower than the prime rate…"

[61] There are two lines of authority on whether it is appropriate for a plaintiff to be compensated twice for inflation. The double recovery here would come, first, from adjusting the value of the precedents on general damage awards for inflation to the date of trial, and, second, by allowing pre-judgment interest on the adjusted award for general damages at a rate significantly higher than the average rate between the day the cause of action arose and the trial date, or alternatively, the interest rate at the time of trial.

[62] In *Rogers*, the presumptive rate was 14.25%. However, defence counsel urged McDonald J. to use the lower rate of 11.75%, which was the prime rate at the time of the accident. Defence counsel relied on two British Columbia Court of Appeal cases in support of his argument: *Leischner v. West Kootenay Power and Light Company Limited*, [1986] 3 W.W.R. 97 (B.C.C.A.); and *Graham v. Grant*, (1990) 46 B.C.L.R. (2d) 151. McDonald J. noted that the legislation in British Columbia, unlike the Yukon legislation, did not set a presumptive rate of pre-judgment interest. Rather, courts in British Columbia had complete discretion to set the pre-judgment interest rate, providing it was not lower than the rate stated in the Canada *Interest Act*. Section 1(1) of British Columbia's *Court Order Interest Act*, R.S.B.C. 1979, c. 26, provided as follows:

> "Subject to section 2, a court shall add to a pecuniary judgment an amount of interest calculated on the amount ordered to be paid <u>at a rate the court considers appropriate in the circumstances, but the rate shall not be less than the rate that applies to interest on a judgment under the *Interest Act* (Canada)</u>, from the date on which the cause of action arose to the date of the order." (my emphasis)

[63] McDonald J. concluded that, because of the difference between the Yukon *Judicature Act* and the British Columbia *Court Order Interest Act*, the British Columbia cases were of no value in interpreting the Yukon legislation (para. 10). With respect, I would not go so far.

[64] In *Leischner*, the Court of Appeal panel, composed of five judges, made a comment which seems to be directly relevant to the double recovery question (at p. 30):

> "… The purpose of pre-judgment interest is to place the plaintiff in the position he would have been in had the award been paid on the day his cause of action arose. If the award is updated for inflation occurring between then and the trial date, he is placed in substantially in that position, except for what money he would have earned in that period over and above inflation.…"

[65] *Graham v. Grant* makes another relevant point. There, a three judge panel of the British Columbia Court of Appeal commented that *Leischner* recognized the proposition that (at p. 4):

> "While the inflation factor in the award is directed towards preserving the real value of money, interest is to compensate one for being kept out of the money.: *Wright v. British Railways Board*, [1983] 2 All E.R. 698."

[66] *Leischner* was referred to with approval by the Nova Scotia Court of Appeal in *Bush v. Air Canada*, (1992) 87 D.L.R. (4th) 248 (N.S.C.A.). The Court in *Bush* referred as well to *Melnychuk v. Moore and Associated Beer Distributors Ltd.*, [1989] 6 W.W.R. 367 (Man. C.A.), where Twaddle J.A. said at p. 379:

> "What we are concerned with in this case is an award of general damages for pain and suffering and loss of amenities. These non-pecuniary damages are assessed with reference to the value of money at the date of trial. There is thus included in the amount awarded to the plaintiff a factor for monetary inflation between the date of the accident and the

> date the judgment was delivered. The plaintiff is still entitled to a profit on the money she would have received at an earlier date, but the allowance for interest at the full rate would duplicate the inflation factor already included in the judgment."

[67] In *Bush*, Chipman J.A., speaking for the Nova Scotia Court of Appeal at p. 10, recognized that care must be taken in assessing statements by courts dealing with different statutory provisions. Nevertheless, he commented that the principle from *Melnychuk*, i.e. that a plaintiff ought not to be compensated twice for inflation, had considerable appeal in formulating an approach to the exercise of the broad discretion given under the *Judicature Act* of Nova Scotia. At p.13, he concluded that a double recovery should be avoided in the exercise of that discretion, stating:

> "… The conclusion must be that <u>to the extent that inflation was taken into account for the period between the accrual of the cause of action and the trial, the judge should then adjust the interest rate so that it is not taken into account for a second time.</u> This exercise should be carried out in fixing the rate and requires an examination of the award to determine whether inflation from the date the cause of action arose has been taken into account. <u>Judges should take particular care in cases where a long period of time has elapsed between the time the cause of action arose in the assessment of damages…</u>." (my emphasis)

[68] In S*pencer v. Rosati*, (1985), 50 O.R. (2d) 661 (C.A.) and *Graham v. Rourke*, (1990) 75 O.R. (2d) 622 (C.A.), the Ontario Court of Appeal went in a different direction, essentially taking the position that, as a general rule, trial judges should exercise restraint before deviating from the presumptive rate. In *Spencer*, the Court was dealing with s. 36(3)(a) of the *Judicature Act*, R.S.O. 1980, c. 223, which, like s. 35(3) of the Yukon *Judicature Act*, specified as the presumptive rate of interest the use of the Bank of Canada's prime rate in the month preceding the month on which the action was

commenced. That rate was 16.5% in *Spencer*, however the average rate of interest over the period from the notice of claim to the judgment was 15.2%. The trial judge allowed 12%. The Ontario Court of Appeal held that the trial judge erred in reasoning that more than 12% would "very likely be in the nature of a windfall". Morden J.A., speaking for the Court at para. 17, said that this was "a quarrel with the basic policy of the legislation". And further:

> "…In providing for the prime rate, the Legislature must be taken to know what the credit structure in our economy is and its policy decision should not be ignored simply on the ground that the rate appears to be too high for practical realization. (It may be noted that the current legislation, which is not applicable to this proceeding, provides for interest at the "bank rate": *Courts of Justice Act*, 1984 (Ont.), c. 11, ss. 137 and 138.) The same kind of reasoning applies to the "windfall" consideration. If there be a windfall, the policy of the legislation, which is intended to provide an incentive for early settlements or payments, must be assumed to be that it is the plaintiff and not the defendant who is to enjoy it…."

[69] In *Graham v. Rourke,* the Court was dealing with the Ontario *Courts of Justice Act,* S.O. 1984, c. 11. The combined effect of ss.137 and 138 of that *Act* authorized the trial judge to set "an interest rate at the bank rate at the end of the first day of the last month of the quarter preceding the quarter in which the proceeding is commenced…". Section 140(b) of the *Act,* similar to s. 35(7) of the Yukon *Judicature Act,* provided as follows:

> "140. The court may, where it considers it just to do so, having regard to changes in market interest rates, the circumstances of the case, the conduct of the proceeding or any other relevant consideration,
>
> …
>
> (b) allow interest at a rate higher or lower than that provided in section 138 or 139…"

[70] The trial judge in *Graham* fixed the pre-judgment interest rate at 12% and declined to lower that to the average rate of interest (10.85%) between the date when notice of the claim was given and the date of judgment. Doherty J.A., speaking for the Ontario Court of Appeal at para. 15, reviewed the trial judge's exercise of discretion in setting the interest rate, stating:

> "… I begin from the premise that a party is prima facie entitled to pre-judgment interest at the rate prescribed in ss. 137 and 138 of the *Act*. The onus is on the party seeking a higher or lower rate to justify a deviation from that "presumptive rate": *Spencer v. Rosati* (1985), 50 O.R. (2d) 661, 1 C.P.C. (2d) 301, 9 O.A.C. 119 (C.A.), at pp. 664-65 O.R." (my emphasis)

[71] Further, while Doherty J.A. acknowledged that one of the relevant considerations in s. 140 was a fluctuation in the market interest rates:

> "… Fluctuation in the rates does not, however, demand some variation in the rate provided by ss. 137 and 138 of the *Act*. It is one factor to be considered. Its significance will depend in large measure on the extent of the fluctuation." (my emphasis)

[72] At para. 17, Doherty J.A. noted that a four point fluctuation in the pre-judgment interest rates, which resulted in only 1.15% deviation between the statutory rate and the averaged rate was "not a substantial one" in the circumstances of that case. Finally, at para. 18, Doherty J.A. held that it would be improper to apply a "presumption" in favour of the averaged rate:

> "To give effect to the appellant's submission, I would have to conclude that the four percentage fluctuation in pre-judgment interest rates resulting in a 1.15 percentage point difference between the two suggested rates required that the trial judge apply the lower or averaged rate. To do so, I would have to replace the statutory regime premised on a specified rate subject to variation by the exercise of judicial discretion with a

> judge-made presumption in favour of the averaged rate. Where the legislature, through specific legislation, has established a policy with respect to pre-judgment interest, it is not for the court to rewrite that legislation to reflect a different policy…." (my emphasis)

[73] In *Trans North Turbo Air*, cited above, the presumptive interest rate under the Yukon *Judicature Act* was 7.5%, however the average rate over the statutory period under the *Act* was 5.21%. The difference in the two rates amounted to over $1 million over a four-year period. Nevertheless, Veale J. did not find the difference sufficient to exercise his discretion to depart from the presumptive rate under the *Act* (para. 28). At para. 26, Veale J. said:

> "North 60 also submits that the objective of pre-judgment interest is to be compensatory, but not punitive. While I agree with that statement, it must also be remembered that each party knows the pre-judgment interest rate once the claim is filed. The defendant, and particularly insurers, can take steps, such as setting reserves to protect themselves in the event of an unfavourable decision. Dramatic or massive fluctuations in the interest rate would be one example where it may be "just" to modify. It is also important to keep in mind that we are dealing with prime rates and not commercial rates." (My emphasis)

[74] In upholding Veale J.'s decision on this point, the Yukon Court of Appeal, at para. 57 said this:

> "While it might be argued that this is an appropriate case for the exercise of discretion afforded by s. 35(7), it was not, in my view, an error in principle for the judge to decline to fix a lower rate of pre-judgment interest. The *Act* provides that where a judge considers it to be just in all of the circumstances the discretion is to be exercised. The legislation does not mandate that a lower rate must be fixed if the presumptive rate is higher than the average existing rate. It is a matter of discretion to be exercised in each case.

> The judge did not see fit to fix a lower rate here. There was no error in that." (My emphasis)

[75] In the case at bar, the difference between the presumptive rate of interest (6.25%) and the average rate of interest between the date of the accident, i.e. when the cause of action arose (3.85%), and the trial date, is seemingly small in absolute terms, at 2.4%. However, I agree with Superstore's counsel that 2.4% becomes significant in relation to either the presumptive or average rate. A reduction of 2.4% from the former to the latter is a 38% drop; conversely, an increase of 2.4% from the average rate to the presumptive rate is a 52% increase.

[76] Considering all the circumstances, I am of the view that the difference between the presumptive rate and the average rate is sufficiently large to engage my discretion under s. 35(7)(b) of the *Judicature Act.*[First, the difference between the two rates is primarily due to the drastic reduction in the Bank of Canada's prime rate of interest following the global financial crisis in late 2008, a circumstance obviously beyond the control of either party. Second, in *Trans North Turbo Air*, where the difference at issue was 2.29%, the Yukon Court of Appeal suggested that "it might be argued that this is an appropriate case for the exercise of discretion afforded by s. 35(7)". Third, I am mindful that it has taken just over five years for the plaintiff to proceed from the commencement of this action to the trial. That is quite a long time, given the relative simplicity of her case, and it would seem inequitable for her to receive the added benefit of <u>both</u> the higher presumptive rate <u>and</u> the longer time period over which it applies. Finally, the amount I have awarded the plaintiff in general damages has already been adjusted for inflation to date. Thus, in my view, to allow the plaintiff to have the benefit of the higher presumptive interest rate, would potentially give rise to a form of double recovery.

[77] Accordingly, I find that it is just to set a rate of pre-judgment interest lower than the presumptive prime rate. Bearing in mind what the Ontario Court of Appeal said in *Graham v. Rourke*, I do not think that the alternative to the presumptive rate should invariably be reliance upon the average rate. However, in this particular case, it seems just to use the latter.

COSTS

[78] I did not hear from counsel on the issue of costs. If necessary, they may return before me to make submissions on the point. However, in the hope of expediting this matter, while not prejudging the issue, it would appear that Ms. Alfred was substantially successful in her claim. Further, based on the manner in which she presented her case, there was obviously no formal admission of liability by Superstore before the trial. Nevertheless, given that Superstore chose to call no evidence (beyond that introduced jointly in documentary form), it is apparent that there was never any serious dispute about its liability. An admission in that regard may have shortened the trial somewhat and reduced the amount of preparation required by Ms. Alfred's counsel. I would urge counsel to keep these considerations in mind in their discussions about costs.

_____

Gower J.