

Date of Release: November 6, 1992

No. A911320

Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

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)

**MEL UNRUH
*JUDGMENT***

)

REASONS FOR

)

PLAINTIFF

)

)

OF THE HONOURABLE

AND:

)

)

**STEVE WEBBER
*MEREDITH***

)

MR. JUSTICE

)

DEFENDANT)

Dates and place of trial:

September 14 - 18,

21 - 25, 28 - 30 and

October 1, 2, and 5, 1992

Vancouver, B.C.

Counsel for the plaintiff:

J.N. Laxton, Q.C.

and R.D. Gibbens

Counsel for the defendant:

M.J. O'Grady, Q.C.

I have abbreviated the style of cause leaving in only the names of the protagonists now remaining.

Liability

I conclude that the defendant Webber intentionally pushed or checked the plaintiff Unruh from behind, that Unruh was propelled head first into the end boards of the hockey rink and thus broke his neck. I do not suggest for an instant that Webber meant to inflict any injury. The push or check was thoughtless, not vicious. But Webber was, by his own admission, well aware firstly, that the push or check from the rear was banned under the rules and secondly, that a player employing the tactic might well cause a devastating spinal cord injury of the sort suffered by Unruh.

I hold therefore, that Webber was duty bound to avoid contacting Unruh from the rear, especially in the proximity of the boards, as he could foresee that disastrous results might well ensue. Webber was negligent and is liable accordingly in damages for the injury suffered by Unruh.

I think the account of Mrs. Singbeil most accurately describes what happened, even though she may not have observed or remembered every detail. I choose her evidence because she was as well placed to see the incident as anybody, because she is an experienced spectator and follower of the game, because she was called as a witness for the defendant, not the plaintiff, and finally, lest it be thought she was biased, because her evidence accords with much of the evidence of most of the other eye witnesses in vital particulars.

Shortly after the game Mrs. Singbeil gave a written statement which read in part:

On March 7th, the Aldergrove Midgets AA team played an exhibition game against the Arbutus Club Midget team. They had played the 20 minutes stop time period, had an ice clean and then about halfway through the second period when Mel Unruh was injured. Mel was at the boards to the left of the Aldergrove net. He was about three to four feet out from the boards with his head down toward the boards. He was attempting to play the puck at his feet. The Arbutus player checked Mel from behind. It did not appear to be a particularly hard check; it was not vindictive or vicious - both players wanted to play the puck. As a result of Mel's position and the check, he fell forward hitting the top of his head sharply on the boards. He twisted and collapsed on his back on the ice.

The foregoing statement was put in as part of the case for the defendant. In it Mrs. Singbeil says that Webber checked Unruh from behind and in the result, Unruh fell into the boards hitting the top of his head "sharply". In cross-examination Mrs. Singbeil expanded upon her statement. She said:

Q. Can you put a little cross in red where you think Unruh struck his head on the boards. And with a blue pen can you draw the direction you saw Webber going. Can you put a little arrow on it. Was Webber pretty well directly behind Unruh?

A. Slightly to his left. Slightly to Mel's left.

Q. Were they going quite fast?

A. Yes, they were both skating.

Q. Did you see the way that Webber contacted Unruh?

A. He hit him from behind.

Q. Did you see Webber, which part of Webber's body came in contact with Unruh?

A. I don't remember exactly how. It was a solid contact on the back.

Q. A solid contact on the back?

A. Yes.

Q. As a result of that solid contact on the back, was Unruh knocked off balance?

A. He was pushed into the boards.

Q. Was he then off balance after he was hit, do you remember?

A. He didn't have any control. It pushed him. It catapulted him into the boards.

Q. Catapulted him into the boards. Did he appear to be -- Did Unruh appear to be properly balanced before he was hit by Webber?

A. Yes.

Q. From what you could see, was this check from behind, was it avoidable?

A. I felt that it could have been avoided either by stopping or changing direction or by putting the arm around Mel and riding him into the boards. It would have been a holding penalty but they do it.

Q. But a holding penalty is better than the accident that occurred?

A. Yes.

Q. In your statement, you said that Mel had his head down towards the boards. What were you intending to mean by that?

A. He was preparing to play the puck and so he had glanced down. He still could see the boards but he had glanced down so his head wasn't up straight. He had glanced down like this but he could still have peripheral vision.

Q. Was he in what is sometimes described as the skating stance?

A. Yes.

Q. Was that a normal skating stance he was in when you saw him?

A. Yes.

Q. Now, in your statement you said it didn't appear to be a particularly hard check. What did you have in mind?

A. When I say something is a particularly hard check, I am usually referring to checks where players that are usually coming from opposite directions and they hit and bounce. It is a jarring impact. Mel and the Arbutus player were going the same direction so Mel absorbed some of the impact. It wasn't basically --- He was pushed ahead absorbing the impact.

Q. So your definition of a particularly hard check would be a sort of a, two players hitting from opposite directions. You said it was not vindictive or vicious. What do you mean by that?

A. I didn't think the Arbutus player was out to deliberately hurt Mel. He wasn't out head-hunting, as they say, or as you often see the player will charge someone or two-hand slash them because they are angry. I felt he wanted the puck, just like Mel did, and was going for it, Mel was in his way, and he hit him. It was more careless or thoughtless (sic) dangerous than it was vicious or vindictive.

Q. Have you heard of the expression "spinorama"?

A. Yes.

Q. Apparently, Serge Savard is supposed to be famous for doing a spinorama -- are you aware of that?

A. I never really thought about it. I know they talk about it in making a fancy turn.

Q. Did you see Unruh do a spinorama or anything like it before he was hit by Webber?

A. No.

Q. Are you sure about that?

A. Yes.

Q. Had Unruh reached the puck when he was hit by Webber?

A. It was just in front of him, slightly to his right.

Q. The puck was just in front of Unruh when he was hit?

A. Yes.

Q. So does that mean he had actually reached the puck when he was hit?

A. I believe he was just going to make the play with it and try and pass it behind the boards or behind the net around the boards.

Q. But at the moment of the hit, Unruh wasn't actually in possession of the puck?

A. No.

. . .

Q. And where was the point of contact between the two players?

A. Just over the goal line.

Q. Do you want to put a little cross where you think the two players contacted each other? Did you have a

pretty good view and a good memory of what happened after Unruh crossed the goal line?

A. There wasn't time for much to happen. He crossed it, he went to make the play, he was hit.

Q. So is it fair to say that you have a good memory of everything that happened after Unruh crossed the goal line?

A. I believe so.

Mrs. Singbeil said that Unruh's head met the end, not the side, boards. This accords with the evidence of all the eye witnesses save only Webber. Webber had Unruh's head in contact with a spot where the side boards meet the corner curve. I conclude that Unruh's head contacted the end boards about where Mrs. Singbeil says it did.

The eye witnesses for the plaintiff and several of the eye witnesses for the defendant testified that Webber hit Unruh on or just over the goal line. The goal line is just over ten feet from the end boards. It follows the hit must have taken place about six to eight feet or a little more from the end boards.

The preponderance of the testimony establishes that almost certainly Unruh had not reached the puck when Webber hit him.

I think it probable that Webber pushed Unruh in the back either with his stick or with his hands. Mrs. Singbeil apparently did not see a push. However, a number of other eye witnesses swore they saw it. In particular, the Aldergrove players on the ice at the time, Blount, Charlton and Burns. A push was also reported by the onlookers Wendy Flint and Walter Charlton, and by the linesman John Masse.

Mrs. Flint said this:

Q. Would you describe what you saw.

A. Okay. Mel Unruh was heading in the direction of the puck. Mr. Webber was in pursuit. When they got very close to the goal line, just over the goal line, I saw Mr. Webber following directly behind Mel and with two hands on his stick, hit him from behind up on the upper back area.

The linesman Masse, on March 10, 1990, three days after the event, reported to the B.C. Amateur Association:

This report is about a game that took place on March 7, 1990, at 8:30 pm. The game was between Aldergrove Midget "AA" and Arbutus Club "A" and was played in Vancouver at the Arbutus Club.

At approx. the middle of the 2nd period (exact time not known) the Aldergrove player (I believe his first name was Mel and I don't know his last name or number) was going into the corner of his defending end to get the puck. At this time I was in the same end of the ice as the Aldergrove team and was inside my blueline. As the Aldergrove player was about a stride or stride and a half from the boards his head dropped and he was then hit from behind and went into the boards with his head down and unable to protect himself from any possible injury.

Mr. Masse at trial added this:

Q. *Could you see whether Unruh's skates were still on the ice after he was hit by Mr. Webber?*

A. *No, I could not.*

Q. *Now, from your observations of this hit, how would you describe it?*

A. *It was a very harsh, deliberate, vicious hit.*

Q. *From what you observed, could Webber have avoided hitting Unruh?*

A. *Yes, without a doubt.*

Unruh's own account of the event is as follows:

I was up in between the two face-off circles because, like I said, we were moving up the ice. I noticed the puck had gone back in, so I turned up around there and I started heading towards the puck. When I first turned, I noticed well, as it turns out, Steve Webber behind me. I turned. I noticed him over to my left shoulder. We went racing for the puck. We were going top speed almost. I knew he was behind me because, when I saw him, I knew he was racing right behind me. You

could hear him behind you. We were going in. We got to about the goal line. The puck was still against the board. I had broken stride a bit, ready to play the puck, was still breaking stride, when I felt contact in my upper back. I felt a large contact so I assume it was both hands. It threw me off balance and I essentially went flying into the boards. My feet came off and I struck the boards with my head.

I conclude that the evidence of the witnesses that I have mentioned is to be believed.

I come then to some of the witnesses called for defence. Unfortunately, the account given by Webber himself cannot be believed. He had Unruh facing out from the boards in possession of the puck and turning. Webber said that his right hip contacted Unruh's left hip and Unruh went into the boards at a point between the side boards and the curved corner. If his account were true, his check may well have been acceptable hockey. But given the account of the incident by the other witnesses, the account given by Webber is simply not to be believed.

I have recited the gist of the evidence of Mrs. Singbeil. As I say, she was a witness called for the defence. I do not think that the evidence given by the other witnesses for the defence are compelling where they differ from the evidence of the plaintiff's witnesses.

Mr. Mullan, the father of one of the Arbutus players, saw the event. This is a part of his evidence:

I saw the Aldergrove player appear to start out to the right of the Aldergrove goal, his back was to me, and I saw him start in that direction, and I saw an Arbutus player coming towards him. I didn't know who the Arbutus player was at the time, and he appeared to reverse, he reversed himself, the Aldergrove player reversed himself with his face towards the boards, and at that, just about that juncture he was hit by the Arbutus player, and I had the impression that the Aldergrove player either stumbled or lost his balance just at the same time that the impact occurred. And I saw the Aldergrove player, his head go down and it went directly into the boards, the forehead of the Aldergrove player, his helmet hit the end boards and then he went down immediately.

And then in cross-examination he said:

Q. *And he was hit from behind by Webber?*

A. *Yeah, I guess his back was to Steven, yes.*

Q. *There is no doubt about that, is there?*

A. *There is no doubt.*

Q. *And having been hit from behind Unruh went forward head first, didn't he?*

A. *Yes, he did.*

Q. *And at some point he was horizontal before he hit his head on the boards?*

A. *Yes.*

Possibly the suggestion is that Unruh turned so that the hit in the back by Webber was inevitable. In other words, Unruh was responsible for his own injury. That theory is dispelled by other credible evidence.

And the evidence of Marriott, an Arbutus Club player on the ice at the time, tends, I think, to support the case of the plaintiff. He said:

A. *And this is where Steven Webber and Melvin Unruh went to pick up the puck, and both players were in pursuit of the puck and they were going at -- they were heading for the boards at an angle approximately 80 degrees or so into the boards. The puck, when Melvin picked it up, was approximately two to three feet out from the boards and Steven was approaching him and Steven was behind him and he was one or two strides behind. Melvin picked up the puck and I saw -- I did not see if Mel noticed he was there, I did not see him look back, I don't recall that, I just can't remember. However, I did see a head fake by Mel Unruh to the left and then to avoid the contact with Steven he started to cut right to avoid contact, and this is where he lost balance, and at that precise moment he lost balance Steven made contact with Mel and contact -- Mel was off balance and his head was down and as he was off balance his body was somewhat turned to the*

right with his right shoulder facing out towards the rink, and I would say when contact was made Mel's body was approximately at a 45-degree angle towards the boards, and Steven hit -- hit Mel with his body mid-section, that contact was made, and from there Mel collapsed with his feet towards the goal, his head towards the corner lying parallel to the boards.

Q. How would you describe this contact in general terms?

A. Steven's mid-section hit Mel Unruh's upper body on the right side, on the shoulder blade and on the arm, the upper arm.

Q. Can you recall whether either player had possession of the puck?

A. I -- no.

Q. Can you recall where they were on the ice when the contact occurred, I mean the distance from the end boards?

A. It was about two feet from the boards.

...

Q. Do you recall anything about where Steven Webber's stick was?

A. It was in his left hand on the ice. His other hand was out-stretched with an open hand. His hand was out-stretched probably to grab hold of Mel.

The other credible evidence puts the point of contact between the players at much more than two feet from the boards. The injury itself suggests it must have been.

The "out-stretched" arm suggests a push rather than an attempt to "grab ahold of Mel."

Then Mrs. Eyford for the defence gave the following evidence:

Q. And what did you see of the incident of which Mr. Unruh was injured?

A. *I saw them skating for the puck and I thought it looked like he saw Steven behind him, and then he was checked and he hit the boards. That's what I saw.*

Q. *What kind of a check did you see?*

A. *I saw what to me looked like a shoulder hit type check. I didn't see his hands go up at all.*

Q. *And where was the check in relation to the net and the side boards?*

A. *Well, distance you mean?*

Q. *Approximately?*

A. *Well, it was a few feet from the end boards. I couldn't exactly see because of where I was sitting how many feet, and it was a little bit to the left of the net, Aldergrove net.*

The referee Howard Jampolsky also gave evidence for the defence. His evidence was that Unruh and Webber were skating so slowly that there was no need to watch their play. His evidence, like Webber's, is so at variance with the observations of the other witnesses that it cannot be accepted.

The Arbutus coach, Stuart Perler, was an eye witness. Mr. Perler put the point of contact between Webber and Unruh approximately at the goal line. He said this:

Q. *Now, you observed that the contact between Mr. Webber and Mr. Unruh was by Mr. Webber's right hand coming into contact with the right upper back/shoulder portion of Mel Unruh. Is that correct?*

A. *I had mentioned in the Discovery that contact was made between the edge of Mel's shoulder and Steve's hand. Incidental contact.*

Q. *I didn't ask you if it was incidental. I know you want to keep saying that. I just want you to tell us which part of Mel Unruh was hit by which part of Mr. Webber.*

A. *It would have been the right edge of Mel's shoulder and it would have been Steve's left hand approximately in this type of a position.*

Q. *Left hand?*

A. *Yes.*

Mr. Perler was standing in the Arbutus bench. Webber's back was to him when the hit occurred. A push by Webber would probably not be visible to Perler. But Perler does confirm in any event that Webber contacted Unruh from behind.

Finally, Mr. P.J. Bishop an expert in "impact biomechanics" gave evidence for the defence. A part of his written report reads:

Injury to Mr. Unruh

In describing the injury to Mr. Unruh I have assumed that the examinations for discovery of Mr. Webber and Mr. Perler provide the correct version of the injury circumstances. The injury to Mr. Unruh occurred when Mr. Webber attempted to check Mr. Unruh and Mr. Unruh made a spin move to avoid Mr. Webber. Such a manoeuvre is not uncommon in ice hockey but, when performed near the boards, it places the turning player in a position where he temporarily faces the boards with his back to the checker. Given the motion of Mr. Unruh in turning and the motion of Mr. Webber in checking, it is my opinion that when contact was made both motions would contribute to overall impact of Mr. Unruh with the boards. The speed of the collision would be governed by the motion of both players and it is my opinion that it would not have required an excessively high speed on the part of Mr. Webber for this accident and injury to occur.

It is at least surprising that Mr. Bishop assumed that the "version" of Webber and Perler was correct. For one thing, the versions given by these two witnesses were quite divergent. In any case, because the accident happened as Unruh said it did, the evidence of Mr. Baker is of no assistance.

All parties concede that checking from behind is extremely dangerous, especially near the boards. I take this paragraph from a publication of the Pacific Coast Amateur Hockey Association:

Hockey-Related Spinal Injuries

In recent years there has been a growing concern with checking from behind and other dangerous and illegal checking techniques. The Canadian Amateur Hockey Association addressed this issue in 1985 with the adoption of new Rule 53 - Checking From Behind. In 1989 the C.A.H.A. rewrote and considerably toughened this rule, and in 1990 the Pacific Coast Amateur Hockey Association adopted the Special Rule - Checking From Behind (automatic Major plus Game Misconduct).

In 1987 the Canadian Sports Spine and Head Injuries Research Centre at the University of Toronto updated its national survey of hockey-related spinal injuries. The updated survey identified 107 such spinal injuries over the period 1975-1987. Some of the findings of the study were as follows:

- 1. 50% of the injuries covered by the survey occurred in Ontario, 12% in Quebec, and 6% in British Columbia.*
- 2. 87% of the injuries were to the neck.*
- 3. 65% of the known cases suffered damage to the spinal cord.*
- 4. 95% of injuries happened in organized games.*
- 5. 80.9% of the injured players struck the boards.*
- 6. 34% of the known injuries occurred when players were pushed or checked from behind (28 injuries of 82 for which this information was recorded).*
- 7. 5% of the known injured players died.*

The Canadian Amateur Hockey Association endorses this statement made by Mike Bossy in a video which was played during the course of the trial:

Do not hit another player from behind, it's a gutless type of check, it's very dangerous and it must be stopped. In fact, I believe players who hit from behind like this should receive very stiff

penalties and even long term suspensions because the injuries they cause sometimes last for life.

Webber, an experienced hockey player, was well aware of the risks involved in checking or pushing from behind. He gave this evidence:

Q. You are aware though that if you push somebody from behind head first into the boards there is a real risk of injury?

A. Yes.

Q. And you were aware that the injury that could be caused could be a very serious injury?

A. Yes.

Q. And you were aware that the injury that could be caused could include even a broken neck?

A. Yes.

Q. So you knew that special care had to be taken when you are approaching somebody from behind when they're close to the boards?

A. Yes.

Q. And you would also know, Mr. Webber, that if you had a choice between allowing an opposing player to get away with the puck or the choice of stopping him by using a careless check from behind which might cause him to go head first into the boards, you should let him get away?

A. I would use a different way of trying to stop him, yes.

Q. I take it that you knew that the rule against checking from behind was because players in that situation are generally unable to protect themselves?

A. Yes.

Nathan Rempel, an Aldergrove player, went over to Webber after the incident. He said in evidence:

Q. Would you tell his lordship what the conversation -- what your conversation was with Mr. Webber?

A. Well, I had gone over to see Mel and I had turned around and I looked at Steve and he was noticeably shaken, I suppose as anybody would be confronted by the possibility that you have seriously injured somebody, so I went over to sort of, you know, console him and tell him to sort of take it easy because he was quite upset and --

Q. You were not angry yourself?

A. No, I wasn't. I have generally been found to have a very sort of relaxed personality, I don't get upset that easily, so I was talking to him and I don't remember most of the conversation except for he turned to me and looked and he said, "I am such an asshole. I never should have done that."

Webber does not deny making the statement. He says he does not remember whether he said it or not.

The defence argues that Unruh was a willing participant in a game rife with bodily contact, and thus that he accepted the risk of the injury that he suffered. The statement of defence reads as follows:

3. The Defendants admit that the Plaintiff Melvin Unruh was injured in the course of a hockey game played March 7, 1990 at the Arbutus Club as the result of a check administered by Webber. The Defendants also admit that checks from behind are contrary to the CAHA Official Hockey Rules and that Webber was penalized following the check on the Plaintiff.

4. The Defendants say that the check was made in the normal course of the game. They deny that a breach of the playing rules, including a check from behind, constitutes negligence in law, and they put the Plaintiff to the strict proof of his allegations of negligence against Webber.

5. The game of ice hockey is a vigorous and physical game which involves a great deal of bodily contact between players. A risk of bodily injury is inherent in the game. The Defendants say that the Plaintiff agreed to engage in the sport of hockey knowing that it is

a contact sport played at high speed entailing a risk of injury. The Plaintiff accepted the risk of physical injury arising from the kind of bodily contact which can be expected in the sport, whether within the rules or as a result of unintentional rule infractions. These Defendants plead and rely on the doctrine of **volenti non fit injuria**.

One authority translates the latin maxim *volenti non fit injuria* as "where the sufferer is willing no injury is done."

Counsel for the defendant summarizes his submission as to the applicable law as follows:

In summary, there is no liability for an injury suffered during a sporting contest unless the act causing the injury was either intentional, in the sense that the defendant had a "definite resolve to cause serious injury" or was reckless in that he realized the substantial risk of injury, and nevertheless deliberately set out to run that risk. The imposition of a penalty for a breach of the rules is not a determining factor.

In this case the fact is that the defendant realized the substantial risk of injury and ran the risk. He was reckless.

Obviously, Unruh did not accept the risk of an illegal check from behind. The rule infraction was intentional not unintentional as paragraph 5 alleges. As I have said, the check was intentional although the consequences doubtless were not. Under these circumstances the legal principles of negligence must apply.

Damages

Preliminary Observations

The accident occurred on March 7, 1990 when the plaintiff was 17½ years of age. He is confined to a wheelchair, so far as can be foreseen, for the rest of his life. He has no use of his legs and practically none of his arms and hands. He is dependent upon others in practically everything he does. He requires almost constant care or, if not care, then attention.

His mental faculties, his hearing and his eyesight are unimpaired.

Notwithstanding his grave disabilities, it is probable that in time the plaintiff will be able to operate, and get in and out of a motorized Van by himself, employing mechanical means.

With reference to the plaintiff, I am required to:

- (1) Assess past proven losses, called special damages;
- (2) Assess general non-pecuniary damages for pain and suffering, loss of amenities and loss of enjoyment of life;
- (3) Estimate the income that the plaintiff would probably have received had he lived out his predicted pre-accident lifetime;
- (4) Estimate the income, if any, that the plaintiff will probably receive as a quadriplegic, so as to deduct it from (3);
- (5) Predict the post-accident life expectancy of the plaintiff;
- (6) Estimate the present value of the probable cost of future care of the plaintiff;
- (7) Predict the amount of income tax that would be attracted by the lump sum figure arrived at for future care ("gross-up") that would preserve the future care fund;
- (8) Estimate the cost of any custodial or investment management that the plaintiff may justifiably be put to to preserve the future care fund.

The reality is that these computations, other than possibly special and non-pecuniary damages, are made simply as a means of arriving at a lump sum to be awarded to the plaintiff. The plaintiff need not, and indeed cannot, spend the award in the manner computed. How he will in fact dispose of the lump sum will be entirely up to him: he may save it, invest it, spend it or even squander it as he likes, however the amount is calculated.

The fact is that even before this case was heard, in fact probably before it was commenced, the plaintiff (by his mother at the time, since he was under age) doubtless committed a very sizeable portion of the award to his solicitors. He has already, therefore, spent much of the money to which he will be found to be entitled.

Thus, as I say, the separate amounts computed are not awarded to the plaintiff to be spent in conformity with the computations, although the language adopted in some judgments would suggest the contrary.

For example, however exact the calculations, the plaintiff will certainly not pay the income taxes on the income from the full present value of future care ("gross-up").

And in this case it may well be that all or a portion of the amount awarded may not be recoverable. I do not suggest that the award should be reduced on that account. But it may be that the plaintiff will not be put to the expenses calculated not only because he may spend the award in quite different ways, but also because he might well in fact not receive all or even part of it.

This case differs from damages awarded for injuries suffered in automobile accidents or through professional negligence. In those cases the defendant may well be taken to be fully insured against negligence. A structured settlement designed, amongst other things, to keep the plaintiff in regular receipt of fixed amounts during his lifetime may be appropriate in those cases because the money is available to implement them. However, in the present case money may not be available to purchase a required annuity to ensure the continuation of the payments.

Special Damages

The following items are claimed:

Material and equipment for changes

to existing house (Exhibit 57)

[In round figures] \$88,760

Work provided by Mr. Unruh (the plaintiff's

father) in making changes to existing

accommodation \$15,000

In trust services provided by Mr. and

Mrs. Unruh in caring for Mel's needs

\$56,800

\$160,560

I think the item of \$15,000 constitutes "in trust" services as does the item of \$56,800. These services are detailed in the argument and valued. The defence argues that the first item at least is overstated. The submission is:

It is submitted that under the special damages heading, no more than this amount (i.e. \$67,677) should be allowed to the plaintiff. The summary of special damages at Exhibit 57 makes it clear that the modifications to the Unruh family home include alterations which are unnecessary or unreasonable given the plaintiff's disabilities. These items, which include the outside lift (\$1,500) (as conceded by Ms. Schulstad, this function could have been provided by a simple ramp to the patio), kitchen cabinets (\$11,513.70), appliances (\$4,200), kitchen table and chairs (\$1,549), and carpeting (\$5,743), total \$24,505.70. The balance of the special damages claim remaining after these deductions is just under \$65,000.

But the fact is that more than \$100,000 (and probably no little ingenuity) has been spent in changes to the family home to accommodate the plaintiff. I hold the plaintiff entitled to the total of the three amounts to be paid to the persons entitled. Because the award of special damages includes the extraordinary costs involved in adding onto and modifying the present home, I will not take account of the added cost of modifications in future.

An additional sum of \$72,016 is claimed for the acquisition and modification of a Van. The matter is put in argument this way:

Mr. Unruh noted that he has now purchased a Van. The initial cost of the Van is detailed in Exhibit 56 . . . The cost in total is as follows:

Basic Van (1992 Grand Caravan)

\$25,038.00

Options and basic conversions

26,978.00

Driveable options (approx.)

20,000.00

Total

\$72,016.00

Where the money came from for the purchase is not clear to me. In any case, it has been purchased although a less expensive model may well have been available. I award the plaintiff by way of special damage the sum of \$25,038 and \$26,978 already spent or committed. But I do not award the additional sum of \$20,000. That sum is about equal to the probable cost of a vehicle the plaintiff would have purchased had he not been injured.

I am sure that counsel will be able to agree on the computation of pre-judgment interest that the plaintiff will be entitled to on these amounts.

General Damages - Non-pecuniary Loss

This was a "catastrophic" injury. The parties are in agreement that the plaintiff should be entitled under this head to the maximum permitted by the Supreme Court of Canada, \$238,000. This figure is calculated in terms of the present value of the dollar, inflation having been taken into account. In view of the recent change in the *Court Order Interest Act* brought about by the change in the *Interest Act (Canada)*, and adopting the view of Paris, J. in **Braddick v. Simon** (October 7, 1992, Vancouver Registry No. B895472), I award prejudgment interest under this head at 3½%.

Loss of Capacity to Earn Income

What has the plaintiff probably lost because he has been incapacitated?

I find the calculations of Mr. Taunton, a consulting economist called for the defendant in this regard, compelling. Because the plaintiff has no history of employment, Mr. Taunton calculates the "Mean (average) Earnings" of several "educational attainment groups". I have to decide in what group the plaintiff would probably be. I

conclude that the plaintiff would not have entered university but would have completed a post-secondary school non-university training.

The plaintiff does not have a very good scholastic high school record. In fact he was, probably for that reason alone, denied university entrance after the accident. His evidence suggests to me that he is more action than academically oriented. Neither his father nor his mother have university educations. So I think it probable that he would fall into the category I have mentioned.

Mr. Taunton calculates that the plaintiff would earn income until age 65 years. So does the economist called for the plaintiff.

Mr. Taunton then adds fringe benefits:

Employment income for the purposes of this report is defined to include not only the value of all wages/salaries paid (including vacation/holiday pay), but also the value of non-wage or fringe benefits paid by an employer on behalf of an employee. Examples of such benefits include those required by statute (for example, employer contributions to Canada Pension Plan) and those provided voluntarily or pursuant to a collective agreement (for example, coverage for medical/dental plans).

Mr. Taunton has also made allowance for negative contingencies as follows:

In computing future employment income with and without the injury, explicit allowance has been made in the analysis for the following negative contingencies, all of which are based on broad statistical averages applicable to British Columbia males of Mr. Unruh's age or level of education:

Non-Participation in the Labour Force - participation rates measure the propensity of individuals to be in the labour force, i.e., either working or (if not working) actively seeking work. Obviously, those outside the labour force by definition do not earn employment income.

Unemployment - unemployment rates measure the proportion of labour force participants not working but actively seeking work. With the exception of those drawing Unemployment

Insurance benefits, the unemployed also do not earn employment income.

Part-Time Work - of those who are working, not all are employed on a full-time full-year basis. Part-time work tends to reduce the value of expected employment income.

Premature Death - allows for the risk of premature death prior to any given age, eg. 65 years. Normal life expectancy has been assumed in calculation of pre-injury future employment income, while reduced life expectancy of three years has been assumed in computing post-injury income.

On page 5 of his report Mr. Taunton expands on the foregoing factors. Mr. Taunton has also made allowance for the escalation of the earnings data incorporated in his Tables to 1992 dollars. In his calculation the present value (based on a capitalization rate of 2.5% called for by the *Law and Equity Act*), of prospective earnings to age 65 amounts to \$899,147. I agree.

The material assumptions upon which Mr. Taunton makes his estimates (supported by the evidence at trial) are as follows:

Melvin Unruh was born on October 18, 1972.

At the time of the injury, he was in Grade 12. Following the injury, he graduated with his class in June 1990.

Mr. Unruh had no firm career plans at the time of the injury, although he had made application to attend community college.

Mr. Unruh has not pursued further education since the injury, nor has he been gainfully employed.

Mr. Unruh's father has a Grade 11 education and is the owner of a small business. Mr. Unruh's mother has a secondary school education.

Mr. Unruh has one older sister. She works on occasion for her father in his business. [She has since taken up a university swimming scholarship].

The actuaries called for the plaintiff put the loss a good deal higher mainly because on instructions they made no allowance for contingencies. They say:

As instructed, we have not included in our calculations any allowance for contingencies (such as death or disability due to other causes, periods of unemployment, etc.) and their affect on Mr. Unruh's assumed future working lifetime. We submit that such losses are highly subjective.

. . .

This calculation with no discount for the risk of early death is not in accordance with the generally accepted actuarial practice. Generally accepted actuarial practice would use the life annuity method, whereby the payment in each future year is multiplied by the probability that the life will survive to that year. The value would then be the sum of the value of those gradually decreasing payments to the end of the mortality table.

If "subjective" means "highly speculative", I agree. Nevertheless, negative contingencies are real. They must be taken into account including, certainly, the risk of early death.

Counsel for the plaintiff vigorously attacks the validity of Mr. Taunton's conclusions. But I think all of the criticisms are answered in Mr. Taunton's report itself. True, Unruh may have become an entrepreneur but whether successful or not will always remain a question.

Post-Accident Income

Is it likely that the plaintiff, with his post-accident disabilities, will earn income between now and the time he is 65 years of age? If so, the amount should be deducted from the loss of expected income as above.

Counsel for the plaintiff urges that the plaintiff will not. If so, no deduction should be made from the pre-accident estimate. Counsel for the defendant argues that a substantial deduction should be made on this account. I think it is likely that the plaintiff will

be eventually financially productive but not to the extent urged by counsel for the defendant.

It may be that with extraordinary effort the plaintiff could obtain a university degree. But I think this is most unlikely. My holding that in his pre-accident condition he would not achieve a university degree would be inconsistent with a conclusion that he would persevere to obtain a degree with the incapacitating injuries he suffered in the accident. It is even less likely that the plaintiff would go on to be a chartered accountant as the defendant suggests.

But the plaintiff has three things going for him: firstly, he will, as Dr. Anderson says, want to become productive; secondly, the advent of the computer and the acceleration of computer technology means that he will be able to use his intelligence without the necessity of appreciable body movement; and thirdly, with the advance of computer technology it may well be unnecessary for the plaintiff to move from home to a work place.

Mr. Taunton has calculated post-injury lifetime income on the basis that the plaintiff would attain a university degree, and retire at age 60. On the basis of "part-time work" the plaintiff, on Mr. Taunton's calculations, would have a value of \$477,145. I would fix \$100,000 as the amount that the plaintiff will probably earn post-accident. This is a little more than 20% of the figure postulated in Mr. Taunton's calculations. Admittedly this is a pure guess.

Plaintiff's counsel, in argument, invokes statements of Judges in various cases in support of his proposition that persons suffering disabilities such as Unruh's lose all prospect of earning money. But those conclusions are factual. They are not binding on me, or for that matter, are they particularly persuasive. And in this case I conclude the fact is that the plaintiff will probably earn money in the future.

In my final award I will take account of the rounded sum of \$800,000 for prospective net loss of income.

Before leaving the subject of future income, I observe that the income tax that would have been paid by the plaintiff on the income received had he not been injured, is not deducted in the calculations. The reason for this and the reason that the loss of

future earnings is calculated under the heading of Loss of Earning Capacity is explained by Dickson, J. (later C.J.) in this passage from the judgment in **Andrews v. Grand & Toy Alberta Ltd.**(1978) 83 D.L.R. (3d) 452 at 474-75 as follows:

*In **The Queen v. Jennings**, this Court held that an award for prospective income should be calculated with no deduction for tax which might have been attracted had it been earned over the working life of the plaintiff. This results from the fact that it is earning capacity and not lost earnings which is the subject of compensation. For the same reason, no consideration should be taken of the amount by which the income from the award will be reduced by payment of taxes on the interest, dividends, or capital gain. A capital sum is appropriate to replace the lost capital asset of earning capacity. Tax on income is irrelevant either to decrease the sum for taxes the victim would have paid on income from his job, or to increase it for taxes he will now have to pay on income from the award.*

(Underlining mine)

The authority of the foregoing passage is beyond question. However clear the reasoning may be to others, I, for one, fail to fully grasp its significance.

Life Expectancy

I hold that the plaintiff, even with his disability, will live about a further 51.7 years. This accords with the opinion of Dr. Anderson, a witness for the plaintiff. The figure is vital in determining the amount of the award made for cost of future care.

Dr. West, for the defence, estimated that the mortality estimate of the plaintiff would be approximately 500%. I take this to mean that the likelihood of death would be 5 times greater in the case of the plaintiff than the general population. Mr. Taunton, in his report of August 20, 1992 translated this assumption to a reduction in the plaintiff's average life expectancy to 36.578 years. But the vast improvements noted by Dr. West in his report suggest to me that the acceleration in improved methods of treatment will result in the life expectancy for the plaintiff that Dr. Anderson predicts.

I note parenthetically that if the life expectancy calculated by Mr. Taunton were accepted; i.e., about 36 years, it would be expected that the calculations should involve a number of "lost" years. In **Semenoff v. Kokan**, 59 B.C.L.R. (2d) 195, followed in **Toneguzzo v. Savein and Burnaby Hospital**, (Court of Appeal, Vancouver Registry No. CA014300, as yet unreported) the calculation of the loss of pre-accident expected loss of income would involve quite a different calculation in that personal expenses, and, I would suppose, income taxes, should be deducted before the present value is established. Thus Mr. Taunton's report that "*pre-injury employment income estimates are not affected*" by the decreased life expectancy is probably inaccurate.

Cost of Future Care

In a letter of August 14, 1992 Mr. Taunton enclosed calculations of the cost of future care required by the plaintiff as described in a report prepared by OT Consulting/Treatment Services Ltd. (Irene Harris) dated August 12, 1992. He made the calculations based on a three year reduction in life expectancy, that is to say, very close to the prediction of life expectancy made by Dr. Anderson as above.

The initial costs shown by Mr. Taunton in his computations including G.S.T. amount to \$29,692. From this there should be deducted the sum of \$18,000 for "Van modifications". I have dealt with these under the heading of special damages. Thus the initial costs including G.S.T. amount to \$11,692.

Mr. Taunton then computes ongoing costs with G.S.T. where applicable and to those costs applies a multiplier consistent with the frequency of the ongoing costs.

By far the most significant of the ongoing costs is attendant care (\$48,581) and food for attendant (\$2,070). These are annual expenses. The present calculated values are respectively \$1,214,604 and \$48,368.

The second most significant expense is for "Van modifications". The present value of that contingent expense amounts to \$91,476. That figure I conclude should remain even though the actual Van apparently acquired by the plaintiff is different from the Van proposed in the Harris report.

In the result, the total present value of the projected future costs of care amounts to \$1,509,663. To this should be added the initial costs to which I have referred amounting to \$11,692.

I therefore will base my ultimate award for initial costs and the present value of future costs in the total of the above two figures.

I decline to accept the Schulstad report because I hold the costs, where they differ from the costs in the Harris report, as unreasonable or unnecessary. It is quite true that money without limit could not compensate the plaintiff for the injury he has suffered. But there must be some balance between the plaintiff's needs and diversions and the obligation to pay by the defendant.

I comment on several of the major items contained in the Schulstad report.

1) Under Homemaker Support Needs and Attendant Care Needs the Schulstad report contains the following: " full personal care and homemaking costs on a daily basis through Drake Medox is \$272. Therefore the yearly cost is $\$272 \times 365 \text{ days} = \$99,280$. This would provide for an attendant to be available for 16 out of 24 hours per day".

On the face of it, it seems to me almost absurd that the plaintiff would require services valued at almost \$100,000 for the services listed even through an agency.

2) A "custom electric wheelchair with postural support, recline features, and a voice activated cellular phone - \$15,000, to be replaced every 5 years involving a yearly cost of \$3,000". The plaintiff does have at the moment, an electric wheelchair. It may very well not be the very best available on the market. But to contemplate its replacement immediately by the wheelchair proposed would be very wasteful indeed.

3) A "Dodge Caravan with side door custom adaptation to allow Mel to drive (on order) - \$70,000, involving a yearly cost of \$8,750". It will be convenient for the plaintiff to have the Dodge Caravan already on order. But I do not think that this should necessarily be at the expense of the defendant. I have already dealt with this under the heading of special damages.

4) A "Computer and DragonDictate - \$18,000". I think the Harris figure is much more sensible.

5) A "Double Size electric control bed/hi-low and side tilt option - \$8,000". The plaintiff, at the moment, has a bed. The Schulstad report postulates that he will need a double bed so as to accommodate someone else. That may be so but not at the moment or at the expense of the defendant.

6) An "Exercise Machine - \$2,500". The medical evidence would suggest that this may be in fact undesirable.

7) "Outside yard work allowance at \$75 per month" involving a yearly cost of \$900. I think this pre-supposes that the plaintiff would acquire a house and need a gardener. I very much doubt this.

Mr. McKellar of the Wyatt Company, "consultants and actuaries", prepared three reports for the solicitors for the plaintiff. Each was based on the Schulstad estimates of initial care and ongoing care totalling \$3,181,517. This is more than twice the figure upon which I will base my award. The calculations of Mr. McKellar are augmented because he made his calculations on the instruction that the plaintiff would live to age 76 and he did not employ "accepted actuarial practice". He says:

As instructed, we have taken into account Mr. Unruh's mortality after the date of trial by assuming that the specified expenses will continue until his age 76, which is the approximate median age at death for a male age 19 years according to the 1985-87 Canadian Life Table. This method uses an annuity certain and is not in accordance with generally accepted actuarial practice. Except for the treatment of the contingency of death, our report has been prepared in accordance with generally accepted actuarial practice.

Generally accepted actuarial practice would use the life annuity method, whereby the payment in each future year is multiplied by the probability that the life will survive to that year. The value is then the sum of the value of those gradually decreasing payments to the end of the mortality table. The total expected payment amount is approximately equal to that under the method used here, but because of the timing of the payments, the value discounted with interest is less.

Mr. Taunton made his calculations on the basis of accepted actuarial practice. I think that method is to be preferred as "accepted".

Income Tax Gross-Up

Under this head I again adopt the reasoning of Mr. Taunton. But first I must decide whether an investment portfolio consisting of bonds only or of part bonds and part equity stock would be appropriate. It seems to me that in the interests of security the portfolio would be in bonds alone. Mr. Taunton, in his letter of August 20, 1992 to the solicitor for the defendant, says:

You have requested that we calculate what may be termed "representative" estimates of the income tax gross-up and investment management fees in the above-captioned matter.

The representative estimate that I have chosen as appropriate, as I have said, is complete post-secondary non-university education.

Mr. Taunton goes on:

In this regard, it is important to recognize that any estimates generated here are dependent upon the size of the award for future care and the timing of "draws" from the resulting fund established for this purpose. In particular, much depends on the court's findings with respect to the major components of an award for future care, particularly the cost of full-time attendant care.

Income Tax Gross-Up

For purposes of calculating the income tax gross-up, we have started with our estimates of future care as found in our report to you dated August 18, 1992. These estimates are \$29,692 for initial costs and \$1,509,663 for on-going costs. Where an immediate house purchase is assumed, we have also made allowance for an additional \$67,677 in construction or renovation costs to accommodate Mr. Unruh.

I have taken for initial costs the sum of \$11,692 and about \$1,509,663 for on-going costs. I have not assumed an immediate house purchase.

On page 2 of the report Mr. Taunton continues:

We have also adopted a "conventional" approach to calculating the income tax gross-up, namely on a "second dollar" or "stacked" basis. Our key assumptions in this regard are as follows:

Our price inflation assumptions are an average of 2.0 percent per year to 1995 and 4.0 percent per year thereafter.

I think this means in effect that Mr. Taunton has assumed income from investments of 3.5 plus 2.0 percent to 1995 and 7.5 percent per year thereafter. But I am by no means sure of that.

Mr. Taunton continues with the following assumptions:

We have assumed that starting 1997, the personal income system reverts back from partial to full indexing. Otherwise, the personal income tax system is assumed to remain unaltered from 1992 levels over Mr. Unruh's remaining lifetime.

. . .

Allowance has been made for application of the Medical Expenses Tax Credit in computing incremental taxes owing on the income generated from the future care award. Since a full-time care attendant is assumed, there is no provision for the Disability Tax Credit being applicable.

Substituting the figures I have found for those of Mr. Taunton in Table 2 of his report:

Total Future Income Loss	\$ 800,000
Initial Future Care Cost	11,692
Ongoing Future Care Cost	1,509,663
Income Tax Gross-Up	<u>949,578</u>
Combined Award	<u>\$3,270,933</u>

The figure representing income tax gross-up seems to amount to 62.90% of the present value of the on-going costs of future care.

Investment Management Fees

Mr. Taunton makes these observations:

Real interest rates are defined as the difference between actual nominal interest rates on secure investments on the one hand and price inflation on the other. In assessing the need for investment management fees in this instance, the court may wish to take into consideration the fact that for at least the past decade, real interest rates in Canada have been well above the "target" real rate of return implicit in the discount rates set pursuant to The Law & Equity Act in British Columbia (namely 3.5 percent per year above price inflation).

This remains true despite recent drops recorded in nominal interest rates, with both medium and long-term real interest rates remaining at high levels. For example, a five-year GIC paying a nominal 7.125 percent per year today implies a real rate of return of in excess of 5.75 percent per year, where price inflation averages 1.3 percent per annum (the current rate of consumer price inflation in Canada).

In these circumstances, therefore, it should be possible to obtain the target rate of return on investments without initially having to resort to an investment fund manager.

Given that the investment portfolio that I hold to be most prudent is investment of bonds, I decline to make any allowance for investment management fees, custodial or otherwise. It seems to me that what the plaintiff will require is a good deal of accounting advice in order to maintain what remains of the award intact.

Conclusion

It follows that I award the plaintiff for his injuries:

Special Damages	\$ 212,576
Non-pecuniary Damages	238,000

Combined award as above

3,270,933

Total

\$3,721,509

The plaintiff will have his costs.

"K. E. Meredith, J."

November 5, 1992

Vancouver, British Columbia