CITATION: Sandhu v. Wellington Place Apartments, 2008 ONCA 215

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COURT OF APPEAL FOR ONTARIO

ROSENBERG, SIMMONS AND MACFARLAND JJ.A.

BETWEEN:

HARVINDER SANDHU, minor, by his Litigation Guardian, Sukhdev Sandhu, SUKHDEV SANDHU, personally, JAGDISH SANDHU, and PARMINDER SANDHU, minor, by his Litigation Guardian, Sukhdev Sandhu

Plaintiffs and Defendants by Counterclaim
(Respondents/ Appellants by Cross-Appeal)

And

WELLINGTON PLACE APARTMENTS, E. MANSON INVESTMENTS LIMITED, EMERY INVESTMENTS LIMITED, GRASON DEVELOPMENTS LIMITED, RICHARD GOLDBERG and THE 1995 MANSON-GOLDBERG FAMILY TRUST, under the Registered Partnership Style, E.M. MANAGEMENT, and DAVE FERGUSON

Defendants and Plaintiffs by Counterclaim
(Appellants/ Respondents by Cross-Appeal)

John A. Campion and Annie M.K. Finn for the appellants, respondents by cross-appeal

Earl A. Cherniak, Q.C., Kirk F. Stevens and Nancy L. Ralph for the respondents, appellants by cross-appeal

Linda M. Waxman for the Children's Lawyer

Heard: September 4, 2007

On appeal from the judgment of Justice Carolyn J. Horkins of the Superior Court of Justice dated June 19, 2006, with reasons reported at [2006] O.J. No. 2448.

BY THE COURT:

[1] This is an appeal from a jury verdict delivered January 19, 2006 and from the judgment of the Honourable Madam Justice Horkins dated June 19, 2006 wherein the respondents were awarded total damages, interest and costs in excess of $17 million.

[2] The respondents cross-appeal the trial judge's decision to invest the entire award for future care cost in an annuity. The respondents' solicitors' cross-appeal, contingent on the appellants successfully overturning the $350,000 costs premium payable by them, asks that any amount that the appellants are relieved from paying be charged to Harvinder.

OVERVIEW

[3] On June 5, 1997 Harvinder Sandhu fell from a fifth floor apartment window at 1901 Martin Grove Road in Toronto, landed on the cement pavement below that window and suffered catastrophic injuries as the result. Harvinder was born April 26, 1995 and accordingly was just past his second birthday when he suffered the injuries which are the subject of this appeal. The window through which Harvinder fell was located in the bedroom of an apartment leased from the appellants by his aunt and uncle, Simarjit Kaur Sandu Dhillon and Balvir Singh Dhillon.

[4] The open sliding sash window through which Harvinder fell had a screen, but the screen had a large hole in it and the window lacked a child safety lock.

[5] The appellants knew that the screen was broken for at least three weeks before Harvinder's fall. The building superintendent, Dave Ferguson, was told about the problem more than once and he in turn requested material to repair the screen from Lilly Bellicoso, the property manager, more than once.

[6] The Dhillons had installed a lock on the bedroom door to keep their children and the Sandhu children, who lived down the hall on the same floor with their parents, out of the room when unsupervised.

[7] On the day of the accident, after returning with the children from outside, Mrs. Dhillon forgot to lock the door and shut the windows; the children were left unsupervised in the living room as she prepared dinner. Harvinder went into the bedroom alone, climbed onto the bed that the Dhillons had placed under the window, and, unseen by anyone else, plunged five stories to the ground below.

[8] Harvinder suffered numerous injuries, including a frontal lobe brain injury so severe that he will never be gainfully employed and will always require supervision.

Harvinder was awarded substantial damages by the jury of $12,936,145.60; the additional sum of $4,182,039.02 for guardianship costs, pre and post-judgment interest on damages awarded by the jury and costs were added to the award by the trial judge.

[9] The appellants raise twelve grounds of appeal:

1. The jury, in awarding damages for future cost of care, awarded an amount which exceeded "the highest amount sought by the plaintiffs" of $9.605 million by $1.336 million. The jury's award was $10.942 million. The appellants submit this higher amount was not based on any credible evidence or theory of compensatory damages for future care.

2. The jury awarded non-pecuniary general damages at the highest amount permitted by the Supreme Court of Canada of $311,000.

3. The jury awarded $100,000 to each of Harvinder's parents and his brother for their derivative claims pursuant to the *Family Law Act*, R.S.O. 1990, c. F-3.

4. The jury awarded damages for loss of future income at the highest level based on a retirement age of 65.

The appellants say in respect of these four issues that the amounts awarded are too high.

5. The trial judge erred in admitting evidence of subsequent remedial measures.

6. The trial judge erred in improperly holding a *voir dire* on Harvinder's competence in the absence of the jury.

7. The trial judge erred in denying the appellants access to Harvinder's teachers.

8. The trial judge erred in her rulings in excluding evidence of the appellants' expert, Mr. Charles Still, and in relation to the scope of evidence from the respondents' expert, Dr. Khalid Dinno.

9. The trial judge erred in refusing to qualify the appellants' neurodevelopmental expert, Dr. Jo-Anne Finegan, to give expert evidence on adult outcomes.

10. The trial judge erred in permitting the reply evidence of Dr. Caroline Lemsky.

11. The trial judge's charge was overly favourable to the respondents.

The appellants say the cumulative effect of these errors improperly influenced the jury and resulted in the inflated damage awards.

12. Based on recent Supreme Court of Canada jurisprudence, the trial judge erred in granting a costs premium to the respondents payable by the appellants.

ANALYSIS

[10] We begin with the observation of this court in *McIntryre v. Grigg* (2006) 83 O.R. (3d) 161 (C.A.) at para. 91:

> [C]ourts accord great deference to a jury's findings in civil negligence proceedings. The verdict of a civil jury will not be set aside as against the weight of the evidence unless it is so plainly unreasonable and unjust as to satisfy the court that no jury, reviewing the evidence as a whole and acting judicially, could have reached it [citations omitted].

[11] By the same token a jury verdict will be unjust where there is no evidence to support it. Where an appellate court finds such an absence of evidence to support a particular verdict the court has the right as well as the duty to set that verdict aside.

The Quantum Issues

(1) The future care damage award exceeded the amount sought by the respondents

[12] The cost of future care to meet Harvinder's needs was a hotly contested issue at trial. Each side called expert evidence to support the various scenarios they urged the jury to accept, the appellants obviously urging lower numbers than those advanced on behalf of the respondents.

[13] The main thrust of the appeal on this ground is stated in the appellants' factum. After listing the various experts called on behalf of the respondents in relation to future care costs, the appellants write this:

> The evidence of these experts was used to build up three scenarios for the net present value of future care costs, summarized in Exhibit 83. The highest cost scenario contained in Exhibit 83 was a 24-hour, at home care for Harvinder, for the rest of his natural life, at market rates for

> caregivers. The caregivers included attendant care, rehabilitation support, responsible persons for night-time, speech and language therapist, job coach, occupational therapist, physiotherapist, neuropsychology expert, psychology/counselling, family support, cognitive rehabilitation, summer activity, case management and transportation costs. The highest cost scenario, calculated based on all of the expert testimony for the 24 hour-a-day care for his entire life, and the cost of medical supplies and rehabilitation equipment was $9.605 million over Harvinder's life expectancy (normal life expectancy).
>
> The plaintiff made no claim for cost of future care above $9.605 million. There was no evidence suggested by plaintiffs' counsel in her closing or reviewed with the jury by the trial judge, indicating that a jury verdict above $9.605 million for future cost of care was possible on the evidence.
>
> The jury granted a future cost of care award, at the highest amount claimed by the plaintiffs, plus a $1.336 million "bonus", giving Harvinder $10.942 million for future cost of care.
>
> The jury was not competent, without reliable expert testimony, to increase the legitimate mark of $9.605 million for the cost of future care. The jury could have decreased the future cost of care below the $9.605 million using expert testimony that, if accepted, could have decreased the award for future cost of care from the highwater mark by removing discrete elements of the 24-hour-a-day care or by substituting different models of care.
>
> There was no expert evidence led permitting the jury to fairly and competently grant an award above $9.605 million for future cost of care.

[14] The argument is essentially that it is an error for the jury to return a verdict for an amount higher than the highest damages scenario put by respondents' counsel to the jury for the cost of future care, and that this is an error of the magnitude that calls for this court to set that verdict aside. The appellants say there is no expert evidence to support that number.

[15] We begin with the observation that the jury was only asked to assign a figure for the cost of future care; it was not asked to explain how the figure was arrived at.

[16] Exhibit 83 was a chart which presented three scenarios or examples of calculations of the cost of future care. The figure of $9.605 million was the highest dollar figure depicted in the chart, and it was the example that respondents' counsel, in her closing address, suggested that the jury accept.

[17] Juries are told they may accept some, none or all of the witnesses' evidence. This jury was not obliged to accept only one of the scenarios presented by counsel by way of example. They were free to make their own calculation, provided that the calculation was based on the evidence.

[18] The respondents' actuarial expert, Mr. John Siegel, who gave evidence at trial explained in his evidence-in-chief, using Exhibit 83, how the jury could adjust the figures set out in Exhibit 83 upwards or downwards if they thought it appropriate, depending on the evidence they accepted on their assessment of the various components of the claim.

[19] As the respondents point out in their factum, there was evidence before the jury which, if accepted, would result in a higher figure for future care cost than the one in the scenario advocated by respondents' counsel at trial. Clearly there is no obligation on the jury to accept only the suggestions of counsel.

[20] In their calculation, the respondents used the hourly rate of $10 for caregiver's earnings. However, there was evidence from Mr. Douglas Hyatt, the appellants' expert economist, that the hourly rate charged by agencies employing these caregivers is $24 per hour. In addition, while the respondents' charts used an hourly rate of $49 for rehabilitation support workers based on the rate charged by Harvinder's then current tutor, Ms. Heather Ricardo, there was evidence from an operator of an agency that his agency charged $49 per hour plus G.S.T. for a total hourly rate of $52.43.

[21] Changing these two items alone would have resulted in a future care cost award in excess of that actually awarded.

[22] We give no effect to this ground of appeal.

(2) The jury awarded non-pecuniary general damages at the highest amount

[23] There is no issue but that at the time of trial the maximum or "cap" for non-pecuniary damages, adjusted for inflation, was $311,000.

[24] The appellants submit that in awarding this sum the jury effectively found that Harvinder has experienced, and will throughout his life experience, the greatest

conceivable amount of pain and suffering. They submit that awards of this size should be reserved for the most serious of cases and that the present case falls short of such characterization.

[25] The upper limit for non-pecuniary damages in catastrophic injury cases is not to be used as a scale against which non-pecuniary claims for all other injuries are to be measured: see *Howes v. Crosby* (1984), 45 O.R. (2d) 449 (C.A.). In other words, it is inappropriate to evaluate Harvinder's injuries solely on the basis of some notional comparison with an imagined worst case scenario. While awards for non-pecuniary damages in similar cases should achieve a degree of consistency and uniformity, this kind of comparative analysis offers only limited assistance. The assessment of non-pecuniary damages ultimately depends on the mix of factors peculiar to each particular plaintiff: see *Koukounakis v. Stainrod* (1995), 23 O.R. (3d) 299 (C.A.) at 7.

[26] It is apparent from her charge that the trial judge was of the view that the maximum award was appropriate for Harvinder:

> Because of the severity of Harvinder's injuries, it would be reasonable, in my view, to award the upper limit, or an amount that's very close to this limit.

[27] In addition to numerous physical injuries, Harvinder suffered a severe and permanent injury to the frontal and temporal lobes of his brain. He will never be able to work competitively. He will never be in any productive setting or activity without a support person. He can never be left alone; he requires 24-hour care. For the rest of his natural life he will function at the probable equivalent of a twelve-year old. He has difficulty with attention, concentration, memory and processing. He attends special education classes which focus on life and vocational skills and which teach, for example, how to take a bus and how to go to a store. He is, because of his injuries, impulsive, distractible and at times oppositional.

[28] We are of the view that it was appropriate for the jury to award Harvinder the maximum considering the nature of his injuries, their permanence and the manner in which they have affected the quality of his life. Further, there is precedent for awarding the upper limit for non-pecuniary damages in a frontal lobe brain injury case like Harvinder's: see *e.g. Baynton v. Rayner*, [1995] O.J. No. 1617 (Gen. Div.).

[29] We therefore dismiss this ground of appeal.

(3) The jury gave high awards pursuant to the *Family Law Act*

[30] The jury awarded $100,000 to each of Harvinder's parents and brother for their derivative claims pursuant to the *Family Law Act*.

[31] In their factum the appellants submit:

> While *Family Law Act* claims are not subject to a formal "cap" comparable to that applied to general "pain and suffering" damages, they are subject to limits of reasonableness, must fall somewhere within the range of damages established in comparable cases, and must be supported by evidence of the care guidance and companionship that the family member has, in fact, been deprived of. Damage awards to parents rarely exceed $100,000, and such amounts are generally reserved for cases involving the death of a child. Awards of this magnitude to siblings are virtually unheard of and are consistently lower than $50,000.

[32] At the risk of repetition, we begin with the observation that each and every case must be decided on its own particular facts. Other cases concerning other injuries and other family relationships are of limited assistance.

[33] In her charge to the jury the trial judge said:

> Now, there is no cap [or] ceiling in place for these family claims as there is for Harvinder's non-pecuniary damages. However I'm going to offer you the following guidance. I stress this is my opinion as to what is fair and reasonable, and you are not bound to accept it.
>
> For the parents an amount of $100,000 each would be fair and reasonable in my view. So that would be $100,000 for the mother, $100,000 for the father and for Parminder the brother $50,000.

[34] It is apparent from their answers to the questions that the jury agreed with the trial judge's numbers for the parents' claims but considered that Parminder's award should be higher and equivalent to that of his parents.

[35] We note that, although certainly not determinative of the point, the appellants did not submit the quantum of these awards as any part of the basis in support of their motion to strike the verdict of the jury immediately following the receipt of that verdict.

[36] While the awards are at the high end of the range for derivative awards we are satisfied that these particular awards are well supported on the evidence.

[37] The Sandhu family is close in every respect. Parminder and his brother were happy playmates prior to the accident. Since then, the contrast in their respective abilities is stark. Parminder no longer has a playmate who is his equal. He is required to include Harvinder in his activities and to provide the necessary care and oversight Harvinder requires during these activities. As a result, he has had to sacrifice some of his own independence and ability to interact with his peers. As his parents age, he will assume greater care and concern for Harvinder. In their Punjabi culture it is the responsibility of sons to care for their parents; Parminder will not have Harvinder's support to rely on. Parminder's commitment will be lifelong and, as the respondents note in their factum, "the injury to Harvinder in some ways will affect Parminder more profoundly than the death of a sibling".

[38] While the awards are high, they are not so high or inordinate that they would call for this court's interference.

[39] This ground of appeal is dismissed.

(4) The jury awarded damages for loss of future income at the highest level based on a retirement age of sixty-five

[40] While not pressed in oral argument, in their factum the appellants state:

> [T]he jury awarded loss of income at the highest possible level, based on the retirement age of 65 in the fac[e] of uncontested expert evidence led by the defendants that the average retirement age in Ontario for men was 61.4.

[41] This statement is inaccurate. While the jury did award loss of income damages based on the retirement age of sixty-five they did not do so in the face of uncontested expert evidence. The jury had before it the evidence of Mr. Siegel, the expert actuary called on the respondents' behalf.

[42] In her re-examination of Mr. Siegel, Ms. Ralph posed the following question:

> Mr. Mair brought up the issue of your income calculation going to age 65. Why did you choose to do your calculation to 65 rather than 62?

Mr. Siegel responded:

> I do hundreds of these a year, and it still seems that 65 is the accepted level of retirement. It is lower statistically because

> as I said, a lot of people who have teachers' or government pensions can retire earlier, but we are finding now that they are legislating to remove mandatory retirement ages and people are tending to work a little more out of financial need, if nothing else.

[43] On this evidence alone it was entirely open to the jury to select sixty-five as the appropriate age of retirement.

[44] We give no effect to this ground of appeal.

Cumulative effect argument with respect to quantum

[45] Although not listed as a ground of appeal, the appellants argue that because the jury awarded the maximum amounts on every head of damage, the fact that it did so "reveals that the jury abdicated its responsibility". The appellants say:

> Even if, considered individually, it might appear that appellate intervention is not warranted because, although high, these damage awards fall within acceptable ranges, these awards cannot stand when considered in their totality. Cumulatively, these awards reveal that the jury abdicated its responsibility. The jury made no honest good faith attempt to assess the quantum of damages reasonably required to put the plaintiffs in the position they would have been had the accident not occurred. Rather, in every instance the jury automatically awarded the highest amount claimed, and in several instances amounts high than those claimed.

[46] The appellants submit that where the amounts awarded under each head of damage consistently equal or exceed the highest amounts claimed, it may be concluded that the trial was not fair, but rather that the errors resulted in a significant predisposition in favour of the respondents. Leaving aside the fact that we have found no errors in the jury's damages awards, the appellants cite no authority for this somewhat startling proposition. They argue their submission is the corollary of this court's decision in *Landolfi v. Fargione* (2006), 79 O.R. (3d) 767.

[47] In *Landolfi* this court held that on the facts of that case, the cumulative prejudicial effect of the trial judge's errors compromised fundamental trial fairness and rendered it far from certain that if the errors had not occurred, the jury would necessarily have returned the same verdict. This court indicated that where such errors had occurred, the reasonableness of a jury's damages award may provide some assistance in determining

whether, notwithstanding errors in the conduct of the trial, the jury nonetheless arrived at a fair and just verdict.

[48] The appellants' submission put another way amounts to this: whenever a plaintiff is awarded the maximum amounts sought on each claimed head of damage it should be concluded the trial was unfair and any errors on the part of the trial judge must necessarily have resulted in a significant predisposition in favour of the plaintiff, thereby rendering the verdict unreasonable. In other words it would only be in a "perfect" as opposed to "fair" trial where a verdict based on maximum awards could stand.

[49] This proposition is plainly wrong. A careful review of the authorities relied on by the appellants do not support their submission. In *Pereira v. Hamilton Township Farmers' Mutual Fire Insurance Co*. (2006), 267 D.L.R. (4th) 690 (Ont. C.A.), a jury had awarded damages for loss of profit in the complete absence of evidence to support such a claim. Similarly in *Barker (c.o.b. Mike Barker Auto Sales) v. Zurich Insurance Co.* (2001), 140 O.A.C. 358, the court found no basis in the evidence to support the liability finding made by the jury. Neither of these decisions are comparable to the present one under appeal.

[50] In this case the awards made are within the appropriate range of damages awarded in similar cases and in each instance is supported by the evidence as described in the reasons set out above.

The Evidentiary Issues

(5) The trial judge admitted evidence of remedial measures

[51] The appellants acknowledge that repair of damaged screens was the responsibility of the landlord. The appellants' property manager agreed that the hole in the screen in the Dhillon apartment was a safety hazard. As we have said, there was also evidence that the Dhillons had asked the landlord to fix the screen on more than one occasion before the accident.

[52] Following Harvinder's fall, the appellants took remedial measures. They immediately replaced the screen in the Dhillon apartment by taking a screen from another apartment and within days had replaced twenty bedroom screens in eleven other apartments. The cost of the screening material for these repairs was less than $150. Within five days of the fall, they installed child safety latches throughout the building at a cost of less than $2,000.

[53] The trial judge admitted evidence of these subsequent remedial measures. The appellants submit that this evidence was inadmissible because it was not relevant to any issue in the case and was highly prejudicial.

[54] It has been argued that evidence of subsequent remedial measures should not be admissible in a negligence action because it lacks relevance and on policy grounds. These arguments are summarized in the decision of the British Columbia Court of Appeal in *Anderson v. Maple Ridge (District)*, [1993] 1 W.W.R. 172 at 177. First, it is argued that the evidence lacks relevance because it shows nothing more than a belief by the defendant that the prior condition was capable of causing injury. That belief is either irrelevant or, at best, equally consistent with a belief that the injury was in fact caused in some other way. Second, it is argued on policy grounds that if evidence of subsequent remedial measures is admitted, defendants would avoid taking corrective measures for fear that their actions would be taken as an admission of fault.

[55] We will deal with the relevance argument first. The relevance of any piece of evidence depends upon the particular circumstances of each case. As McLachlin J. said in *R. v. Seaboyer; R. v. Gayme*, [1991] 2 S.C.R. 577 at 609:

> Relevance must be determined not in a vacuum, but in relation to some issue in the trial. Evidence which may be relevant to one issue may be irrelevant to another issue. What is worse, it may actually mislead the trier of fact on the second issue. Thus the same piece of evidence may have value to the trial process but bring with it the danger that it may prejudice the fact-finding process on another issue.

[56] The impugned evidence in this case provides an example of such a situation. Apart from any inference of an admission of liability, the fact that repairs to the screens were made quickly and inexpensively after the accident was relevant in other ways. It was evidence from which the jury could infer that the appellants had failed to meet a reasonable standard in keeping the building in good repair. The evidence of repairs could also be evidence of a failure to take reasonable care because it was capable of showing that the appellants' inspection of the building before the accident failed to meet a reasonable standard.

[57] Similarly, the evidence concerning the safety locks was also relevant to the issue of reasonable care. Evidence was led showing that the standard of care required installation of child safety locks. In determining whether the defendants acted reasonably in not installing those locks, the cost and ease with which such locks could be installed was relevant. A comparable conclusion was reached in *James v. River East School Division No. 9* (1975), 64 D.L.R. (3d) 338 (Man. C.A.), where that court reviewed a number of the authorities and found that evidence of subsequent remedial measures was relevant to the question of negligence.

[58] However, it is argued that even if such evidence is relevant, it should be excluded for policy reasons. The policy argument with respect to evidence of remedial measures is premised on the theory that defendants would be discouraged from taking necessary remedial measures if they knew that these measures would be admitted against them at trial as an admission of liability. Courts have tended to discount this policy argument. As Seaton J.A. said in *Cominco Ltd. v. Westinghouse Canada Ltd.* (1979), 11 B.C.L.R. 142 at 157 (C.A.):

> No case binding on us supports an exclusionary rule based on policy and I am not inclined to introduce such a rule. In my view *a defendant will not expose other persons to injury and himself to further lawsuits in order to avoid the rather tenuous argument that because he has changed something he has admitted fault*. [Emphasis added.]

[59] We agree with this statement. We also note that a similar view of the limited value of the policy reason for exclusion has been adopted by courts in this province: see *e.g. Algoma Central Railway v. Herb Fraser and Associates Ltd.* (1988), 66 O.R. (2d) 330 (Div. Ct.). In our view, the policy argument alone is not a basis for excluding evidence of subsequent remedial measures.

[60] Where a plaintiff offers evidence of subsequent remedial measures, the trial judge must balance the probative value of that evidence against its prejudicial effect. The prejudicial effect includes whatever weight the trial judge might give to the policy argument for exclusion, but also includes considerations such as whether the evidence will unduly lengthen the trial or may be misused by the jury. In considering the balance between probative value and prejudicial effect, the trial judge can take into account whether limiting instructions to the jury can mitigate any prejudice.

[61] In our view, the trial judge did not err in admitting the evidence of subsequent remedial measures in this case and she properly directed the jury as to the use that could be made of it. In her ruling on the admissibility of this evidence, the trial judge took into account the fact that the appellants' trial counsel did not object to respondents' counsel's reference to evidence of remedial measures in her opening statement. The trial judge was entitled to consider this failure to make a timely objection as a factor undermining the subsequent assertion of prejudice. In considering the probative value of this evidence, the trial judge held that while the evidence could not be used as an admission of liability, it was relevant to the issue of the nature of steps that could have been taken to reduce the risk. She concluded that any concern regarding the possible misuse of the evidence could be overcome by proper limiting instructions to the jury. In our opinion, the trial judge properly applied the test for admissibility of this evidence. We agree with her ruling.

[62] In her charge to the jury, the trial judge said the following:

> I want to provide you with some direction on what I just said. I must caution you about your use of the evidence about the remedial steps that were taken by the Defendants after Harvinder fell. That is, replacing the screens and putting child locks on the windows in the building. I'm going to call those remedial steps. *These remedial steps, as evidence, standing on their own, cannot be taken as an admission of liability by the Defendants.*
>
> *I want to repeat that. They cannot be taken as an admission of liability on the part of the Defendants. Just because the Defendants took these steps, you don't jump to the conclusion that they are liable. These remedial steps can't be the basis for a finding of liability against the Defendants*.
>
> It's the Plaintiffs' position that the repair of the screen and the child lock installation were effective steps that were readily and immediately available at minimal cost to the Defendants.
>
> You can consider the particulars of these remedial steps to assist you in determining whether the care the Defendants took before Harvinder fell was reasonable in the circumstances to see that Harvinder and others were reasonably safe. So the remedial steps are circumstances that can be considered along with all of the other evidence relevant to liability. It is relevant as to what effective steps the Defendants could have taken to make the window safe. For example, the expense and ease of doing the remedial work could influence your determination of what was reasonable care in the circumstances. [Emphasis added.]

[63] In our view, the charge to the jury was correct. As can be seen, the trial judge expressly instructed the jury not to use the evidence as an admission of liability, and we agree with that limitation on the use of the evidence. She then went on to instruct the jury as to the permitted uses of the evidence, namely, as evidence of what was reasonable in the circumstances and whether the appellants took reasonable care.

[64] Accordingly, we dismiss this ground of appeal.

(6) Harvinder's competency *voir dire* was conducted in the absence of the jury

[65] The appellants submit that the trial judge erred in not conducting the *voir dire* as to Harvinder's competency to testify in the presence of the jury, which deprived the jury of the opportunity to evaluate and assess the mental and cognitive abilities demonstrated by Harvinder on the *voir dire*.

[66] It is necessary to consider the context in order to understand this ground of appeal. Near the end of their case, the respondents brought Harvinder to court to obtain a ruling from the trial judge as to his competence. The respondents' purpose in producing Harvinder was unclear. They had not decided whether to call Harvinder and seemed to be considering producing him before the jury as demonstrative evidence of his condition. Appellants' counsel expressed concern about this issue, stating:

> [T]here are two concerns expressed there, the first being that if the child is effectively brought in as an exhibit and then the evidence may not be properly recorded. So the Court of Appeal would be effectively deprived of any evidence. If the child is being brought in so the jury can assess his demeanour, again he's effectively being used as an exhibit, but one which the Court of Appeal would not be able to see.
>
> If he's being brought into court to show the nature and extent of his injuries, that might be more accurately explained by the witnesses who have given oral testimony.

[67] Following submissions from counsel, the trial judge decided to hold the *voir dire* in the absence of the jury. Not surprisingly, given his position, appellants' counsel did not object. Following the *voir dire*, respondents' counsel announced that she had decided not to call Harvinder as a witness.

[68] The following day, appellants' counsel stated that he wanted the trial judge to rule on Harvinder's competency, but he refused to disclose whether he intended to call Harvinder until after the trial judge had ruled. The trial judge stated that she needed to know the purpose for which the appellants might call Harvinder and that the issue remained open. She did not make a ruling and appellants' counsel did not seek to revisit the issue. In the end, neither party called Harvinder to testify.

[69] In our view, the trial judge did not err in holding the competency *voir dire* in the absence of the jury. As noted by the trial judge, holding competency *voir dires* in the presence of the jury is the general practice, but is not mandatory. The reason for this general practice is that if the witness is found to be competent, the jury will have had the

benefit of the witness' answers in assessing the reliability of his or her testimony. Holding a competency *voir dire* in the jury's presence thus saves time by avoiding the need to repeat this testimony. However, since in the end Harvinder was never called as a witness, there was no prejudice to the parties or to the efficient management of the case in not conducting the *voir dire* in the presence of the jury. In addition, the trial judge's decision ensured that the *voir dire* was not used as a vehicle to present Harvinder before the jury as if he were an exhibit, particularly in the absence of a clear purpose for calling him as a witness.

[70] Finally, given the appellants' position at trial, they should not now be heard to complain about the procedure. This is especially so since it is likely the trial judge adopted the procedure that she did in order to minimize prejudice to the appellants.

[71] We give no effect to this ground of appeal.

(7) The trial judge refused to compel Harvinder's teachers to speak to counsel

[72] The appellants submit that the trial judge erred in denying them access to Harvinder's teachers. Again, the context is important to understand this issue. Prior to trial, the respondents produced all of Harvinder's school records. The appellants then sought an order, in part pursuant to r. 30.10 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, requiring Harvinder's teachers to respond to a detailed questionnaire. Master MacLeod dismissed the motion and the appellants did not appeal his order.

[73] During the first week of trial, counsel for the appellants contacted the principal of Harvinder's school in an attempt to interview Harvinder's teachers. The principal agreed to meet with counsel on condition that she be present to moderate any meetings and that the teachers could decline to participate. Only Harvinder's current teacher, Ms. Melissa Sherman, agreed to meet with appellants' counsel and they had a short meeting moderated by the principal.

[74] On learning of this meeting, respondents' counsel brought a motion to prohibit any future attempts by the appellants to interview teachers. Appellants' counsel undertook not to make any such further attempt and the motion lay in abeyance.

[75] But after Ms. Sherman had testified for the respondents and the appellants had opened their case, the appellants sought a ruling on the respondents' motion to prohibit any future attempts to interview teachers. In addition, appellants' counsel seemed to be seeking a ruling to compel Harvinder's teachers to submit to interviews, although the legal basis for the request was unclear and he conceded that the teachers could decline the interviews.

[76] Against this backdrop, the trial judge treated this as a motion to compel Harvinder's teachers to submit to the interviews, and ruled that she would not compel the teachers to speak to appellants' counsel. She noted that they were now in the fifth week of the trial, that the appellants had not appealed from Master MacLeod's order, and that teachers owe a duty of confidentiality to their students under the *Education Act*, R.S.O. 1990, c. E.2, s. 266. The trial judge therefore held as follows:

> A teacher who is subpoenaed must attend and, in the witness stand, is required to answer questions. *There is no obligation to answer questions that counsel might have prior to the teacher testifying.*
>
> In denying this relief I want to emphasize that the defendants have had full access to the school records and the opportunity to cross-examine Mrs. Sherman, Harvinder's teacher. This is not a situation where an interview with Harvinder's teacher is the only way the defendants would have had access to the teachers. [Emphasis added.]

[77] The appellants submit that they had a *prima facie* right to interview Harvinder's teachers and that the trial judge's ruling was, in the words of their factum, "tantamount to an injunction prohibiting defence counsel from contacting Harvinder's teachers and gathering evidence essential to make full answer and defence." They submit that the trial judge should have made an order authorizing counsel to interview Harvinder's teachers and that the confidentiality provisions of the *Education Act* did not apply in the circumstances.

[78] We cannot give effect to this ground of appeal. The trial judge's refusal to compel the teachers to speak to defence counsel cannot be equated to forbidding defence counsel from approaching the teachers. The appellants did not require the permission of the court to speak to the teachers, and indeed they attempted to do so, but the teachers were under no obligation to cooperate. We also do not agree that the appellants had a right to interview the teachers. While there is no property in a witness, equally no potential witness can be forced to speak to counsel outside the courtroom unless the court makes such an order in accordance with statutory or common law rules.

[79] The appellants had sought paper discovery of the teachers, relying in part on r. 30.10, but that attempt failed and they did not appeal. The appellants had tried to interview the teachers, but the teachers refused, as was their right. The appellants may have sought discovery of the teachers as non-parties under r. 31.10, but the respondents correctly point out that it was far too late to embark on that process in the fifth week of the trial.

[80] Finally, the appellants have failed to show how they were prejudiced by the ruling. While they complain that they were deprived of the ability to make full answer and defence, they have not demonstrated any basis for this assertion. The appellants had all of Harvinder's school records and had the opportunity to meet with and later cross-examine Ms. Sherman. They have not shown by reference to the records or any other material how the opportunity to interview the other teachers would have assisted their defence.

[81] We therefore dismiss this ground of appeal.

(8) The trial judge's rulings in relation to Mr. Still and Dr. Dinno's evidence

(a) ***The exclusion of Mr. Still's evidence***

[82] The appellants sought to call Mr. Still as an expert witness in the design, manufacture and testing of window screens and windows. Mr. Still was an architect and had worked for many years in the United States designing doors and windows. He was not an engineer and had no expertise with respect to the science of forces. He was familiar with United States and international building standards, but had no familiarity with Canadian building codes generally or the *Ontario Building Code*, O. Reg. 403/97, in particular. The effect of his evidence would have been that the kind of screen used in the Dhillon apartment was effective for keeping out insects but was not intended to protect children from falling out of windows. His opinion, based on United States and international building codes, was that window screens serve no safety function. He had no knowledge of the *Ontario Building Code*.

[83] There were a number of problems with Mr. Still's proposed evidence. He purported to give an opinion as to how Harvinder fell and that the cause of the accident was the fault of the Dhillons rather than the landlord. This part of his opinion was little more than speculation and would have usurped the role of the jury. Although Mr. Still's opinion on the manner and cause of the accident was mere speculation, the appellants submit that Mr. Still should have been allowed to testify on the more narrow issues of industry standards relating to window screens and the purpose of window screens.

[84] The trial judge ruled that Mr. Still could not testify. She held that his opinion did not satisfy the requirements of necessity and relevancy and that he lacked the qualifications to render an expert opinion on the standard of care in Ontario or on the physical forces relevant to causation. In particular, the trial judge rejected Mr. Still's opinion concerning the purpose of window screens because it was not relevant to the

Canadian context.[1] In addition, she explicitly noted that an expert is not required to testify to the contents of building codes, which are public documents.

[85] The appellants submit that the trial judge erred in rejecting Mr. Still's qualifications on the basis that he had no Canadian experience and no familiarity with Canadian building codes. They further submit that the necessity and relevancy requirements were clearly met since the trial judge had previously ruled that Dr. Dinno, the respondents' expert, could testify on similar matters.

[86] We agree that the trial judge erred in excluding Mr. Still's evidence on the narrow issue of standards in the industry, including the purpose of window screens. Ordinarily, lack of experience in Canadian standards should not disqualify an expert from giving evidence about standards in the industry. A lack of Canadian experience merely goes to the weight to be attached to the evidence. However, we are also satisfied that this error did not affect the verdict, because of the limited value of Mr. Still's evidence.

[87] Mr. Still's lack of expertise with local standards rendered his evidence of limited value in addressing the standard of care. For example, the uncontradicted evidence was that since 1986, the *Ontario Building Code* required window protection to minimize hazards to children in apartment buildings. This protection included a requirement that there be a "heavy duty screen". While the *Ontario Building Code* was not determinative of the standard of care,[2] it afforded "a specific, and useful, standard of reasonable conduct": see *Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 at 228. Mr. Still could give no useful evidence that would have undermined the impact of this fact. Further, the appellants' own witnesses had conceded that the tear in the window screen was a safety defect.

[88] In our view, no reasonable jury would have reached a different verdict had it heard Mr. Still's evidence.

(b) *The scope of Dr. Dinno's evidence*

[89] The appellants submit that in contrast to her treatment of Mr. Still, the trial judge was overly permissive when it came to the admission of evidence from the respondents' liability expert, Dr. Dinno.

[90] Dr. Dinno was a civil and forensic engineer with a doctorate in structural engineering. He practiced as a forensic consulting engineer and had experience in the

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[1] The trial judge also rejected Mr. Still's qualification to give an opinion that even if the screen in the Dhillon apartment had not been ripped it would not have prevented the fall. It is unclear whether the appellants contest this part of the trial judge's ruling. In any event, she was clearly correct. Mr. Still, unlike Dr. Dinno, was not qualified to give evidence about the amount of force that a child of Harvinder's size could exert on the screen.

[2] This standard also did not directly apply to the building, which had been constructed in 1971.

area of force. He had also worked frequently with building codes and he had passed the 2003 building code structural exams that included topics dealing with occupant safety and window protection in apartment buildings. However, as the appellants point out, Dr. Dinno had no experience with window screens.

[91] The trial judge ruled that Dr. Dinno could testify about the science of force, the relevant provisions of the *Ontario Building Code* and the applicable standards. She held that his lack of specific experience with screens was a matter going only to weight.

[92] We can see no basis for interfering with the trial judge's ruling. Dr. Dinno gave important evidence that was beyond the scope of a lay person concerning the amount of force that a child of Harvinder's size could exert on a window screen, the fact that an intact screen would have been able to prevent the fall, and the use of the *Ontario Building Code* in establishing standards in the industry. Dr. Dinno was eminently qualified to testify on these topics.

[93] We give no effect to this ground of appeal.

(9) The trial judge placed a limitation on Dr. Finegan's evidence

[94] The appellants submit that the trial judge erred in failing to qualify Dr. Finegan to testify on adult outcomes for children with acquired brain injury. The appellants relied on Dr. Finegan's evidence to establish what Harvinder's needs would be throughout his childhood and into adulthood. The trial judge qualified Dr. Finegan as an expert in the area of the psychology of children and adolescents, particularly those with neurodevelopmental disorders. However, the trial judge refused to qualify Dr. Finegan to testify concerning Harvinder's adult needs.

[95] The trial judge gave detailed reasons for her ruling, including the following:

- Dr. Finegan's practice is restricted to children and adolescents. She only sees adults if they have a very young developmental age (*i.e.* three to six years of age).

- She does not treat children with acquired brain injury, but rather refers them out to other specialists. While she will discuss long-term outcomes with parents, she generally refers parents to other experts.

- She does not do vocational assessments for the children she sees.

- She is not involved in assessing or making recommendations on an adult's needs for medical and rehabilitation interventions.

- She has never set up a residential placement for a patient with a brain injury and has no experience with the difficulties that adults with acquired brain injury or developmental delay have in a residential setting.

- She does not follow adults in the community nor provide them with clinical or other support.

- She has never supervised a job placement for an adult patient nor been involved with an adult with a brain injury who has tried to work.

[96] We agree with the trial judge's ruling. The threshold for qualification as an expert is whether the witness has "acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify": see *R. v. Mohan*, [1994] 2 S.C.R. 9 at 25. A witness may be qualified to give evidence in respect of one area but not qualified in a related area because he or she does not possess this special knowledge and experience.

[97] In this case, it was open to the trial judge on the record to find that Dr. Finegan did not have the requisite expertise to give evidence about adult outcomes for children with acquired brain injury. Dr. Finegan had no special or peculiar knowledge either through study or experience in such matters. To the contrary, her *voir dire* testimony demonstrated that when such issues arose, she referred the patients and their parents to other experts. At most, she seems to have had some impression about adult outcomes from later hearing back from parents. For example, she gave the following answers in cross-examination on the qualification *voir dire*:

> Parents would call me and ask me for the names of vocational… people to provide vocational assessment and job coaches and I would give them the names that I'm aware of.
>
> …
>
> Specific interventions, as I said earlier, I don't know how a speech language pathologist for an adult would propose a treatment plan. I don't know how an [occupational therapist]… [would] propose a treatment plan. I don't know a

> physiotherapist, whether they would propose a treatment plan, those specific things with adults is outside my area of expertise, yes.
>
> …
>
> I know how [job coaching] has worked with many children. So that's led me to form an impression of how it operates, but it's not something I do, correct.

[98] We also agree with the respondents' position that even if the trial judge erred in failing to qualify Dr. Finegan to testify about adult outcomes, the error was of no consequence. Given Dr. Finegan's obvious lack of expertise in the area, it is not reasonable to believe that the jury would have accorded any weight to that part of her testimony, had she been allowed to give it.

[99] We therefore dismiss this ground of appeal.

(10) The trial judge permitted Dr. Lemsky's reply evidence

[100] The appellants submit that the trial judge erred in permitting the respondents to recall Dr. Lemsky to give reply evidence. The trial judge ruled that the respondents could call Dr. Lemsky in reply to respond to the appellants' evidence concerning job coaching, the use of Alarm Force and Life Line as a substitute for overnight live-in care, and the level of care that could be provided by an inexperienced caregiver. The trial judge was of the view that the appellants' position respecting these issues had not been disclosed prior to trial, and further that the appellants' position had evolved during their case. In fact, when the respondents objected to the admissibility of the appellants' evidence on those issues because of the late disclosure, appellants' counsel stated that any prejudice to the respondents could be overcome by permitting the respondents to call reply evidence.

[101] The trial judge referred to the proper principles relating to reply evidence. She was well aware that plaintiffs are not entitled to split their case. But she also recognized that she had a discretion to permit reply evidence where the defence has raised some new matter or defence that the plaintiff had no opportunity to deal with and which the plaintiff could not reasonably have anticipated.

[102] The trial judge was in the preferred position to decide whether the respondents could reasonably have anticipated the matters raised in the appellants' defence. We are not persuaded that she misapprehended the record. In so finding, we think it appropriate to place weight on the fact that the appellants seemed to acknowledge at trial, initially at

least, that these were new matters and that reply evidence would be appropriate. As the trial judge noted in her detailed reasons on the reply evidence issue:

> Parties who choose to develop their evidence as their case is proceeding run the risk that prejudice will be caused to the other side that can only be cured in a fair manner by allowing reply evidence. Although the defendants now dispute the plaintiffs' request to call reply evidence they clearly recognized that this was the risk they were running when leave to call late evidence was dealt with.

[103] We do not accept this ground of appeal.

The Jury Charge Issue

(11) The jury charge was overly favourable to the respondents

[104] The appellants submit that the trial judge's jury charge was overly favourable to the respondents in two main areas.

(a) *The charge relating to liability issues*

[105] The first objection is in relation to the issue of liability. The appellants submit that having improperly excluded the expert evidence of Mr. Still and having been overly permissive in relation to the evidence of Dr. Dinno, the trial judge exacerbated her errors by pointing out the absence of defence evidence on liability and by failing to give an appropriate cautionary instruction concerning Dr. Dinno's lack of expertise in relation to window screens.

[106] Our conclusions concerning the admissibility of this evidence are dispositive of these submissions. Although we agree that Mr. Still's evidence in relation to the narrow issue of industry standards should not have been excluded, we have concluded that there is no realistic possibility that his evidence on this point could have affected the jury's verdict. In these circumstances, the trial judge's statement to the jury that the appellants did not "present any contrary expert opinion about the standard of care in Ontario" occasioned no prejudice to the appellants. Further, given our conclusion upholding the trial judge's ruling on the scope of Dr. Dinno's evidence, we are of the view that the trial judge was not obliged to give a limiting instruction concerning his evidence.

(b) *The charge relating to future care costs*

[107] Second, in relation to the issue of future care costs, the appellants submit that the trial judge's charge unfairly favoured the respondents in the following respects:

- The trial judge effectively invited the jury to give little weight to the evidence of the appellants' expert, Dr. Shevell, concerning Harvinder's prognosis and needs for the future. The trial judge unduly emphasized Dr. Shevell's expertise with children while at the same time failing to point out that the respondents' expert, Dr. Lemsky, did not conduct a personal assessment of Harvinder.

- The trial judge failed to summarize the evidence of various lay witnesses who testified about programs that would be available to Harvinder as an alternative to 24-hour-a-day care.

- The trial judge implicitly minimized the credibility of the appellants' future care witnesses when summarizing the appellants' position by prefacing her remarks with phrases like "the defendants say" and "it is the defendants' position" but failing to use similar qualifying words relating to the respondents' witnesses other than the heading, "The Plaintiffs' Position".

[108] We reject these submissions. In our view, the trial judge's description was not unfair. The appellants have not challenged the accuracy of the trial judge's description of Dr. Shevell's experience. Moreover, the trial judge stated explicitly that Dr. Shevell had conducted an assessment of Harvinder; the absence of a similar statement in relation to Dr. Lemsky's evidence, as well as the trial judge's comments that Dr. Lemsky had reviewed the medical records and neuropsychological testing that others had done, would have made it obvious to the jury that Dr. Lemsky had not conducted an in-person assessment.

[109] As for the failure to summarize the evidence of the lay witnesses, in our view, the main issue in dispute was the level of care that Harvinder required and not whether the appellants' proposal for providing the level they suggested was realistic. In this regard, we note that the trial judge also did not refer to the evidence of the respondents' witnesses who testified about how Harvinder's needs could be met if the level of care they suggested was accepted. There was no imbalance in this aspect of her charge. In these circumstances, we are not persuaded that the trial judge erred by failing to summarize the evidence of the lay witnesses.

[110] We see no merit in the appellants' submissions concerning the trial judge's summary of the parties' positions on future care costs. Based on our review, in summarizing the respondents' position on this issue, the trial judge used the terminology

"the plaintiffs say" and "the plaintiffs' position" eleven times over approximately four and a half pages of transcript. While she used similar terminology more frequently when setting out the appellants' position, there is simply no air of reality to the suggestion that this difference created any unfairness to the appellants. Based on the trial judge's language, it would have been obvious to the jury that the trial judge was summarizing both parties' positions.

[111] Accordingly, we dismiss this ground of appeal.

The Costs Premium Issues

(12) The trial judge granted a costs premium of $350,000 payable by the appellants

[112] The appellants submit that the trial judge erred in awarding plaintiffs' trial counsel a premium of $350,000. In the contingent cross-appeal, respondents' trial counsel asks that any amount that the appellants are relieved from paying be charged to Harvinder. Harvinder's parents support the contingent cross-appeal.

[113] The trial judge awarded a costs premium payable by the appellants of $350,000. In doing so, she applied decisions from this court including *Walker v. Ritchie* (2005), 197 O.A.C. 81, rev'd [2006] 2 S.C.R. 428. The Supreme Court of Canada subsequently reversed this court's decision and held that as r. 57.01 stood at the time, the court had no power to award a risk premium over and above partial or substantial indemnity costs.

[114] In *Manufacturers Life Insurance Company v. Ward*, 2007 ONCA 881, this court held that the result in *Walker v. Ritchie* governed notwithstanding recent amendments to r. 57.01. It follows that the respondents are not entitled to a risk premium.

[115] The respondents submit that *Walker v. Ritchie* can be distinguished in this case because the trial judge awarded the premium only partly on the basis of risk and that other factors at play in this case justified a premium over and above substantial indemnity costs. We now deal with that submission.

[116] By the time the trial judge came to deal with costs, the parties had entered into minutes of settlement by which the respondents were entitled to their costs on a partial indemnity scale up to the date of the respondents' offer to settle and thereafter on a substantial indemnity scale. The costs were fixed at just over $1 million with disbursements of approximately $230,000.

[117] The respondents sought a premium based on the risk undertaken and the result obtained of a further $1 million. The trial judge reviewed the various decisions of this court concerning risk premium and concluded that a risk premium can only be awarded where the plaintiff has been awarded substantial indemnity costs, counsel have achieved an outstanding result and there was a possible risk of non-payment of fees. The trial

judge found that these criteria were met and awarded a total premium of $1 million, with a solicitor-client premium of $650,000 payable by Harvinder and a premium of $350,000 payable by the appellants

[118] The respondents submit that in this case the premium was only partly based on risk and that a premium over and above substantial indemnity costs was justified because of the outstanding result achieved. They point out that the minutes of settlement only took into account time spent on the file and that the criteria under r. 57.01 would allow the court to take into account other factors including the amount recovered, the complexity of the matter, and the importance of the issues. They submit that taking these additional factors into account justifies an award of costs above substantial indemnity and closer to full indemnity. They submit that the entire $350,000 can be justified without consideration of the risk.

[119] The amended r. 57.01 adds two factors to subsection (1):

> (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
>
> (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

[120] This amendment also added paragraphs (d) and (e) to subsection (4), and paragraph (d) is as follows:

> (4) Nothing in this rule or rules 57.02 to 57.07 affects the authority of the court under section 131 of the *Courts of Justice Act*,
>
> …
>
> (d) to award costs in an amount that represents full indemnity;

[121] In our view, it is apparent from the trial judge's lengthy and considered reasons for costs that the dominant consideration in fixing the premium was the risk undertaken by respondents' counsel. As she said at para. 51 of the costs decision, reported at (2006), 81

O.R. (3d) 307 at para. 51, costs premiums "are awarded to recognize the financial risk assumed by counsel to provide impecunious plaintiffs with access to the courts".

[122] It would not be reasonable and would be inconsistent with r. 57.01(0.b) to impose on the appellants additional costs approaching full indemnity solely on the basis of the result achieved and the other factors mentioned in r. 57.01 besides time spent, such as the complexity of the matter and the importance of the issues.

[123] However, having regard to these other factors we would grant leave to appeal costs, allow the appeal and reduce the amount payable by the appellants by $300,000. In other words, the appellants are entitled to recover from the appellants $50,000 over and above the amount agreed to by the parties in the Minutes of Settlement.

The Contingent Cross-Appeal

[124] This leaves for consideration the contingent cross-appeal requesting that any amount that the appellants are relieved from paying be charged to Harvinder. In our view, this cross-appeal should be allowed and the solicitor-client fees approved by the trial judge increased by $300,000.

[125] It is apparent to us that the trial judge would have made such an award. She gave lengthy and careful reasons for approving the solicitor-client premium of $650,000 and we agree entirely with those reasons. She took into account all of the appropriate factors and considered a number of benchmarks that would justify not only the $650,000 premium but the entire amount sought by appellants' counsel.

[126] We allow the cross-appeal accordingly.

The Cross-Appeal Relating to the Investment Strategy

(a) *Overview*

[127] Following the jury's verdict, in a ruling dated April 20, 2006, the trial judge rejected the respondents' proposal that $7.5 million of Harvinder's award be invested in a structured annuity and that the remaining $5.12 million be invested in a balanced capital fund. Instead, the trial judge ordered that the entire future care award of $10,942,908 be invested in an annuity.

[128] In a subsequent ruling dated June 16, 2006, the trial judge ordered that the balance of Harvinder's award be invested in the capital market. As of that date, this balance totalled approximately $3 million, consisting primarily of $1,166,283 on account of future loss of income, $311,000 on account of general damages, and $1,127,000 on account of future corporate guardianship fees awarded on June 16, 2006, plus interest.

[129] The respondents cross-appeal from the trial judge's April 20, 2006 ruling, which they say has the effect of requiring that approximately 80% of Harvinder's total award be invested in a structured annuity. They ask that they be permitted to invest the total amount awarded to Harvinder in the proportions requested at trial, namely, 70% in a structured annuity and 30% in a capital fund, and that the investment strategy issue be remitted to the trial judge to make any necessary adjustments arising from the accrual of interest or changes in the cost of annuities.

[130] The respondents' original proposal that $5.12 million of Harvinder's award be invested in the capital market was premised on expert evidence concerning the cost of annuities and increasing health care costs. The respondents' evidence demonstrated that the cost of an annuity indexed at the estimated long-term inflation rate of 3.5% would cost $11,567,893.68, while the cost of an annuity that would cover Harvinder's future care needs and that was fully indexed for inflation would cost $15 million. Both annuities cost well in excess of the $10,942,908 amount awarded to Harvinder for future care costs. In addition, the respondents' evidence indicated that the cost of health care services was increasing somewhat faster than the estimated long-term inflation rate.

[131] Given the annuity costs and the estimated long-term inflation rate, the respondents proposed investing $7.5 million in an affordable annuity indexed at 2% for inflation and that the remaining $5.12 million be invested in a balanced capital portfolio. Based on the historical performance of balanced capital funds over the preceding thirty years, the respondents projected that the $5.12 million investment would produce a rate of return that would offset the difference between long-term inflation and the 2% indexing provided by the proposed annuity.

(b) *The April 20, 2006 ruling*

[132] In her April 20, 2006 ruling, the trial judge held that r. 7.09(1) of the *Rules of Civil Procedure*, requiring that a minor's award be paid into court, was the starting point for the analysis. She noted that Harvinder was eleven years old and had a normal life expectancy. She observed that the stream of payments from an annuity could be guaranteed to continue for Harvinder's life and would not be exposed to the risk of a poorly performing market or the poor performance of an investment manager. She concluded that using thirty years of data to predict the next seventy years would not give her "the comfort level" she needed to approve "such a significant departure from rule 7.09(1)."

[133] In addition, the trial judge stated that the respondents' investment proposal was driven by their experts' opinion that "the annuity [could] not protect against the inflationary pressures on health care costs". However, she noted that the respondents' expert had testified at trial that the discount rate prescribed in r. 53.09(1) had taken into account the difference between estimated investment interest and inflation rates.

Accordingly, she ruled that the respondents should have led evidence at trial indicating that health care costs are increasing at a faster rate than inflation and asked for a different discount rate.

[134] Finally, the trial judge noted that respondents' counsel had not asked for a gross-up for income tax on the future care award at trial based on an assumption that all of Harvinder's future care award would be invested in an annuity and therefore not subject to income tax.

(c) *The June 16, 2006 ruling*

[135] In her June 16, 2006 ruling directing that the balance of Harvinder's award be invested in the capital market, the trial judge found that paying the money into court would not be in Harvinder's best interests because that procedure is cumbersome and expensive. Further, given that she had "secured the future care award in an annuity," she concluded that it would be "prudent to have the degree of flexibility that a $3 million capital fund will offer". In this regard, she pointed to "the changes in the marketplace and the advances that have occurred in the last 70 years" and indicated that it would be preferable that Harvinder's guardians have the flexibility to respond to changes in the future.

(d) *The grounds of cross-appeal*

[136] The respondents submit that the trial judge made three errors in her April 20, 2006 ruling.

[137] First, she erred in treating r. 7.09(1) as the starting point for her analysis because that provision is aimed at ensuring that awards in favour of minors are administered in their best interest; it offers no guidance as to what type of investment strategy is appropriate. The question of whether payment into court is in the best interests of the person under disability is quite different from the question of the best investment strategy.

[138] Second, she failed to appreciate that the r. 53.09(1) present-value calculation is entirely distinct from the investment strategy issue. The present-value calculation under r. 53.09(1) converts the amount of a plaintiff's losses for expenses that will be incurred in the future into present-day dollars as of the date of judgment. It involves determining the present value of the future care costs based on prescribed rates of interest and inflation; in contrast, the investment strategy issue concerns whether the annuities available to structure future payments will provide adequate protection against inflation.

[139] Third, she ignored the fact that the only evidence before her indicated that an investment strategy with a capital fund component was more likely to protect the integrity of the award than investing all of it in an annuity indexed at only 2%.

(e) *Analysis*

[140] Although we agree that the trial judge made some of the errors alleged, on balance we are not persuaded that she erred in exercising her discretion in the way that she did.

[141] On the first issue, we agree that r. 7.09 was of limited value to the trial judge's analysis. That provision deals with payment into court and offers no guidance as to what type of investment strategy is appropriate. Rather than focussing on r. 7.09(1), the focus of the trial judge's analysis should have been on s. 116 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[142] Section 116 deals with the circumstances under which a court should order damages to be paid on a periodic basis rather than a lump sum basis in personal injury cases. Section 116(1)(b) provides that where the plaintiff makes a claim for income tax gross-up, the court must order a structured award unless it is demonstrated that such an award would not be in the plaintiff's best interests. Although the respondents did not expressly request a gross-up for income tax on the income from the future care award, as was noted by the trial judge, that was because respondents' counsel assumed the award would be structured. The obvious basis for counsel's assumption was that, absent a structured annuity, a gross-up would be necessary to maintain the integrity of the award.

[143] In the circumstances, we agree that the requirements of s. 116(1)(b) of the *Courts of Justice Act* were satisfied: see *Chesher v. Monaghan* (2000), 48 O.R. (3d) 451 at para. 7 (C.A.), in which this court held that the triggering event under s. 116(1)(b) is the request for a gross-up, either "express or implied". That said, as we read her reasons, the trial judge's main concern was Harvinder's best interests, and that is the proper focus of the analysis under s. 116.

[144] With respect to the second issue, in our view, the trial judge made no error when she found that to the extent that the respondents relied on health care costs increasing at a faster rate than the general inflation rate as the basis for their investment strategy proposal, they could and should have led that evidence at trial and asked for a different discount rate: see *e.g. Walker v. Ritchie* at paras. 88 and 91 (C.A.), rev'd on other grounds; and *Roberts v. Morana* (1997), 34 O.R. (3d) 647 (Gen. Div.), aff'd (2000), 187 D.L.R. (4th) 577 (Ont. C.A.).

[145] The present-value calculation under r. 53.09(1) assumes that the award will earn interest equivalent to the average rate of interest for long-term Government of Canada bonds but discounts this rate of growth by the estimated long-term inflation rate. To the

extent that a plaintiff believes that r. 53.09(1) does not accurately convert the cost of specific expenses to be incurred in the future into present-day dollars because the costs for those expense are increasing at a rate faster than the estimated long-term inflation rate, that is a factor that affects the quantum of the award for the specific expenses and is an issue that should be raised at trial.

[146] In our view, however, the trial judge erred by failing to appreciate that the difference between the estimated long-term inflation rate for health care expenses and the general estimated long-term inflation rate was not the sole basis of the respondents' investment strategy proposal. Rather, their proposal was also based on the submission that there was no affordable annuity available to protect Harvinder's award against the estimated general long-term inflation rate.

[147] Nevertheless, on the facts of this case, we are not persuaded that we should interfere with the trial judge's order concerning the quantum of funds to be invested in a structured annuity. Based on either the second or third error relied on by the respondents, in the particular circumstances of this case, we are not satisfied that the trial judge erred by focussing on the advantages of the security of an annuity as opposed to any requirement to offset the risks of inflation. Future care costs are awarded on the basis of a real and substantial risk that the expense will be incurred. Particularly since the jury awarded an amount for future care costs in excess of the maximum that respondents' counsel suggested to the jury, we consider that the trial judge's approach of maintaining a higher proportion of Harvinder's award in a secure investment vehicle was appropriate.

[148] The cross-appeal on this issue is therefore dismissed.

DISPOSITION

[149] In summary, save in relation to the costs premium issue, the appeal is dismissed. On the costs premium issue, the trial judge's order is set aside and an order awarding a costs premium of $50,000 is substituted. The cross-appeal on the investment strategy issue is dismissed. The solicitors' contingent cross-appeal is allowed and an order is made increasing the solicitor-client fees approved at trial by $300,000.

[150] Concerning costs, the respondents were completely successful on all issues on the appeal with the exception of the costs premium issue. However, the appellants successfully resisted the cross-appeal as to investment strategy. In the circumstances, costs of the appeal are to the respondents on a partial indemnity basis in the amount of $50,000 inclusive of G.S.T. and applicable disbursements. There will be no order as to costs of the cross-appeal and the contingent cross-appeal on the costs premium issue.

RELEASED: March 31, 2008 "MR"

"M. Rosenberg J.A."
"Janet Simmons J.A."
"J. MacFarland J.A."