CITATION: Degennaro v. Oakville Trafalgar Memorial Hospital, 2011 ONCA 319
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COURT OF APPEAL FOR ONTARIO

LaForme, Rouleau and Watt JJ.A.

BETWEEN

Diane Degennaro and Paul Degennaro,
Justin Degennaro and Ryan Degennaro, minors
by their Litigation Guardian, Diane Degennaro

Plaintiffs
(Responding Parties/Respondents)

and

Oakville Trafalgar Memorial Hospital and
Halton Healthcare Services

Defendants
(Moving Parties/Appellants)

Deborah Berlach and Emily McKernan, for the appellants

Paul J. Pape and Shantona Chaudhury, for the respondents

Heard: January 18, 2011

On appeal from the judgment of Justice Douglas K. Gray of the Superior Court of Justice, dated July 2, 2009, with reasons reported at (2009), 67 C.C.L.T. (3d) 294.

Rouleau J.A.:

OVERVIEW

[1] This appeal concerns an accident that occurred at the appellant hospital in which the respondent Diane Degennaro fell and cracked her sacrum. She experienced chronic pain from the injury which was diagnosed as fibromyalgia several years later. The main issue at trial was causation because Ms. Degennaro had been involved in a car accident between the initial injury and the fibromyalgia diagnosis. The trial judge found that the sacrum injury was the cause for the fibromyalgia and he awarded substantial damages for current and future costs of care as well as lost income and non-pecuniary damages totaling over $3 million. The appellants appeal both liability and the award of $1.7 million for the costs of future care.

FACTS

[2] On May 19, 1999, Ms. Degennaro's son became ill. He was admitted to the appellant Oakville Trafalgar Memorial Hospital on May 20. That night, Ms. Degennaro stayed with her son in his room. A nurse showed her a bed on which she could sleep. The bed was in fact a chair that could fold out entirely flat. She sat on the end of the bed to make a telephone call and the bed buckled. Ms. Degennaro fell heavily onto the floor, landing on her buttocks and lower back. She felt excruciating pain and later testified that she might have blacked out. The nurse who had shown her the bed attended to her and said, "You're not supposed to sit on that end of the bed … it collapses."

[3] Following the fall, Ms. Degennaro took Extra Strength Tylenol to help ease the pain. When the pain continued, she had an X-ray performed on May 31, 1999, and was told that she had a cracked sacrum. Over the period that followed, she was treated by her family physician, Dr. Trudy Chernin. Ms. Degennaro's pain persisted, although she continued to work. She consulted two specialists, both of whom told her that surgery was not an option. Dr. Chernin also referred Ms. Degennaro to an acupuncturist/chiropractor and a massage therapist.

[4] None of the treatment she received could relieve the pain and, on May 28, 2001, on the advice of Dr. Chernin, Ms. Degennaro stopped working. She began taking anti-depressants and meeting with a psychiatrist.

[5] In February 2002, Ms. Degennaro was involved in a motor vehicle accident. Her left arm and the left side of her neck were injured. There was no injury to her lower back or sacrum and the trial judge found that there was no aggravation of her earlier injury. The trial judge accepted that the injuries suffered in the motor vehicle accident had healed by the fall of 2002.

[6] On the prompting of her disability insurer, Ms. Degennaro attempted a gradual return to work starting in June 2003. As her hours of work increased, the pain worsened and spread to other parts of her body. She then returned to see Dr. Chernin who diagnosed her as having fibromyalgia.

[7] Ms. Degennaro stopped working on July 25, 2003, and has not returned to work since. She has seen several specialists since that date and manages her pain with medication and various treatments.

[8] At trial both the appellants and the respondents relied on the testimony of several medical witnesses. The respondents called: Dr. Chernin; Erin Finnegan, Ms. Degennaro's massage therapist; Dr. David Saul, a general practitioner with expertise in chronic pain; Dr. Steve Blitzer, a board certified pain management physician; Dr. Gregory Ko, a board certified physiatrist, with a sub-specialty in chronic pain; and Dr. Gordon Lawson, a chiropractor who assisted Dr. Ko with doing an assessment of Ms. Degennaro. Each of the medical witnesses called by the respondents had treated Ms. Degennaro at some point in time. However, with the exception of Dr. Chernin and Ms. Finnegan, none had treated her prior to the car accident. The evidence of these experts supported Ms. Degennaro's claim that the fibromyalgia was caused by the hospital fall and not by the 2002 motor vehicle accident.

[9] The appellants called two medical experts: Dr. Benjamin Clark and Dr. Michael Devlin, both physiatrists who treat chronic pain. Prior to the trial, Dr. Devlin examined Ms. Degennaro and reviewed the documentary evidence while Dr. Clark only reviewed the documentary evidence prior to providing his report. These two experts opined that the fibromyalgia was caused by the 2002 motor vehicle accident.

[10] Both Ms. Degennaro and her husband Paul testified at the trial regarding the degree to which their home life had changed following the injury. They stated that Paul was forced to assume many of the daily household tasks and responsibilities related to the care of their children. Paul Degennaro testified that he was forced to change his shifts at work and switch to part-time hours in order to accommodate his additional household duties.

[11] In support of their claim for future damages, the respondents filed a set of documents that included two reports authored by rehabilitation counselor Anne Wiega, the first dated April 25, 2006, and the second dated October 28, 2008. There was also a report prepared by forensic accountant Elaine G. Vegotsky dated November 6, 2008. The appellants' trial counsel admitted that the reports were authentic but did not admit the truth of their contents. As a result, the trial judge entered the reports as exhibits, on consent, subject to proof. The respondents did not call Ms. Wiega or Ms. Vegotsky as witnesses and the appellants did not ask to have them produced for cross-examination.

[12] During final submissions, the respondents' counsel directed the judge to the Vegotsky report for quantification of the claim for damages of costs of future care. He stated that the expenses claimed in that report stood "unchallenged, uncontradicted, and ought not to be disturbed."

[13] The appellants' trial counsel had led no expert evidence on the issue of costs of future care and his submissions on the issue were very limited. Those submissions are contained in the following exchange with the trial judge:

> MR. BIRLEY: I say in respect of the future cost of care, that this couple has been functioning. The evidence is that Mr. Degennaro has been shouldering some of the burden, but that the amount of future cost of care is really minimal rather than that which is reflected in the reports.
>
> THE COURT: Well you didn't cross examine on them.
>
> MR. BIRLEY: No, but those are my submissions.
>
> THE COURT: Okay. But I mean, what do I base that on apart from your…
>
> MR. BIRLEY: The evidence that….
>
> THE COURT: …exhortation that I should ignore this?
>
> MR. BIRLEY: Well the evidence Your Honour is that this is a functioning couple without spending the amount of money that is sought, they've been functioning for ten years.
>
> THE COURT: Okay, but she's taking all kinds of drugs and so she says it will cost, assuming she gets Botox, which everybody seems to have recommended but she can't afford right now. So by allowing her that, plus all the other drugs that she's taking, that's over almost $600,000 right here.
>
> MR. BIRLEY: Yes.
>
> THE COURT: What do I do to ignore that apart from saying, you know, you say – what else do you say I should ignore from here?
>
> MR. BIRLEY: The help around the house; help around the garden.
>
> THE COURT: Well she says she wants a manual wheelchair. I mean, why shouldn't I – how do I just ignore that and say well, I don't really think she'll need that even though she did have a scooter and found that helpful. Isn't that a reasonable expenditure?

> MR. BIRLEY: Well, Your Honour, you know, what we have here, what we know….
>
> THE COURT: Because age 65, assuming that she's in the condition she's in now, she says she'll need a personal support worker. Well I mean, intuitively I would say, well that seems reasonable.
>
> MR. BIRLEY: Okay. You have my submission.

[14] In his reasons for judgment, the trial judge found that the appellants owed a clear duty of care and that they had fallen below the standard of care. He found that the symptoms resulting from the motor vehicle accident had resolved themselves within a year of the accident and, as a result, he rejected the appellants' argument that the precipitating event for the fibromyalgia was the 2002 car accident. The trial judge concluded that the fibromyalgia was caused by the injury suffered by Ms. Degennaro when she fell at the hospital in 1999. He went on to find that the specific injury suffered by Ms. Degennaro, chronic pain, was a foreseeable result in a person of ordinary fortitude. The eventual fibromyalgia diagnosis was a classic "thin-skulled plaintiff" situation. As a result, all of the resulting damages in this case were foreseeable.

[15] In determining the amount of damages, the trial judge adopted the figures for the costs of future care set out in the Vegotsky report. He stated that these totalled $1,767,800.[1] He then applied a five percent reduction to this figure for contingencies, resulting in an award of $1,679,410 for the costs of future care.

[1] The Vegotsky report actually gave a slightly larger figure of $1,774,100 for the total costs of future care. This was based on the application of a 15% gross to the present value of future costs, calculated at $1,542,720. See footnote 2.

[16] Regarding his reliance on the Vegotsky report, the trial judge commented at para. 94 of his reasons:

> Assumptions are based on facts that are not within the knowledge of the analyst. Most of these facts were not proved by independent evidence. Notwithstanding this, counsel for the defendants did not object to the introduction of the report, nor did he take the position that I could not take its conclusions at face value, notwithstanding that most of the underlying facts and assumptions had not been proved by independent evidence. In argument, counsel for the defendants did not submit that the underlying facts and assumptions had not been proven, and did not argue that I could not rely on the report. He simply argued that the amounts claimed for the projected future loss of income and the future costs of care should be reduced for contingencies.

[17] The trial judge returned to this issue again at para. 165, stating:

> Furthermore, the damages consisting of loss of income to date, in the amount of $308,100, the future loss of income, in the amount of $934,800, and the present value of future costs, grossed up by 15%, in the amount of $1,767,800, are not in dispute. The only issue is whether the claims for … future costs should be reduced for contingencies.

[18] As a result, the trial judge fixed the amount of damages at $3,073,210.45, which included the $1,679,410 in costs of future care (that is, $1,767,800 less 5% for contingencies).

ISSUES

[19] On appeal, the appellants argue that the trial judge erred in three respects:

(1) in rejecting the evidence of the appellants' medical experts on the basis that they were not "treating physicians";

(2) in concluding that it was foreseeable that Ms. Degennaro would develop fibromyalgia four years after her fall and after her intervening car accident; and

(3) in awarding $1,679,410 in costs of future care in the absence of evidence supporting any need.

[20] For the reasons that follow, I would allow the appeal in part to vary the amount awarded for the costs of future care.

ANALYSIS

1. The rejection of the evidence of the appellants' medical experts

[21] As noted earlier, the appellants called two physicians, Dr. Clark and Dr. Devlin, to give expert evidence on the issue of causation. Both of these physicians were experienced and qualified to give expert evidence on the subject of chronic pain and fibromyalgia. Their opinion was that the fibromyalgia was caused by the 2002 motor vehicle accident.

[22] The appellants submit that the trial judge rejected their evidence and preferred the evidence of the respondents' experts on the basis that the respondents' experts were Ms. Degennaro's treating physicians. This, in the appellants' view, was an error of law. The appellants argue that the fact that an expert is a treating physician is not a proper basis to prefer that evidence and, in fact, should lead a court to assign less weight to that expert's evidence and not more. Cases such as *Williams (Litigation Guardian of) v. Bowler*, [2005] O.T.C. 680 (S.C.), and *Greer v. Horton* (1996), 38 C.C.L.I. (2d) 251 (Ont. Gen. Div.), stand for the proposition that a treating physician who has a relationship with the plaintiff may not have the same objectivity as an independent expert. The appellants

maintain that rejecting the evidence of independent experts because they are not treating physicians, as the trial judge did in this case, creates unacceptable unfairness for defendants. Defendants are not permitted to speak with, let alone retain, a plaintiff's treating physicians. This places defendants in the position where they will always be at a disadvantage as they can never tender treating physicians as experts.

[23] I would not give effect to this submission. The trial judge did not, as the appellants suggest, simply reject the appellants' experts solely on the basis that they were not the treating physicians. In reaching his decision to prefer the respondents' experts, the trial judge considered a number of factors. First, as the trial judge explained, the appellants' own expert, Dr. Clark, agreed on cross-examination that treating physicians were in a better position to make a diagnosis of fibromyalgia than a doctor conducting a paper review. Further, the trial judge found the qualifications of one of the respondents' expert on chronic pain, Dr. Ko, to be superior to those of the appellants' experts. Also, there were problems with the evidence of both of the appellants' experts. Dr. Clark acknowledged in his testimony that the hospital fall was a material cause of Ms. Degennaro's fibromyalgia and Dr. Devlin conceded on cross-examination that, when he prepared his opinion, he had not been aware that some of Ms. Degennaro's upper body symptoms had been observed before the car accident occurred. There was, therefore, ample basis for the trial judge's decision to prefer the opinion of the respondents' experts.

[24] Finally, I do not view the cases cited by the appellants as providing support for their position. These cases simply provide that where a treating physician has a personal

interest in the outcome of the case or lacks the objectivity and independence essential to a medical expert, this may adversely impact the weight to be given to the expert's testimony. There was no suggestion that the experts who testified on behalf of the respondents lacked objectivity or independence.

2. Was the fibromyalgia foreseeable?

[25] The appellants argue that damages flowing from the fibromyalgia were not foreseeable because the fibromyalgia developed four years after the fall and required an intervening traumatic event, the car accident. In the appellants' submission, the trial judge ought to have applied the Supreme Court of Canada's decision in *Mustapha v. Culligan of Canada Ltd.*, [2008] 2 S.C.R. 114, and found that the damages were too remote to warrant recovery.

[26] I would reject this submission. The trial judge found as a fact that the debilitating pain suffered by Ms. Degennaro commenced immediately after the hospital incident in May 1999 and that, but for this incident, Ms. Degennaro would not be suffering from the chronic pain with which she is now afflicted. The trial judge accepted the evidence of the respondents' experts that the motor vehicle accident played no role in the development of the chronic pain and fibromyalgia. The trial judge concluded that "it is foreseeable that chronic pain may result from a physical injury" and that "this is a classic 'thin-skulled plaintiff' situation and the defendants must take the plaintiff as they find her." These findings are well supported in the evidence and are entitled to deference on appeal.

[27] In my view, the trial judge did not misapply *Mustapha*, which does not stand for the proposition that a defendant needs to foresee all of the damage suffered by the plaintiff. Rather, the defendant needs to reasonably foresee damages suffered by a person of reasonable fortitude. Where, as here, the damages suffered are more extensive because the plaintiff was "thin-skulled", the defendant is nonetheless liable.

3. The costs of future care

[28] The appellants submit that the trial judge erred in awarding the respondents close to $1.7 million in damages for costs of future care without proof of their entitlement to these damages. The trial judge stated that the amounts being claimed were not disputed and he simply adopted the costs of future care listed in the Vegotsky report without any analysis. That report, however, was entered into evidence subject to proof and no one ever testified as to the truth of the assumptions that underlay that report. The appellants maintain that they never accepted the figures and argue that the only evidence presented at trial as to the need for these expenditures was the evidence of Mr. and Ms. Degennaro. That evidence lacked detail and only spoke generally of Ms. Degennaro's reduced abilities and Mr. Degennaro's increased responsibility for carrying out household duties.

[29] Evidence specifically addressing Ms. Degennaro's pre-accident responsibilities and Ms. Degennaro's present abilities was, in the appellants' view, necessary because the record indicated that she and Mr. Degennaro were able to cope quite well when she was off work. Given that the trial judge had also awarded Ms. Degennaro a substantial sum

for future loss of income, it was incumbent on him to consider whether all of the costs of future care being sought were in fact justified and required.

[30] The appellants submit that the figures used in the Vegotsky report were drawn almost exclusively from the Wiega reports, which were also filed subject to proof. The Wiega reports, in turn, relied on various notes, records and other information. Some of these, such as clinical notes and records of various physicians and experts, were filed at trial. Other material relied on, however, was not filed. For example, the second Wiega report, which is dated October 28, 2008, refers to a future care needs and costs analysis carried out by Barbara Nagy, a physiotherapist. Ms. Nagy's report was not filed. The second Wiega report also relies, in part, on various discussions the author and Ms. Nagy had with Ms. Degennaro. The appellants argue that the Vegotsky report could not be relied on because the two Wiega reports were not put to Ms. Degennaro and there was no testimony directly addressing the need for many of the cost items listed in the Vegotsky report.

[31] The respondents submit that the appellants did not argue at trial that the reports had not been proven and could not be relied on. In the respondents' view, the appellants only argued that the report should be ignored because the Degennaros had been living for years without access to the care costs set out in the reports. The trial judge properly rejected that submission because the appellants had led no evidence that the Degennaros did not need the care provided for in the reports. The respondents argue that it is disingenuous for the appellants to now question the figures set out in the report.

[32] There is merit to the appellants' submission. It is not unusual for counsel, at the outset of a civil trial, to mark one or more volumes of bound documents as exhibits. These are normally marked as exhibits subject to proof. This will often allow for a better and more orderly management of the exhibits filed at trial. This case highlights the importance of ensuring that, at the conclusion of the trial, the status of the many documents contained in those volumes is clear (i.e. whether they have been proven and can be relied on by the trial judge in reaching a decision). This is particularly so where, as in this case, they are referred to and relied on in final submissions and they are critical to the quantification of the claim for costs of future care. It is the failure to clearly agree on the status of the Wiega and Vegotsky reports that has, in the present case, given rise to confusion as to their evidentiary value and the use to which they could be put in assessing damages.

[33] In my view, the trial judge erred in the use he made of the Wiega and Vegotsky reports to determine the damages for costs of future care. At para. 165 of his reasons the trial judge stated that the amount of $1,767,800 being sought for costs of future care was "not in dispute" and that the only issue was whether there should be a reduction for "contingencies". Although the appellants' submissions at trial on the issue of costs of future care were, to say the least, minimal, the exchange I have reproduced earlier in these reasons shows that the appellants did in fact dispute the amount being claimed. The appellants' position was that the items included in the costs of future care calculation in the Vegotsky report were not supported by the evidence at trial and were not reasonable.

As put by their trial counsel, the appellants' position was that "the amount of future cost of care is really minimal rather than that which is reflected in the reports." In the exchange that followed, the court expressed the view that there was evidence of a need and commented on certain items listed in the Wiega reports such as the need for a wheelchair, the need for various drugs and the need for a personal support worker when Ms. Degennaro reached the age of 65. At the end of that exchange, the appellants' counsel did not resile from the stated position; he simply responded, "You have my submission."

[34] In my view, therefore, the trial judge's premise for the assessment of the costs of future care was in error. The need for the various items listed in the Vegotsky and Wiega reports was in dispute and the appellants' position was that the amount for costs of future care was not made out on the record.

[35] In submissions before us, the appellants conceded that there was some evidence in support of many aspects of the costs of future care being claimed. By way of example, the claim for the drugs listed in the costs of future care report was largely based on medical records and evidence led at trial. Similarly, the need and benefit of different types of therapy such as pilates and yoga were addressed in the evidence of Ms. Degennaro and others. In addition, it is apparent from the trial judge's comments in his exchange with the appellants' trial counsel concerning the costs of future care that he was prepared to make a number of assumptions based on Ms. Degennaro's testimony and appearance at trial. Specifically, he saw the need for her to have a manual wheelchair and

believed that she would likely need the assistance of a personal support worker when she attained the age of 65.

[36] There was, therefore, a basis for awarding damages for the costs of future care. The issue, however, is whether the need for all of the amounts sought by the respondents was made out. In my view, they were not. In several instances there was simply no evidence to support the claim set out. For example, the second Wiega report claims the need to recover an annual cost of $255.00 until age 75 for house painting. The assumption here is that, but for the injury, Ms. Degennaro would have painted 1000 square feet of the house every five years until she reached the age of 75. There was no evidence by Ms. Degennaro that she had painted the house in the past or that there was a need for her to carry out this type of regular house painting until age 75. The second Wiega report states that the amount claimed is "[s]upported by Ms. Barbara Nagy, physiotherapist in her report dated August 15, 2007". That report was not entered into evidence and Ms. Nagy did not testify. There are several other unsubstantiated claims listed in the Wiega reports and these are all included in the amount claimed in the Vegotsky report and awarded by the trial judge.

[37] Had the trial judge not erred in finding that the amounts set out in the report were undisputed, he would have subjected each of the items claimed in the Wiega reports to a critical analysis to determine whether the claim had been established on the record and whether the assumptions made were reasonable.

[38] Given the trial judge's error in assessing damages, this court must decide whether to send the matter back to trial. Pursuant to s. 119 of the *Courts of Justice Act*, this court has the power to substitute its own assessment of damages if it considers it just. In my view, ordering a new trial on one aspect of damages is neither desirable nor warranted. I say so for several reasons.

[39] This case involves a fall that occurred almost 12 years ago. It was a 10-day trial and involved the testimony of several expert witnesses. There were no real credibility issues and the fairness of the trial has not been put into question. The trial judge's error does not affect liability and goes only to the quantification of one aspect of damages, albeit an important one, the costs of future care.

[40] In the circumstances of this case, I consider it to be in the interest of justice that a new trial, even one limited to damages, be avoided. The more appropriate remedy is for this court to review the record and substitute its own view of the proper amount for costs of future care.

4. The appropriate amount of costs of future care

[41] The appellants submit that although the Vegotsky and Wiega reports were marked as exhibits, the court could make no use of them because no one testified to their accuracy, and the factual underpinnings for the reports were not proven at trial. The appellants rely on this court's decision in *Wunsche v. Wunsche* (1994), 18 O.R. (3d) 161 (C.A.), for this submission.

[42] I disagree. The situation in *Wunsche* was quite different. *Wunsche* was a family law case where the central issue was the determination of the value of the husband's corporate shareholdings for the purpose of the net family property calculation. The wife had obtained a valuation report that expressed an opinion about the value of the corporate shareholdings. It was listed in a request to admit that was served on the husband. As the husband failed to respond to the request to admit, the trial judge allowed the report to be marked as an exhibit at trial. The husband, who was self-represented, argued that the valuation was wrong, as were many of the assumptions underlying the report. He asked to have the evaluator testify and be cross-examined. This did not occur, and the trial judge simply accepted the valuation contained in the report as being proven. On appeal, this court held that, in the circumstances, the request to admit only established the authenticity of the document, not the truth of the contents of the valuation report or the correctness of the underlying assumptions. The valuation could not, therefore, be used by the trial judge as proof of the value of the shareholdings. This was particularly so because the husband had been given no real opportunity to object to the admissibility of the report, nor to cross-examine on the accuracy and reliability of the report and its underlying assumptions. Since the entire action concerned the equalization of property between the parties and there was no other admissible evidence upon which the court could determine the value of the husband's shareholdings, the court sent the matter back for a new trial.

[43] In the present case, the situation is quite different. In closing submissions, the appellants' trial counsel only challenged the *need* for the items listed in the Vegotsky and Wiega reports. For example, the appellants' counsel questioned several items listed under the rubric of home maintenance and argued that the need for these items had not been made out on the evidence at trial. The appellants were silent as to the accuracy of the calculation of the cost of these items should the need be proven. Indeed, although the respondents explicitly stated in their submissions that they were relying on the reports, the appellants never disputed the calculation in the reports nor did they seek to cross-examine Ms. Wiega or Ms. Vegotsky. The transcript suggests that the parties had discussed between themselves whether to call the authors of these reports, and ultimately concluded that it was not necessary.

[44] It was apparent, therefore, that the parties accepted the accuracy of the costing of the goods and services listed in the reports. The only issue was whether the respondents had proven that the various goods and services listed therein were needed. As a result, I see no basis to reject the reports in their entirety. The accuracy of the costing was not an issue at trial and there is no reason why this court cannot rely on those costs in reassessing the appropriate amount of damages for the costs of future care.

[45] The Vegotsky report assessed the costs of future care from January 1, 2009, to September 9, 2051. The calculations were based on the revised table of costs in the second Wiega report dated October 28, 2008. The Vegotsky report lists items of need

related to the treatment of fibromyalgia as well as items related to assisting Ms. Degennaro with her day-to-day living.

[46] Turning first to the treatment-related items, the Vegotsky report provides that the total present value of Ms. Degennaro's medical needs, which includes medicines and botox therapy, is $576,787. The total present value of non-medical therapeutic costs, such as pilates and yoga classes as well as various therapeutic aids and devices, is $90,544. Professional services related to treatment, such as physiotherapy, massage therapy and travel to medical appointments, amount to $180,638.

[47] The trial record contained substantial evidentiary support for Ms. Degennaro's need for these present and future medical and therapeutic items. Ms. Degennaro testified, for example, that while her chronic pain had not gone away, she was taking several prescribed drugs to manage her fibromyalgia symptoms, the massage therapy was helping her with her sleep, and the pilates sessions were helping her regain lost muscle strength in her legs. Dr. Ko – whom the trial judge found to be "extraordinarily well qualified in the field of chronic pain" and whose evidence the trial judge preferred – testified that "anybody in a chronic pain state needs every strategy to help reduce the pain". From my review of the trial record, I am satisfied that the above costs for medical needs, non-medical therapeutic costs, and treatment-related services are reasonably required. Indeed, the appellants conceded the costs pertaining to medical needs in the course of their oral submissions on appeal. The present value of these items as listed and valuated in the

Vegotsky report totals $847,969 of the total $1,542,720 in costs of future care (before application of the 15% gross and 5% reduction for contingencies for taxes).[2]

[48] The costs of future care related to Ms. Degennaro's day-to-day living require further discussion. The Vegotsky report lists the following items:

Future care	**Present value**
Mobility	
Manual wheelchair	$ 15,471
Annual maintenance (50%)	1,320
Personal Care	
Toenail care	15,191
Personal support worker (from age 65)	88,013
Home Maintenance (until age 75)	
Housekeeping services	97,558
Home support worker	352,583
Heavy house cleaning	9,099
House painting	7,101
Window cleaning	7,804
Snow removal	10,442
Handyperson services	61,887
Lawn care	28,281

[49] From my review of the trial judge's comments made in the course of the submissions from the appellants' trial counsel on the issue of costs of future care, it is, as noted earlier, apparent that the trial judge was satisfied that in light of Ms. Degennaro's condition she should be provided with a wheelchair and a personal support worker who

[2] The $1,542,720 figure in the Vegotsky report is slightly larger than the $1,537,200 figure used by the trial judge. The record does not disclose the reason for the discrepancy. For the purpose of determining the amount of the adjustment to be made, I have assumed that the figures used in the Vegotsky report totaling $1,542,720 are accurate.

will begin assisting her when she reaches the age of 65. As a result, I accept that both these costs of future care are appropriate and necessary.

[50] However, the trial judge did not comment, either favourably or unfavourably, on the remaining items in the Vegotsky report. These items are the $15,191 in costs for toenail care and the costs for home maintenance (until age 75), the latter of which include a home support worker in the amount of $352,583 and various home maintenance services such as housekeeping, house painting, lawn care and the like totaling $222,172.

[51] From my review of the transcripts, there was virtually no evidence about whether Ms. Degennaro had previously carried out home maintenance work such as house painting and snow removal. The parties never addressed whether, but for the accident, these would have continued to be carried out by her until age 75 and whether it was reasonable to assume that she would carry them out in the frequency and to the extent assumed in the report.

[52] With respect to Ms. Degennaro's need for assistance from a home support worker for homemaking and housekeeping tasks, Ms. and Mr. Degennaro testified as to Ms. Degennaro's reduced abilities in this regard, and the various medical evidence provided support for such a need, at present and in the future. The trial judge's reasons and comments suggest that he had accepted that a need in these areas had been established. There is, however, no analysis of the extent of the present need and the extent of her need in the future once Ms. Degennaro has the benefit of the additional medication and

therapies provided for in the judgment and once the children leave the home. In my view, the extent of the need for home support will likely decline significantly as time advances and, therefore, the figures proposed in the Wiega and Vegotsky reports should be adjusted to reflect these changes.

[53] I would therefore reduce the amount of $352,583 sought for a home support worker by 50% and reduce the amount sought with respect to the balance of the home maintenance items totaling $222,172 by 75%. The reduction, therefore, would total $342,921.50. Applying the 5% reduction for contingencies and the 15% gross up for taxes, the net adjustment to the trial judge's damage award should be $374,640.65.

CONCLUSION

[54] I would allow the appeal in part and reduce the damage award by $374,640.65. With respect to costs, the parties had agreed that costs of $35,000 inclusive of disbursements and applicable taxes should be awarded to the successful party. Given the disposition I propose, neither party has been totally successful. The respondents have been totally successful with respect to the liability issues and have been largely successful with respect to the damages issue. As a result, I would award the respondents costs fixed at $20,000 inclusive of disbursements and applicable taxes.

"Paul Rouleau J.A."
"I agree H.S. LaForme J.A."
"I agree David Watt J.A."

RELEASED: April 26, 2011