Citation: *Mineault v. Takhini Hot Springs Ltd.,* 2002 YKSC 48

Date: 20020829
Docket: S.C. No. 00-A0278
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

DARCEY MINEAULT

PLAINTIFF

AND:

TAKHINI HOT SPRINGS LTD.

DEFENDANT

REASONS FOR JUDGMENT OF
MR. JUSTICE HUDSON

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[1] This is an action for damages resulting from a slip and fall, which occurred at a Hot Spring venue near Whitehorse, operated by the defendant, in which the plaintiff, in the facility provided for ladies to change and shower, slipped on a floor and suffered a severe wrist injury.

[2] The plaintiff claims damages for her injuries under three heads, they being:

a) non-pecuniary damages for pain and suffering,

b) past loss of wages, and

c) loss of capacity to earn income.

I am informed there is no claim for special damages.

[3] The defendant has pleaded the *Contributory Negligence Act*, R.S.Y. 1986, c. 32 in claiming that the plaintiff failed to exercise appropriate prudence in her conduct leading up to the slip and fall.

[4] It should be noted at the outset that there is no occupiers liability legislation in the Yukon Territory.

[5] All issues, be they liability or quantum of damages, are alive in these proceedings as there are no admissions with respect to any issue of fact or law.

[6] The plaintiff's claims sound both in contract and in negligence. The issues in more detail are:

1. Did the defendant fail in its duty to the fee-paying customer of the Hot Springs to take reasonable care to ensure that the condition of the surface of the floor in the women's change room was safe enough that the plaintiff might use it without risk of danger?

2. Did the plaintiff in her conduct leading up to the slip and fall exercise appropriate care for her own safety?

3. Is there evidence upon which a finding under the *Contributory Negligence Act, supra*, can be made to result in an apportionment of liability for the injuries suffered?

4. If liability is found, what is the appropriate amount for:

a) non pecuniary losses such as pain and suffering and loss of enjoyment of life;

b) pre-trial loss of wages (past loss of wages);

c) compensation for loss of income earning capacity?

[7] The evidence discloses that the plaintiff was a person in her mid-40's, having recently arrived in the Yukon. She was employed as a bartender in a local establishment, having been hired only recently. This was the plaintiff's first experience as a bartender. She had previous employment of a variety of jobs, extending to auto detailing and delivery of auto parts by driving a small truck. None of these jobs resulted in an income in excess of $20,000 per annum.

[8] The plaintiff described how she attended at the defendant's Hot Springs with two friends. It was her first visit there. A fee was paid for the use of the facilities. She noted that no one was initially available to take their money, no one gave any words of welcome and, specifically, no one in any way urged upon them any need for any degree of care in walking on any part of the premises about to be used. She said she noted a young girl come from the woman's change room with a mop and bucket. This person was never fully identified in evidence.

[9] The only sign she remembers seeing was a temporary appearing sign directing the removal of shoes. No signs directed caution in walking on the tile floors. She said it was approximately two feet from the rubber mat provided to the change cubicles, which necessitated stepping on the tile floor. She described how she used the premises in a

normal fashion, was aware the floor was slippery and used appropriate caution, but slipped and fell to her complete surprise, and described her pain and what occurred thereafter.

[10] On the evidence, there was no other witness to the slip and fall. Her friend, Linda Collins, was in a toilet stall and another person, Linda Anderson, was in the shower. Nobody was in a position to observe her immediately before she fell.

[11] Her friends, Linda Collins and Lester Gauthier, describe the occurrences immediately after the slip and fall. There were two persons, Amy Kent and Linda Anderson, both associated with the defendant as employees or shareholders, who came upon the scene quickly, and who gave descriptions of what they saw immediately after the accident. This differs substantially from the evidence of the defence witnesses. A significant uncontradicted piece of evidence was that the plaintiff was found with her feet laying on the tile area and her upper body on a mat.

[12] Thereafter, the plaintiff described the treatment she received and the difficulty she experienced as a result of her wrist injury, including her difficulties of finding work after recovery and leading to a claim for past wage loss over a period of 15 months.

[13] The plaintiff called evidence with respect to her physiotherapy assessments, leading to an opinion with respect to her function capacity evaluation. Evidence was also heard concerning her occupational employability residual to the injury. Written reports critiquing this evidence were filed as evidence.

[14] Medical evidence took the form of short written reports by Dr. Chana and a further written report with respect to physiotherapy undertaken at Lake Beaumaris Physical Therapy in Edmonton. Photographs showed the fixator which involved metal skewers piercing her skin and extending to the broken arm and out the other side – a clearly painful and awkward apparatus.

[15] The defendant brought evidence with respect to the premises of the defendant and, in particular, the floor upon which it is alleged that the plaintiff slipped and fell.

[16] A long-term employee by the name of Amy Kent testified. She was in attendance that evening. A shareholder named Linda Anderson testified at an earlier date and her evidence was presented by means of videotape. The manager, who was not present at the time of the accident, testified. A person who was a director and, on the evidence, appeared to be the moving force behind the defendant's business, also testified, as did another shareholder who was collecting information to support planning future developments of the facility.

[17] The testimony of all defence witnesses, other than those dealing simply with the quantum of damages, dealt with the steps taken by the defendant to see that the premises were safe, in particular the change room. Further, in particular, it dealt with the steps taken with respect to the tile floor which is situate in the location of the slip and fall, including the application of acids to etch the tiles and add traction, and the initial use of a thin rubber mat to provide traction and the ultimate decision to install interlocking but moveable, rubber matting. Reference was made to the placement of these mats at the relevant time.

[18] Witnesses for the plaintiff who were at the scene at the time of the accident testified to the fact that it would be necessary to step on the tile floor from the mat to get to the change cubicle. There was evidence from defence witnesses who could not recall the specifics of the location of the mats on the day in question, as well as evidence from a defence witness to the effect that there was, as the plaintiff's witnesses had said, a considerable space between the last available mat and the change cubicle, and others who describe how a customer could go from a bench to the change cubicle without stepping on the tiles.

[19] Evidence was given by Katie Hayhurst, who testified as to having diagramed the placement of the mats at the outset some two months before the incident, whereby virtually 85 percent of the floor space was covered and a person could easily step from one group of mats to another to get to any part of the change room. This witness, however, testified that shortly after she installed the mats she found that the groupings of floor mats that she had organized had been altered by separating them into smaller portions, which she discovered after the incident. She, therefore, was not in a position to testify as to the location of the mats at the time of the incident. Other evidence made clear that the janitors disliked the mats which made their work much more difficult.

[20] Linda Anderson, who testified by videotape, drew a diagram which indicated that the placement of the mats, while radically different from that described by Hayhurst, nonetheless disclosed that the mats were close enough to the change cubicle that a person could step from a mat to the dry area in the change cubicle.

[21] All witnesses agreed that the tile floor was wet to one degree or another, with the plaintiff and her two friends testifying that the degree of wetness was greater than it first appeared.

[22] Evidence was also given of the application of acid to the floor by a contractor to increase the traction by etching. Some evidence was given that when this acid was applied in 1999, the defendant was informed that they should repeat the process before one year's time was up. Evidence was further to the effect that this was not done.

[23] General evidence was given with respect to efforts made by the defendant corporation to solve the problem perceived of slipperiness in the change room. A survey was done in Hot Springs across western Canada, but the results of that were after the fact and did not, essentially, come up with conclusions that were not already known.

[24] Evidence was given by Hayhurst of information she collected concerning the safety aspects for presentation to the Board of Directors. Her evidence generally testified to what she intended to have happen ("my principles") and had little to do with what, in fact, took place when weighed against the other testimony I heard.

[25] Defence witnesses referred to the practice of placing warning signs on the wall and the placement of floor signs to indicate slippery floors. These signs are made of thin paper and appear temporary. No evidence firmly contradicted the plaintiff's evidence that on that date no such signs were in place.

[26] Essentially the matter with respect to liability came down to whether the defendant had taken steps by the etching procedure, by the use of warning signs and

informational signs, and, in fact, by the placement of mats, which taken together, satisfied the duty upon them to take reasonable care for the safety of their patrons.

[27] In addition to this is the issue of whether or not the plaintiff took reasonable care for her own safety.

[28] Evidence with respect to damages, if any, and submissions thereon will be addressed later in these reasons.

[29] It was generally conceded that the law respecting this matter and the issues raised is that pronounced in the case of *Brown and Brown v. B. & F. Theatres Ltd.,* [1947] 3 D.L.R. 593 (S.C.C.) (QL). This was a case in which a party, having paid admission to a theatre and wishing to use the ladies room, proceeded to do so and opened the wrong door, falling and injuring herself. Ever since, the judgment of Rand J. has been treated as the law respecting the contractual duty of a proprietor of premises when the customer has paid to enjoy the premises, constituting the relationship to be one of contract.

[30] Mr. Justice Rand said at page 596:

> The case has been treated as raising the ordinary question of the duty owed by a proprietor of premises towards an invitee. I think, however, I should observe that this is not merely a case of such invitation as was present in *Indermaur v. Dames* (1867), L.R. 2 C.P. 311. Here, Mrs. Brown paid a consideration for the privileges of the theatre, including that of making use of the ladies' room. There was a contractual relation between her and the theatre management that exercising prudence herself she might enjoy those privileges without risk of danger so far as reasonable care could make the premises safe. Although the difference in the degree of care called for may not, in the circumstances here, be

> material, I think it desirable that the distinction between the two bases of responsibility be kept in mind: *Maclenan v. Segar,* [1917] 2 K.B. 325 following *Francis v. Cockrell* (1870), L.R. 5 Q.B. [184]. In *Cox v. Coulson,* [1916] 2 K.B. 177 at p. 181, Swinfen Eady L.J. said: "The defendant must also be taken to have contracted to take due care that the premises should be reasonably safe for persons using them in the customary manner and with reasonable care", citing *Francis v. Cockrell …*

[31] In the result, the plaintiff was entitled to damages. It should be noted as well that the jury's finding that the plaintiff was 10% responsible was not disturbed.

[32] This case sounded the death knell of the ultimate negligence concept and probably the legal concept of "last clear chance". This case was followed in the case of *Finigan v. City of Calgary, et al* (1967), 65 D.L.R. (2d) 626 (Alta. S.C.) (QL). This case involved a municipal park and a pathway in which the people involved in the making of the pathway neglected to remove a vertical root projection over which the plaintiff tripped to her detriment and injury.

[33] Cairns J., at p. 628 stated:

> For these reasons I am of the opinion that the respondents (the municipality) created or suffered to exist an unusual danger for which, if damage arose because of it as it did in this case, they are liable even on the principles enunciated in *Indermaur v. Dames*.
>
> However, completely apart from the principles of the invitee cases it is my view that the respondents are liable on the basis of breach of contract.
>
> Here the appellant paid an admission fee to view the exhibits and thereby entered into a contract with the respondents that she might enjoy those privileges provided she exercised prudence herself without risk of danger so far as reasonable care could make the premises safe. This principle was laid

> down by Rand, J., in *Brown and Brown v. B. & F. Theatres Ltd.,* [1947] 3 D.L.R. 593, [1947] S.C.R. 486.

[34] Cairns J., quoting from *Maclenan v. Segar,* [1917] 2 K.B. 325, stated as follows:

> In my opinion the existence of a contract between the plaintiff and the defendant in such a case as that now before me is of great importance, for it may lead to the implication of a warranty which carries the duty of a defendant substantially beyond the obligation indicated in *Indermaur v. Dames.*

[35] Further, Cairns J. stated at pp. 332-333:

> Where the occupier of premises agrees for reward that a person shall have the right to enter and use them for a mutually contemplated purpose, the contract between the parties (unless it provides to the contrary) contains an implied warranty that the premises are as safe for that purpose as reasonable care and skill on the part of any one can make them. The rule is subject to the limitation that the defendant is not to be held responsible for defects which could not have been discovered by reasonable care or skill on the part of any person concerned with the construction, alteration, repair, or maintenance of the premises…

[36] Cairns J. also cited the case of *Francis v. Cockrill*, *supra,* as follows:

> Where A enters B's structure under a contract entitling him to do so, it is an implied term in the contract that the structure shall be reasonably fit for the purpose for which it is intended; but this does not extend to any unknown defect incapable of being discovered by reasonable means.

[37] Clearly, therefore, the law to be found in *Brown and Brown, supra*, was the law in 1967. The concept was also cited favorably in the case of *McGinty, et al v. Cook, et al* (1989), 68 O.R. (2d) 650 (H.C.) (QL), indicating *Brown and Brown, supra,* was the law in 1989.

[38] The case of *Dean v. Credit Valley Conservation Authority,* [1993] O.J. No. 2389 (Gen. Div.) (QL) contains facts which are roughly similar to those in the case at bar with respect to liability.

[39] While this was a case in which the statute law in the *Occupiers Liability Act,* R.S.O. 1990, c. O.2 was in question, on the basis of that, that *Act* was a codification of the common law in that area. It is precedential material for this case.

[40] In that case, MacKenzie J., said at para. 26:

> In my view, the evidence clearly indicates that water had accumulated on the hallway floor being a high traffic area of the defendant's premises and there was no clear evidence in the *pro forma* inspection and maintenance records kept by the defendant that there was regular inspection by the defendant of the hallway floor area during the hours of operation of the facility. The evidence clearly established recognition by the defendant of the accumulation of water in the hallway in question by reason by its placement of the carpet runner in the hallway outside the first aid room.

The circumstances are usefully similar to a consideration of the facts in this case.

[41] There was a discussion of the case of *Bogoroch v. Toronto (City),* [1991] O.J. No. 1032 (QL). In that case the trial judge found that the occupier is not an insurer required at all times to keep his premises absolutely free of snow and ice, but rather the occupier is under duty to take reasonable steps to keep premises safe in the circumstances. The trial judge then went on to find the plaintiff partly liable for his injuries in that he focused his attention only on a part of the pathway that he was following. In that case the plaintiff was found 40% liable.

[42] The *Dean, supra*, case is, in fact similar to the case at bar. Although a contributory negligence finding was available to the trial judge, no such finding was made in that the evidence did not support a conclusion that the plaintiff failed to keep a proper lookout.

[43] The case of *Funnell v. Kamloops (City),* [1998] B.C.J. No. 775 (S.C.) (QL) involved the use of a change room at a swimming pool, in which there was consideration of the *Occupiers Liability Act*, R.S.B.C. 1996, c. 376. Notwithstanding that, the Supreme Court of British Columbia was followed in the law as cited in *Brown and Brown, supra.* There are also certain quotes from the evidence that are similar to evidence given in the case at bar by the defendant's staff.

[44] Blair J., in *Funnell, supra,* referred to "the standard of care" in the *Occupiers Liability Act, supra,* and stated at paras. 8 and 9:

> Counsel for the City submits that the efforts of the City's employees in resurfacing the change room floor satisfied the standard of care expressed in s. 3 of the *Occupiers Liability Act* which requires the City to take that care that in all the circumstances of the case is reasonable to see that a user of the facility, such as Mr. Funnell, will be reasonably safe in using the premises.
>
> I am satisfied that Mr. Funnell moved prudently as he entered the change room and that in spite of his caution he slipped and suffered injury.

CAUSATION

[45] With respect to causation, the case of *Wiens v. Serene Lea Farms Ltd.,* [2001] B.C.J. No. 2719 (C.A.) (QL) was cited. This is not a case in which there was a contract,

but deals with causation and proof thereof. Low J.A., citing *Snell v. Farrell,* [1990] 2 S.C.R. 311 at 328:

> I am of the opinion that the dissatisfaction with the traditional approach to causation stems to a large extent from its too rigid application by the courts in many cases. Causation need not be determined by scientific precision. It is, as stated by Lord Salmon in *Alphacell Ltd. v. Woodward,* [1971] 2 All E.R. 475, at p. 490:
>
> > …essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory.

[46] While there was little argument with respect to causation in the trial of the case at bar, the law indicated above should put the matter to rest at this point in time.

[47] In reaching my conclusion herein, I have made certain findings of fact on the evidence presented.

[48] I find as a fact that the mats in the change room were as described by the plaintiff in that they were placed in such a way that it was necessary to step on the tiled floor to go from the bench where the plaintiff sat to the change cubicle to which she wished to go. The witnesses Linda Collins and Lester Gauthier generally described the placement of the mats to confirm the placement indicated by the plaintiff and as shown in Exhibit 13 in red. Collins, in fact, also indicated that in proceeding from the hallway to where the plaintiff lay, she herself slipped and she, too, came close to falling.

[49] There were pictures of the change room, which bear the date January 2001, but no evidence was given as to when these photographs were actually taken or who took

them. Nonetheless they were taken before January 2001 and I deduce that since they show mats in certain locations, they were not taken at a time when the defendant was engaged in removing numbers of the mats for any purpose. They tend to confirm the evidence of the plaintiff's witnesses, indeed the evidence of Amy Kent, a witness for the defence, and the evidence of the witness Katie Hayhurst, to the extent that her pattern of laying the tiles was changed. Because of the evidence that the janitors did not like the use of the mats and because no janitor was called to testify (from which I infer that their evidence would not have been helpful to the defence), I am satisfied on the whole of that evidence that a finding that it was necessary to step on the wet tile floor is the most appropriate conclusion to reach on a balance of probabilities.

[50] I also find that in the matter of signage, there was insufficient warning given to any patron of the Takhini Hot Springs as to the extra care needed in crossing and re-crossing the tile floor of the change room.

[51] The plaintiff and her witnesses testified that they did not see any signs. The defendant's witnesses were unable to swear that on the date in question there were any such signs present. The evidence of signs indicated that when such signs were present, they gave an insufficient warning to the state of affairs on the floor of the change room. If signs were, in fact, used, they were of such temporary appearance as to be calculated to fail to indicate that any danger referred to was constant. Professionally prepared and framed signs under glass, permanently attached, would have had a much better chance of success in passing the message to potential users as to what they might expect. The users of this change room had no idea what to expect, at least from anything said to them by the proprietors orally or in writing.

[52] As to a system to ensure that the premises were safe, the evidence disclosed some indications of a system. The evidence also disclosed that the premises were operated under a system where shareholders and directors were given authority, if not responsibility, on the premises to undertake whatever steps they saw fit to improve safety; notwithstanding what non-shareholder management and staff might decide to do. With this kind of procedure, it is easy to see how any one person involved could be under the impression that other persons were taking care of certain aspects leading to a safer premise and that it was no necessary for them to be alert or to use initiative.

[53] The “mission statement” indicates a very confusing state of affairs as to responsibility for these matters. I am not satisfied on a balance of probabilities that there was a firm concept held by ownership or management as to what was necessary to make the premises safe.

[54] Whatever efforts were predetermined to see that the premises were safe, the evidence of the absence of any checklist or consistent system of inspection leads only to the conclusion that whatever goals relating to making the premises safe existed, there was little way of determining that the steps needed to be taken to accomplish such goals were, in fact, taken.

[55] It is pertinent to these questions as well to note that the etching with acid of the tiles, which was recommended at one stage and carried out, was not repeated. This leads to a strong inference that cost was a consideration temporarily placed before safety.

[56] Having regard to these findings of fact and applying the law as stated in *Brown and Brown, supra*, and the other legal principles referred to above, I find that the defendant did breach the warranty or other duty which was raised by the purchase by or on behalf of the plaintiff of the ticket to enter the defendant's premises as described in *Brown and Brown, supra*. With respect to that concept, the defendant has not brought before the court evidence to indicate on a balance of probabilities that the plaintiff failed to exercise prudence in her use of the floor in the ladies change room. (See *Waldick v. Malcolm,* [1991] 2 S.C.R. 456 (S.C.C.) (QL), which is authority for the proposition that the burden of proof falls on the defendant asserting such lack of prudence.)

[57] The plaintiff, herself, testified that she used care. The witness, Katie Hayhurst, described how she would have navigated the floor if it was just tile. The evidence of the defence witnesses who were in the premises at the time gave no indication of a lack of care on the part of the plaintiff.

[58] In *Dean v. Credit Valley Conservation Authority, supra*, with respect to the same circumstances, the court said at para. 32:

> Keeping in mind that it was Dean's first visit to the facility and that there were no warning signs or notices to users of the facility either at the cash booth or the entrance to the hall advising users as to the hallway floor having any accumulation of water thereon, he cannot be said to have been in the same position as *Bogoroch* in failing to keep a proper lookout.

[59] I have reached the same conclusion in the case at bar. Therefore, on the evidence before me, I cannot find that the plaintiff failed to meet the duty placed on her in such circumstances by the common law as detailed in *Brown and Brown, supra*.

Further, I cannot find that the plaintiff is liable to share the responsibility for the liability for her injuries pursuant to the *Contributory Negligence Act, supra*. The evidence falls short of establishing that.

[60] I find for the plaintiff on the issue of liability and rule that the defendant is liable to the plaintiff in damages. I also find that the plaintiff is not required to suffer a reduction in her damages on the common law, nor is she in any way responsible for her own injuries, pursuant to the Yukon *Contributory Negligence Act, supra.*

DAMAGES

[61] The evidence with respect to damages was that of the plaintiff; her supervisor at her place of employment, the ’98 Hotel; the *viva voce* testimony of Ms. Milton, a physiotherapist who conducted a functional capacity evaluation; Mr. Bruce, who filed a report with respect to residual employability assessment; written reports by Dr. Chana; a report of Lake Beaumaris Physical Therapy as to the defence on the matter of damages; reply evidence of Jodi Ann Fischer in response to the evidence of witness Milton; and the written report of Barbara Wilkinson, also in response to Ms. Milton’s and Mr. Bruce’s report.

[62] The evidence is that Ms. Mineault, who achieved Grade 10, left school voluntarily. She has worked as an automotive detailer in various locations. The evidence is that she could clear up to $200 per day (no average was given in evidence). For health reasons, she gave up automobile detailing, attended a business college and took training in business information processing. She attempted working in that field but failed to get any long lasting employment as she found it difficult. She was also employed as a camp

attendant and as a driver delivering auto parts. There were other short-term employments, such as a mail sorter, counting seedlings for the forest service, and relief driver for an automobile company. Ms. Mineault testified that she moved around frequently to accompany her male companion. For these reasons, from time to time, she discontinued the employment that she had.

[63] Ultimately, Ms. Mineault moved to Whitehorse in 2000, having friends living here. She gained work at the ’98 Hotel as a bartender and bar waitress. Prior to her accident, she was earning approximately $8.00 per hour as a trainee. She could have looked forward to an increase to $9.00 per hour, but her employment was interrupted by the accident in question. Her notices of assessment for the years 1996, 1997, 1998, 1999 and 2000 are in evidence, indicating that successively her total income was:

1996	$9,678
1997	$9,999
1998	$9,109
1999	$16,599
2000	$14,590

In 2001 her total income is shown to be $5,348. It would appear that the employment she secured at the ’98 Hotel, had she continued, would have been in line with her previous annual income in the two years previous.

[64] The injury to her wrist is depicted in photographs. The plaintiff described the pain that she suffered initially (she said she observed the broken bone pressing on her skin from inside her wrist), the surgery she endured, the personal discomfort and inconvenience, the difficulties in dressing, bathing and everyday household tasks that

she experienced. She was prescribed substantial painkillers for a period of several months following the injury.

[65] The evidence of Dr. Chana is that on October 31, 2000, “she was still suffering from pain and her fingers were swollen. She was still restricted from doing ordinary tasks.”

[66] The evidence of Lake Beaumaris is described in a letter dated December 22, 2000 and states:

> Darcey initially attended this clinic September 05, 2000. … There was a marked decrease in distal glides of all bones of wrist with tenderness on palpation.
>
> …
>
> December 13, 2000:
>
> Range of motion of right wrist: flexion 65°, extension 40°, pronation 90% of full, supination 90% of full, radial deviation 20°, and ulnar deviation 10°. Range of motion of fingers: thumb, ring and small 100%; index finger and long finger (middle) had full extension but flexion was 75° at proximal interphalangeal joint, 90° at interphalangeal joint and 55° at distal interphalangeal joint meaning she still does not have full fist or tuck ability.
>
> There was minimal restriction within soft tissues of forearm and elbow region but definite dysfunction around the wrist. Capitate, lunate, scaphoid, and radius still have dysfunctional movement.

[67] The plaintiff’s testimony was that at trial date she was still experiencing pain, which pain is exacerbated by the need to lift objects or to use her wrist for repetitive movements for any period of time.

[68] Ms. Milton's report, otherwise known as a functional capacity evaluation, contained many findings, the principle of which are as follows:

> a) Can not perform occupations that require repetitive continuous unassisted use of right hand for longer than 30 minutes.
>
> b) Can perform occupation requiring bilateral medium hand and arm control on an occasional basis (Less than 34% of the time). Unable to perform occupations that require expedient efficient or bilateral medium hand and arm control.

[69] The report of Ms. Milton sets out the problems that the plaintiff will experience and does experience with respect to the use of her right hand, wrist and elbow. The report does not go so far as to state that her right hand will be unavailable to her for her work needs, but the injury will restrict the extent to which she can rely on her right hand and wrist for certain jobs. For instance, the report with respect to unilateral carrying states:

> Can carry objects no greater than 14 lb. with right hand with hand at side and arm extended.

[70] Ms. Milton further states in her report:

> In general, Miss Mineault will be able to perform occupations rated as **Limited (1) to Light (2)** strength requirements according to the NOCS (National Occupational Certification Standards). She should avoid positions that involve repetitive flexion, extension, supination and pronation of the right wrist and elbow on a frequent basis (between 34% and 66% of the time). At the present time she is functioning as bartender/bar waitress by using left hand for tray support and using left hand for pinch grip of glasses. Ms. Mineault reports that whenever it is possible she uses the left hand for gripping, pushing, pulling and minimizes the repetitive strain on right upper extremity.

[71] The report further states:

> With respect to further rehabilitation, Miss Mineault completed a comprehensive thorough rehabilitation program at Lake Beaumaris. It appears that although she had a great deal of difficulty initially with pain control she was compliant and motivated throughout the rehabilitation program.

[72] In this regard, the letter of Lake Beaumaris Physical Therapy (Exhibit 18) states as of December 22, 2000:

> It is my opinion that Darcey will continue to improve over time and, with continuing progressive exercise and work conditioning be able to attain full mobility and strength meaning that she could return to her previous occupation.

[73] It should be noted at this time that Ms. Mineault, at the time of testifying, indicated she was working regularly at the job at the ’98 Hotel, handling the duties reasonably well.

[74] Ms. Milton’s report indicated the ongoing effects of the injury, none of which constitute any more than partial disability. The indications are, however, that there is a possibility that due to the nature of the injury, her previous history of osteoporosis and her age, Ms. Mineault can expect to experience additional weakness in her right wrist and hand as the years go on.

[75] Mr. Bruce’s report detailed what Ms. Mineault’s position in the work place would be through his residual employability assessment. In essence, Mr. Bruce’s expectation is somewhat negative in that it is his opinion that due to the injury, Ms. Mineault’s age, and her brief education, that unless she has a sympathetic employer to accommodate

the weakness in her right hand, Ms. Mineault will have difficulty as a result of the accident in seeking gainful employment. He stated:

> If this support (of the present employer) is no longer available to her, she will be at a competitive disadvantage for other employment opportunities. She would be competing against a large labour pool of younger, non-disabled persons for positions which are generally low paying and which require limited skills.

[76] Mr. Bruce did agree that in the position Ms. Mineault now holds and the particular location of her employment, that while not decisive, a pleasing personality and attitude go a long way to maintaining employment. It was my observation that the plaintiff is possessed of these pleasant attributes. Mr. Bruce, as I have said, stated that it is his opinion that the areas of skilled or semi-skilled employment were now closed to the plaintiff because of her age, the lack of educational standing and the injury suffered. I do not feel that the evidence supports such a negative view.

[77] The place of employment is described as a small enterprise with 51 or so seats, with a small clientele, with whom Ms. Mineault is no doubt developing a rapport. I find it difficult to fully accept the somewhat negative approach taken by Mr. Bruce, but I certainly recognize the skill that he possesses to make this assessment. Whatever employment difficulties the plaintiff is going to experience in the future, they appear to me to be more long range than short range. I consider that in the award that I am making.

[78] Reports were filed in answer to Ms. Milton's report and that of Mr. Bruce, namely the reports of Wilkinson and Fischer. While certainly relevant and of interest, these

reports have, in my view, a somewhat limited negative critique on the reports of Milton and Bruce, with respect to which Milton and Bruce disagreed under oath. After reading the reports of Wilkinson and Fischer, the basic premises of the Milton report and the Bruce report do survive and provide a useful basis for the court's deliberations on the quantum of damages to be awarded. I agree with plaintiff's counsel that it is important in assessing this evidence to recognize that neither Wilkinson nor Fischer ever examined the plaintiff.

[79] The plaintiff describes her leaving Whitehorse shortly after she left hospital, with an external apparatus ensuring stability of the point of the fracture. Pictures placed in evidence disclosed that it was an apparatus, which, undoubtedly, caused much inconvenience and restriction on the plaintiff's activities. The plaintiff proceeded to Edmonton and reported to medical personnel there for the purpose of treatment and, ultimately, removal of the apparatus on her wrist.

[80] Dr. Chana stated in his report dated January 28, 2001 as follows:

> It should be noted that she suffered considerable pain following immediately after the fracture and during the course of the treatment. When she was under my care she was given Rhovail 200 mg od and 642 tablets prn for pain relief and inflammation. The *(sic)* she was unable to work at her own occupation. Her enjoyment of life was severely affected negatively.

[81] Further, describing the last visit of October 31, 2000 the Doctor said:

> In the future she may continue to experience pain in the right wrist with any repetitive movements in this wrist.

[82] On August 8, 2000, Ms. Mineault was seen by Dr. Van der Merwe. From the evidence it would appear that the external fixator was to be removed on August 9, 2000. The swelling and pain appear to have continued through to the month of December 2000.

[83] The plaintiff expressed that she was not a person to sit at home and she sought work early in the new year of 2001. She took short-term employment at a Holiday Inn working the front desk and at a delicatessen as a server. She trained for work as a foster caregiver. When her first assignment involved caring for a teenage mentally handicapped person she found it beyond her capacity and had to give it up. The plaintiff was always seeking work but was unable to develop anything on a long-term basis.

[84] In September 2001 the plaintiff received a call asking her to come back to the ’98 Hotel in Whitehorse, which she did. She resumed her employment there, which continued to the date of her testimony, at least.

[85] During this period in 2001, before the plaintiff returned to the ’98 Hotel, she had earned a grand total of $910.86.

QUANTUM OF DAMAGES

[86] With respect to the quantum of damages, I had regard to the cases of *Palmer v. Goodall,* [1991] B.C.J. No. 16 (C.A.) (QL); *Pallos v. Insurance Co. of British Columbia,* [1995] B.C.J. No. 2 (C.A.) (QL); and *Rosvold v. Dunlop*, [2001] B.C.J. No. 4 (C.A.) (QL). I have also read and considered the case of *Iaci v. Wye-Tech Services et al*, Supreme

Court of Yukon, June 7, 1994, Hudson J. (Unreported) and *Iannone v. Hoogenraad*, [1992] B.C.J. No. 682 (C.A.) (QL).

[87] With respect to non-pecuniary damages, pain and suffering, impairment of enjoyment of life and inconvenience, there is evidence of the pain suffered, which, in the first instance was extreme. The photographs of the apparatus (fixator), which she was required to wear for two months, which carried additional pain with it, are there to be seen.

[88] In comparison to the award of the plaintiff in the case of *Iaci, supra, Iaci* showed a longer period of treatment, more extensive surgery and pain in more than one part of her body.

[89] The plaintiff is described as a stoic person, prepared to accept what comes and get on with her life. I take that into consideration for non-pecuniary damages, loss of amenities, pain and suffering and inconvenience. I award the sum of $45,000 under this head.

PRE-TRIAL LOSS OF WAGES

[90] With respect to the pre-trial loss of wages, otherwise known as past wage loss, Mr. Bruce, in his report, opined that the annual wage the plaintiff could have expected for this period, on the figures he had and which he would apply to the plaintiff, was $22,000, at a minimum. Plaintiff’s counsel suggested that the wage loss would be in the range of $24,337 to $27,337, taking into consideration the likely receipt of tips.

[91] I have made my own calculation:

$72 per day x 4 days = $288.00 per week

$288 per week x 63 weeks = $18,144 (From June 25, 2000 to Sept. 14, 2001)

There is in the evidence an estimate of $20 - $30 per day in tips. Therefore, I add to this $6,000 in tips, resulting in a total of $24,144.

[92] From this would be deducted the sum of $910.86, the plaintiff's earnings prior to regaining her employment at the '98 Hotel. I therefore round off the past wage loss to $23,000.

[93] I stopped calculating past wage loss on September 14, 2001, because on that date she regained her previous position at the same wage and the same working conditions, according to the evidence.

[94] With respect to future loss of income, Finch J. (as he then was), stated in the case of *Pallos v. Insurance Co. of British Columbia, supra, (*at para. 24):

> In addition to those cases cited by counsel, I would also refer to *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 393 (C.A.). There Mr. Justice Taggart quoted with approval from *Brown v. Golaiy, (supra)* as follows (at p. 399):
>
> > The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:
> >
> > 1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
> >
> > 2. The plaintiff is less marketable or attractive as an employee to potential employers;

> 3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
>
> 4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[95] Mr. Justice Finch also cited the case of *Palmer v. Goodall, supra,* wherein Madam Justice Southin said at p. 59:

> Because it is impairment that is being redressed, even a plaintiff who is apparently going to be able to earn as much as he could have earned if not injured or who, with retraining, on the balance of probabilities will be able to do so, is entitled to some compensation for the impairment. He is entitled to it because for the rest of his life some occupations will be closed to him and it is impossible to say that over his working life the impairment will not harm his income earning ability.

[96] Finch J. went on to say at para. 29 of *Pallos, supra*:

> The plaintiff's claim in this case, properly considered, is that he has a permanent injury, and permanent pain, which limit him in his capacity to perform certain activities and which, therefore, impair his income earning capacity. The loss of capacity has been suffered even though he is still employed by his pre-accident employer, and may continue to be so employed indefinitely.

[97] Contrary to what counsel argue I consider that the pre-accident employment level of the plaintiff is relevant. I repeat those figures that I expressed earlier in this judgment.

1996	$9,678
1997	$9,999
1998	$9,109

1999	$16,599
2000	$14,590

[98] Mr. Bruce testified, as I have said, that the age of the plaintiff, and the lack of education, both of which pre-existed the injury, and the injury serve to increase the likelihood or magnitude of the capacity loss. I also assume the osteoporosis pre-existed the injury, which is evidenced. When combined with the injury, these are to be considered in concluding that the potential for employment for the plaintiff in the more distant future is considerable and stands in support of her claim. Mr. Bruce also testified that the plaintiff in all likelihood would be competing with much younger people for the available jobs. I have considered and applied the case of *Athey v. Leonati,* [1996] 3 S.C.R. 458 (QL) in reaching this conclusion.

[99] Reviewing all of the relevant evidence and the cases cited, to which I have referred, and recognizing that what I am dealing with are damages for the effects of an injury that may not be clearly manifested for some time in the future, what I am therefore ordering is present dollars for future compensation. It is significant but not decisive that the plaintiff is in the same job with the approximate same wage as she was when the accident occurred. I recognize that this plaintiff is not likely to suffer the depression and loss of self-esteem that is so often characterized by such claims. I award the sum of $90,000 for loss of capacity to earn income.

[100] I have been asked to reserve on the question of costs and I do so, simply stating that representation on costs may be made to the court by arrangement with the trial coordinator.

CONCLUSION

[101] To sum up, my award is:

Non-pecuniary damages	$ 45,000
Damages for past income loss	23,000
Damages for loss of capacity to earn income	90,000
TOTAL:	$158,000

_____
Hudson J.

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