

Overturing a Jury's decision?

In the recent Court of Appeal decision in *Fonseca v. Paul Hansen et al*, an appeal was brought regarding the trial decision of a jury. The appellant was involved in a motor vehicle accident when she was hit from behind by a transport truck, while stopped at a red light. At the time, she was enrolled in a dentistry general practice residency in Vancouver and was home in Mississauga for Easter visiting her family. Her injuries prevented her from maintaining a full time clinical dentistry practice. Liability was admitted shortly before the commencement of trial and the trial was focused on damages.

The respondents took the position that the appellant had recovered from her injuries to resume her practice. The appellant's position was that she was only able to work 15-20 hours a week and that her condition would be permanent. The appellant's economic loss expert opined that her future income loss would be between \$6,000,000.00 - \$18,000,000.00. The jury awarded the following:

General Damages	\$104,000
Past Income Loss	\$584,187
Future Income Loss	\$112,496
Other Special Damages	\$44,412
Future Health Care Costs	\$27,450

This paper is going to focus on 2 aspects of the Court of Appeal's decision:

1. Whether the award for future income loss was inconsistent with the other awards of damages or so low, that it amounts to an injustice?
2. Also, did the trial judge err in failing to instruct the jury that pre-trial communication between appellant's counsel and an expert witness was not a proper basis upon which to reject the expert's testimony? This decision was being heard before *Moore v. Getahun* had been heard by the Court of Appeal and provided direction on interactions between counsel and their experts. Therefore, this was a contentious issue in the *Fonseca* trial.

Therefore, the appellant asked the court to set aside the jury's verdict and substitute it with its own assessment and that a fair and reasonable number would be \$6,000,000.00, the lower amount put forward by its expert. Alternatively, a new trial was requested solely on the question of future income loss.

The Court provided the analysis for overturning a verdict of a jury. The case law is set out in the case, but basically, the Supreme Court of



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Canada in *McCannell v. McLean*, stated that:

The principle has been laid down in many judgments of this Court to this effect, that the verdict of a jury will not be set aside as against the weight of 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.

The appellant stated that the inference made from the jury was that an amount was awarded for past income loss, which “indicates that the jury found the appellant would have worked as a general practice dentist but for her injury.” It also indicates that the jury accepted the appellant’s expert and that by awarding a future loss of income claim, the jury accepted that the appellant was going to have an ongoing loss.

The Court of Appeal found,

On the whole of the evidence there was a divide in the medical opinions. Some of the medical professionals were of the view that the appellant’s condition was unlikely to improve in the future and it was unlikely that she would be able to resume a full time clinical practice. Others were of the view that soft tissue injuries

improve over time and that there was nothing preventing the appellant from resuming a full time clinical practice provided that she maximized her “ergonomic IQ” and worked in an “optimized clinical setting”.

Others also found that the appellant would be limited in returning back to work.

MacFarland J.A., writing on behalf of the Court of Appeal stated:

In my view, it is not “inconsistent” for the jury to have awarded the full past income loss amount that the appellant claimed but only a relatively smaller sum for future income loss. The jury was clearly satisfied that while the appellant had suffered a compensable income loss to the date of trial, based on the evidence they accepted, she could either resume a full time clinical practice or earn an equivalent income in the very near future.

The jury’s award for future income loss was significantly less than the plaintiff had claimed – so too was their award for future health care costs. While the appellant’s counsel did not suggest a figure for future health care costs to the jury, it was plain on the evidence that her ongoing expenses for kinesiology,

massage therapy, and botox injections alone over the course of her working life would well exceed the \$27,450 that the jury awarded.

Therefore, it was found that there was not an inconsistency in the amount awarded by the jury and that it was not to be set aside.

The effects of Moore v. Getahun

The other issue was that while this trial was taking place, the decision in *Moore v. Getahun* regarding the review of expert’s reports, had not yet been argued by the Court of Appeal. Therefore, there was discussion during this trial about the propriety of appellant’s counsel in having discussions with the expert, before the report was prepared. Although sympathetic to the appellant’s position, and finding that the respondent’s line of questioning was undoubtedly improper in light of the subsequent Court of Appeal decision in *Moore*, it was found that counsel agreed to the contents of the Judge’s charge on this issue and therefore, it was not a grounds for appeal.

This case demonstrates that the standard for appellate review of a civil case is very high and the onus is on the appellant.