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FROM: Dale Willis, Judicial Assistant

DATE: July 2, 2009

RE: **DIANE DEGENNARO et al v. OAKVILLE TRAFALGAR**
Court File No. C22753/00

COMMENTS: Attached please find a copy of Justice Gray's Reasons for Judgment in this matter, dated today.

NO. OF PAGES, including cover sheet: 40 pages
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[2] Chronic pain syndrome is viewed, in some quarters, with suspicion. That is primarily because there is no certain cause, and there are hardly any objective symptoms. Its existence is discerned almost exclusively from subjective descriptions related by the injured party. However, the pain is real. The existence of the syndrome has been recognized by reputable experts and has been the subject of litigation. The issues before me are whether its existence has been proven; whether the defendants have caused it; and what is the measure of the plaintiffs' damages.

Background

[3] Diane Degennaro lives in Mississauga with her husband and two sons, who are now 10 and 12 years old. She and her husband were married in 1993, and they live in a comfortable four-bedroom home. She is 40-years old. She last worked in July, 2003.

[4] Before 1999, Ms. Degennaro had no significant health problems, although she was involved in a motor vehicle accident in 1988. She recovered from that accident within a short period.

[5] After graduating from high school in 1987, Ms. Degennaro attended George Brown College in Toronto, and took a hotel management program, from which she graduated in 1990. She worked at Kelsey's Restaurant in Oakville, and then National Auto Accident Services Limited for slightly more than one year, until April, 1997.

[6] After the birth of her first child, Justin, Ms. Degennaro worked for Woodhead Canada Limited. Eventually, she was promoted to a customer

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service job. She had good performance reviews. The last salary she earned there was approximately \$33,500 per annum.

[7] On May 19, 1999, some events occurred that are crucial from the perspective of this case.

[8] Ms. Degennaro's son, Justin, who was then two years old, became ill. She took him to a clinic, but his condition worsened. He had symptoms of flu, he was vomiting, and had diarrhoea. Eventually she took him to Oakville Trafalgar Hospital, one of the defendants in this action, at approximately 7:30 p.m. Justin was admitted to the hospital at about 1:15 a.m. on May 20, 1999.

[9] Ms. Degennaro attended in the hospital room where Justin was to stay. There was a nurse in the room. The nurse placed Justin in a crib, and explained how the crib worked. Ms. Degennaro was to stay in the room with Justin. The nurse showed her a bed on which she could sleep. There were some sheets piled on one end of it, together with a blanket. The bed itself was actually a chair, which could be folded out into a bed. It was flat when it was first shown to Ms. Degennaro.

[10] Ms. Degennaro moved the bed so that it would be closer to the crib. It was on casters, and was not hard to move.

[11] Ms. Degennaro wanted to telephone her husband to give him the room number. There was a telephone near the head of the bed. She sat on the end of the bed nearest to the telephone. The next thing she knew, the bed buckled. Essentially, the end of the bed collapsed, and the bed rolled away. She fell heavily onto the floor, landing on her buttocks and lower back. She felt excruciating pain; she thinks she blacked out, she was dizzy and saw stars.

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[12] The nurse, who had been in the room, came over, sat her up, and put her in the middle of the bed. The nurse asked Ms. Degennaro if she was all right, to which she responded in the affirmative.

[13] Significantly, the nurse said to Ms. Degennaro "you're not supposed to sit on that end of the bed". Ms. Degennaro said "oh", to which the nurse responded, "it collapses".

[14] Ms. Degennaro stayed the night. She was uncomfortable. She found it hard to sit down in the bathroom.

[15] The next day, Ms. Degennaro went to the pharmacy and got some Extra Strength Tylenol.

[16] Justin was discharged from the hospital after three days. Ms. Degennaro did not go to work the day Justin was discharged, which was a Friday. She first went to work the following Tuesday. In the meantime, she felt pain and nausea.

[17] Ms. Degennaro returned to the hospital on May 31, 1999, because she still experienced pain. X-rays were done. A Dr. House told her she had a cracked sacrum, and that she should take Tylenol. Ms. Degennaro saw her family physician, Dr. Chernin, the next day. Dr. Chernin prescribed an anti-inflammatory, and told her to get plenty of rest.

[18] For the next month or so, Ms. Degennaro continued to take Tylenol but the pain persisted. She had difficulty getting out of bed. During the month of June, 1999, she could only walk slowly. If there was any movement, there was shooting pain in her legs and back. Sitting caused her more pain. She bought an inflatable cushion to sit on.

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[19] That summer, the family went on vacation. They went camping in a trailer. She could not do much to help. She could not engage in any bike riding or hiking.

[20] Ms. Degennaro saw Dr. Chernin a number of times between July and November, 1999. While the dizziness and nausea had disappeared, she continued to have pain down her thighs. Dr. Chernin sent her to see Dr. Malcolm, an orthopaedic specialist. By then, things were not as painful and she found it easier to get out of bed. Pain continued in her lower back. She was engaging in less activity than she did before.

[21] Ms. Degennaro's first visit to Dr. Malcolm was on January 17, 2000. Dr. Malcolm, after examining the x-rays, told her that she had a fracture in her sacrum, that surgery was not an option, and that she should give the injury time to heal. She should return in the spring if pain continued.

[22] Ms. Degennaro returned to see Dr. Malcolm in June, 2000. Nothing much had changed. The pain continued. She was still working and driving her car. Her marriage was getting stressful. Intimate relations were rare, and she and her husband were not getting along very well.

[23] Dr. Malcolm recommended that Ms. Degennaro see Dr. Hamilton Hall. She visited him in October, 2000. Dr. Hamilton Hall advised her that the muscles and tendons that were attached to the sacrum area had been disrupted, and they had not healed. He said she could suffer pain for as long as seven to ten years. He suggested that she continue using a cushion to sit down, and that she continue with pain medication, and just manage the pain. He did not recommend surgery, in fact he suggested that surgery might make the condition worse.

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[24] Ms. Degennaro consulted Dr. Chernin in March, 2001. Her symptoms were much the same. She found it difficult to sit at work. She had suffered a miscarriage in late 2000.

[25] Dr. Chernin recommended that Ms. Degennaro see Dr. Yip, an acupuncturist and chiropractor, and Erin Finnegan, a massage therapist. She began to see Dr. Yip twice per week, and Ms. Finnegan once per week.

[26] Ms. Degennaro saw Dr. Chernin on May 25, 2001. She told Dr. Chernin that she could not "keep it together". Because of the pain, she could not sleep, she was in emotional turmoil, and she "just wanted my life back."

[27] Dr. Chernin recommended that Ms. Degennaro stop working. She did so, and her last day of work was May 28, 2001. She commenced drawing short-term disability. She was sad to stop working because she enjoyed it. She expected to return.

[28] Dr. Chernin prescribed an anti-depressant, and referred her to a psychiatrist, Dr. Jan Fleming.

[29] Ms. Degennaro found that the therapy she received from Dr. Yip and Ms. Finnegan helped somewhat. She still had problems with headaches, and she had to sit on the cushion. She had some pain in her shoulder blades. Ms. Finnegan was treating the whole body.

[30] Ms. Degennaro saw Dr. Fleming in June, 2001. Dr. Fleming tried to encourage her to accept her condition. Her mood was low. She was losing hope, she was distressed and anxious.

[31] Dr. Fleming increased her medication, and referred her to the Dorothy Madgett Clinic, for relaxation therapy. She attended at the clinic in August, 2001.

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While there, she picked up a brochure which described the symptoms of fibromyalgia. After reading about it, it occurred to her that maybe she had fibromyalgia. While she showed the pamphlet to Dr. Hamilton Hall, who did not believe in fibromyalgia, she did not show it to her family doctor, Dr. Chernin.

[32] In the summer of 2001, the family again went camping. Her symptoms were worse. She could not do much during the camping trip.

[33] In the fall of 2001, she went to the Dominican Republic for one week. There, she had severe pain, and remained in bed for three days.

[34] Ms. Degennaro attended again on Dr. Hall in October, 2001. He referred her to the Canadian Back Institute, which she attended on November 27, 2001. She attended there about a dozen times within the next six months. There, she did exercises that were intended to strengthen her back and neck, and she did exercises at home. The exercises did not help the pain, which remained about the same, although she was better able to sleep.

[35] In February, 2002, Ms. Degennaro was involved in a motor vehicle accident. She hit the rear bumper of a car that had stopped ahead of her. Her left arm and the left side of her neck were injured. There was no injury to her lower back or sacrum, and there was no aggravation to her earlier injury. Ms. Degennaro testified that the symptoms from the motor vehicle accident were resolved by the fall of 2002.

[36] Ms. Degennaro continued to see her family doctor and Dr. Fleming, as well as attend the Madgett Clinic and Ms. Finnegan. She and her husband attended marriage counselling. She said her marriage was falling apart, as a result of the stress caused by the pain. She and her husband continued with marriage counselling until the end of 2008.

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[37] In October, 2002, Ms. Degennaro attended the pain clinic at Toronto Western Hospital, for pain management. This was intended to assist her to cope with the pain, not eliminate it.

[38] In 2002, Ms. Degennaro again went camping with the family for one week. She tried to participate in activities as much as she could. She was learning to manage the pain, although it never went away. At the beginning of 2003, she was learning how to deal with the pain, and she had a somewhat more positive outlook.

[39] In 2003, Manulife, which was providing her disability benefits, determined that she should attempt to return to work. Ultimately, she did so on a trial basis in June, 2003. What was contemplated was a gradual return to work, starting with a total of 12 hours over the first three days, and an increase in hours over eight weeks until she would be working full-time. She said she wanted to return to work because she enjoyed it.

[40] Ms. Degennaro testified that she attended at work for four hours per day for the first week. During that time, the pain increased in her lower back by 50%. During the second week, the pain returned to its original levels. Her legs, hips and knees were numb. She had migraine headaches which were worse. Her overall symptoms were worse. She said she felt like she had been hit by a truck.

[41] During her third week, she went to work every day. She said her supervisor and some co-workers observed her struggling with the pain. She felt overwhelmed. Her upper body pain was worse.

[42] During the fourth week, her symptoms were even worse. The stress in her family returned.

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[43] During the fifth week, she developed new symptoms. Her neck, shoulders, arms, hands, legs, feet and back were painful.

[44] Ms. Degennaro went to see Dr. Chernin, who told her that she believed she had fibromyalgia. Dr. Chernin discussed fibromyalgia with her. In substance, Dr. Chernin told her that the nerves continue with pain symptoms, even though it is difficult to determine the cause. She told her there are 18 "trigger" points. Dr. Chernin tested the trigger points, and advised her that she exhibited tenderness in 11 or 12 out of the 18. Dr. Chernin advised that it was likely the return to work had increased the problem.

[45] Dr. Chernin arranged for Ms. Degennaro to see Dr. Gordon Ko.

[46] Ms. Degennaro went to work again during the sixth and seventh weeks, but the symptoms got even worse. She finally stopped working altogether on July 25, 2003. She has never returned to work since. She testified that she could return to work if her chronic pain went away. However, no doctor has ever told her that the pain will go away.

[47] Ms. Degennaro has seen a variety of doctors, and she has followed all of their recommendations. She tries to manage her pain with medication, which she takes faithfully.

[48] Ms. Degennaro testified that her condition has had an impact on her children. She cannot do things with them that she used to do, such as engage in sports and teach them to skate. She cannot assist them with homework. They go to her husband Paul for help, and not to her.

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[49] Her relationship with her husband Paul is very difficult. Since December, 2008, they are no longer in marriage counselling. They have agreed on a trial break. When they are together, they are just housemates. There is no intimacy.

[50] Ms. Degennaro testified as to her out-of-pocket expenses, to which I will refer later.

[51] Ms. Degennaro's husband, Paul, testified. He said that, before the accident in 1999, they were an active couple. They engaged in sports, including golf, they walked, hiked, went camping and travelled. He said the marriage was great before the accident.

[52] Paul Degennaro testified as to his activities on May 19, 1999, the day of the accident in the hospital. He said he went to the hospital the next day, and discovered that the accident had occurred. He went over to the bed. There was a waste basket under the unsupported part of the bed. He took the waste basket out and pushed down. The bed folded up and essentially collapsed. It did not take very much force.

[53] Paul Degennaro described his wife's symptoms and activities subsequent to the accident, and essentially confirmed her evidence.

[54] Counsel for the plaintiffs called a number of physicians and a number of other health practitioners as witnesses. I will not describe their evidence in detail. I will attempt to summarize the relevant parts.

[55] Dr. Trudy Chernin, Ms. Degennaro's family doctor, testified that, before the accident in 1999, Ms. Degennaro was healthy. She had no serious medical issues. Commencing on June 17, 1999, the first day she saw her after the accident, Ms. Degennaro has been in pain. She has referred her to various

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doctors. Starting in November, 1999, she became concerned that the pain was continuing. From the nature of the injury Ms. Degennaro suffered, Dr. Chernin thought the pain should be reducing, but it was not.

[56] In March, 2001, she referred Ms. Degennaro to Dr. Yip, a chiropractor, and Erin Finnegan, a massage therapist. By then, the original fracture in Ms. Degennaro's coccyx had healed.

[57] By May, 2001, Ms. Degennaro was complaining that she felt overwhelmed. She was always fatigued, she was not sleeping, she was tearful and irritable. She complained that she could not be a wife or mother. The pain continued through 2001.

[58] On February 26, 2002, Dr. Chernin saw Ms. Degennaro after she had been in a motor vehicle accident. There was spasm in her left neck, her left shoulder, and her left arm. There was tenderness in her shoulder joints. There was a full range of movement in her spine. By April, 2002, she had responded positively to physiotherapy, there was decreased numbness and tingling in her left arm.

[59] In July, 2003, after Ms. Degennaro had attempted a return to work, Dr. Chernin discussed with her the symptoms of fibromyalgia. She described it as a diffuse chronic pain syndrome. She exhibited tenderness in a number of the trigger points. She thought the syndrome had developed from the original injury in 1999. By the middle of July, the pain was worse, and she had tenderness in 16 out of the 18 trigger points.

[60] Through the years 2003 to present, Ms. Degennaro has exhibited the same chronic pain symptoms, and there is no significant change to date.

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[61] Erin Finnegan, a massage therapist, testified. Ms. Degennaro had been referred to her by Dr. Chernin in 2001, for the treatment of myofacial pain. She described the nature of the treatment plan on which Ms. Degennaro was put, and which Ms. Finnegan described as conservative.

[62] After the motor vehicle accident in February, 2002, Ms. Finnegan started some treatment for Ms. Degennaro's symptoms in her left shoulder and arm. She said those symptoms had resolved within a few months.

[63] Ms. Finnegan treated Ms. Degennaro to the end of 2003, and did not see her again until February, 2007. By the end of 2003, Ms. Degennaro had significant, intense symptoms of pain.

[64] As noted, Ms. Finnegan commenced seeing Ms. Degennaro again in 2007. She still exhibits the same symptoms.

[65] Dr. David Saul testified. He is a general practitioner, whose practice is restricted to chronic pain and men's health. He has no particular qualifications as an expert in chronic pain. He has published no peer-reviewed articles on chronic pain, and he does not teach the subject. His expertise is derived through experience as a general practitioner whose practice is devoted, to a considerable extent, to the treatment of chronic pain.

[66] Dr. Saul described fibromyalgia as pain having a wide distribution through the body, accompanied by fatigue, sleep disorder, and mood disorder. He said he has treated at least 7,500 patients for fibromyalgia, and he gets about five to ten new patients per week with the syndrome.

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[67] Dr. Saul testified that there is no clear diagnosis for fibromyalgia. There is no blood test or other test that can be used to diagnose it. There is no clear cause and effect.

[68] Dr. Saul testified that fibromyalgia is one of a number of conditions lumped together under the umbrella of chronic pain. Some of the others are rheumatoid arthritis, osteoarthritis, and multiple sclerosis pain.

[69] Diagnosis of the syndrome involves taking the history from the patient, and determining tenderness at 18 trigger points in the body. If the patient exhibits tenderness at 11 out of the 18 points, it points to fibromyalgia. For some reason, most people with fibromyalgia are women. Indeed, 90% of fibromyalgia patients are women.

[70] There are three degrees of severity: mild, moderate and severe. Mild severity involves silent suffering, but the pain is manageable. Moderate severity involves pain that affects life to a degree, and affects the ability to sleep. Severe chronic pain involves intractable pain, with sleep disorders, fatigue, difficulty in walking, and sometimes it means that the patient is bedridden.

[71] Dr. Saul testified that diagnosis of the syndrome can take quite some time, sometimes five to ten years.

[72] The causes of the syndrome are unknown. It sometimes starts with familial disposition, resulting in a lower pain threshold. In some 20 to 40 percent of cases, the onset of symptoms coincides with physical trauma which does not have to be severe.

[73] Ms. Degennaro was referred to Dr. Saul in December, 2003. She exhibited symptoms of fibromyalgia. She exhibited tenderness at 16 out of the

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18 pressure points. She had a full range of motion. Her fibromyalgia was moderate to severe.

[74] By January, 2004, she was obtaining no benefit from the significant medications she was taking. Dr. Saul last saw her in December, 2004, when she had tenderness at 16 out of 18 pressure points. He referred her to a Dr. Karmy, for trigger point injections and opiates.

[75] Her condition was always the same. There was never any improvement. For the future, he can only see that she will have to live with chronic pain.

[76] In Dr. Saul's opinion, the onset of fibromyalgia commenced at the time of Ms. Degennaro's injury in 1999. Her coccydynia established the platform for a chronic pain state, which progressed to fibromyalgia. By the summer and fall of 2001, the pain was more widespread, accompanied by sleep disorders and headaches. By July, 2001, she was using a scooter.

[77] Dr. Saul was aware of the motor vehicle accident in February, 2002. In his opinion, that injury did not contribute to the progression of fibromyalgia. The symptoms of that injury were effectively resolved within a few months.

[78] Dr. Steve Blitzer testified. He is a board certified pain management physician. He is a staff physician at a headache and chronic pain clinic. While he has written peer-reviewed articles, only one is on the subject of pain, that being on recurrent migraines. 90% of Dr. Blitzer practice involves the treatment of chronic pain.

[79] Dr. Blitzer described chronic pain as being pain which persists despite the passage of time, greater than 12 months, and despite appropriate treatment. He described fibromyalgia as being widespread body pain in all four quadrants of the

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body, for longer than three months. The patient exhibits tenderness in at least 11 out of 18 standard points on the body.

[80] Treatment techniques include the encouragement of activity as much as possible; the use of medications; procedures such as injection into trigger points, nerve block injections, and Botox injections; physical therapy; and the evaluation of concurrent problems such as depression.

[81] While no specific cause can be pinpointed, several things can give rise to the syndrome, including muscular/skeletal injury; repetitive strain injury; psychological stress; sleep disturbance; illness; or surgery. A small number of people develop the syndrome with no apparent explanation at all. He said pain in one location in the body can spread so that it becomes whole-body pain. In the case of a localized injury, one would not expect it to develop into whole-body pain right away. The severity increases over time. Often, the syndrome is not recognized immediately.

[82] Dr. Blitzer saw Ms. Degennaro on December 20, 2005. She exhibited tenderness in 11 out of the 18 pressure points. She fit the definition of chronic pain, and she met the criteria of fibromyalgia. He noted that she was asymptomatic before her injury in 1999. He considered her injury in 2002, and concluded that the symptoms resulting from that injury were resolved within four months. In his opinion, which he reduced to writing in June, 2006, the injury that Ms. Degennaro suffered in May, 1999, was a significant contributing factor to her chronic pain syndrome. He testified that it is unlikely that Ms. Degennaro will return to work.

[83] Dr. Gordon Lawson testified. He is a chiropractor. He has worked with fibromyalgia patients for 27 years. He worked with Dr. Gordon Ko in doing an

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assessment of Ms. Degennaro. He did a physical examination, and prepared some of the material for a report done by Dr. Ko.

[84] Dr. Gordon Ko testified. He is a physiatrist. Within physiatry, one of the specialties is in chronic pain. Dr. Ko is board certified in physiatry, with a subspecialty of chronic pain. 90% of his practice is in the treatment of pain.

[85] It is difficult to imagine an expert witness who is more qualified in the subject of chronic pain than Dr. Ko. He has a *curriculum vitae* that runs to 39 single-spaced pages. He is a diplomate of the American Board of Pain Medicine. He is the Medical Director of the Physiatry Pain Treatment Clinic, Sunnybrook Health Sciences Centre. He has attended dozens, if not hundreds, of courses and lectures on the subject of chronic pain. By my count, he has authored or co-authored 29 peer-reviewed articles on the subject of chronic pain.

[86] Dr. Ko first saw Ms. Degennaro in April, 2003. In July, 2003, he diagnosed her as having chronic pain syndrome. She had tenderness in 14 out of the 18 pressure points.

[87] He next saw her in April, 2004. She still had pain. In his opinion, her fibromyalgia was severe. He has seen her subsequently.

[88] In Dr. Ko's opinion, the 1999 accident was the precipitating event that led to her fibromyalgia. In Dr. Ko's opinion, the 2002 motor vehicle accident was not a significant factor. The symptoms involving her left upper body, arising from that accident, were resolved within a reasonable period.

[89] In Dr. Ko's opinion, Ms. Degennaro will not return to work. Her quality of life has been reduced, and her relationship with her husband and children has been adversely affected.

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[90] The plaintiff called Ana Mather to testify. Ms. Mather was a colleague of Ms. Degennaro at Woodhead. She was able to observe the plaintiff at work, and she knew the plaintiff socially. Before the accident in 1999, they would engage in after-work activities, including bowling, volleyball, dancing, camping and clubbing.

[91] After the accident in 1999, Ms. Degennaro looked tired and drained. Ms. Degennaro walked in a funny way, with a limp. She had a "whoopie cushion" to sit on while at work. She took Advil or Tylenol every day, and she appeared to be struggling and in pain.

[92] Ms. Mather went camping with Ms. Degennaro in 2000 or 2001. Ms. Degennaro could not set up the tent, build fires, or engage in bike riding. She would just lie down or sit in a chair.

[93] On consent, counsel for the plaintiffs filed an updated report regarding Ms. Degennaro's out-of-pocket expenses.

[94] Counsel also filed, on consent, a report of a financial analyst regarding Ms. Degennaro's loss of income, and the costs of future care. I should note that, as would be expected, the projections made by the analyst are based, in large part, on information obtained from others, primarily Ms. Degennaro. 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

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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.

[95] In the report, the analyst calculates the loss of income to the date of trial at \$308,100, and the future loss of income, to July 31, 2033, at \$934,800. The analyst calculates the present value of future costs from the date of trial to September 14, 2051 at \$1,537,200. With a tax gross-up at 15% (\$230,600), the total future costs claimed are \$1,767,800.

[96] Counsel for the plaintiffs read in a portion of the examination for discovery of the defendants. That evidence discloses that the Hospital knows the name of the nurse who was with Ms. Degennaro when the accident occurred in May, 1999, and that the nurse is still employed by the Hospital. That nurse was not called as a witness.

[97] Counsel for the defendants called two witnesses: Dr. Benjamin Clark, and Dr. Michael Devlin. Dr. Devlin had examined Ms. Degennaro, but Dr. Clark had not. Dr. Clark rendered his opinion based only on a review of documentary records.

[98] Mr. Kwinter objected to the calling of Dr. Clark as a witness. He argued that to allow Dr. Clark to be called in this fashion was an indirect way of attempting to avoid the requirements of s. 105 of the *Courts of Justice Act*, which permits only one pre-trial examination by a doctor of the defendant's choice, without leave of the Court.

[99] I overruled that objection, and permitted Dr. Clark to testify. The defendants had had one pre-trial medical examination, which was conducted by Dr. Devlin. In my view, there is nothing in s. 105 of the *Courts of Justice Act* that

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prohibits the defendants from calling more than one medical witness. The fact that a witness' opinion is based on material other than an actual examination of the plaintiff may, and undoubtedly will, affect the weight to be given to the opinion. The fact that it is based on something other than an actual examination does not make the opinion inadmissible in and of itself. The records on which Dr. Clark based his opinion were already in evidence at this trial, and they had been made by various health practitioners who had testified. In the result, I permitted Dr. Clark to testify.

[100] Dr. Clark is a physiatrist, with a sub-specialty in internal medicine. He is engaged in a group practice, primarily involved in the management of pain. He treats chronic pain, including fibromyalgia.

[101] As noted, Dr. Clark reviewed a large number of the records that have been introduced into evidence at this trial. Based on those records, it appeared to Dr. Clark that, by November, 1999, the fracture that Ms. Degennaro suffered as a result of the accident in May, 1999, had healed.

[102] Dr. Clark noted that the general body pain suffered by Ms. Degennaro developed, for the most part, after she suffered her motor vehicle accident in 2002.

[103] Dr. Clark agreed that Ms. Degennaro suffers from chronic pain, particularly fibromyalgia, but in his opinion that condition was contributed to by more than one incident. Further, in his opinion, the coccydynia, resulting from the incident in May, 1999, was not specifically responsible for the development of Ms. Degennaro's fibromyalgia. In his view, there were a number of contributing factors, including factors personal to Ms. Degennaro. The most likely contributing factors were, in his view, a tendency to depression on the part of Ms.

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Degennaro, and the upper body trauma that she suffered as a result of the motor vehicle in 2002.

[104] On cross-examination, Dr. Clark agreed that he never met Ms. Degennaro, and that he had simply conducted a paper review. He acknowledged that a paper review is not the best way of performing an assessment, and that the medical practitioners who had actually treated Ms. Degennaro are in a better position to make a diagnosis. Notwithstanding that, he disagrees with the opinions of Dr. Chernin, Dr. Saul, Dr. Blitzer and Dr. Ko.

[105] When pressed to give some proportional estimate of the factors that contributed to Ms. Degennaro's condition, he allocated 20 to 25% to the Hospital incident in 1999, 20 to 25% to the motor vehicle accident in 2002, and the balance to factors personal to Ms. Degennaro, including her personality, her coping skills, her cultural background, and genetic factors.

[106] When pressed further, Dr. Clark acknowledged that Ms. Degennaro would not likely have developed fibromyalgia had the 1999 incident not occurred. However, he also was of the view that she would not have developed it without the 2002 motor vehicle accident. In his view, that accident "pushed her over the edge".

[107] The defendants called Dr. Michael Devlin to testify. He is a physiatrist, who deals extensively with chronic pain.

[108] Dr. Devlin examined Ms. Degennaro on September 6, 2006. He also reviewed the relevant documents.

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[109] Dr. Devlin took Ms. Degennaro's history, but significantly, he did not ask her about the onset of her complaints. Ultimately, he agreed with the other medical practitioners that Ms. Degennaro suffers from fibromyalgia.

[110] Dr. Devlin noted that the first diagnosis of fibromyalgia occurred in 2003, after the motor vehicle accident which occurred in 2002. Prior to the motor vehicle accident, Ms. Degennaro suffered primarily from what he termed localized chronic pain in her lower back. In his view, the time gap between 1999, when the first incident occurred, and 2003, when the diagnosis of fibromyalgia was made, was simply too long for there to be any causal connection. It was more likely, in his view, that the 2002 motor vehicle accident was the precipitating event, being closer in time to the diagnosis in 2003.

[111] On cross-examination, Dr. Devlin acknowledged that, while it is difficult to pinpoint a cause of fibromyalgia, the pain suffered by the patient is nevertheless real. He also acknowledged that fibromyalgia can remain undiagnosed for a considerable period of time. He was not aware that, in 2001, before she suffered the motor vehicle accident in 2002, Ms. Degennaro had exhibited symptoms of upper body pain, pain in her jaw, and that she had difficulty sleeping. He acknowledged that these features are consistent with fibromyalgia.

Submissions

[112] Mr. Kwinter submits that the Hospital is liable, in law, for the accident that occurred in May, 1999. Under the *Occupiers Liability Act*, and indeed at common law, the Hospital is under a duty to take reasonable care that persons entering on the premises, such as Ms. Degennaro, are reasonably safe while on the premises. In this case, the portable bed on which Ms. Degennaro was to

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sleep was subject to collapsing if weight was put on it in certain places. The Hospital's employee, the nurse who was in the room with Ms. Degennaro, was aware that this could occur. The nurse was not called as a witness, and it was submitted that I should draw an adverse inference as a result. Ms. Degennaro would obviously not have been aware of the tendency of the portable bed to collapse if she sat at one end of it. The Hospital was under a duty to take reasonable care that the bed would not pose a danger to Ms. Degennaro if she sat on it, or at the very least was required to warn her of the potential danger.

[113] With respect to the damage suffered by Ms. Degennaro, being chronic pain, specifically fibromyalgia, Mr. Kwinter submits that I should conclude, on the balance of probabilities, that there is a casual link between the 1999 incident and the pain that Ms. Degennaro suffers to this day. In Mr. Kwinter's submission, "but for" the 1999 incident, Ms. Degennaro would not likely suffer from chronic pain.

[114] Mr. Kwinter submits that this conclusion flows inexorably from the evidence, including the evidence of Ms. Degennaro herself, who described the onset of pain following the 1999 incident, which persisted even after the normal healing of the fracture. According to Ms. Degennaro, while the pain was primarily located in her lower back, it spread to other parts of her body, and was accompanied by other symptoms such as depression and an inability to sleep. The spread of the pain was gradual, and became more acute in 2003 and thereafter.

[115] Mr. Kwinter submits that Ms. Degennaro's own evidence is buttressed by the evidence of four physicians, all of whom were treating physicians, Drs. Chernin, Saul, Blitzer, and Ko. Each of these physicians, based on their own observations and their experience, made a causal link between the 1999 incident

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and Ms. Degennaro's fibromyalgia. Mr. Kwinter submits that the contrary opinions of Drs. Devlin and Clark should be discounted, because they were not treating physicians, and were simply retained to give opinions for the purposes of this litigation. Dr. Clark's opinion, particularly, suffers from his lack of a personal assessment of Ms. Degennaro.

[116] Mr. Kwinter submits that the injuries suffered by Ms. Degennaro were foreseeable. He submits that, while most people will heal normally after the type of incident that occurred in May, 1999, and will suffer no ongoing consequences after a few months, some people, as did Ms. Degennaro in this case, will suffer ongoing chronic pain.

[117] With respect to damages, Mr. Kwinter notes that there appears to be no disagreement as to the quantum of damages for Ms. Degennaro. Her expenses to trial, as reflected in Exhibit 15, which was admitted on consent, are \$116,120.45. With respect to her loss of income, to date and in the future, and the cost of future care, they are reflected in Exhibit 16, which, once again, was admitted on consent. Thus, Ms. Degennaro's loss of income to the date of trial is \$308,100; her future loss of income to July 31, 2033, is \$934,800, for a total loss of income of \$1,242,900. The present value of future cost of care is \$1,537,200, and it should be grossed up by 15%, for a total for future costs of \$1,767,800.

[118] Mr. Kwinter submits that an appropriate amount for non-pecuniary loss for Ms. Degennaro would be \$175,000 to \$200,000.

[119] With respect to the claims brought by Ms. Degennaro's husband and children under the *Family Law Act*, Mr. Kwinter submits that \$75,000 would be appropriate for Paul Degennaro, and \$25,000 would be appropriate for each child.

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[120] Mr. Birley, for the defendants, submits that the main issue in this case is causation.

[121] While the defendants did not admit liability for the incident in May, 1999, Mr. Birley did not strenuously argue that the defendants should not be found liable.

[122] Mr. Birley submits that the most likely cause of Ms. Degennaro's full-body pain was the motor vehicle accident that occurred in February, 2002. It was only after that accident that widespread pain to Ms. Degennaro's entire body developed. This view, he submits, is consistent with that expressed by Dr. Devlin and Dr. Clark, and should be accepted by the Court. There was simply too much time that elapsed between the incident that occurred in May, 1999, and the onset of full-body pain, which only occurred after the motor vehicle accident in February, 2002.

[123] Mr. Birley submits that the onus is on the plaintiff to demonstrate that, "but for" the incident in May, 1999, her full-body pain would not have occurred, and she has failed to discharge that onus.

[124] Mr. Birley also submits that, assuming that there is a causal link between the 1999 incident and Ms. Degennaro's full-body chronic pain, that consequence was not foreseeable. It is submitted that the damage suffered by Ms. Degennaro was simply too remote to justify compensation by the defendants. As stated by McLachlin C.J.C. in *Mustapha v. Culligan of Canada Ltd.*, [2008] 2 S.C.R. 114, at para. 14, the question is what a person of ordinary fortitude would suffer. In the same paragraph, McLachlin C.J.C. quoted from *White v. Chief Constable of South Yorkshire Police*, [1998] 3 W.L.R. 1509 (H.L.), at p. 1512: "The law

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expects reasonable fortitude and robustness of its citizens and will not impose liability for the exceptional frailty of certain individuals.”

[125] Mr. Birley submits that a person of reasonable fortitude and robustness, who suffered an incident similar to that which occurred in May, 1999, would have suffered localized pain for a few months while the fracture healed. That is the extent of the damage that would be foreseeable, and that is the extent of the damage for which Ms. Degennaro should be compensated. In this case, Ms. Degennaro did not suffer any income loss for two years after the incident, and she should simply be given a modest amount for non-pecuniary loss for the localized pain that would, in the ordinary course, have disappeared within a few months. Mr. Birley suggests that the sum of \$20,000 would be reasonable.

[126] On the assumption that damages are to be assessed on the basis that the defendants are liable for the ongoing chronic pain suffered by Ms. Degennaro, Mr. Birley did not take issue with the figures put forward in Exhibit 16. However, he submitted that the amounts claimed for future loss of income and future care should be reduced for contingencies by 20%. Mr. Birley submits that an appropriate figure for non-pecuniary loss for Ms. Degennaro is \$60,000. The claims under the *Family Law Act* by Paul Degennaro and the children should be assessed at \$25,000 for Mr. Degennaro, and \$15,000 for each child.

Analysis

[127] As noted at the outset of these reasons, claims based on chronic pain have engendered suspicion. As stated by Gonthier J., for a unanimous Supreme Court of Canada, in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, at para. 1:

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Chronic pain syndrome and related medical conditions have emerged in recent years as one of the most difficult problems facing Workers' Compensation schemes in Canada and around the world. There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real. While there is at this time no clear explanation for chronic pain, recent work on the nervous system suggests that it may result from pathological changes in the nervous mechanisms that result in pain continuing and non-painful stimuli being perceived as painful. These changes, it is believed, may be precipitated by peripheral events, such as an accident, but may persist well beyond the normal recovery time for the precipitating event. Despite this reality, since chronic pain sufferers are impaired by a condition that cannot be supported by objective findings, they have been subjected to persistent suspicions of malingering on the part of employers, compensation officials and even physicians.

[128] Notwithstanding suspicions of this sort, the expert witnesses called by both parties in this case acknowledge that chronic pain, including fibromyalgia, is real, and can be the result of a precipitating event, including trauma.

[129] Since liability for the May, 1999 incident has not been conceded by the defendants, I must determine whether liability has been established.

[130] The issues for my determination are as follows:

- (a) Did the defendants owe Ms. Degennaro a duty of care?
- (b) Did the defendants breach the standard of care?
- (c) Did Ms. Degennaro suffer damage as a result of the May, 1999 incident, and if so, what is the extent of the damage?
- (d) Was the damage suffered by Ms. Degennaro foreseeable?

[131] I will consider each of these issues in turn.

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(a) Did the defendants owe Ms. Degennaro a duty of care?

[132] It is clear that the defendants owed Ms. Degennaro a duty of care. Whether Ms. Degennaro would have been considered a licensee or an invitee at common law is no longer material. The duty of care is now set out in s. 3 of the *Occupiers Liability Act*, as follows:

3 (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.

(2) The duty of care provided for in subsection (1) applies whether the danger is caused by the condition of the premises or by an activity carried on on the premises.

[133] Thus, the duty of the Hospital was to take such care as in all the circumstances of this case were reasonable to see that Ms. Degennaro was reasonably safe while on the premises. That duty of care applies whether any danger was caused by the condition of the premises or by an activity carried on on the premises.

[134] In this case, the Hospital was obliged to take reasonable care that Ms. Degennaro would not injure herself as a result of some condition in its hospital room that might pose a danger to her. In this instance, Ms. Degennaro was going to be sleeping in the hospital room while her son was ill. She had been directed to sleep on a portable bed supplied by the Hospital. The Hospital was under a duty to take reasonable care that the bed would not pose a danger to her. At the very least, the Hospital was under a duty to warn her about any condition of the bed that might pose a danger to her, so that she could take precautions herself.

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(b) Did the defendants breach the standard of care?

[135] In this case, the Hospital supplied a bed for Ms. Degennaro's use that posed a danger to her. If pressure was applied to one end of the bed, it would collapse. The Hospital was obliged to provide a bed that would not collapse in such a fashion, because of the obvious potential danger. At the very least, it was obliged to warn Ms. Degennaro of the potential danger so that she could take precautions herself.

[136] In this case, the Hospital was aware, through its employee, the nurse, that the bed would collapse if pressure was applied to one end of it, as indeed it did. At the very least, the Hospital was obliged to warn Ms. Degennaro that the bed would likely collapse if she sat on one end of it. The Hospital did not do so.

[137] Ms. Degennaro would have had no way of knowing that the bed might collapse if she sat on one end of it. She did sit on one end of the bed, it did collapse, and she fell heavily to the floor, suffering injury.

[138] There is no doubt, in my view, that the Hospital breached the standard of care to which it was subject, and it is liable for the injury suffered by Ms. Degennaro as a result.

(c) Did Ms. Degennaro suffer damage as a result of the May, 1999 incident, and if so, what is the extent of the damage?

[139] There is no dispute that Ms. Degennaro suffered damage as a result of the incident that occurred in May, 1999. The only dispute is the extent of that damage.

[140] The defendants submit that the extent of the damage flowing from the incident was the normal pain that would flow from the injury itself, and from the

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healing process, which would be expected to run its course within a few months. In this case, that healing process was completed by November, 1999, about five months after the injury.

[141] Ms. Degennaro, on the other hand, submits that the consequence of the incident in this case was full-body chronic pain, or fibromyalgia, resulting in ongoing pain which she will likely suffer for the rest of her life, and which means that she will never be able to work again.

[142] The thorny issue of causation has been explored by the Supreme Court of Canada in three relatively recent cases: *Snell v. Farrell*, [1990] 2 S.C.R. 311; *Athey v. Leonati*, [1996] 3 S.C.R. 458; and *Hanke v. Resurface Corp.*, [2007] 1 S.C.R. 333.

[143] In *Snell*, Sopinka J., for the Court, stated, at para. 30, that "causation need not be determined by scientific precision", and at para. 34, he said, "The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn although positive or scientific proof of causation has not been adduced."

[144] In *Athey*, Major J. delivered the judgment for a unanimous court. His judgment appeared, on first impression, to signal a retreat from the traditional "but for" test for causation.

[145] At para. 14 of his judgment, Major J. noted that "The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant." However, in other paragraphs of his judgment, he appeared to suggest that a broader test, a "material contribution" test, is more appropriate.

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[146] At para. 13 of his judgment, Major J. stated that "Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury." After referring to the "but for" test at para. 14, as I have quoted it, he then stated, at para. 15, "The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury", and at para. 17, he stated that "It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the *sole cause* of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring." In the same paragraph, he stated:

As long as a defendant is *part* of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions; defendants remain liable for all injuries caused or contributed to by their negligence.

[147] In *Resurface*, the Court reverted to a more traditional statement of the "but for" principle. Commencing at para. 19 of her judgment, McLachlin C.J.C., for the Court, stated:

19 The Court of Appeal erred in suggesting that, where there is more than one potential cause of an injury, the "material contribution" test must be used. To accept this conclusion is to do away with the "but for" test altogether, given that there is more than one potential cause in virtually all litigated cases of negligence. If the Court of Appeal's reasons in this regard are endorsed, the only conclusion that could be drawn is that the default test for cause-in-fact is now the material contribution test. This is inconsistent with this court's judgments in *Snell v. Farrell*, [1990] 2 S.R.C. 311 (S.C.C.), *Athey v. Leonati*, at para. 14, *Walker Estate v. York-Finch General Hospital*, [2001] 1 S.C.R. 647, 2001 SCC 23 (S.C.C.), at paras. 87-88, and *Blackwater v. Plint*, [2005] 3 S.C.R. 3, 2005 SCC 58 (S.C.C.), at para. 78.

20 Much judicial and academic ink has been spilled over the proper test for causation in cases of negligence. It is neither necessary nor helpful to

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catalogue the various debates. It suffices at this juncture to simply assert the general principles that emerge from the cases.

21 First, the basic test for determining causation remains the "but for" test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that "but for" the negligent act of omission of each defendant, the injury would not have occurred. Having done this, contributory negligence may be apportioned, as permitted by statute.

22 The fundamental rule has never been displaced and remains the primary test for causation in negligence actions. As stated in *Athey v. Leonati*, at para. 14, per Major J., "[t]he general, but not conclusive test for causation is the 'but for' test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant." Similarly, as I noted in *Blackwater v. Flint*, at para. 78, "[t]he rules of causation consider generally whether 'but for' the defendant's acts, the plaintiff's damages would have occurred on a balance of probabilities."

23 The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and defendant's conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone"; *Snell v. Farrell*, at p. 327, per Sopinka J.

[148] Commencing at para. 24, McLachlin C.J.C. noted that there can be exceptions to the "but for" test, and in some circumstances a "material contribution" test can be applied. However, the application of that test involves two requirements. First, it must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test, due to factors that are outside of the plaintiff's control, for example, current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury.

[149] In this case, I am satisfied that whether one applies the "but for" test or the "material contribution" test, the plaintiff has established causation on the balance of probabilities.

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[150] In my view, the plaintiff succeeds on the basis of the "but for" test. I come to this conclusion for a number of reasons:

- (a) The plaintiff's evidence, which I accept, establishes that debilitating pain commenced immediately after the incident in May, 1999. While it was focused in her lower back, and thigh area, it was not restricted to those areas. It progressed to other parts of her body, including her upper body. It was sufficient to prevent her from engaging in activities that she had enjoyed, including sports, hiking and walking. The pain had spread to such an extent that she thought she exhibited the symptoms of fibromyalgia, even before it was diagnosed in 2003.
- (b) The opinions of Ms. Degennaro's four treating physicians, Drs. Chemin, Saul, Blitzer and Ko, are consistent. The triggering event for Ms. Degennaro's chronic pain was the incident in May, 1999. The upper body injury suffered as a result of the 2002 motor vehicle accident was largely resolved within a few months.
- (c) I do not accept the contrary opinions of Drs. Devlin and Clark. Neither physician was a treating physician of Ms. Degennaro, and they do not have the advantage that a treating physician would have. The qualifications of neither physician approach those of Dr. Ko, who is extraordinarily well qualified in the field of chronic pain.

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[151] Thus, I conclude on a balance of probabilities that it is more likely than not that but for the incident in May, 1999, Ms. Degennaro would not suffer from the chronic pain from which she now suffers.

[152] While this is sufficient to dispose of the causation issue, in my view, the circumstances here are such that it would also be appropriate to apply the material contribution test.

[153] It is clear, as I noted earlier, that the Hospital breached a duty of care owed to Ms. Degennaro, thereby exposing her to an unreasonable risk of injury, and she suffered injury as a result. If she cannot prove, to scientific precision, that the 1999 incident was the cause of her chronic pain, her difficulty in doing so is as a result of limits of scientific knowledge. As noted by the Supreme Court of Canada in *Martin*, and as acknowledged by all of the medical witnesses in this case, it is impossible to pinpoint a specific cause of chronic pain, based on current medical knowledge. In this case, two incidents occurred, either of which may have contributed, to some extent, to the chronic pain now suffered by Ms. Degennaro. She cannot prove that the 1999 incident was the cause, to a degree of scientific precision. However, it is clear that, at the very least, the 1999 incident was a materially contributing factor. Indeed, Dr. Clark, one of the witnesses called by the defendants, acknowledged as much.

[154] For these reasons, based on the material contribution test, in addition to the "but for" test, I would hold that causation has been established.

(d) Was the damage suffered by Ms. Degennaro foreseeable?

[155] Counsel for the defendants argues that, assuming that the chronic pain suffered by Ms. Degennaro was caused by the 1999 incident, that consequence

was unforeseeable, and is too remote. Mr. Birley argues that the defendants can only be called upon to compensate the plaintiff for the consequences of the injury that would be suffered by a person of ordinary fortitude. A person of ordinary fortitude would be expected to suffer some localized pain that would last about as long as the healing process, which, in a case such as this, would be a few months.

[156] I do not accept this submission. In my view, this is a classic "thin-skulled plaintiff" situation, and the defendants must take the plaintiff as they find her.

[157] Much confusion has ensued from the two decisions of the Privy Council in *The Wagon Mound, Nos. 1 and 2: Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co.*, [1961] A.C. 388 (P.C.); and *Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty.*, [1967] A.C. 617 (P.C.). In those two cases, the Privy Council came to arguably inconsistent results on whether damage suffered as a result of the ignition of fuel oil on the surface of water was foreseeable.

[158] In *Mustapha, supra*, the Supreme Court of Canada analyzed the issue. In that case, the Court held that it was not reasonably foreseeable that the plaintiff would suffer serious mental injury as a result of seeing flies in a bottle of water that he was about to install for a customer.

[159] At para. 14 of her judgment, McLachlin C.J.C. stated that a plaintiff is to be considered objectively, not subjectively. Thus, a plaintiff is not to be considered in the context of his or her own personal makeup, which may give rise to the specific injury suffered, but rather objectively. That is, one must ask what a person of ordinary fortitude would suffer.

[160] At para. 16 of her judgment, McLachlin C.J.C., in a passage that has some significance for this case, stated:

Once a plaintiff establishes the foreseeability that a mental injury would occur in a person of ordinary fortitude, by contrast, the defendant must take the plaintiff as it finds him for purposes of damages. As stated in *White*, at p. 1512, focusing on the person of ordinary fortitude for the purposes of determining foreseeability, "is not to be confused with the 'eggshell skull' situation, where as a result of a breach of duty the damage inflicted proves to be more serious than expected". Rather, it is a threshold test for establishing compensability of damage at law.

[161] In my view, it is foreseeable that chronic pain may result from a physical injury. While the actual cause of chronic pain is not known, it is known that some people will develop chronic pain after physical trauma. Thus, chronic pain is foreseeable as falling within a range of consequences that may flow from a physical injury. This is a foreseeable consequence in a person of ordinary fortitude. Thus, in my view, the defendants must take the plaintiff as they find her. As noted by McLachlin C.J.C. at para. 16 of *Mustapha, supra*, this is simply a case where the damage inflicted has proven to be more serious than expected.

[162] There is obviously a subtle distinction between a person of less than ordinary fortitude who suffers damage that is not foreseeable, and a person of ordinary fortitude who suffers damage that is more serious than expected. However, in view of the analysis in *Mustapha*, the distinction is real and must be respected. I have no doubt that Ms. Degennaro falls into the category of a person who is a person of ordinary fortitude who has suffered damage that is more serious than expected.

[163] For the foregoing reasons, the chronic pain suffered by the plaintiff, Ms. Degennaro, was a foreseeable consequence of the incident that occurred in May, 1999, and the defendants must compensate her for it.

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Damages

[164] As noted, the expenses to the date of trial, \$116,120.45, are not in dispute.

[165] 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 loss of income and future costs should be reduced for contingencies. As noted earlier, Mr. Birley submits that both claims should be reduced by 20%. Mr. Kwinter submits that there should be no reduction, but that if there is to be any reduction, at most the future loss of income claim should be reduced by 10% and there should be no reduction for the claim for future costs.

[166] The issue of deductions for contingencies is discussed in some depth in Cooper-Stephenson, *Personal Injury Damages In Canada*, (2nd ed.) (Carswell, 1996). Contingencies with respect to future loss of earnings are discussed at pages 375-394, and with respect to future cost of care at pages 449-455.

[167] With respect to future income loss, the author notes that allowances for contingencies have varied considerably. Even in the famous "trilogy" of 1978 (*Andrews v. Grand & Toy Alberta Ltd.* (1978), 83 D.L.R. (3d) 452 (S.C.C.); *Arnold v. Teno* (1978), 83 D.L.R. 609 (S.C.C.); and *Thornton v. Prince George School District No. 57* (1978), 83 D.L.R. (3d) 480 (S.C.C.)), the deductions ranged from 10% to 20%.

[168] It is clear that any deduction for contingencies reflects something less than a precise analysis, and is really a form of guesswork. Furthermore, contingencies may work both ways, up and down. While a plaintiff may lose his

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or her job, or may die prematurely, it is equally possible that a plaintiff may be promoted or secure a higher-paying job, or may have a longer working career than expected.

[169] With respect to contingencies relating to the cost of care, the author notes that any reduction will normally be a modest one, and that an award may well be increased for contingencies. In any event, the positive and negative contingencies may cancel each other out.

[170] In the circumstances, I will reduce the award for future loss of income by 15%, and I will reduce the award for future costs by 5%.

[171] I am persuaded that the range for non-pecuniary loss for Ms. Degennaro, urged upon me by Mr. Kwinter, is appropriate. I will award Ms. Degennaro \$175,000 for non-pecuniary loss.

[172] It is clear that Paul Degennaro and the children have suffered a loss of guidance, care and companionship as a result of the injury to Ms. Degennaro. I will award Mr. Degennaro \$65,000 for his claim under the *Family Law Act*. I will award each child \$25,000.

[173] In the result, I award as follows:

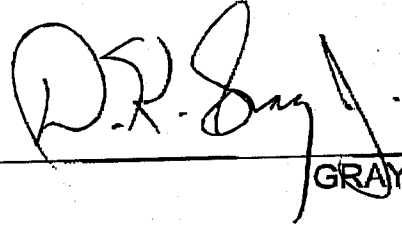
(a) Ms. Degennaro:

(i)	Expenses to the date of trial -	\$116,120.45
(ii)	Loss of income to the date of trial -	\$308,100.00
(iii)	Future loss of income -	\$793,900.00
(iv)	Future costs -	<u>\$1,679,410.00</u>
	TOTAL	\$3,073,210.45

- (b) Paul Degennaro - \$65,000;
- (c) Justin Degennaro - \$25,000;
- (d) Ryan Degennaro - \$25,000

[174] Prejudgment interest shall be calculated in accordance with s. 128 of the *Courts of Justice Act*. If there is any dispute as to the calculation, I may be spoken to.

[175] I will entertain written submissions with respect to costs, not to exceed five pages, together with a costs outline or bill of costs. Counsel for the plaintiffs shall have ten days to file submissions, and counsel for the defendants shall have ten days to respond. Counsel for the plaintiffs shall have five days to reply.



 GRAY J.

Released: July 2, 2009

COURT FILE NO.: C22753/00
DATE: 20090702

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

DIANE DEGENNARO and PAUL
DEGENNARO JUSTIN DEGENNARO and
RYAN DEGENNARO, minors by their
Litigation Guardian DIANE DEGENNARO

Plaintiffs

- and -

OAKVILLE TRAFALGAR MEMORIAL
HOSPITAL and HALTON HEALTHCARE
SERVICES

Defendants

REASONS FOR JUDGMENT

Gray J.