



In this medical malpractice action the plaintiffs sought damages against a number of defendants. Dr. Burg was found liable at trial for damages as follows:

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| 1. | Non-pecuniary loss    | \$ 40,000.00   |
| 2. | Past loss of income   | \$ 501,000.00  |
| 3. | Future loss of income | \$ 280,000.00  |
| 4. | Court order interest  | \$ 117,494.73. |

At the opening of the appeal, counsel for the appellant abandoned the appeal on liability.

At issue in the present appeal is the award for past loss of income, future loss of income, and the award for court order interest.

The plaintiff Guenther was injured in a motor vehicle accident on September 19, 1980. As a result of that accident, the plaintiff sustained a comminuted fracture of the left humerus. The complaint against the defendant Burg was that he failed to debride the wound. The plaintiff Guenther developed an infection in his left upper arm which led to chronic osteomyelitis.

At the time of the accident Guenther was 34 years of age and carried on business as a logging contractor. His company operated three units of heavy machinery known as feller-bunchers. Guenther was a very efficient logging operator and his business was expanding.

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3 Guenther had left school after Grade 9 and commenced working in  
4 the forest industry. He found employment operating equipment in various areas  
5 of the forest industry and, as he operated the equipment, he also developed  
6 knowledge and ability which enabled him to adjust and repair the equipment. In  
7 1978 he commenced to operate a feller-buncher, a machine used to cut down  
8 trees growing in the forest. During 1978 Guenther entered into an arrangement  
9 with N.N. Kalyn to purchase a feller-buncher. Kalyn leased the feller-buncher  
10 with a right-to-purchase. In December 1978, when experience showed that  
11 Guenther was a suitable feller-buncher operator, Kalyn permitted Guenther to  
12 purchase the feller-buncher in question. Thereafter Guenther had a contract  
13 with Kalyn to cut trees for Kalyn who, in turn, had a contract to supply logs to  
14 B.C. Forest Products Ltd.

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16 During spring breakup in 1979, Guenther arranged to have Jake L.  
17 Guenther Logging Ltd. incorporated. The incorporation took place on May 31,  
18 1979. Guenther then rented his feller-buncher to the company. The purchase  
19 price of that machine had been \$167,000.00.

20 On September 27, 1979 the company acquired a second feller-buncher  
21 which had a capitalized value of \$267,000.00. On June 4, 1980 the company  
22 acquired a third feller-buncher at a capitalized value of \$ 232,900.00. After the  
23 company acquired the second feller-buncher, it too was under contract to Kalyn  
24 Logging, cutting trees for delivery by Kalyn to B.C. Forest Products Ltd. It was  
25 necessary for each feller-buncher unit to produce \$20,000.00 of revenue per  
26 month in order for its operation to be profitable. At the time that the company  
27 commenced operating the one feller-buncher and then the second feller-buncher  
28 for Kalyn Logging, Kalyn in turn had a contract with B.C. Forest Products Ltd.  
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3 to deliver between 18 and 25 truckloads of logs per day. Due to a recession in  
4 the forest industry commencing sometime in 1980, B.C. Forest Products Ltd.  
5 reduced the number of truckloads it required from Kalyn Logging to 15  
6 truckloads per day. The effect of this reduction was to require, in effect, one  
7 and a half feller-bunchers to meet Guenther Logging Ltd.'s contractual obliga-  
8 tions to Kalyn Logging.

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10 The trial judge found, upon the evidence before him, that the  
11 recession that occurred in the forest industry did not contribute to the losses  
12 suffered by Guenther Logging Ltd. subsequent to Guenther's accident. The  
13 evidence disclosed that work was available for feller-bunchers during that  
14 period. The trial judge concluded that the losses were the result of Guenther not  
15 being present to supervise the operation and do his work as an operator and  
16 mechanic.

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18 Evidence was led by the plaintiffs at trial to show the earnings of  
19 Guenther from 1975 to 1983, together with evidence of the profits and losses of  
20 Guenther Logging Ltd. from its incorporation until the date of trial.

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22 PAST LOSS OF INCOME

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24 On this issue the plaintiffs contended that the loss fell into three  
25 categories:

- 26 (1) lack of supervision  
27 (2) increased expenses re maintenance costs  
28 (3) increased expenses re extra operators' costs.  
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3 Guenther was not able to return to supervise his logging operation  
4 until September 1981. After that date he was only able to give it a limited  
5 amount of supervision due to the osteomyelitis from which he was suffering. He  
6 returned to full-time supervision in June 1982.

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8 Prior to the accident, Guenther had made a lot of the necessary  
9 repairs and adjustments to the equipment in the field, although on more major  
10 problems it was necessary to obtain assistance from Finning Tractor & Equip-  
11 ment Co. Ltd., the supplier of the feller-bunchers. Further, prior to the  
12 accident, Guenther himself had operated one of the feller-bunchers and, upon the  
13 evidence, he was a very efficient operator. During the period when he was unable  
14 to supervise, all the repairs had to be done by Finning Tractor & Equipment Co.  
15 Ltd. It was not until he returned to full-time supervision in June 1982 that he  
16 was able to hire a feller-buncher operator who had the necessary mechanical  
17 experience and ability to make the type of repairs that Guenther himself had  
18 formerly made to the equipment on site.

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20 During the period from September 1980 until June 1982, two of the  
21 feller-bunchers continued to work for Kalyn Logging. During this period Kalyn  
22 sought to give such supervision to the operation of the feller-bunchers as time  
23 permitted. The third feller-buncher was initially employed upon work for B.C.  
24 Forest Products Ltd. on a causeway contract. Logging had been completed on  
25 the causeway on September 15, 1980 and thereafter it was necessary to construct  
26 a logging road including culverts and excavation work to permit the logs to be  
27 hauled to the weigh scales. The cutting head from the feller-buncher was  
28 removed at that time and replaced with a bucket in order that the culverts could  
29 be installed and ditching could be done. A new operator had been employed when  
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3 the feller-buncher had been acquired in 1980. Guenther was training him at the  
4 time of the accident. As a result of his absence from work, the feller-buncher  
5 was not fully employed during the fall of 1980, nor, according to the evidence,  
6 was it fully employed during 1981. In January 1982 the feller-buncher owned by  
7 Guenther was destroyed by fire. It was not replaced. Thereafter the two feller-  
8 bunchers owned by Guenther Logging Ltd. were employed performing the  
9 contract with Kalyn Logging.

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11 At trial the evidence disclosed that the revenue from contract  
12 logging by Guenther Logging Ltd. was as follows:

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<u>1980</u>	<u>1981</u>	<u>1982</u>	<u>1983</u>
\$ 470,026	\$ 425,321	\$ 317,544	\$ 288,031

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17 During those same fiscal periods, the costs incurred for equip-  
18 ment, repairs and maintenance were as follows:

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<u>1980</u>	<u>1981</u>	<u>1982</u>	<u>1983</u>
\$ 35,508	\$ 77,024	\$ 105,900	\$ 54,557

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23 The evidence showed that the cost to the company of hiring an  
24 operator to replace Guenther was \$32,000 per annum.

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26 At trial the plaintiffs called Dr. Guthrie, a business valuator, who  
27 had prepared a report dealing with the past loss of income of the plaintiffs. It  
28 was his conclusion that the past loss of income amounted to \$501,000. That  
29 opinion was accepted by the trial judge. He said:  
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Dr. Guthrie said he conducted his research and investigations of the plaintiffs' operations from time to time over a period of 21 months prior to trial. I have concluded that the facts upon which he based his opinions were canvassed during the evidence before me and I am therefore able to accept the opinion of Dr. Guthrie as to the past income loss to the plaintiffs. I set that loss at \$501,000.

Dr. Guthrie prepared a number of tables which were included in his report. In part, the information contained in the tables was extracted from the financial statements of the company. Dr. Guthrie showed, in one table, the net income of Guenther Logging Ltd. during the years in question. That income was as follows:

	<u>1980</u>	<u>1981</u>	<u>1982</u>	<u>1983</u>
<u>Corrected</u> <u>Income</u> <u>(Losses)</u>	\$13,595	\$(54,458)	\$(74,388)	\$(57,656)

The approach adopted by Dr. Guthrie was to take the operating year preceding the accident as a model for the expected revenue-cost structure for succeeding years. Upon that basis, he then proceeded to relate his estimates of what earnings should have been in the post-accident years to the actual experience in order to determine the business losses. Dr. Guthrie concluded that the loss to the plaintiffs between the date of the accident and the date of trial amounted to \$392,000. To that figure he added an inflation factor, and this brought his calculation for past loss of earnings to \$501,000.

To begin with, the defendant contends that no calculation should have been made by Dr. Guthrie with respect to inflation. His task was to determine the past loss of income up to the date of trial. In response to that submission, the plaintiffs rely upon the decision of this Court in McArthur v. Barton (1982),

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37 B.C.L.R. 10. In that case the Court was dealing with a claim for pre-judgment interest with respect to damages for non-pecuniary loss. In the present case, on this issue, the Court was seeking to determine the extent of the loss of income from the date of the accident to the date of trial. In my opinion, a distinction is to be drawn between past loss of income and damages for non-pecuniary loss. Once the extent of the past loss of income is established, then it would be appropriate to make an award of court order interest in respect of such past loss of income but, unlike an award for non-pecuniary loss, I do not consider it proper to include in the computation of past loss of income a factor for inflation: see McCaig et al v. Reys et al (1979), 90 D.L.R. (3d) 13.

On this appeal the defendant further contended that an examination of the financial statements of Guenther Logging Ltd. did not support the assumption of Dr. Guthrie that the operating year preceding the accident could be adopted as a model for the expected revenue-cost structure for succeeding years.

It will be apparent from the passage quoted above from the reasons for judgment at trial that the trial judge did not examine the assumptions adopted by Dr. Guthrie before accepting his opinion as to the extent of the past loss of earnings.

The acquisition of the second feller-buncher in June 1980 affected the expenses of Guenther Logging Ltd. For example, the allowance for depreciation and amortization, as disclosed by the financial records, was as follows:



<u>1980</u>	<u>1981</u>	<u>1982</u>	<u>1983</u>
\$ 46,441	\$ 112,201	\$ 115,431	\$ 115,756

The new equipment also had effect on the interest paid on long term debt as follows:

<u>1980</u>	<u>1981</u>	<u>1982</u>	<u>1983</u>
\$ 27,292	\$ 63,663	\$ 52,457	\$ 69,338

The increases in depreciation and amortization and interest on long term debt were not items of expense arising from the claim of negligence against Dr. Burg. Dr. Guthrie concluded that upon the basis of the operating year preceding the accident the company earned a 16 percent return on revenue. He then applied that to the succeeding years in order to establish the extent of the loss of income without regard to those increases. Not to do so led Dr. Guthrie to an erroneous conclusion with respect to the past loss of income.

Before simply accepting and adopting the report of Dr. Guthrie and the opinion expressed by him as to the extent of the loss of income between the date of the accident and the date of trial, the trial judge ought to have considered whether the result would constitute an award that, upon the basis of the evidence, was inordinately high. In a different context, Dickson, J. (as he then was) said in Lewis v. Todd, [1980] 2 S.C.R. 694 at p. 708:

Third, the award of damages is not simply an exercise in mathematics which a judge indulges in, leading to a "correct" global figure. The evidence of actuaries and economists is of value in arriving at a fair and just result. That evidence is of increasing importance as the niggardly approach sometimes noted in the past is aban-

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done, and greater amounts are awarded, in my view properly, in cases of severe personal injury or death. If the Courts are to apply basic principles of the law of damages and seek to achieve a reasonable approximation to pecuniary restitutio in integrum expert assistance is vital. But the trial judge, who is required to make the decision, must be accorded a large measure of freedom in dealing with the evidence presented by the experts. If the figures lead to an award which in all the circumstances seems to the judge to be inordinately high it is his duty, as I conceive it, to adjust those figures downward; and in like manner to adjust them upward if they lead to what seems to be an unusually low award.

In my opinion, the award for damages for loss of income to trial was inordinately high. I turn to the categories advanced by the plaintiffs as the basis for determining loss of income to trial.

The first consideration is lack of supervision. During the period between the accident and June 1982 when Guenther returned to full-time supervision of the logging operations of his company the revenue produced by the feller-bunchers diminished. Even after his return to full supervision in June 1982, the revenue of the company continued to decline and again the plaintiffs attribute this to his absence from full-time supervision up to June 1982.

The evidence disclosed that feller-bunchers were in demand throughout the period 1980 to 1984 and it is the contention of the plaintiffs that if Guenther had been available to supervise and maintain and repair the equipment, the revenues would have been substantially increased. That was not the approach adopted by Dr. Guthrie. He used the actual revenues earned in the post-accident years for two machines. During this period two machines were committed to the Kalyn Logging contract. As B.C. Forest Products Ltd. reduced the quota of logs it would accept from Kalyn, the work upon which these two feller-bunchers were engaged was reduced. That resulted in a reduction in

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revenue. It was those figures that Dr. Guthrie used for two machines in making his calculations. But the plaintiffs on appeal sought to contend that if Guenther had been available during this period he would have found other work to supplement the work provided by Kalyn Logging. The contract with Kalyn Logging was not in evidence, nor was there any evidence as to how practical it would be to transport these very large machines to other locations from time to time to keep them fully employed. Therefore I am not persuaded that the two machines would have been able to earn additional revenue during this period.

Turning to the third machine, it is clear that it was not efficiently employed during the period September 1980 to June 1982. The evidence, as I have indicated, discloses that work was available from sources other than Kalyn Logging. But the record does not disclose to what extent the third feller-buncher could have been effectively employed to earn the necessary \$20,000 per month in order to show a profit during this period.

On this subject, Guenther complained in his evidence that his feller-buncher operators did not work efficiently in his absence but Kalyn testified that during this period all his quota requirements were met by Guenther Logging Ltd. so that lack of supervision did not interfere with his company meeting its contractual obligations to Kalyn Logging.

It is necessary to keep in mind that after January 1982, when the machine owned by Guenther was destroyed by fire, the other two machines worked for Kalyn Logging.

In my opinion, the appropriate award for the loss of Guenther's supervision of the company's operations would be \$25,000.

Turning to the second category, namely increased expenses re maintenance costs, the financial records of the company disclose the following:

	<u>1980</u>	<u>1981</u>	<u>1982</u>	<u>1983</u>
<u>Equipment</u> <u>Repairs &amp;</u> <u>Maintenance</u>	\$ 35,508	\$ 77,024	\$ 105,900	\$ 54,557

From the foregoing table it would appear that during the 1980 fiscal year the company, even with the assistance of Guenther repairing and maintaining the equipment on the work site, incurred substantial expenses for repairs and maintenance. In his absence in 1981 the costs more than doubled, and continued to increase substantially in 1982. Then, as might be expected as a result of the hiring of a feller-buncher operator in June 1982 who had mechanical ability to effect repairs, the cost of equipment, repairs and maintenance substantially declined in 1983. It is clear on the evidence that the absence of Guenther from the worksite in 1981 and 1982 accounted for increased expenses to the company for equipment, repairs and maintenance. To some extent, those increases are to be accounted for by inflation, but that is a relatively modest factor in the overall increase. In my opinion, an appropriate allowance for this item would be \$65,000.

Turning to the third category, namely increased expenses for the operator who replaced Guenther, reference may be made to the financial statements of the company. They disclose the following:

	<u>1980</u>	<u>1981</u>	<u>1982</u>	<u>1983</u>
<u>Wages &amp; Related Costs</u>	\$ 140,353	\$ 123,485	\$ 100,023	\$ 94,032

These details were not canvassed at trial and therefore it is not clear why the wages paid by the company were declining while an additional employee was engaged at a salary of \$32,000 per annum to replace Guenther. Nevertheless, it is clear that such expense was a direct result of his incapacity resulting from the negligence of Dr. Burg. For this category I would fix the increased expenses at \$70,000.

Therefore, I would award \$160,000 for loss of income to trial.

FUTURE LOSS OF INCOME

At trial the plaintiffs introduced the report of an actuary who had proceeded to make calculations upon the basis that but for the accident if Guenther had been employed as a feller-buncher operator he would have earned \$44,000 per annum in 1984 terms. Upon the basis that he would give up the logging operation conducted by his company and become a motel manager, the actuary assumed that he would then receive a future annual rate of earnings of \$28,700 in 1984 terms. Upon the basis of an expected future loss of \$15,300 per annum for the balance of his working life, the actuary concluded that his future loss of income would be \$280,000.

At trial Guenther testified as follows:

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3 Q All right. Now, what are your plans for the future  
right now, Mr. Guenther? What do you want to do  
workwise for the rest of your life?

4 A I don't know why, I've always had it in my mind I  
5 have to get out of this logging deal any which way  
6 or the other. But for some time, I've always had it  
7 in my mind that I would like to run a small motel or  
8 something in a place now where it's warmer."

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10 Upon the basis of that evidence, the trial judge concluded:

11 As to future wage loss, I find as a fact that while  
12 the plaintiffs' operation is still carrying on Guenther will  
13 not be able to work as a feller-buncher operator. He must  
14 be compensated. The plaintiff testified that he wished to  
15 go into the motel business, a small one he suggested,  
16 perhaps in the Okanagan Valley. I do not think this is  
17 unreasonable in all the circumstances. The actuary's  
18 report has calculated the future lost earnings at \$280,000.  
19 Mr. Skorah on behalf of the defendant Dr. Burg submitted  
20 that the plaintiff's wish for a motel in the Okanagan be  
21 disregarded because the company is being operated and  
22 appears to be viable. However, I have concluded that it is  
23 unreasonable in all the circumstances for the plaintiff  
24 Guenther to continue in such altered circumstances. The  
25 defendant called no evidence as to future loss of income  
26 and therefore I am accepting the actuarial report and I  
27 find as a fact that Guenther's future loss income is  
28 \$280,000.

(my emphasis)

29 At trial Kalyn testified that the production of Guenther Logging Ltd.  
30 was improving. Guenther testified that for the nine-month period ending  
February 29, 1984, the balance sheet of the company showed that it had made  
approximately \$40,000. However, he noted that the company still had to go  
through the breakup season to the end of the fiscal year, namely May 31, before  
it would know precisely how the year was going to turn out. Dr. Guthrie  
concluded his evidence in chief with the following comment:

Just to finalize, I think we did say that Guenther  
had had — he has testified this morning, and I have seen

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3 the financial interim statements. He has turned it around  
4 now. He is back in business, so to speak, and these  
5 machines, in fact the potential, if one wanted to sort of  
6 start blue-skying, it's tremendous, although now he's cutt-  
7 ing with the sawhead rather than the pincher — the shear-  
8 head, which of course is obviously faster. You can cut  
9 more trees. I saw the production figures where Guenther  
10 actually with one machine grossed \$10,000 in December  
11 1983, albeit he was double-shifting machines, but it shows  
12 the potential. Obviously, I wasn't going to come and say  
13 he was going to do that kind of volume, because there  
14 wouldn't be any trees left in the whole territory, I guess.  
15 The potential is there.

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17 Based upon this evidence, in my opinion, it was a palpable error for  
18 the trial judge to conclude that Guenther was going to wind up his logging  
19 operation and become a motel manager. The inability of Guenther to operate a  
20 feller-buncher does not lead to a conclusion that Guenther Logging will not  
21 continue in business. Also, this case is to be distinguished from those decisions  
22 which deal with a loss of an opportunity: see Conklin v. Smith et al, [1978] 2  
23 S.C.R. 1107

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25 On the evidence Guenther Logging was making a good recovery from  
26 the setback it suffered in the 1982 and 1983 fiscal years. Its prospects were  
27 bright. Upon that basis, the reasonable conclusion was that Guenther would  
28 continue to operate his logging business. However, in the future, if for some  
29 reason he was compelled to wind up that company's operations and return to the  
30 type of employment he had before the accident, his permanent disability in his  
left arm would prevent him from again engaging in the type of physical activities  
which were involved in his employment prior to the accident. In that event, he  
would require some job retraining and an opportunity to become established in a  
new type of employment. Initially that employment might not result in an  
income equal to the income he would otherwise enjoy. It is against that

contingency that an allowance should be made in this case. In my opinion, an appropriate award on this head of damages would be \$35,000.

The third issue raised by the defendant concerned the matter of court order interest. In view of the conclusions I have reached with respect to the first issue, it follows that it is unnecessary to deal with this issue. As I have already indicated the plaintiffs are entitled to court order interest on the past loss of income.

For these reasons, I would allow the appeal.



I agree:



The Honourable Mr. Justice Craig

I agree:



The Honourable Mr. Justice Hutcheon

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