COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Buksh v. Miles,***
2008 BCCA 318

Date: 20080808
Docket: CA034092

Between:

Mustak Ahmed Buksh and Anita Buksh

Appellants
(Plaintiffs)

And

Johnny Tad James Miles

Respondent
(Defendant)

And

Insurance Corporation of British Columbia

Respondent
(Third Party)

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Frankel

W.D. Mussio	Counsel for the Appellants
G.M. Hagel	Counsel for the Respondents
Place and Date of Hearing:	Vancouver, British Columbia January 9, 2008
Place and Date of Judgment:	Vancouver, British Columbia August 8, 2008

Written Reasons by:
The Honourable Madam Justice Saunders

Concurred in by:
The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Frankel

Reasons for Judgment of the Honourable Madam Justice Saunders:

[1] After a trial by judge and jury, the action of Mr. and Mrs. Buksh for damages for injuries sustained in a motor vehicle accident was dismissed with costs against them. They appeal, saying the trial judge made errors in the conduct of the case with the result that they did not receive a fair trial. They contend as well that the jury verdict is perverse and contrary to uncontradicted evidence that they suffered injury in the accident.

[2] The motor vehicle accident occurred on March 29, 2002, when the vehicle carrying the appellants stopped for a red light and was struck from behind by a vehicle driven by Mr. Miles. Liability of Mr. Miles was admitted.

[3] Mr. Buksh, a realtor, was 47 years old at the time of the accident and 51 years old at the time of trial. He alleged that he had suffered injury to his neck, back, and knees, and that he suffered headaches and some other minor problems arising from the accident.

[4] Mrs. Buksh, a hairdresser, was 43 years old at the time of the accident and 47 years old at the time of trial. By the time of the trial, she had relinquished her work because, she said, of ongoing problems caused by the accident. She alleged an injury to her lower back and right shoulder, and said the shoulder injury limited her ability to work with her arms in the position required of a hairdresser, causing her first to reduce her hours and then to cease working as a hairdresser altogether in May 2004.

[5] The respondents contended at trial that the plaintiffs lacked credibility and their assertions that they suffered injury in the accident should not be believed.

[6] The jury was asked in separate questions whether Mr. Buksh and Mrs. Buksh sustained personal injury as a result of the car accident. The jury answered “No” to each question, with the result that the action was dismissed.

[7] The appellants advance four grounds of appeal. They candidly acknowledge that each of the first three grounds, by itself, may not be enough to allow them to succeed in setting the order aside. They say, however, that taken together, they establish an unfair trial. The grounds alleged are:

1) the trial judge erred in allowing the respondent to seek an adverse inference for failure of the appellants to call evidence from all their doctors;

2) the trial judge erred in not allowing the clinical records to go before the jury;

3) the trial judge erred in allowing the respondent to cross-examine extensively on collateral issues in regards to Mr. Buksh; and

4) the jury verdict is perverse in finding no injury to either appellant in the face of uncontradicted evidence to the contrary.

[8] The first complaint of the appellants concerns the instruction given to the jury that it could draw adverse inferences against the plaintiffs because they did not call

all physicians they had seen in connection with their alleged injuries. To fully understand the extent of medical evidence before the jury, it is useful to address the second ground of appeal first — removal of clinical records from the evidence before the jury.

[9] The appellants complain that at the beginning of the trial both counsel, by agreement, presented two volumes, one entitled “Joint Book of Documents of Mr. Buksh” and the other “Joint Book of Documents of Mrs. Buksh”. The volumes included, for Mr. Buksh, clinical records of Dr. Mudaliar, Fraser Heights Medical Centre, Guildford Medical Centre, Dr. Caines, and Rehab Max, and for Mrs. Buksh, clinical records of Dr. Mudaliar, Fraser Heights Medical Centre, and Dr. Hughes.

[10] The trial judge expressed concern about leaving the clinical records with the jury, absent evidence explaining them, in this exchange:

> THE COURT: Now, with respect to the medical records, I have had a lot of difficulty with medical records. I think that they often include things that shouldn’t properly be before the jury, that the jury draws from conclusions from them, and my concern is that you may have included full medical records with such things as the sticky note about Dr. Hughes that shouldn’t properly be before the jury. So what is included in the medical records?
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> COUNSEL FOR THE PLAINTIFFS: We have included full clinical records from the treating physicians of the plaintiffs. That’s been my practice. It’s there to provide for evidence of when the plaintiff was there and what the plaintiff said to the doctors and as to on what the doctor is basing his opinion.
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> THE COURT: But you’re calling the doctors, correct?
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> COUNSEL FOR THE PLAINTIFFS: Yes.
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> THE COURT: The doctors will be able to --

> COUNSEL FOR THE PLAINTIFFS: Well, we're calling the -- the family physician. The plaintiffs were treated by other doctors, as well. There were some walk-in clinics, and there was a specialist in the case of Mr. Buksh who is not being called. So there are other doctors, as well.
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> THE COURT: To the extent that the doctors are being called and the plaintiffs are being called, they can say who they saw, when they saw them, and those sorts of things. To the extent that there are notes made in the records, I don't think they serve a legitimate purpose, if I can put it that way. In other words, the plaintiff can say what they were complaining of. The doctors that are called can say what was said to them. But the notes that are made in the records I think do more disservice to the parties than they do service to the parties. I -- I think it's a bad idea to put the records in. You may be able to bring them in within business -- the business records exception, but it does a disservice to the parties to have the medical records there. They go in front of the jury. Nobody is being called to testify about them. Nobody is being called to explain what their notes mean. The jury draws conclusions without having any evidence to base it on, and I think it doesn't do anybody any good. So I'm inviting you to reconsider what you've done with respect to medical records.

[11] In the result, the clinical records were removed from the books, as seen in this exchange:

> THE COURT: -- don't have a problem with them being left in to the extent that you propose to cross-examine on them. My concern is notes that nobody ever touches on in evidence, where they simply go in front of the jury, and the jury draws whatever conclusion they will from them. Because they don't have the evidence with respect to what those notes mean. So, for example, in a case that I had, there's an X-ray report. Nobody ever touches on it, and the jury goes away and conclude whatever they want from the X-ray report. They have no expertise to interpret that X-ray report. No expert is called to assist them, and yet they go away with an expert report. Those sorts of things are the concerns that I have.
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> COUNSEL FOR THE RESPONDENT: Perhaps what we could do, My Lady, is -- is remove them from the books and then to the extent that they're referred to, hand them out to the jury -- --
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> THE COURT: That would -- --
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> COUNSEL FOR THE RESPONDENT: -- with the instruction -- --

> THE COURT: -- certainly be my -- --
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> COUNSEL FOR THE RESPONDENT: -- to put them -- --
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> THE COURT: -- preference, where -- --
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> COUNSEL FOR THE RESPONDENT: -- in the appropriate tab.
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> THE COURT: -- to put them in the book. Because to the extent they're referred to, certainly they're appropriate to go before the jury, but where they are not referred to at all, I think they are not appropriate to go before the jury.
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> COUNSEL FOR THE PLAINTIFFS: That would be acceptable to me, My Lady.

[12] Of the doctors whose clinical notes were removed from the joint book, Dr. Hari of the Fraser Heights Medical Centre, Dr. Tadros of the Guildford Medical Centre, and Dr. Caines, an orthopaedic surgeon, were not called as witnesses and their clinical records were never re-tendered.

[13] The trial judge, in my view, was squarely within her discretion to control the trial process in suggesting that simply presenting clinical records to a jury as part of a book of documents was not a desirable way to proceed. I see nothing in her comments that precluded either counsel from applying to tender all or some of those documents, having established their admissibility by correctly introducing them through a witness, producing them as business records, or advancing them on such other basis as may have been available. It is significant that the plaintiffs' trial counsel did not object to their removal from the books. Indeed, he could not have done so because it is always open to a trial judge to require a proper foundation for admission of any document notwithstanding the agreement of counsel to the contrary.

[14] Mr. Mussio, counsel for the appellants on appeal, acknowledges correctly that this complaint concerning removal of documents from the joint book, by itself, cannot win the appeal, but he says it bears on the issue of the invitation given by the trial judge to the jury to draw adverse inferences against Mr. Buksh because Dr. Hari, Dr. Tadros and Dr. Caines did not testify, and against Mrs. Buksh because Dr. Hari did not testify. He says that had the clinical records of those doctors been exhibits, the fact of the visits of Mr. and Mrs. Buksh to those doctors would have been clear, redounding in favour of their credibility and countering the defendant's submission that the plaintiffs' failure to call these witnesses should lead to an inference that their evidence would not have supported the plaintiffs' claims of injury from the accident, which were not to be believed.

[15] While it may be that the clinical records would have filled this function, I cannot say the trial judge erred in having the documents removed from the agreed books of documents. Nor can I say the plaintiffs were prejudiced by that removal; the plaintiffs, at an early stage of the trial, were alerted to the need to re-tender those documents if they wished to rely upon them in any way.

[16] I return, then, to the first ground of appeal, the issue of the invitation to draw an adverse inference.

[17] Mrs. Buksh testified she first consulted a walk-in clinic doctor within days of the accident in relation to low back pain, which she contends was caused by an injury sustained in the accident. The doctor, Dr. Hari, practiced at the Fraser Heights Medical Centre located in the mall in which Mrs. Buksh worked.

Approximately eight weeks later, in May 2002, Mrs. Buksh consulted her family physician, Dr. Mudaliar, complaining of both low back pain and shoulder pain. Dr. Mudaliar prepared medical opinions that were exhibits at trial, and he testified. In his report he stated:

> Mrs. Buksh most likely sustained a soft tissue strain to her lower back and right shoulder. Her shoulder injury caused her partial disability for work and activities of daily living until at least May 2003. Her prognosis is good with eventual recovery likely without permanent injury.

[18] Mr. Buksh testified he, too, first consulted Dr. Hari of the Fraser Heights Medical Centre for problems arising from his accident. He also consulted his family physician, Dr. Mudaliar, Dr. Tadros of the Guildford Medical Centre and Dr. Caines. As to Mr. Buksh, Dr. Mudaliar said in medical opinions introduced at trial:

> In summary Mr. Buksh sustained a soft tissue strains to his neck and back during the March 2002 car accident. This has caused him partial disability for work and activities of daily living until at least the end of June 2003. His prognosis is good and no permanent disability is expected.

and:

> Mr. Buksh was also assessed by Dr. Cecil Caines, an orthopaedic surgeon on May 5, 2003. Physical examination by Dr. Caines revealed decreased forward lumbar flexion. Neurologic examination was normal. There was normal lumbar lordosis without spasm or scoliosis. The sacroiliac joints were felt to be normal. Dr. Caines diagnosed mechanical low back pain. Exercise was recommended.

[19] The plaintiffs did not call either of the two doctors from the walk-in clinics (Dr. Hari and Dr. Tadros) as witnesses. They also did not call Dr. Caines, although Dr. Mudaliar referred to his opinions in the passage replicated above.

[20] Injury to both Mr. and Mrs. Buksh was in issue throughout the proceedings. For that reason, an independent medical examiner, Dr. Schweigel, examined Mr. and Mrs. Buksh at the request of the third party, the Insurance Corporation of British Columbia, and by agreement of counsel for Mr. and Mrs. Buksh.

[21] Dr. Schweigel examined both Mr. and Mrs. Buksh, but provided a written opinion only in respect to Mrs. Buksh. He was called as a witness to explain that he had not been asked to provide a written opinion concerning Mr. Buksh, and to answer questions on his opinion concerning Mrs. Buksh. His written medical opinion stated:

> **Diagnosis:**
>
> This lady sustained some soft tissue injuries to the neck. These soft tissue injuries would have been a strain of muscles and ligaments.

and:

> **Prognosis:**
>
> This lady will not develop any degeneration and/or arthritis of the low back. She will not require any surgery. She will not be more prone to injury in the future because of this low back problem she had on March 29/02. I will not comment on the prognosis for the right shoulder as, in my opinion, it is unrelated to the MVA of March 29/02, and is elaborated on in the section “Opinion.”

[22] Near the end of the trial, after the plaintiffs had closed their case and before Dr. Schweigel testified, trial counsel for Mr. and Mrs. Buksh advised the Court he would ask the judge to instruct the jury that they could draw an adverse inference from the fact Dr. Schweigel examined Mr. Buksh on behalf of the third party and was not asked to prepare a written opinion concerning Mr. Buksh. This prompted counsel for the third party, at the close of evidence, to advise the court that he may argue for an adverse inference arising from the fact certain treating physicians of Mr. Buksh were not called. Counsel for the plaintiffs made no comment in reply.

[23] The next day, in addressing the jury, counsel for the plaintiffs said, concerning the absence of evidence from Dr. Schweigel in relation to Mr. Buksh:

> At no time during the cross-examination or otherwise did ICBC suggest that anything other than the accident of March 29th, 2002 was the cause of Mr. Buksh's injuries. ICBC could have had a report from Dr. Schweigel on Mr. Buksh. He certainly put Mr. Buksh through enough. Dr. Schweigel was in a position to write such a report. They chose not to. Why? It's open to you to conclude, and I ask you to do so, that ICBC knew that a report from Dr. Schweigel would not be helpful to them. That he wouldn't say anything different from what Dr. Mudaliar had said. You can then conclude, based on that and the rest of the evidence that you heard, that Mr. Buksh is a credible witness and that he has suffered and is still suffering from the injuries that he sustained in the accident of March 29th, 2002.

[24] In his address to the jury, counsel for the third party referred to Dr. Schweigel's evidence, gave his explanation for the fact Dr. Schweigel had not prepared a report on Mr. Buksh, and said as to adverse inferences:

> He says you should draw an adverse inference against ICBC because I didn't get a report from Dr. Schweigel about Mr. Buksh. Well, what about Mr. Buksh and his doctors? He has seen Dr. Mudaliar, Dr. Tadros, Dr. Hari, who's the first doctor who treated him, and

> Dr. Caines, who's an orthopaedic surgeon, a specialist. We have two reports from Dr. Mudaliar. We don't have a report from Dr. Hari, even though Dr. Hari was the first doctor to treat Mr. Buksh. We don't have a report from Dr. Tadros, even though, as you heard in cross-examination, he told me on examination for discovery that he probably saw Dr. Tadros more than he saw Dr. Mudaliar. And we don't have a report from Dr. Caines, the specialist who treated Mr. Buksh. …

[25] In reply, counsel for Mr. and Mrs. Buksh explained why he had not obtained expert reports from the clinic doctors and Dr. Caines:

> Now, I'd just like to finish by saying something about the doctors. Mr. Hagel said we didn't get reports from Dr. Hari, Dr. Tadros and Dr Caines.
>
> You heard the evidence Dr. Hari and Dr. Tadros work at walk-in clinics. These are the people that the Bukshs go and see when they can't get down to Dr. Mudaliar's office, when he's too busy, when they've got something they need to deal with fairly quickly. They're not their family doctors. They're not the people who know the Bukshs and treat them all the time and know their history. That's why we didn't get reports from them, because they're not the right people to get reports from. A clinic sees, I don't know, 50, a hundred patients a day. They see them very quickly. There's the sign on the wall that says just deal with one thing. And they are not the right people to give a report, and that's why we didn't get the report from them.
>
> Now, Dr. Caines we didn't get a report because Dr. Mudaliar had Dr. Caines' opinion, and he incorporated that opinion into his report. There was no need to get another report that just said the same thing.

[26] The trial judge instructed the jury as to adverse inferences in relation to Dr. Schweigel, and in relation to Drs. Hari, Tadros and Caines:

> You also heard evidence that Dr. Schweigel examined Mr. Buksh on behalf of the third party, but the third party has not provided his opinion with respect to Mr. Buksh's injuries.
>
> You have heard the explanation provided by counsel for the third party that he determined that it was not necessary for the third party to

> obtain the opinion of Dr. Schweigel with respect to Mr. Buksh's injuries and told Dr. Schweigel not to prepare a report.
>
> In these circumstances, you may -- not must -- draw an inference against the third party for failure to produce an opinion from Dr. Schweigel. In other words, you may conclude that the evidence of Dr. Schweigel would not have supported the third party's suggestion that Mr. Buksh's injuries were not caused by the accident or were not as severe as he said they were.
>
> If you accept the explanation provided by counsel, you should not draw this inference.

and:

> You also heard evidence that Mr. Buksh saw Drs. Hari, Tadros and Caines, and Mrs. Buksh saw Dr. Hari. None of them provided opinions with respect to the plaintiffs' injuries. Again you may -- not must -- draw an adverse inference against the plaintiffs that the opinions of those doctors would not have supported the plaintiffs' position. You also heard the explanation provided by counsel for not obtaining a report from those doctors. If you accept the explanation provided by counsel, again you should not draw an adverse inference against the plaintiffs.

[27] At the conclusion of the charge, counsel for Mr. and Mrs. Buksh did not object to the instruction on adverse inferences.

[28] On this appeal, counsel for Mr. and Mrs. Buksh say the trial judge erred in instructing the jury it draw an adverse inference in relation to the opinion of a doctor they consulted who was not called as a witness, citing ***McTavish v. MacGillvray*** (1997), 38 B.C.L.R. (3d) 306 (S.C.); ***Morton v. McCracken*** (1995), 7 B.C.L.R. (3d) 220, 57 B.C.A.C. 47; ***Lawson v. Vu***, 2000 BCSC 206; ***Xavier v. de Jesus Nobrega***, [1994] B.C.J. No. 1007 (S.C.) (QL); ***Gyorffy v. Johal***, [1991] B.C.J. No. 763 (S.C.) (QL); and ***Mate v. Nour***, [1999] B.C.J. No. 930 (S.C.) (QL).

[29] The respondent in turn refers to the lack of objection by counsel to the charge, particularly in relation to Mrs. Buksh, and says there was no miscarriage of justice, citing ***McTavish v. MacGillvray***; ***Staples v. Monacelli*** (1997), 33 B.C.L.R. (3d) 126 (S.C.); ***Palmer v. Goodall*** (1991), 53 B.C.L.R. (2d) 44 (C.A.); and ***Prest v. Buckland (Guardian ad litem of)***, [1997] B.C.J. No. 2345 (C.A.) (QL). The respondent says there was ample evidence upon which the jury could find Mr. and Mrs. Buksh lacking in credibility, apart from any adverse inference, and that the dismissal of both claims is supported by the evidence.

[30] The notion of adverse inference is related to the best evidence rule. The observation in Wigmore's *Evidence in Trials at Common Law*, Chadbourne Rev. (Toronto & Boston: Little Brown & Company: 1979) vol. II, §287, at 202-3, offers valuable guidance:

> Furthermore, it seems plain that possible witnesses whose testimony would be for any reason comparatively *unimportant*, or *cumulative*, or *inferior* to what is already utilized, might well be dispensed with by a party on general grounds of expense and inconvenience, without any apprehension as to the tenor of their testimony. In other words, put somewhat more strongly, there is a general limitation (depending for its application on the facts of each case) that the inference cannot fairly be drawn except from the non-production of witnesses whose testimony would be *superior* in respect to the fact to be proved.
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> [Emphasis in original.]

[31] The general proposition long applied in British Columbia, stated by Mr. Justice Davey in ***Barker v. McQuahe*** (1964), 49 W.W.R. 685 (B.C.C.A.), is that an inference adverse to a litigant may be drawn if, without sufficient explanation, that

litigant fails to call a witness who might be expected to give supporting evidence. Further, said Mr. Justice Davey at 689, a plaintiff seeking damages for personal injuries "ought to call all doctors who attended him in respect of any important aspect of the matters that are in dispute, or explain why he does not do so".

[32] It seems to me that the tactic of asking for an adverse inference is much over-used in today's legal environment, and requires, at the least, a threshold examination by the trial judge before such an instruction is given to the jury.

[33] A judge trying a case with a jury is bound to instruct the jury as to the applicable law, and thereby to assist the jury in its consideration of the evidence and determination of the facts. Whether an adverse inference is drawn from failure to call a witness is a question for the trier of fact. In this case, I cannot say the trial judge erred in the content of the instruction she gave the jury on the matter of adverse inferences. However, it bears reminding that the delivery of medical care is not now as it was in 1964 when Mr. Justice Davey made his comments in ***Barker***. There is, today, a proliferation of "walk-in" medical clinics where the role of the "walk-in" clinic physician may be more limited than was the role of a family physician in 1964. Further, even people who have a family doctor may attend one or more such clinics as a matter of convenience, but still rely upon their family physician for core medical advice and treatment. The proposition stated by Mr. Justice Davey does not anticipate this present model of medical care. Likewise, the discovery process available to both sides of a lawsuit is not now as it was in 1964 when, in explaining his view on the need to call all treating physicians, Mr. Justice Davey referred to the professional confidence between a doctor and the patient. Today, the free

exchange of information and provision of clinical records through document discovery raises the possibility that an adverse inference may be sought in circumstances where it is known to counsel asking for the inference that the opinion of the doctor in question was not adverse to the opposite party.

[34] Taking the admonition of Mr. Justice Davey to the extreme in today's patchwork of medical services raises the likelihood of increased litigation costs attendant upon more medical reports from physicians or additional attendances of physicians at court, with little added to the trial process but time and expense, and nothing added to the knowledge of counsel. Perhaps the idea that an adverse inference may be sought, on the authority of ***Barker***, for the reason that every walk-in clinic physician was not called fits within the description of "punctilio" that is no longer to bind us, referred to by Mr. Justice Dickson in ***R. v. Sault Ste. Marie***, [1978] 2 S.C.R. 1299, in a different context.

[35] In this environment, and bearing in mind the position of a lawyer bound to be truthful to the court, it seems to me there is a threshold question that must be addressed before the instruction on adverse inferences is given to the jury: whether, given the evidence before the court, given the explanations proffered for not calling the witness, given the nature of the evidence that could be provided by the witness, given the extent of disclosure of that physician's clinical notes, and given the circumstances of the trial (e.g., an initial agreement to introduce clinical records that work contrary to the inference, or incorporation of that witness's views or observations in the report of a witness called by the other side) a juror could reasonably draw the inference that the witness not called would have given evidence

detrimental to the party's case. Where, as here, the trial started on the basis that all records should be before the jury, and ended with a request for an instruction on adverse inferences, and when both counsel have explained the failure to call the witness or witnesses by referring to their own assessment of the utility or need for the evidence, the answer to the threshold question I have stated is not self-evidently affirmative. In this case, in my view, the judge herself should have heard the explanations, considered the degree of disclosure of that witness's files and the extent of contact between the party and the physician, received submissions and determined whether a reasonable juror could draw the inference sought before giving the instruction to the jury for its consideration in its fact finding role. If not, the instruction had no place in her charge to the jury.

[36] The respondents say, referring to ***Brophy v. Hutchinson*** (2003), 9 B.C.L.R. (4th) 46 (C.A.); ***Matich-Robbins v. Roden***, 1999 BCCA 141, 121 B.C.A.C. 142; ***Morton v. McCracken***, *supra*; ***Sinclaire v. Collins***, 2006 BCCA 291, 54 B.C.L.R. (4th) 276; and ***Basra v. Gill*** (1994), 99 B.C.L.R. (2d) 9 (C.A.), that the appellants are doomed in this appeal because no objection was taken to the jury charge.

[37] It is true that this Court often has considered the lack of objection to a procedural deficiency or error fatal to an appeal. However, given the manner in which this issue arose, the timing of the various elements that have compounded the deficiency, and its effect on the fairness of the trial process, I do not consider the appeal should fail for this reason. Notwithstanding the lack of objection to the process by counsel for the plaintiffs, I consider this one of those instances in which

the order should be set aside on the basis of procedural unfairness, and a new trial ordered.

[38] Nor does it assist the respondent to say, as in ***Prest***, that there is more than ample evidence upon which to satisfy us that the jury's apparent assessment that the two plaintiffs lacked credibility was inevitable even without an invitation to draw an adverse inference. One must assume that it was important to the respondent's case, else the submission would not have been sought. Further, because the issue was one of credibility, a matter solely within the purview of the trier of fact, the issue is significant. One cannot know that the jury would have had in mind absent the request by counsel and the judge's instruction.

[39] In reaching this conclusion, I have not addressed the issue of the extensive cross-examination of Mr. Buksh on matters said to be collateral, or the appellants' submission that the verdict was perverse.

[40] On the former, Mr. and Mrs. Buksh complain that Mr. Buksh was cross-examined at length on his financial circumstances and disputes he had with others in the community. I consider both of these areas of examination bore on the quantum of damages; the first bore on the basis of Mr. Buksh's claim for lost income and the latter bore on his claim for non-pecuniary damages for diminishment of enjoyment of life. While the cross-examination may have been long-winded, it related to issues before the court and was for the trial judge to control at her discretion. I would not agree that the cross-examination of Mr. Buksh is a basis upon which to interfere with the verdict.

[41] Was the verdict perverse? Although the submission in the appellants' factum is directed to both appellants, at the hearing of the appeal the submission was narrowed to Mrs. Buksh's claim only. I agree that the order, dependent as it is on the jury's negative answer to the question of whether Mrs. Buksh suffered injury, is perverse. Both Mrs. Buksh's family physician and the independent medical examiner (who reviewed the medical records of Dr. Hari) concluded that Mrs. Buksh had suffered injury to her low back. Setting aside her claim for injury to her right shoulder, the evidence of the two doctors is not reasonably capable of an interpretation that Mrs. Buksh suffered no injury. For that reason, had I not formed the view that the entire action should be remitted for a new trial, I would set aside the verdict as it relates to Mrs. Buksh and order a new trial of her claim.

[42] In conclusion, I would allow the appeal, set aside the order and direct a new trial.

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Madam Justice Kirkpatrick"

I AGREE:

"The Honourable Mr. Justice Frankel"