

*Indexed as:*

**Kraft (Next friend of) v. Oshawa General Hospital**

**Between**

**Bertha Janet Kraft, a person of unsound mind, by her Next  
Friend, Richard Kraft, and the said Richard Kraft, plaintiffs,  
and**

**Oshawa General Hospital, Dr. Ian Lee, Dr. Lawrence W. Oxenham,  
Dr. A.G. Stocks, Eunice Bowman, Olive King and Jackie Coathup,  
defendants**

[1985] O.J. No. 1085

**Ontario Supreme Court - High Court of Justice**

**Boland J.**

March 22, 1985.

(39 pp.)

**Counsel:**

R.J. **Sommers**, Q.C., and R. Roth, for the plaintiffs.

C. Campbell, Q.C., and G. Smith, for the defendants.

---

**1 BOLAND J.:**-- This action concerns a substantial claim for damages arising out of a medical malpractice suit. At the commencement of the trial, liability was admitted on behalf of Dr. Lawrence W. Oxenham, an anaesthetist at the Oshawa General Hospital, and the claims against the other defendants were dismissed. Special damages have been agreed upon in the sum of \$40,596.96.

**2** The serious issue of the quantum of damages to be awarded to the injured plaintiff, Bertha Janet Kraft, and to her family, pursuant to s. 60 of the Family Law Reform Act, R.S.O. 1980, c. 152, remains. The injured plaintiff seeks compensatory and punitive damages totalling \$4,500,000.00. Her husband, Richard Kraft, seeks damages for loss of his business, lost income, value of services,

and loss of guidance, care and companionship. Seven other members of her family have also asserted claims under the Family Law Reform Act.

**3** The facts are virtually uncontested. Janet Kraft was born on December 22, 1933 in the town of Bowmanville, Ontario. She had three older brothers, James, William and John, as well as an older sister, Bernice. According to all reports, she was a good student and a devoted reader. Dr. James Long testified that, prior to her injury, she had an excellent vocabulary, and "was of superior intelligence". Janet completed grade 13, took a one-year commercial course, and as well, obtained a teacher's diploma in music from the University of Toronto. After graduation, she was employed as a bookkeeper by the Bowmanville Public Utilities Commission.

**4** Janet met Richard Kraft in the fall of 1962 and they were married July 26, 1963. She continued to work as a bookkeeper, gave private music lessons and assisted her husband with his paint and wallpaper business. In 1964, the Krafts moved to Brooklin, Ontario, where Richard Kraft ran a painting business and Janet operated his paint and wallpaper store. She kept all the business records, looked after the stock and sold paint and paper to his customers.

**5** Their son Alan was born on August 4, 1967, and James followed on February 21, 1970. Shortly after the birth of James, the family purchased a bungalow in Oshawa, Ontario, where they lived until 1983, when the home was sold. From 1970, until her unfortunate injury in November, 1980, Janet was the hub of the family. She was an excellent housekeeper and a devoted wife and mother. Her friend, Judith Ann Miles, described her as a "perfectionist". She stated: "She was conscientious, kind and considerate. A happy person". Mrs. Miles also testified that Janet was an excellent cook, an accomplished pianist and a talented artist. She said Janet's family "always came first". "She looked after their needs and was always home when the boys arrived from school". "She was very affectionate with her sons and loved to hug them."

**6** Janet taught both boys to play the piano, helped them with their homework and sports, and encouraged their activities in Scouts. The Kraft family enjoyed swimming, camping, skiing and travelling together. Janet also enjoyed her friends and attended dances and conventions with her husband. She often played the piano for the Lions Club, the Kinsman Club, the blind and the elderly. She coached her husband's soccer team when he was away. Janet continued to assist her husband in his painting business and spent half of each day looking after his books, typing invoices, estimates, and statements, and acting as sales clerk. When there was time, she loved to read.

**7** Janet enjoyed good health except for a long history of recurrent and chronic ear disease. On the advice of her family doctor, she was admitted to the Oshawa General Hospital on November 6, 1980 for a mastoidectomy. Surgery was to take place the following morning at 8 o'clock and the operation was scheduled to take 2 1/2 hours. She advised her family that she was to be released from the hospital 24 hours later.

**8** The surgery commenced under a general anaesthetic administered by Dr. Oxenham. He elected to manually ventilate her and according to the evidence this was the proper procedure in the

circumstances. Her respirations were entirely controlled by him. He was required to diligently squeeze the anaesthetic bag attached to the tubing to ensure that she received sufficient oxygen. The cardiac monitor was in front of him and he was also responsible for monitoring the patient's vital signs.

**9** The surgery appeared to be progressing well until around 8:30 a.m. when the patient began to develop bradycardia. She became hypertensive and eventually there was an appearance of cardiac arrest. The surgeon began external cardiac massage, the emergency button was pressed for extra assistance, and Dr. Oxenham continued oxygenation of the patient. Emergency resuscitation measures restored her vital functions. The surgery was not completed and the patient was removed to the intensive care unit. She remained comatose and unresponsive for three weeks. According to the medical evidence, she had suffered extensive brain damage.

**10** Dr. Kenneth Gorman, a specialist in internal medicine who has reviewed the hospital charts and records, testified that the blood oxygen level was considerably below normal. According to his testimony, if the anaesthetist fails to squeeze the bag, the patient will not receive oxygen, the blood concentration will fall, and a crisis may develop. Dr. Gorman testified that, in order for the patient's blood pressure and pulse rate to have dropped so drastically, and for her to have suffered such extensive brain damage, she must have received insufficient oxygen for at least four minutes prior to her developing bradycardia.

**11** Jackie Coathup, the registered nurse who assisted the surgeon during the operation, testified that after the initial incision the surgeon stated: "Glory this blood is a little dark". Dr. Oxenham checked the tube and the connections to the machine, noted that everything was fine and sat down. She observed him pull the hospital chart, clipped to a three-ring binder, back onto his lap. She also observed that only a portion of the chart was visible. A crossword puzzle was clipped on top of the anaesthetic record and portions of the puzzle had been filled in. After the emergency button was pressed, Nurse Coathup saw Dr. Oxenham scribbling on the chart and scratching things out. She also saw him tear the puzzle into pieces and crumple it.

**12** Janet Kraft was hospitalized for nine months. Initially her doctors had little hope for her survival and funeral arrangements were made by the family. When she emerged from her coma, she was unable to recognize her husband and her children. She was seen by a neurologist and the diagnosis was "diffuse hypoxic brain damage".

**13** Dr. Claude H. Vipond practices rehabilitation medicine. According to his report dated May 11, 1981, when he first saw Janet on December 3, 1980, she was unable to answer questions and had diffuse twitching movements. She was kept in restraints. On December 30, 1980, she was transferred to the rehabilitation area. She had poor balance and was prone to falls. She had to be trained to sit, walk and balance herself. She had to be taught how to construct sentences and communicate her thoughts and feelings. At the time of his report, she had difficulty getting out of a chair and walked with a slow, shuffling, unsteady gait. Her balance was still poor and she was still

prone to falls. She required assistance to climb stairs. She was incontinent and lacked coordination in her hands. According to Dr. Vipond's report, Janet Kraft's greatest loss was in her change of personality. Her brain damage seriously affected her faculties of reason, judgment, higher emotions and memory. She was unable to plan, organize and integrate her daily activities. She was incapable of interpreting abstract ideas. In his report, he stated his opinion that she had by that time, achieved most of the recovery to be expected and would never be able to care for herself.

**14** Dr. William Geisler, a specialist in internal and rehabilitation medicine, examined Janet on June 9, 1981, and again on October 25, 1983. Dr. Geisler gave evidence and on consent filed two detailed reports outlining his findings. He found that the damage to her central nervous system subjected her to faulty memory, sudden emotional changes, poor muscle tone and power, the inability to identify stimuli on both sides of her body, poor movement coordination and abnormal reflexes. He found her to be severely handicapped. Dr. Geisler's prognosis was that Janet is permanently and severely brain damaged. She will require constant attendant care to attend to her needs and ensure her safety. She will not be able to carry on normal conversation. There will be episodes of inappropriate behaviour, and continued spasticity and weakness in her muscles. She will continue to have major memory problems and will require constant, close supervision as long as she lives.

**15** Dr. James Long, an experienced clinical psychologist, met the Kraft family and was able to examine and test Janet on seven separate occasions. He found her to be unspontaneous, and testified that she seemed to understand his questions. He found her to be "a gentle lady who became irritable when confronted with her problems". The tests indicated that she was of superior intelligence prior to her injury and now functions in the area of retardation. She knows the meaning of words and can respond to questions but is unable to relate her inner thoughts or to communicate. She can recognize geometric forms but she cannot reproduce them. She can no longer draw or play the piano. She is unable to plan or organize tasks. It was Dr. Long's opinion that she would always need constant supervision and attention.

#### Cost of Future Care

**16** The most seriously contested issue was the suitability and cost of future care. All concerned are agreed that this was a tragic incident. I have reviewed the evidence over and over again and have given a great deal of thought to what would be the best future care plan for Janet Kraft. Unquestionably, she is entitled to full compensation. Unfortunately, no sum of money can possibly compensate her for the loss of her coordination and the changes in her personality and in her family relationships. My task is to provide this injured plaintiff with the most secure and comfortable life possible. In other words, I must determine what will be in Janet's best interest, a task made more difficult by the fact that she is unable to speak for herself.

**17** The expert witnesses are all agreed that the best care plan for Janet would involve her continuing to live in her home with her family, assisted by attendant care. However, what is best for

Janet is out of the question as far as her family are concerned. They have cared for her over a period of four years. It has been a terrible burden for all of them. They are drained emotionally and the husband and sons have advised the Court that they are unable to continue. They do not want to live with her and this is most understandable.

**18** The only other seriously considered alternatives were a home of her own with attendants around the clock and a nursing home. Counsel for the plaintiffs contends that Janet's needs are best met by enabling her to live in her own home with twenty-four hour attendant care. Counsel for the defendant argues that this would be completely impractical. Considering her physical and mental condition, Janet's needs would best be met in a nursing home.

**19** Dr. William Geisler specializes in rehabilitation medicine and according to his testimony he is particularly active in the management and treatment of severely neurologically disabled persons with spinal cord injuries. He examined Janet six months after the injury and again on October 25, 1983. It was his opinion that she was severely handicapped and permanently brain damaged. There would be little improvement in the future and she must be attended to twenty-four hours a day. It was also his opinion that she could never be gainfully employed. Dr. Geisler has considerable expertise in this area and I accept this evidence without hesitation.

**20** Dr. Geisler also testified that optimal care for Janet was to be in her own home with her family. He felt it was important for her to have the "security of attendant care". He explained that security of attendant care can be given by the family, it can be obtained by other persons who may be found to come into the home or it may be obtained in a hospital setting. It was Dr. Geisler's opinion that the care and the attention of the nursing staff in a hospital environment was excellent. He testified that "in a hospital setting, there is security of attendant care that may not be available outside". He described how the head nurse could move her staff around and "there would be no loss of continuity in terms of what might happen to endanger that patient's welfare. In the home setting, unless there is a security of attendant care, there is a real problem."

**21** Dr. Geisler expressed concern about the availability of proper attendant care for the private home. However, he agreed on examination-in-chief that if he were assured of proper attendant care, from the point of view of rehabilitation, "on balance he would prefer a private home to an institutional setting". He went on to testify that he believed Janet "had an awareness about her" and because of that awareness, he suspected that in an ongoing rehabilitation sense, she may still be advantaged by a more normal environment rather than a hospital environment. He pointed out that in a hospital environment one is continually aware of the agony of the disablement of others. It was his view that "physical disablement begets physical disablement in an emotional way and in a thoughtful way". It was his view that "if a person has an awareness, it is better for them to live in the real world".

**22** On cross-examination, Dr. Geisler stated that security of attendant care for Janet must include protection against injury and against her own physical actions. It must include hygiene and care of

her person as she requires considerable assistance in these matters. It must also ensure her emotional and mental well being. He expressed the opinion that, if a patient were removed from a home setting where there was family providing attendant care, to a home setting where there was attendant care without the presence of family, this might lead the patient to suicide. He said it depends upon the degree of awareness. Dr. Geisler was unable to predict what would happen in Janet's case but concluded "the dice are stacked a little bit against her". He felt it important that she be looked after by compassionate people who have an interest in her and that she have an opportunity to see her family regularly.

**23** Dr. Long is an experienced psychologist and he had the opportunity of testing Janet and seeing her in the family environment on numerous occasions. It was his opinion that Janet Kraft was severely mentally impaired and will impose a demand on whoever cares for her. He testified that she is not psychologically dead and although she has serious memory problems, she still responds to those who are close to her. She is still a human being with needs that must be recognized. She needs her family and she needs stimulus. It was Dr. Long's view that she should continue to live in the home with her family and if that was not possible, she should live in a home that was close by. It was also his view that Janet would probably feel rejected by her family and would regress psychologically if she were in a nursing home. He was concerned that a feeling of rejection could lead to deep depression and dangerous behaviour. On cross-examination he concurred that, if Janet were unable to live with her family or close to them, an acceptable compromise would be a setting where she would feel dignity and a belongingness; a setting where she would receive round-the-clock care by someone who had knowledge of her needs for stimulus and encouragement and a setting that would be available to her family for visits.

**24** Peter Hanrahan, Director of Rehabilitation for the Paraplegic Association, testified that, in his opinion, the Kraft marriage would not last and a separate home would have to be established for Janet. He was aware of the medical evidence that she required continual supervision as well as ongoing assistance to dress, bath and feed herself. He felt a home of her own with proper assistance was preferable to a nursing home because she did not require medical care.

**25** Mr. Hanrahan prepared a schedule of costs to cover the expenses required to place Janet Kraft in a home of her own. He outlined the expenses as follows:

	Initial Outlay	Yearly Cost
(a) Initial outlay for three bedroom bungalow and furnishings	91,950.	

(b)	Yearly housing expenses, insurance, heating, taxes, hydro, telephone		3,272.
(c)	Yearly maintenance for home and grounds		1,270.
(d)	Replacement Reserve	1,545.	
(e)	Initial outlay - equipment	1,900.	
(f)	Yearly equipment replacement reserve		190.
(g)	Equipment maintenance	60.	
(h)	Initial outlay for a car	10,000.	
	Yearly equipment replacement reserve		1,875.
	Yearly equipment maintenance		600.
	Yearly operating costs		1,493.
(i)	Yearly Personal expenses		8,029.
		-----	-----
		\$103,850.	\$18,334.

**26** Judith Ann Bishop, a registered nurse who owns a company that provides home care health services, testified that it was her view that the most appropriate alternative for Janet was to duplicate the environment she was accustomed to. In addition, she would require a trained attendant with basic first aid skills and the personality to provide support and assistance in rehabilitation of life skills. It was also her view that the standard of care required for Janet in her own home would be three shifts of attendants, rotating on a twenty-four hour basis. She testified that there are a number

of home health care agencies that are available to provide this service and she estimated the annual cost would be approximately \$61,908. She did not think a nursing home was suitable as Janet did not require skilled nursing care.

**27** Berenblut and Rosen determined the total cost of future care was \$3,670,850. This figure is made up of the following items:

A.	Cost of homemaker - \$61,908. (discount rate -2.57%)	\$3,142,000
B.	Other annual costs (discount rate 2.5%) (Hanrahan's schedule of costs)	425,000
C.	Cost of required capital purchases - home, automobile, equipment	103,850
		-----
	Total cost of future care:	\$3,670,850

**28** These calculations use a discount rate of -2.57 per cent to ascertain the present cost of homemakers. The evidence of Herbert Connell and Howard Rosen with respect to the increase of wages for health care attendants over the past fifteen years is based on an assumption this increase in wages will continue in the future. We do not know what will happen in the future and this evidence does not persuade me to derogate from Rule 53.09 of the Rules of Procedure. I would use a discount rate of 2.5 per cent.

**29** The next step is to determine the life expectancy of Janet Kraft. The actuarial report of Robert E. Collins, dated September 6, 1984, establishes her age on September 4, 1984 as 50.702 years and her normal life expectancy as 30.839 years. According to the evidence of Dr. Geisler "her life expectancy would approach that of normalcy". The doctor examined Janet on two separate occasions, recognized some risk of falls and suicide and on cross-examination stuck to his opinion of "a little bit diminished from normalcy". On the other hand, Dr. David Breithaupt, the medical consultant with Manufacturers Life, testified that in his view the risk of accident and suicide diminished the life expectancy of Janet Kraft. He testified that her mortality is increased by 1.75 per cent which translates to a reduction of 4 to 5 years from normal expectancy. I prefer the evidence of Dr. Geisler as Dr. Breithaupt had no statistics to back up his opinion and at most his evidence on this point was an educated guess.

**30** On the evidence of Dr. Geisler that her life expectancy "would approach that of normalcy", I find her life expectancy to be 29 years. I have asked Robert E. Collins to re-calculate his table of



life expectancies and present value and furnish a further report. Based on his report dated March 14, 1985, attached to exhibit 15, I fix the total cost of future care for Janet Kraft to live in a home of her own at \$1,705,255. This figure is made up of the following items:

A. Cost of homemaker (discount rate 2.5%) (\$61,908.)	\$1,235,510.
B. Other annual costs (discount rate 2.5%) (\$18,334 - page 14)	365,895.
C. Cost of required capital purchases - home, car, equipment	103,850.
	-----
Total cost of future care	\$1,705,255.

**31** With this evidence in mind, I turn to the evidence of the defense. Jane I. Staub, M.A., a Registered Psychiatrist with experience in the field of neuropsychology and thirty-two years experience with the physically handicapped and their families, testified that the best alternate setting for Janet Kraft was a nursing home. She had read the medical reports and was well aware of Janet's physical and mental disabilities.

**32** Mrs. Staub stated that when choosing a future care plan, one must consider three factors. In the first place one must consider the home setting and the level of care required. In Janet's case, care would have to include items such as supervision, assistance in dressing and bathing, cooking, cleaning the home, shopping and recreation. One must also consider continuity of care and the ability to schedule and direct one's care givers. Finally, one must consider the quality of life the individual can enjoy.

**33** It was Mrs. Staub's opinion that the best environment for Janet Kraft was living in her own home with her family. She stated that this is unquestionably what the disabled person wants. She agreed on cross-examination that it is most desirable for the disabled to live in their own home, provided they are able to direct their care givers. She pointed out that Janet is not capable of doing this. For the rest of her life she must look to others to guide her care givers. Mrs. Staub also pointed out that the person guiding the care giver should be in the same house or close by and should be a member of the family, such as a mother or a spouse. Mrs. Staub expressed grave concern for Janet's safety if it were left to agency staff coming in each day. She emphasized the need for continuity. Someone must be present at all times to supervise the care givers and look after Janet's best interests. She felt that Janet should be in a safe, secure setting where she would receive the care she needs. It was her opinion that hospitals and group homes were not the proper setting for Janet. She

recommended that the best alternative environment for Janet was a private room in a nursing home with some provisions made for recreation. She felt that a nursing home run by a religious order would probably be the most suitable in the circumstances. Mrs. Staub estimated the cost of a nursing home to be approximately \$20,000 annually.

**34** Without question the best care plan for Janet Kraft would be to continue to live in her own home with her family, assisted by attendant care. Unfortunately, her husband and sons are drained physically and emotionally by their long vigil. Each has expressed a desire to live their own independent lives. The only other alternatives for Janet are a home of her own with part-time attendants around the clock or a nursing home.

**35** Without question, Janet is severely and permanently brain damaged. As well, she is seriously physically handicapped. She has achieved most of her expected recovery and will always require care, supervision and attention.

**36** Her family would like to see her settled in a three-bedroom bungalow with a garage and a car. The boys plan to stay with her from time to time. The family feel Janet would regress in any other environment and reject any suggestion of a nursing home. It was apparent from their evidence that they had no real knowledge of nursing homes. They had not inspected any in the area and were not able to identify any specific problems. For these reasons, I am not able to give a great deal of weight to their views.

**37** It was Dr. Long's opinion that Janet should either live with her family or in a home close by, preferably a duplex. It was his concern that if she were placed in a nursing home she would probably feel rejected by her family and would regress psychologically. However, there is no evidence of any offer or even a suggestion from any member of her entire family that they were prepared to live with her or to live close by. Dr. Long agreed that if Janet were unable to live close to her family, an acceptable compromise would be a setting convenient to the family where she would be supervised continually by someone with compassion and dedication.

**38** Dr. Geisler emphasized the security of attendant care for Janet. It was his opinion that she should be in an environment with compassionate persons of reasonable intelligence who are interested in her welfare and understand her loss of complete independence. It was also his opinion that the care and attention of the nursing staff in an institutional setting is excellent. He expressed real concern about the availability and continuity of proper attendant care for a private home.

**39** Jane Staub pointed out that when choosing a future care plan, one must consider the home setting and the level of care required. One must consider the continuity of care and the ability to schedule and direct one's care givers. One must consider the quality of life the individual can enjoy. Mrs. Staub emphasized the need for continuity of care for Janet and pointed out that the real problem in Janet's case is that she is not capable of directing her care givers. She expressed deep concern for Janet's well being if she were left to the attention of part-time agency staff. It was Mrs. Staub's opinion that the best alternative for Janet was a private room in a nursing home run by a

religious order.

**40** Having considered Janet's physical and mental condition and the fact there is little hope for improvement in the future, I accept the evidence of Jane Staub and find that the only acceptable alternative for Janet is a private room in a nursing home. I also find quality of care to be the most important single factor to be considered when choosing a suitable nursing home for Janet. She is going to require considerable nursing care and supervision for the rest of her life. Such care and supervision is best ensured under the continual guidance of a dedicated and compassionate superintendent who will take an interest in Janet. Other factors to be considered are access to her family and recreational pursuits. This is the only way there can be any real sense of security, order and continuity in her life. In my view, the most likely place to find such a superintendent is in a nursing home.

**41** I found Mrs. Staub a most impressive witness. She has far more expertise in the placement and rehabilitation of mentally disabled persons than any of the other witnesses. She recognized the problem immediately: lack of continuity and the inability to direct her care giver. Mrs. Staub also recognized Janet's need for recreation and stimulation and recommended that personnel be available to fulfil these needs.

**42** It is foolhardy to conceive that a person as physically and mentally handicapped as Janet could possibly survive in a home of her own without the constant supervision of family members. Besides the continual shifts of rotating part-time care attendants, Janet would also require cleaning help, gardening help and a housekeeper to supervise her entire staff. Janet suffers from very poor memory and surely the unfamiliar faces arriving day in and day out would only tend to confuse and upset her. Sooner or later she is bound to feel rejected and in no time at all would be a prime candidate for suicide. For these reasons, I am satisfied that a nursing home will provide the best safe and secure setting for Janet Kraft for the rest of her life.

**43** When determining the cost of future care, I have accepted the evidence of Jane Staub and Murray A. Segal as to the annual cost of residence in a nursing home. This sum should include the portion usually paid by O.H.I.P. I have also relied on the tables prepared by Peter Hanrahan to ascertain additional expenses. As well, I have relied on the report of Howard Rosen and the up-dated table of life expectancies prepared by Robert E. Collins. Throughout I have used a discount rate of 2.5 per cent where applicable. Having considered all of this evidence, I find that a reasonable sum for the total cost of future care for Janet Kraft would be \$672,769. This figure is made up of the following items:

A.	private room nursing home care costs including O.H.I.P. portion of \$9,140 \$19,685 annually	392,857.
----	---	----------

B. personnel to assist with  
recreation pursuits - \$5,000  
annually 99,786.

C. general annual expenses

(1)	clothing	600.	
(2)	dry cleaning	240.	
(3)	personal items	240.	
(4)	transportation for planned outings	2,600.	
(5)	holidays for Janet Kraft and companion	4,800.	
(6)	maintenance T.V. and stereo	60.	
(7)	replacement reserve T.V. and stereo	190.	
		-----	
		8,730.	174,226.

D. Initial Outlay

(1)	furnishings for private room	4,000.
(2)	T.V. and stereo	

equipment	1,900.	5,900.
	-----	-----
	5,900.	

Total cost of future care                      \$672,769.

#### Future Lost Income

**44** Prior to her marriage, Janet Kraft was employed as a bookkeeper and throughout the marriage she spent considerable time assisting with the family business. She had always been an excellent student and she took courses to qualify as a medical secretary and achieved high grades. The evidence supports a finding that Janet intended to start working as a medical secretary when her youngest son was enrolled in high school. I am satisfied that she would have been working either as a medical secretary or as a bookkeeper by September 4, 1984.

**45** Sandra Isley owns and operates a registered business college which trains and places medical secretaries. Her placement record is 95 per cent. Mrs. Isley testified that there was a great demand for mature, senior secretaries with Janet's experience and skills. It was her opinion that Janet would have received a starting salary of at least \$17,500 and would have been entitled to receive an 18 per cent benefit package and annual cost of living wage increases. Elizabeth Butler, called by the defence, owns a personnel business that places temporary secretaries in the Oshawa area. She agreed that she knew little about the market for permanent placement of medical secretaries. Her evidence was not very helpful. However, it was interesting to note her statement that industrial clients in the Oshawa area were willing to pay to her a projected \$17,472.00 a year for part-time secretaries with little experience. I am satisfied that a salary base of \$17,500 per annum is a conservative and reasonable basis on which to calculate Janet's loss of future wages.

**46** Next the present value of future loss of income must be determined. If money which is payable in the future is in fact received today, interest can be earned on that money. The object is to determine the present value of the future stream of payments by calculating what present amount, when invested to accumulate interest at a particular rate, will provide the real equivalent of the future stream of payments. Wages and income grow or decrease for a number of reasons, including inflation, productivity and structural changes in the economy. Wages and incomes of particular individuals are also affected by aging, promotion, seniority and education. The increase in the "real" wage rate is the increase in wages over and above the increase in inflation. The "real" interest rate is the return which an investor earns over and above inflation.

**47** Herbert Connell, economist, financial consultant and President of Transfunds Concepts Inc., testified that over the past 15 years secretaries and bookkeepers have enjoyed increases in income 1.61 per cent greater than the rate of inflation. The composite base for his rates was obtained from Statistics Canada. On the basis of this evidence, Berenblut and Rosen have concluded that the

proper discount factor to be applied in calculations relating to future loss of income in this case should be  $1.0250/1.0161 - (1) = .88$  per cent. The present value of \$17,500 per annum to age 65 (13.635 years) discounted at .88 per cent is \$224,530.

**48** However, Rule 53.09 of our Rules of Civil Procedure states:

"The discount rate to be used in determining the amount of an award in respect of future pecuniary damages, to the extent that it reflects the difference between estimated investment and price inflation rates, is 2 1/2 per cent per year".

**49** The opinions of Herbert Connell and Howard Rosen are based on past statistics and the assumption that such wage rates will continue during the working life of Janet. I am not persuaded that I should derogate from the Rule on the basis of this type of evidence. We do not know what will happen in the future. I find that the proper discount rate to be applied in the circumstances of this case with respect to the present value of future cost of future loss of income is 2.5 per cent.

**50** I have found that Janet Kraft has a life expectancy of 29 years. Thus the present value of \$17,500 per annum to the age of 65 (13.635 years), discounted at 2.5 per cent is \$201,709. From this figure the following deductions should be made:

Lost income, 13.635 years, \$17,500 per year, at a discount rate of 2.5%	\$ 201,709.00
(1) No longer required Canada Pension Plan contributions of \$279 per year = \$279 x 11.5262	- 3,216.00
(2) No longer required Unemployment Insurance premiums of \$402 per year = \$402 x 11.5262	- 4,634.00
(3) No longer required miscellaneous work-related expenses of \$1,000 per year	- 11,526.00 -----
Net loss of pre-retirement income	\$ 182,333.00

To this amount, the following additions should be made:

(4)	Loss of pension from Canada Pension Plan of \$1,952 per year = $1.952 \times 8.4310$	16,457.00
(5)	Loss of 18% fringe benefits from employment = $\$201,709 \times 18\%$	36,308.00
	Total present value of future lost income	\$ 235,098.00
		=====

**51** In calculating deductions (1) and (2) from gross income, I have used a discount rate of 2.5 per cent because these items are calculated as a percentage of Janet's wages. In my view, both these items should be considered as they are standard deductions from an employee's gross salary.

**52** I have used a discount rate of 2.5 per cent in calculating deduction (3) because I have concluded that this expense will increase at the average inflation rate. When calculating addition (4), I have also used a discount rate of 2.5 per cent because Canada Pension Plan income is a function of Canada Pension Plan contributions which is in turn based on Janet's wages.

**53** I am not making any deductions for contingencies in the circumstances of this case as it would appear the positive contingencies would offset the negative contingencies.

Management Fee:

**54** Janet Kraft is mentally incompetent and her awards will be substantial. It is important that these moneys be carefully managed to ensure the security of her income. Janet must have the assistance of a professional adviser in the management of her awards. I find on the evidence that an appropriate administration allowance is one-half of one per cent of the amount of the fund per annum. As well, professional portfolio management will be required. It is my view that the additional return resulting from professional advice will probably compensate for any additional management costs. However, the choice of the corporate adviser should be left to Janet's counsel and to her family. It will take considerable expertise to work out a reasonable management fee. If the parties are unable to agree on the management fee, I will be available for further submissions.

Non-Pecuniary General Damages

**55** In reconsidering the upper limit of damages to be awarded for pain and suffering in serious personal injury cases, the Supreme Court of Canada has decided that once a person is properly provided for in terms of future care, it is reasonable that large amounts should not be awarded for non-pecuniary damages. In the Trilogy the Court fixed a "rough upper limit" of \$100,000 for non-pecuniary damages. This limit may be increased upon agreement or proof of inflation.

**56** Janet Kraft suffered extensive brain damage over four years ago and was hospitalized for nine months. She has lost her identity, her independence, her previously enjoyed pleasures and comforts. She is permanently mentally and physically handicapped. Her injuries are monumental and on the balance of probabilities her suffering will last 29 years. In my view, she is as able to utilize an award for non-pecuniary damages for solace as were the three plaintiffs in the Trilogy.

**57** The actuarial evidence establishes that the current value of \$100,000 (1978) dollars is \$173,588. In the circumstances of this particular case, I find that Janet Kraft is entitled to the maximum award of \$173,588.

#### Claim for Business Loss and Lost Income

**58** Richard Kraft came to Canada in 1960. He was a painter and decorator by trade. He operated his painting business at a profit for many years. His earnings were sufficient to enable him to purchase and maintain a house and to provide a comfortable life for himself and his family.

**59** As a result of the enormous amount of time required to care for his wife, Richard Kraft's business has suffered. He testified that Janet's injury had a "terrible effect on his income". His customers were not able to reach him. He had no time to look after his painting business and was forced to declare bankruptcy on October 26, 1983. He also sold the family home and he and the boys moved to a bungalow which he rents from a friend for \$800.00 a month.

**60** Berenblut and Rosen, Chartered Accountants, analysed the unaudited financial statements of Richard Kraft Painting and Decorating Limited and its predecessor, the sole proprietorship, as well as the individual tax returns of Richard Kraft from 1977 through 1983. They were unable to analyse the books and records of the company and market in which the company operates. They were also unable to fully analyse the activity of the company's three major sources of business from incorporation to termination. As a result of these limitations, Berenblut and Rosen were unable to render an independent opinion as to the loss of income suffered by the company. Thus they prepared a calculation estimating the loss of income based solely on the following facts:

- (a) Richard Kraft was sole proprietor of the residential painting and decorating business prior to its incorporation in 1980 and Janet was responsible for running the office and keeping the books.
- (b) painting and commercial contracts were the main source of revenue;
- (c) one other person was employed on a full-time basis and outside help was used to complete large assignments;
- (d) Richard Kraft quoted on all contracts and supervised the work until completion;
- (e) Richard Kraft's work schedule prior to November 1980, was 7:00 a.m. to 6:00 p.m., six or seven days a week;
- (f) the majority of contracts took approximately two months to complete and Richard Kraft worked on two or three assignments concurrently. The value



- of each contract was between \$5,000 and \$15,000;
- (g) during the nine months his wife was hospitalized, Richard Kraft attempted to operate his business as usual in addition to assuming the business and household responsibilities of his wife. In addition, the bookkeeping duties of Janet Kraft were undertaken by a Chartered Accountant;
- (h) in October 1983, the company ceased operations due to lack of supervision on the jobs, lost contracts and poor cash flow;

**61** Berenblut and Rosen assumed that the performance of the company for the period 1980 to October 26, 1983 would have been similar to its performance over the preceding five years. I adopt this assumption. I find that Janet Kraft's injury was responsible for the poor performance of the company between 1980 and October 1983 and its eventual bankruptcy.

**62** Loss of income was estimated at \$33,749.00. Berenblut and Rosen placed a value on the equity in the company at 0 to \$34,606 and their final estimate of loss of value of income and value of equity was between \$33,749.00 and \$68,355.00.

**63** Having considered all of the evidence, I find that Richard Kraft was the business and he worked hard. He attracted the clients, he quoted on all contracts and supervised the work. I also find that the business would probably have continued and prospered if his wife had not been seriously injured. It was bound to run down hill in his absence. The defence argues that Richard Kraft is in the process of re-establishing his business and that Howard Rosen has not taken into consideration the business recouped when estimating the loss of equity.

**64** I have considered the report of Berenblut and Rosen. No contradictory evidence has been offered by the defence. Taking into consideration the limitations set out in the report, I find that a reasonable sum for compensation for loss of net income and value of equity would be \$48,000.

Claims Under the Family Law Reform Act - Section 60(2)(c) and (d)

**65** The Family Law Reform Act provides that certain family members are entitled to recover their pecuniary loss resulting from injury. Section 60(2)(c) creates a right to be compensated for nursing, housekeeping and other services provided to the injured person and s-s. (d) creates a right to be compensated for the loss of guidance, care and companionship that the claimant might reasonably have anticipated from the injured person. It must be recognized that neither this statute nor the common law gives any family member a right to be compensated for grief or loneliness.

**66** Eight members of the Kraft family assert claims for nursing and housekeeping services and for loss of guidance, care and companionship. I propose to deal with the evidence applicable to the various family members.

Richard Kraft (husband)

**67** Richard and Janet Kraft were happily married for seventeen years. Janet was a devoted wife and mother as well as an excellent housekeeper. She was a loving companion and an assistant in all his business ventures. Brain damage has turned her into a mentally retarded and severely handicapped human being. Over the past four years Richard Kraft and the boys have spent a great deal of time looking after all her needs. They have nursed her, fed her, bathed her, dressed her. She has not been able to afford them any guidance, care or companionship. She has lost so many of her human qualities. Fortunately Richard has found another loving companion and Judith Ann Myles and her two children will be moving in with him and his son James. I assess his damages at \$20,000.

Alan Kraft (son)

**68** Alan was thirteen years old when his mother was injured. Janet was a good mother and a continual source of strength and affection for her sons. Alan assisted his father and brother in caring for her daily needs over the past four years. He has moved out of the family home and lives with friends. He is busy building a life of his own. I assess his damages at \$20,000.

James Kraft (son)

**69** James was only eight years old at the time of the injury. He has spent a good deal of his time over the past four years looking after the family home as well as the needs of his mother. He has had very little time to enjoy his childhood and has lost many years of guidance and care from a kind and affectionate mother. I assess his damages at \$25,000.

Bernice Colville (sister)

**70** Bernice is Janet's sister and they shared a strong sisterly affection. She has spent the past year assisting her elderly mother in caring for Janet on weekends. I assess her damages at \$9,000.

Evelyn Colville (mother)

**71** Janet was the youngest member of the family and she was very close to her eighty-year old mother. Each weekend, Evelyn Colville looks after her daughter, Janet. She bathes her, washes her hair, cooks her meals and takes her for walks. Instead of being able to look to Janet for comfort and assistance in her senior years, their roles are reversed. I assess her damages at \$9,000.

James, William and John Colville (brothers)

**72** Janet's three brothers are 63, 62 and 57 years of age. There is no evidence that there has been or will be any loss of guidance, care and companionship, therefore, I am making no award for them.

Punitive Damages

**73** Counsel for the plaintiff, Janet Kraft, claims punitive damages against the defendant Lawrence

W. Oxenham on the ground that his behaviour was reckless and that he was in breach of trust to his patient. He has admitted his negligence and to the extent that the law can compensate the plaintiffs for their loss, damages have been assessed and awarded. In due course, he will have to answer to his peers and to his profession. I am unable to find in the defendant's conduct maliciousness, intent to harm, or that disregard of every principle of decency which is the foundation for an award of punitive damages. It is my view that punitive damages should be awarded only on rare occasions and I am not persuaded that they should be awarded in the circumstances of this case.

#### Prejudgment Interest

**74** The parties are agreed on the length of time for computation of prejudgment interest. They are also agreed on the rate of interest. Counsel for the plaintiffs contends that interest should be paid on all damages. Counsel for the defendant disagrees and argues that there should be no prejudgment interest for loss of future care and future wages. He also contends that there should be no prejudgment interest on non-pecuniary general damages if the \$100,000 limit is indexed to the rate of inflation.

**75** In the absence of evidence from the defendant of inflation and interest rates prior to judgment, and the degree of overlap between them, this argument must fail and the usual practice of this Court followed.

**76** Accordingly there shall be judgment in favour of the plaintiffs against the defendant Dr. Lawrence W. Oxenham in the sum of \$1,253,052. These moneys are to be distributed as follows:

(a) Bertha Janet Kraft

Special Damages as agreed upon		\$ 40,597.00
General Non-Pecuniary Damages		\$ 173,588.00
Present Value of Future care		\$ 672,769.00
Present Value of future lost income		\$ 235,098.00

Richard Kraft

Special Damages	\$	48,000.00
F.L.R.A. Claim	\$	20,000.00

Other F.L.R.A. Claims

Alan Kraft	\$	20,000.00
James Kraft	\$	25,000.00
Bernice Colville	\$	9,000.00



---- End of Request ----

Download Request: Current Document: 61

Time Of Request: Monday, November 19, 2012 10:25:44