

# Legal discussion focussed on evidence of remedial measures

SANDHU

—continued from p. 1—

plaintiffs \$12,936,145.60. The trial judge, Justice Carolyn Horkins, awarded an additional \$4,182,039.02 in guardianship costs, pre- and post-judgment interest on the jury award and costs.

The appellant apartment owners raised 12 grounds of appeal, each of which was dismissed in turn by the panel of Justices Marc Rosenberg, Janet Simmons and Jean MacFarland.

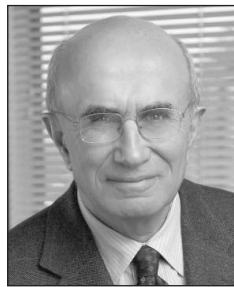
Among the rejected grounds were that the jury's award was \$1.336 million more than the plaintiffs' counsel had recommended in her jury address; that the jury awarded non-pecuniary general damages at \$311,000, the highest amount permitted by the Supreme Court of Canada, and \$100,000 to each of Harvinder's parents and his brother under Ontario's *Family Law Act*, plus damages for loss of future income at the highest level based on a retirement age of 65, and that the trial judge erred in admitting evidence of subsequent remedial measures in the apartment block.

Noting that their court in *McIntyre v. Grigg* (2006) 83 O.R. (3d) 161 had observed that courts accord great deference to a jury's findings in civil negligence proceedings and a jury verdict would not be set aside against the weight of the evidence "unless it is so plainly unreasonable and unjust as to satisfy the court that no jury, reviewing the evidence as a whole and acting judicially, could have reached it," the judges said they could find "no errors in the jury's damages awards."

Although the court's disposition of the judge's alleged errors was almost entirely fact-related, there was reference to case law on the issue of admitting evidence of a defendant's remedial measures in the wake of alleged negligence.

"It has been argued that evidence of subsequent remedial measures should not be admissible in a negligence action because it lacks relevance and on policy grounds," the judges wrote.

"First, it is argued that the evidence lacks relevance because it shows nothing more than a belief by the defendant that the prior condition was capable of causing injury. That belief is either irrelevant or, at best, equally consistent



Earl Cherniak



Nancy Ralph

with a belief that the injury was in fact caused in some other way. Second, it is argued on policy grounds that if evidence of subsequent remedial measures is admitted, defendants would avoid taking corrective measures for fear that their actions would be taken as an admission of fault."

As for relevance, the judges said the relevance of any piece of evidence "depends upon the particular circumstances of each case."

"Apart from any inference of an admission of liability, the fact that repairs to the screens were made quickly and inexpensively after the accident was relevant in other ways. It was evidence from which the jury could infer that the appellants had failed to meet a reasonable standard in keeping

the building in good repair. The evidence of repairs could also be evidence of a failure to take reasonable care because it was capable of showing that the appellants inspection of the building before the accident failed to meet a reasonable standard."

Similarly, evidence that the owners had installed safety latches throughout the building five days after the fall "was also relevant to the issue of reasonable care. Evidence was led showing that the standard of care required installation of child safety locks. In determining whether the defendants acted reasonably in not installing those locks, the cost and ease with which such locks could be installed was relevant."

As for an argument that even if such evidence was relevant, it should be excluded for policy reasons, the court said that was "premised on the theory that defendants would be discouraged from taking necessary remedial measures if they knew that these measures would be admitted against them at trial as an admission of liability."

"In our view, the policy argument alone is not a basis for excluding evidence of subsequent remedial measures," they wrote.

Earl Cherniak and Kirk

Stevens of Lerner LLP, who with trial lawyer Nancy Ralph represented the plaintiffs at the appeal, told *The Lawyers Weekly* this is the largest personal injury award affirmed at the appellate level in Canada.

In a press release, Lerner said Ralph was thrilled with the result. "At last," she was quoted as saying, "this case confirms that survivors of severe brain injury can receive the cap in general damages."

She also termed approval of a \$100,000 *Family Law Act* award to Harvinder's brother Parminder "a vindication for me. I have been fighting for increased recognition of the effect of these catastrophic injuries on siblings for a long time."

Cherniak said *Sandhu* confirms that the Court of Appeal will not interfere with trial level assessments of damage as long as they are "supported by the evidence and the trial was fair."

Stevens commented that the Court of Appeal "obviously rejected any suggestion that it should be more willing to intervene in brain injury cases, where the damage is less visible."

John Champion and Annie Finn of Fasken Martineau DuMoulin LLP in Toronto represented the appellants and Linda Waxman acted for the Children's Lawyer.

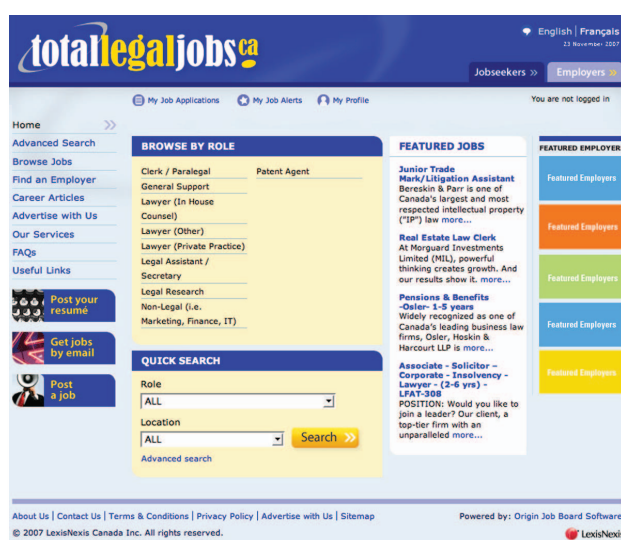
Reasons: *Sandhu v. Wellington Place Apartments*, [2008] O.J. No. 1148.

Attract the most qualified legal professionals with [totallegaljobs.ca](http://totallegaljobs.ca) ...

Practice Management

A legal online job board for employers and job seekers to come together.

- Post, track, and edit jobs quickly and efficiently.
- Search our candidate database of qualified legal professionals to shortlist.
- Track job applications online.
- Build your brand among job seekers.



For more information, please email us at [totallegaljobs@lexisnexis.ca](mailto:totallegaljobs@lexisnexis.ca) or call 1-800-668-6481

TOTAL PRACTICE SOLUTIONS  
Client Development Research Solutions Practice Management Litigation Services

LexisNexis®

LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under licence. Other products or services may be trademarks or registered trademarks of their respective companies. © 2008 LexisNexis Canada Inc. All rights reserved.

## Sound under international law

PERRIN

—continued from p. 15—

gations.

Similarly, charges laid in February against Armand Huard and Denis Rochefort of Quebec City under our extraterritorial child sex offender law only took place after the Government of Haiti contacted United Nations officials about allegations that the aid workers were sexually abusing orphans. It was only at that point that the RCMP and Sûreté du Québec got involved.

Unlike Australia and the United States, which actively employ liaison officers in child sex tourism hotspots to facilitate investigations and cooperate with local authorities, Canada's RCMP liaison officer program does not appear to have a proactive mandate to enforce our extraterritorial child sex offender law. That needs to change, beginning with a focus on Southeast Asia.

**Committing to combat child sex exploitation abroad**

As Canadians, we view our-

selves as good global citizens. Unfortunately, at the moment we are contributing more to the global problem of child sexual exploitation than we are to the solution. We need to start with addressing the serious harm that some Canadians are causing by sexually exploiting children in developing countries.

Our extraterritorial child sex offender law is sound under international law. Prosecutors should not hesitate to lay charges where sufficient evidence exists. What is needed is a deliberate policy shift towards actively enforcing this law, together with a commitment of law enforcement resources to make that a reality.

*Benjamin Perrin is assistant professor at the UBC's faculty of law and is a faculty associate at the Liu Institute for Global Issues. He is a member of the Law Society of Upper Canada and founder of The Future Group, a non-governmental organization that combats human trafficking and child sex tourism.*