

Tiger, Tiger Burning Bright?

HUGHES AMYS^{LLP}
BARRISTERS & SOLICITORS

by Richard Horak

In a much discussed decision (which we understand is under appeal), Justice MacFarland granted Judgment in favour of the Plaintiffs against The African Lion Safari & Game Farm Ltd.. The decision is an interesting one in many respects.

Facts

On April 19, 1996 David Balac and Jennifer Cowles decided to visit African Lion Safari (ALS). They drove there in David's car, a two-door Honda Prelude which was equipped with automatic windows. On the driver's side of the vehicle there were two buttons with which the driver could control both the driver's side window and the passenger side window.

As they drove through the tiger reserve the vehicle was attacked on the passenger side by a tiger known as Paca. Somehow the tiger managed to enter the vehicle; two tigers also attempted to enter the vehicle from the driver's side. As a result both Plaintiffs sustained very significant injuries.

It was agreed by the parties that the windows to the vehicle had to

be in a down position to enable the tigers to get partially into the vehicle. Two engineers testified; they agreed that if the tigers had forced the windows down from a closed or even partly closed position, this would have damaged the window mechanism and would have prevented the windows from functioning thereafter (which was not the case).

Justice MacFarland ultimately concluded that the windows were up when Paca first attacked the vehicle. As a result of the tiger striking the vehicle, David's foot slipped from the clutch and his arm or some other part of his body inadvertently came into contact with the window switches thus lowering the windows on both sides of the vehicle. In her view this was "the most reasonable explanation for what occurred".

In coming to this conclusion Justice MacFarland indicated that both Jennifer and David were excellent witnesses. She stated as follows:

"They were both on the stand for a number of days and were both closely and vigorously cross-examined -

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neither wavered. I thought they were both very forthright and did not see any tendency to overstate or exaggerate."

There was evidence from an employee of ALS (Mitchell), who testified that there was food inside the vehicle and remains of food on the ground in the area where the attack took place. Mitchell also testified that the Plaintiff Balac kept yelling at the Plaintiff Cowles words to the effect "why did you have to open the window . . . why did you have to feed them".

Justice MacFarland rejected this evidence, as she found it problematic in many respects. Both Plaintiffs suffered very serious injuries, were in shock and a great deal of pain and had suffered significant loss of blood. Evidence as to what they may have said in the circumstances had to be "carefully considered". Two other ALS employees who were present did not hear the Plaintiff Balac make similar statements. An Incident Report prepared by Mitchell made no mention of feeding the tigers, nor did it make any mention of the statement allegedly made by Balac to Cowles, but did indicate that Cowles indicated that she had opened the window in order to take pictures of the tigers. This was not Mitchell's evidence at trial and her explanation about the purpose of the report was consid-

ered by Justice MacFarland to be "questionable". Photographs taken by the police after the accident did not show any food remains in the vehicle.

Justice MacFarland accordingly concluded that it would be quite unsafe to accept Mitchell's evidence, given that it was quite materially different from what she had recorded eight and a half years previously.

Evidence was given by an ambulance attendant, who testified that Cowles stated that she had rolled down the window to take a picture. Cowles also allegedly said that Balac got out of the car and came around to her side of the vehicle, which resulted in another tiger jumping into the car through the open door.

Justice MacFarland concluded that the latter part of the statement did not accord with observations made by any others. She indicated that based on the facial expression of the ambulance attendant as he gave this evidence, he thought that this was "pretty far fetched".

As a result she did not consider the evidence of the ambulance attendant to be reliable.

Evidence was also given by a paramedic student in training (Malcolm), to the effect that Cowles told her she rolled the

window down to take photographs. The evidence of this individual was not corroborated by the other two paramedics (one did not testify and the other indicated that she did not overhear the Plaintiff say this). Justice MacFarland concluded that Malcolm may well have been influenced by what she heard from others at the scene and what she saw in the car.

Cowles' aunt (Lister) gave a statement to an adjuster for ALS after the incident, in which she stated that Cowles had told her that she had the window down in order to take a picture of the tiger. Lister had been in precarious health both physically and mentally for some years and Justice MacFarland concluded that her evidence was quite unreliable.

Dr. Wong recorded in the history taken in the emergency room that Cowles rolled down her window to photograph a tiger. While Dr. Wong indicated that his usual practice was to get the history directly from the patient, he agreed on cross-examination that it was possible an ambulance attendant had provided this information. Due to another admitted error in Dr. Wong's recorded history Justice MacFarland concluded that the information must have come from others and not from the Plaintiff Cowles.

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Strict Liability

Justice MacFarland concluded that ALS, as the keepers of wild animals, were strictly liable. After noting that it seemed contradictory to consider a defence of contributory negligence in a case of strict liability, Justice MacFarland concluded that there was no evidence which would constitute contributory negligence, even if such a defence was available. Similarly, there was no factual basis for application of a consent / voluntary assumption of risk defence.

Negligence and Occupiers Liability

Justice MacFarland concluded that in any event ALS was negligent, for a variety of reasons, including the following:

- 1 It was negligent in the extreme for Mitchell to be driving about in the vicinity of the tigers with a tiger cub in her vehicle, as she knew the effect this would likely have on the other tigers.
- 2 Another employee whose job it was to keep her attention focused on the vehicles and the tigers lost sight of the passenger side of the Plaintiff's vehicle and of the tiger Paca, but took no steps to reposition her own vehicle, which was negligent in the extreme.
- 3 This same employee was inattentive and failed to respond as quickly as she

should have.

- 4 ALS failed to properly train its employees.
- 5 ALS failed to construct watch towers in the areas.
- 6 Staffing was inadequate both in terms of quantity and quality.

Damages

The parties agreed on figures for non-pecuniary damages for the Plaintiffs. \$225,000.00 was awarded to the Plaintiff Balac and \$210,000.00 was awarded to the Plaintiff Cowles.

Balac was left with a grotesquely scarred and disfigured right forearm, which was a constant source of pain. While functionally he had a reasonably good result, he was significantly disabled, and activities which required fine motor skills were beyond him. He had also suffered emotionally. His efforts to find employment since the accident had been unsuccessful. Justice MacFarland found it unlikely that Balac would ever be gainfully employed.

Balac was awarded past loss of income of slightly less than \$250,000.00 and future loss of income to retirement at age 65 at slightly less than \$1.2 million.

At the time of the accident Cowles was a single mother who worked as an exotic dancer. She suffered deep and extensive lacerations to her

scalp and right thigh; as a result she was left with unsightly scars to her hip and scalp (the latter were covered up to some extent if she wore her long hair down). She suffered from post-traumatic stress disorder.

Cowles testified that she wished to upgrade her qualifications from personal support worker to registered practical nurse. Justice MacFarland concluded that there was no question that she had the intellectual ability to do so, although she questioned whether this choice was a wise one, given the permanent physical impairments with which she had been left.

Cowles had filed her 1995 income tax return before the attack, in which she had claimed none of her cash income. She filed a revised return following the accident, in which she claimed business income of slightly more than \$17,000.00.

Justice MacFarland concluded that had the accident not occurred, Cowles would possibly have continued as an exotic dancer until the end of 2003, earning \$55,000.00 per annum. Subtracting the amounts the Plaintiff had in fact earned from 1996 to 2003 resulted in a past loss of income award to Cowles of just under \$300,000.00.

With respect to a claim for future loss of income, Justice MacFarland concluded that Cowles could easily qualify for many occupations which would

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not require the physical demands of her chosen nursing field occupation. These other occupations would equal the remuneration of her chosen field. Given that the Plaintiff's permanent disabilities precluded her from a number of occupations,

Justice MacFarland awarded her the sum of \$250,000.00 as an appropriate lump sum for the loss of earning capacity that had been compromised.

Conclusion

It is an old adage of trial lawyers

that surprising things frequently occur; it is difficult to predict in advance how evidence will come out at trial and more importantly, how it will be received by the Court. The Cowles case is but the latest example which proves the truth of this old adage.

Social Host Liability

by Richard Horak

The Supreme Court of Canada has granted leave to appeal in the case of **Childs v. Desormeaux** (see Noteworthy 2004 No. 3). This decision should bring some clarity into an area of law which has been most contentious in recent years.

Firm News

Jamie Trimble will speak on "Making a Settlement Stick - Drafting the Minutes and the Release", at a Law Society of Upper Canada programme on March 7, 2005. He will also be a panelist at a joint Construction Law/Insurance Law program on March 8, 2005, discussing insurance problems in the context of construction cases.

On March 7, 2005, Mario Pietrangeli will deliver a paper on "Practical Tips for Offers to Settle" at the Law Society of Upper Canada programme entitled, "Negotiating, Drafting and Enforcing Settlement".

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