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Personal Injury

OCA affirms deference given to jury verdicts, awards

By Kirsten McMahon, Associate Editor



A recent Court of Appeal decision re-emphasizes the high degree of deference given to jury verdicts, and when an award is granted — even an unusual one — it shouldn't be overturned lightly, Windsor personal injury lawyer [Gino Paciocco](#) tells [AdvocateDaily.com](#).

“Plaintiffs can feel re-assured that any award they receive at trial is not likely to be overturned on appeal without material misdirection or non-direction,” says Paciocco, a founding partner of [Paciocco & Mellow](#).

The matter involved a woman who was struck in the face by a condo developer's sidewalk sign. She brought a claim against the developer and the contracted company that installed the sign and after a 15-day trial, a jury found the defendants liable and awarded the plaintiff \$2.9 million in damages plus interest and costs.

The jury apportioned 94 per cent liability to the developer and 6 per cent to the contractor.

Paciocco, who did not act in this matter and comments generally, says the split of liability is unusual, “as the appeal judges come right out and say in the decision. Normally a jury does not find a defendant to have contributed to the cause of an accident without finding them more at fault.”

However, he says it's plausible for a jury to find a defendant as little as one per cent liable.

“It may be out of the norm, but we should not be too surprised when what's plausible becomes a reality,” he says. “A jury should be free to decide that a defendant was the cause of an accident but may not be blameworthy.”

At the centre of the developer's appeal was whether the trial judge properly instructed the jury on the principles of apportionment of liability.

“[The appellant] submits that the trial judge confused the issue of causation, which is relevant to the breach of the duty of care, with the issue of fault that is relevant to the apportionment exercise,” the panel of judges wrote. “[The appellant] says that this error may explain why the jury arrived at the somewhat unusual split of 94/6.”

The developer claimed “this error is sufficiently serious that this court should intervene by setting aside the jury's verdict” and reapportioning the liability 75 per cent to the contractor and 25 per cent to the developer, the decision states.

In dismissing the appeal, the court ruled "that the language used by the trial judge was not the best. Still, in our view, the answer to the jury's question did not invite the jury to apportion based on degrees of causation. The jury was directed to consider specific negligence on the part of the defendants."

Paciocco says it's noteworthy that a judge may be able to offer the jury an explanation about the duty of care in a case — to better understand cause and fault — without being deemed to influence a jury.

"The elements of negligence are complex and can be difficult for a jury to understand. The average layperson on a jury may require an explanation of why the duty of care exists in a case, in order to determine, if the defendant breached that duty," he says.

"It is slightly unreasonable to ask a jury to find a breach of a duty of care without first understanding what that duty entails," Paciocco says. "Judges must walk a fine line between guiding a jury without influencing them.

He says this decision brings home the importance of making objections to jury instructions during trial.

"Hindsight may be 20/20 but looking back on a jury instruction and appealing after the fact is not an effective tactic, Paciocco notes. "It reiterates that failing to object during trial is taken into account when determining whether there was misdirection that warrants appellant intervention.

"It's a good reminder for plaintiff and defence counsel alike."

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