IN THE COURT OF APPEALS
OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD RESERVATION, PABLO, MONTANA

RONALD BICK, Plaintiff/Appellee, vs. SPRING ANNA PIERCE, Defendant/Appellant.	CAUSE NO. AP-CV-92-134 **OPINION AND ORDER**

Argued April 22, 1996

Decided May 20, 1996

Daniel W. Hileman and Shelly Brander, Kaufman, Vidal and Hileman, P.C., Kalispell, Montana for Spring Anna Pierce, Defendant/Appellant.

Alan J. Lerner, Law Offices of Alan J. Lerner, Kalispell, Montana for Ronald Bick, Plaintiff/Appellee.

Appeal from the Tribal Court of the Confederated Salish and Kootenai Tribes (CS&KT); Gary Acevedo, Trial Judge, Presiding.

Before: PEREGOY, Chief Justice, DESMOND and GAUTHIER, Justices.

PEREGOY, Chief Justice:

Spring Anna Pierce appeals the trial court's judgment awarding Ronald Bick $199,834.30 for damages sustained in an automobile collision for which Pierce admitted liability. We affirm.

I. BACKGROUND

On May 15, 1991, Ronald Bick (Bick) and his three children were involved in an automobile collision with Spring Anna Pierce (Pierce) on the Flathead Reservation. It is undisputed that Pierce's negligence caused the accident. Bick is an enrolled

member of the Confederated Salish and Kootenai Tribes; Pierce is not.

Bick was injured in the collision. He also saw his children injured. Bick and his children were transported by ambulance to a local hospital for treatment and were released at the end of the day. Bick thought that his children's injuries were severe. He testified that this caused him emotional stress and anguish.

As a result of the impact, Bick suffered injuries, primarily to his shoulder and neck. Dr. Edward Vizcarra diagnosed Bick as suffering from myofacial pain syndrome, a condition characterized by recurring symptoms of muscular spasms and headaches, and pain in the shoulders, arm and neck. Dr. Vizcarra testified that although he expected Bick's condition to improve, Bick's myofacial pain syndrome was chronic and ongoing. He concluded that Bick's ailments were caused by the collision.

Dr. Vizcarra also testified that Bick's occupational and recreational activities can trigger his pain. As to Bick's job as a journalist employed by the tribal newspaper, Dr. Vizcarra opined that Bick's work sitting over his computer can trigger the myofacial pain. Dr. Vizcarra further testified that Bick's pain is exacerbated by stress and tension.

Dr. Vizcarra prescribed a three-week physical therapy course for Bick which cost $1,088.15. He also testified that Bick may require future medical treatment and pain and anti-inflammatory medication as a result of his myofacial pain syndrome, and that he may need to make two office visits per year at $40 each.

The record shows that Bick missed 7 days of work after the accident up to the early part of 1993, and that thereafter he missed 1 to 2 days per month. Bick testified that he anticipates that he will continue to miss 1 to 2 days of work per month as a result of his condition, which he further testified was getting progressively worse.

Pierce hired Dr. Randale Sechrest, a certified orthopedic surgeon, to examine Bick for purposes of her defense. Dr. Sechrest diagnosed Bick with a "significant muscular tear of the superior medial aspect of the left scapula." Dr. Sechrest testified that Bick will have chronic shoulder pain and discomfort which may or may not be related to activity, and that he can expect to have permanent discomfort in his shoulder area. Dr. Sechrest further testified that while he did not expect Bick's condition to deteriorate, he neither expected it to improve. He also noted that Bick had a positive Adson's test which is grossly indicative of thoracic outlet syndrome. This ailment involves compression of the nerves in the arm and can cause numbness, weakness and pain in the arm. Dr. Sechrest also testified that these injuries were caused by the accident.

Although Dr. Sechrest was not optimistic about good results, he indicated that a surgical procedure does exist to attempt to correct the scarring in Bick's shoulder. Should Bick elect to undergo such surgery, the cost would be $5,000 to $6,000 in Libby, Montana.

The undisputed expert and lay testimony indicates that, before

the collision, Bick had no pre-existing conditions, was strong and healthy, and had not suffered any injuries to his neck, back or shoulders. Lori Mikesell, a co-worker of Bick, testified that before the accident, Bick was "energetic" and easy to work with, and worked long hours. After the accident, she observed Bick's "strive for life" to be "down," and noted that he seems stressed and grumpy. Also after the accident, Mikesell observed Bick "constantly hunched over and trying to straighten his shoulders up," as a result of his pain. She further testified that Bick would sometimes lay on the floor at work in an attempt to relax. Mikesell also observed that Bick's pain tends to increase as the work day progresses and that such is attributable to sitting in front of his computer. She also indicated that Bick works fewer hours since the accident.

Other lay witnesses testified about the effect of work on Bick's pain. Constance Brooks, who has lived with Bick since May of 1993, testified that Bick's work seems to increase his pain. Bick's former wife, Jaymee, testified that before the accident, Bick worked long hours at his job without pain, but that after the collision, Bick's pain precluded him from working as much. Brooks attributed this to the type of work he is required to do, and the positions in which he sits at his computer.

Brooks and Jaymee also testified about the adverse effect Bick's injuries have had on his personal life. Bick is now often grouchy and preoccupied as a result of his pain, and has a tendency to be inactive. Bick and other witnesses testified that his pain

and related limitations were getting worse.

At the time of the accident, Bick was married to Jaymee. She testified that the pain resulting from Bick's injuries had a negative impact on their relationship and marriage. Bick and Jaymee were divorced in June of 1992, after the accident.

Brooks testified that Bick's pain limits his yard work and ability to undertake home improvements, and prevents him from doing heavier household tasks. She has observed Bick to frequently experience "severe shoulder problems, aching, headaches and muscle spasms" to the point where he would lay on the couch for two days at a time. Brooks further testified that Bick's pain has caused him to reduce his activities with his children, and was a factor in causing the break-up of her relationship with him.

Jaymee testified that due to his pain after the accident, Bick is largely unable to pursue activities such as softball, fishing, cross-country skiing, weight-lifting--activities which he participated in without pain before the accident. Jaymee further testified that Bick's post-accident pain adversely affected his relationship with his children. Bick also testified regarding the adverse affect his injuries have had on his work, recreation, home and personal life.

Pierce admitted liability for causing the automobile collision. On August 19, 1992, Bick filed suit seeking special, compensatory and general damages for his losses. After a one-day bench trial held on May 25, 1995, the trial court awarded Bick $4,867.50 for loss of past earning capacity, $32,850 for loss of

future earning capacity, $2,116.80 for past medical expenses, $10,000 for future medical expenses, and $150,000 in general damages for pain and suffering for a total judgment of $199,834.30.

II. ISSUES, APPLICABLE LAW AND STANDARD OF REVIEW

Pierce raises the following issues on appeal: (1) whether the record contains sufficient evidence to support the finding that Bick is entitled to recover $32,850 for lost future earning capacity and $4,867.50 for diminution of past earning capacity; (2) whether the record contains sufficient evidence to support the finding that Bick is entitled to recover $2,116.80 in past medical expenses and $10,000 for future medical expenses; (3) whether the award of $150,000 for pain and suffering is excessive; and (4) whether the trial court erred by adopting *verbatim* Bick's proposed findings of fact, conclusions of law and decree.

In deciding issues not specifically addressed by tribal or federal law, the law of the Confederated Salish and Kootenai Tribes provides for the application of Montana law. *See* Ordinance 36B, CS&KT Law and Order Code, Ch. II, §3. There is no tribal or federal law governing the specific issue of damages for personal injury presented in the action at bar. Therefore, it is appropriate under tribal law for this Court to apply Montana law, as did the trial court, to decide the issues raised on appeal in this case.

The Montana Supreme Court utilizes the following standard of review of findings of fact by the trial court in a non-jury trial:

> We review findings of fact by the district court to determine if they are clearly erroneous....We will review

> the record to determine if the findings are supported by substantial evidence, and if there is substantial evidence, we next determine if the district court has misapprehended the effect of the evidence. Even if there is substantial evidence and a proper understanding of the evidence, we may yet declare a finding clearly erroneous when it is clear and definite that a mistake has been committed. (Citations omitted). *Schaal v. Flathead Valley Community Coll.*, 901 P.2d 541, 543 (Mont. 1995).

We adopt this standard of review. In applying it, we are guided by certain long-established presumptions employed by the Montana Supreme Court. First, the judgment of the trial court is presumed to be correct, and all legitimate inferences will be drawn to support this presumption.[1] *Citizens State Bank v. Bossard*, 733 P.2d 1296, 1298 (Mont. 1987).

The trial court's findings will not be disturbed unless they are "clearly erroneous." A finding is "clearly erroneous" when a review of the entire record leaves the court with the definite conviction that a mistake has been committed, even though there is evidence on the record to support the finding. *Steer, Inc. v. Department of Revenue*, 803 P.2d 601, 603 (Mont. 1990); *see also Anderson v. City of Bessemer, North Carolina*, 470 U.S. 564, 573 (1985). Merely showing reasonable grounds for a different conclusion is not sufficient to reverse the trial court's findings. *Frank L. Pirtz Const. v. Hardin Town Pump*, 692 P.2d 460, 462 (Mont.

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[1] Counsel for appellant asserted during oral argument that such presumptions were effectively overruled by the Montana Supreme Court in Interstate Production Credit v. DeSaye, 820 P2d. 1285, 1287 (Mont. 1991). This is incorrect. *DeSaye* simply clarified the meaning of "substantial evidence" when used in the context of the "clearly erroneous standard." *DeSaye* did not overrule any of the long-established presumptions cited and applied herein. In fact, the *Desaye* court also applied some of the presumptions employed by this Court in the case at bar. See *DeSaye*, 820 P.2d at 1287-88.

1984).

"Substantial evidence is defined as 'evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance.'" *In re the Marriage of Eschenbacher*, 831 P.2d 1353, 1355 (Mont. 1992). Substantial evidence may be inherently weak and still be deemed "substantial," and may conflict with other evidence. *Cameron v. Cameron*, 179 Mont. 219, 228, 587 P.2d 939 (1978). In determining whether the trial court's findings are supported by substantial evidence, we review the evidence in the light most favorable to the prevailing party. *Roberts v. Mission Valley Concrete Industries, Inc.*, 721 P.2d 355, 357 (Mont. 1986).[2]

While conflicts may exist in evidence presented, it is the duty of the trial judge to resolve them; it is not the function of this Court to substitute its judgment for the trier of fact. *See Interstate Production Credit v. DeSaye*, 820 P.2d 1285, 1287-88 (Mont. 1991). The credibility and weight accorded the testimony of trial witnesses is for the trial court, not this Court, to determine. This is the primary function of a trial judge sitting without a jury; it is of special consequence where the evidence is conflicting. *Cameron, supra*, 179 Mont. at 228.

We review conclusions of law to determine whether the trial court's interpretation of the law was correct. *Schall*, 901 P.2d at 543.

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[2] See footnote 1, *supra*.

III. DISCUSSION

A. Impairment of Earning Capacity

1. Impairment of Pre-Trial Earning Capacity

Pierce contends that Bick did not seek compensation for past earning losses or wages, and that the award therfor was error. Appellant further asserts that the record does not support the court's award of $4,867.50 for loss of past earning capacity. She argues in any event that Bick, as a salaried employee, was compensated by his employer for lost time or wages resulting from the accident, and therefore that he cannot recover such damages from her. These contentions are without merit.

Impairment of a plaintiff's earning capacity before trial, often referred to as "lost time," and such impairment after trial are elements which constitute a recovery for loss of earning capacity. 22 Am.Jur.2d, *Damages*, §151 at 143 (1988). Actual loss of wages between the occurrence of the injury and the time of trial can be proved with reasonable certainty, and is recoverable as special damages. *Id.* Pursuant to his complaint, Bick sought recovery for "special, compensatory and general damages as may be proven at trial." Accordingly, he properly sought recovery for loss of past earning capacity, time or wages, notwithstanding semantics or labels applied.

The plaintiff in a personal injury action is entitled to recover the value of lost time resulting from the injury. *Id.*, §153 at 144-45. There is no single method of proving the value of a plaintiff's lost time prior to trial. However, the basic test

involves a determination of what plaintiff's services would have been worth during the time he was incapacitated by the injury, considering the income, health, age and background of the plaintiff. *Id.*, §156 at 146.

The record shows that Bick missed 4 days of work immediately following the accident, up to 3 additional days to the end of March 1993, and 1 to 2 days per month thereafter to the date of trial in 1995. Bick's income tax returns demonstrated what he earned per day. Based on this evidence, Pierce was liable to compensate Bick for lost time valued between $4,424 and $7,886. The trial court's award of $4,867.50 falls well within this range, and indeed indulges the low end of Pierce's liability for this element of special damages. We conclude that the finding regarding loss of past earning capacity is supported by substantial evidence, and is not clearly erroneous.

Further, there is no legal support for Pierce's attempt to escape liability for these special damages based on the fact that Bick was compensated for lost time by his employer. The law holds otherwise:

> The rule followed in most jurisdictions is that the person whose negligence caused the injury to plaintiff is not entitled to a reduction in an award of damages by the amount of salary or wages received by plaintiff from his employer during the period of disability, whether the payments were pure gratuities or paid pursuant to contractual obligation. The justification for this rule is the theory that the wrongdoer can have no concern with the transaction between the employer and the employee, and such an arrangement has no effect on the tortfeasor's obligation to compensate the plaintiff for all damage done by his negligence, including the impairment of plaintiff's earning capacity.

Id., §574 at 645-46. This is the law in Montana, which we apply here pursuant to CS&KT Ordinance 36B, Ch. II, §3. *See e.g., Tribby v. Northwestern Bank of Great Falls*, 704 P.2d 409, 417 (Mont. 1985) (applying majority "collateral source rule" that benefits received by a plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer; evidence reflecting collateral benefits held to be inadmissible).

2. **Impairment of Future Earning Capacity**

Pierce contends that the trial court erred in finding that Bick suffered a diminution of future earning capacity. The gravamen of her argument is that Bick was not forced to change his occupation as a result of the accident, that his income as a journalist increased thereafter, and that his injuries are not permanent. Pierce further argues that Bick failed to identify "any particular skill which was profitable or potentially profitable to him that he lost because of the accident." In essence, Pierce urges that Bick must establish <u>complete loss</u> of a particular job-related skill or that he is totally unable to function in his pre-accident occupation as a consequence of the injury, before a finding of impairment of future earning capacity can be sustained. We disagree.

Impairment of earning capacity is defined as "permanent diminution of ability to earn money." 22 Am.Jur.2d, *Damages*, §157 at 147 (1988). Impairment of earning capacity differs from loss of wages. As the Montana Supreme Court cogently explained:

> Impairment of earning capacity is different from loss of wages. It is the permanent diminution of the ability to earn money in the future. The loss is part of the general damages which may be inferred from the nature of the injury without proof of actual lost earnings or income. Proof of the injured person's previous health, age, occupation, skills, education, probable number of productive years remaining, physical and mental impairment proximately caused by the injury and similar factors are sufficient to infer a loss of an established earning capacity. *Thomas v. Whiteside*, 421 P.2d 449, 451 (Mont. 1966). (Emphasis added).

Like the circumstance of lost work time before trial, recovery for impairment of future earning capacity is a recovery for injury to that capacity, not for the plaintiff's loss in earnings. The extent of the impairment of the earning capacity is generally determined by comparing what the injured party was capable of earning before the time of injury with what he or she was capable of earning after it occurred. 22 Am.Jur.2d, *Damages*, §167 at 152 (1988).

Continuing to work or earning more money after an injury does not bar recovery for diminution of earning capacity:

> The fact that the injured party may continue to work and earn as much or more than he formerly did does not bar him from recovering for loss of earning capacity. The fact that plaintiff's total earnings have remained the same or increased since the accident may be some evidence that there was no loss of earning capacity, but other evidence may warrant an award of damages for **physical inability to perform formerly remunerative functions.** Thus, damages for decreased earning capacity should be determined by deducting plaintiff's earning ability after the injury from his earning ability immediately prior to the injury--rather than by deducting his income after the injury from his income prior to the injury. 22 Am.Jur.2d, *Damages*, §168 at 152-53 (1988). (Emphasis added).

Pierce apparently construes the law as requiring a showing of a total inability to perform a "formerly remunerative function" or

job as a condition precedent to recovery for diminution of future earning capacity. However, it is well-settled that recovery is not contingent upon <u>total</u> loss or impairment of an occupation or a particular job skill necessary for the performance of duties within one's chosen occupation. Rather, it is impairment of earning or "working capacity," or the "capacity to labor," which is compensable, i.e., a <u>diminution</u> of a plaintiff's ability or capacity to pursue his or her occupation may be taken into account. *See e.g., Id.*, §171 at 154; *see also, Id.*, §158 at 148 (recovery for "partial impairment"). Montana law, which we apply under CS&KT Ordinance 36B, Ch. II, §3, is in accord:

> Under Montana law, where it is determined that the defendant is liable for the plaintiff's injuries, the plaintiff is entitled to recover for lost earnings and <u>loss of future earning capacity</u> in an amount that will reasonably compensate the plaintiff for <u>any loss of past and future earning power</u> occasioned by the injuries in question. In fixing this amount, the finder of fact may consider what the plaintiff's health, physical ability, and earning power were before the accident, and what they are now. The finder of fact is required to consider the nature and extent of the injuries and whether they are reasonably certain to be permanent. All of these matters are considered in order to determine, first, the effect, if any, the injury has had upon past and future earning capacity and, second, the present value of any loss so suffered. (Emphasis added).

Johnson v. United States, 510 F.Supp. 1039, 1044-45 (D.Mont. 1981).

Further:

> As bearing on the degree to which plaintiff's future earning capacity has been impaired, the nature and extent of the plaintiff's business, profession, or employment, **his skill and ability in his occupation or profession, the loss or diminution of his capacity to follow it**, as a consequence of the injury, and the damages he has sustained by reason of such loss or diminution may be shown and taken into account. (Emphasis added).22 Am.Jur.2d, *Damages*, §169 at 153 (1988).

In this case, the record contains substantial evidence to support the trial court's finding that Bick suffered an impairment of future earning capacity as a result of the injuries he sustained in the automobile accident caused by Pierce. The trial record shows that Bick was in good health and had a tendency to work long hours before the accident, and that he rarely missed work. It further shows that he misses 1 to 2 days of work per month due to pain from the injuries he sustained in the accident. Dr. Vizcarra testified that the nature of Bick's work as a journalist, i.e., sitting at a computer, triggers Bick's pain, which is exacerbated by work-induced stress. Both Bick and a co-worker testified that his injuries have curtailed some of his activities at work. The record further shows that Bick's pain adversely affects his mood and interpersonal relationships at work. Bick and other lay witnesses testified that his pain and limitations are getting progressively worse.

Under *Johnson* and other applicable law, *supra*, the trial testimony establishes an impairment of Bick's future earning capacity. In particular, contrary to Pierce's contention, having to miss 1 to 2 days of work per month for at least 21 years as a result of the accident is strong evidence that Bick's working capacity or ability, and therefore his earning capacity, has been accordingly diminished. Pierce asserted in brief and during oral argument that missing work does not entitle Bick to compensation for lost earning capacity if it does not affect his ability to earn money. Counsel argued that Bick's income tax returns showing

increased earnings since the accident prove that his ability to earn money has not been adversely affected by the accident. Appellant confuses earning capacity with actual dollars earned. As the trial court correctly found, Bick's ability or capacity to earn money was reduced by 1 to 2 days per month as a result of the accident. In any event, appellant's assertion is simply another attempt to seek a reduction in the award of future damages by the amount Bick will receive from his employer for sick or other leave necessarily taken as a result of the injuries Bick sustained in the accident caused by Pierce's negligence. However, like the case with lost earning capacity before trial, the collateral source rule prevents Pierce from obtaining such a windfall.

We are obliged to give due regard to the trial court's judgment of the credibility of the witnesses and the weight of their testimony. The testimonial record in this case contains substantial evidence to support the trial court's finding that Bick suffered impairment in future earning capacity as a result of the injuries he received in the automobile accident caused by Pierce. We hold accordingly, noting that such finding was not clearly erroneous.

Moreover, expert testimony on behalf of both parties indicated that Bick's injuries were reasonably certain to be permanent. While Dr. Vizcarra indicated that he expected Bick's condition to improve, he also testified that Bick's myofacial pain syndrome is chronic and on-going. Dr. Sechrest, Pierce's own expert, testified that he did not expect Bick's condition to improve, and that he can

expect to have permanent discomfort in his shoulder area. Contrary to Pierce's contentions, we find no conflict in this expert testimony with regard to the permanency of Bick's injuries. To the extent any conflict can somehow be distilled from this testimony, it is the province of the trial court as the finder of fact to resolve such. Assuming a conflict, the trial court has resolved it by finding that Bick's injuries are permanent. This resolution is binding upon this Court "unless the testimony on which the decision depends is so inherently improbable or transparent or so contradictive in the case as to deny such testimony all claims to belief." *See Frisnegger v. Gibson*, 598 P.2d 574, 578 (Mont. 1979). We find no such improbabilities, transparencies or contradictions here. To the contrary, both expert witnesses testified that Bick's injuries were permanent.

Pierce further argues that the court erred in determining the amount of Bick's loss of future earning capacity. First, she contends that expert testimony is required for the fact finder to award an amount to compensate a plaintiff for an impairment of future earning capacity. This contention is without merit.[3]

While expert testimony may be helpful, it is not required to establish a future earning capacity loss or diminution. Other

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[3] Pierce relies principally on Doble v. Lincoln County Title Co., 692 P.2d 1267, 1270 (Mont. 1985) to support this contention. However, as Bick correctly points out, *Doble* is not applicable to this case. *Doble* involved a standard of care applicable to a title insurer. Since expert testimony was necessary to establish the professional standard of care for the title insurer, the plaintiff's failure to present expert testimony in that case was fatal. The facts and issues in *Doble* are materially different from those at bar, and therefore, *Doble* is not applicable here.

types of evidence, such as mortality and actuarial tables, are competent to aid the determinations of the fact finder. *See e.g., Ewing v. Esterholt*, 684 P.2d 1053, 1060 (Mont. 1984). In 1965 the Montana Supreme Court adopted the following standard for evidence which will support an award for future earning capacity loss:

> "No general rule can be formulated that would properly control the admission of evidence to prove a man's future earning capacity. It must be arrived at largely from probabilities; and any evidence that would fairly indicate his present earning capacity, and the probability of its increase or decrease in the future ought to be admitted." (Emphasis added).

Krohmer v. Dahl, 402 P.2d 979, 982 (Mont. 1965) (citation omitted). In short, there is no ironclad requirement under Montana law that expert testimony is required to prove a future loss of earning capacity, or to give the formulae for a reduction of the award to present day value. No reason exists for this Court to depart from this long-standing principle of law. In fact, this standard is highly appropriate for the tribal court setting. We therefore adopt it. Under *Krohmer*, *supra*, the evidence adduced in this case "fairly indicates" Bick's past and future earning capacity, and is competent and admissible. We find no error here.

As noted, damages for decreased earning capacity may be calculated by deducting plaintiff's earning ability after the injury from his earning ability immediately prior to the injury. *See* 22 Am.Jur.2d, §168, *supra*. The evidence shows that Bick will miss 1 to 2 days of work per month as a result of his injuries, which are permanent in nature. The trial court concluded that Bick's earning capacity loss would continue for a period of 21

years. Based on Bick's wages at the time of trial, 12 to 24 days per year produces an annual loss between $1,781.52 and $3,563.04. The trial court averaged these two figures and determined Bick's earning capacity loss to be $2,672.58 annually. It then discounted the award to present value, employing a 5% *per annum* discount rate based on Bick's testimony about interest earned on his savings account. The court then applied the table in the Montana Pattern Instructions, MPI 25.92A, "Present Value Calculation," and the steps set forth in MPI 25.92 to reduce the award to present day value. This determination of the discount rate and reduction of the award to present value comport with generally accepted methods applied by courts, and the damages awarded are reasonably certain. *See e.g.*, 22 Am.Jur.2d, *Damages*, §§174-79 at 156-58 (1988).

In light of the above, we conclude that the trial court's award to Bick of $32,850 for impairment of future earning capacity is supported by substantial credible evidence, and that it contains no clear error.

B. Past and Future Medical Expenses

1. Past Medical Expenses

Pierce claims that the trial court erred in awarding Bick $2,116.80 for past medical expenses. Although she does not brief the question, she asserts such in her statement of the issues and in the heading of her discussion of medical expenses. There is no merit to her contention.

It is a fundamental principle of damages law that a person who suffers personal injuries resulting from the negligence of another

is entitled to recover the reasonable value of medical care and expenses incurred for the treatment of injuries to the time of trial, and for the cost of those reasonably certain to be incurred in the future. 22 Am.Jur.2d, *Damages*, §197 at 169 (1988). If the plaintiff has proven entitlement to medical expenses, failure to award such requires reversal. *Id*.

The record shows that Bick incurred past medical bills of $1,708.80 and $408 for non-prescription pain killers for a total of $2,116.80. This evidence was admitted without objection and is uncontroverted. In short, Bick made a prima facie case for past medical expenses, and the court properly awarded them.

2. Future Medical Expenses

Pierce also contends that the court erred in awarding Bick $10,000 for future medical expenses. In essence, she posits that Bick's injuries are not permanent and that such future expenses are speculative. Pierce also asserts that the trial court erred on the ground that the damage award of $10,000 is not supported by the express testimony of an expert witness. These contentions also lack merit.

Under Montana law, which we apply pursuant to CS&KT Ordinance 36B, Ch. II, §3, the standard for the award of future medical expenses is whether they are "reasonably certain" to be incurred in the future. *See DeLeon v. McNinch*, 407 P.2d 45, 47 (Mont. 1965). Future damages need not be absolutely certain, only reasonably certain. *Graham v. Clarks Fork Nat'l Bank*, 631 P.2d 718 (Mont. 1981). In determining an award for future damages, the finder of

fact must engage in conjecture and speculation to some degree. *Id.* When such conjecture and speculation are based on reasonably certain human experience regarding future events, the "trier of fact is entitled to rely on that degree of reasonable certainty in determining and awarding future damages." *Frisnegger v. Gibson*, 598 P.2d 574, 582 (Mont. 1979); *Stark v. The Circle K Corp.*, 751 P.2d 162, 168 (Mont. 1988).

The record demonstrates that Bick will suffer permanent pain and limitations from his injuries. Bick currently spends $102 per year on non-prescription pain killers. Dr. Vizcarra testified that Bick may need two office visits per year at a cost of $80. This evidence shows that Bick is likely to incur a medical expense of $182 per year for these matters. The record further shows that Bick's life expectancy at the time of trial was 39.7 years. The record therefore supports an award of $7,225.40 for these two items alone.

Although Dr. Sechrest did not believe that a good result could be obtained, he did testify that Bick could undergo an operation to attempt to repair the scarring in his shoulder. He further testified that if Bick elected to have surgery, the cost of the operation would be between $5,000 and $6,000 in Libby, Montana.

The evidence elicited at trial supports a finding that Bick may incur future medical expenses between $12,146 and $13,146, yet the trial court took a conservative approach and awarded Bick $10,000 for this element of damage. Under *DeLeon*, *Graham* and *Stark, supra*, Bick is "reasonably certain" to incur these future

medical expenses. Moreover, expert testimony established that Bick's residual injuries are permanent in nature and causally related to the accident. The evidence as to future medical expenses is therefore sufficient to support the court's finding. See e.g., 22 Am.Jur.2d, *Damages*, §215 at 180 (1988) (in jurisdictions requiring that future medical expenses be established through expert testimony, a claimant must present medical evidence which at least indicates that there could be a residual disability causally related to the accident).[4] The trial court's award is based on substantial credible evidence, and we find no clear error. It is therefore affirmed.

C. General Damages for Pain and Suffering

Pierce contends that the general damage award of $150,000 for pain and suffering is excessive and was not based on the exercise of calm and reasonable judgment. She asks us to reverse and remand the award for recalculation. We decline to do so.

Montana law, which we apply pursuant to CS&KT Ordinance 36B, Ch. II, §3, does not set a definite standard as to the amount that the fact finder may award to an injured plaintiff for general damages. *Johnson v. United States*, 510 F.Supp. 1039, 1045 (D.Mont. 1981) provides a synopsis of Montana law regarding compensation for mental and physical pain and suffering:

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[4] Cf. 22 Am.Jur.2d, *Damages*, §216 at 181 (1988) (other jurisdictions hold that the trier of fact may infer from the evidence that there will be future medical expenses; such an inference may be drawn from evidence which includes showing the injured party's condition is permanent, that the injured party continues to be in pain, and the condition of the injured party).

> Under Montana law, the plaintiff is entitled to recover from a negligent defendant compensation for mental and physical pain and suffering. This does not require that any witness should have expressed an opinion as to the amount of damages that would compensate for such injuries. The law requires only that when making an award for pain and suffering, the finder of fact exercise calm and reasonable judgment. The amount must of necessity rest in the sound discretion of the finder of fact...In personal injury actions there is no measuring stick by which to determine the amount of damages to be awarded for pain and suffering other than the intelligence of a fair and impartial trier of fact governed by a sense of justice; each case must of necessity depend upon its own peculiar facts...There is no standard fixed by Montana law for measuring the value of human health or happiness...(Citations omitted).
>
> Under Montana law a plaintiff who has been permanently injured as a result of the negligence of the defendant may recover such sum as will compensate him reasonably for the destruction of his capacity to pursue an established course of life as an element of damages distinct from plaintiff's loss of earning capacity...(Citations omitted).

In *Rasmussen v. Siebert*, 456 P.2d 835, 841 (Mont. 1969), the Montana Supreme Court rejected a challenge to a jury verdict on the grounds that it was driven by prejudice and was excessive in light of the injuries sustained by the plaintiff. The *Rasmussen* court recognized that while there is no definite standard fixed by law for awarding damages for pain and suffering, "all that is required is that the jury exercise calm and reasonable judgment in its award." The court explained that the "jury verdict is conclusive unless the amount awarded is so out of proportion to the injuries received as to shock the conscience." *Id.* Tested by these standards, the court upheld an award of $15,000 to compensate the plaintiff for pain and suffering.

Here, the trial court awarded Bick $150,000 as general damages

pursuant to the following finding of fact:

> 11. As the proximate result of the injuries Plaintiff received in the automobile collision, Plaintiff has, and will continue to, suffer mental and physical pain and limitation. As the proximate result of the injuries, Plaintiff received in the automobile collision, Plaintiff has, and will continue to suffer impairment in his ability to pursue the established course of life he enjoyed before the automobile collision. As the proximate result of the automobile collision, Plaintiff has, and will continue to suffer, an inability to perform household services and yard care which he could perform before the automobile collision. As the proximate result of the automobile collision, Plaintiff has suffered emotional stress, anguish, shock and trauma from seeing his three children injured in the automobile collision. This Court finds that the sum of $150,000 is just and reasonable compensation for these elements of past and future general damage suffered by Plaintiff as a proximate result of the automobile collision.

The trial court's finding and award are supported by substantial credible evidence. At the time of the accident, Bick had a life expectancy of 43.7 years. The record establishes that his pain and limitation are of a permanent nature, and that his condition is worsening.

The record also shows that prior to the accident Bick was in excellent health and did not have any of the pain or limitations which his injuries now cause him. The testimony of Bick, Mikesell, Brooks and Jaymee show that Bick's previously established course of life has been adversely affected by the lasting pain resulting from the injuries he sustained in the accident caused by Pierce. This includes his general disposition, interpersonal relationships, recreational activities, and ability to perform household repairs, improvement and maintenance. The record further shows that Bick endured emotional pain and anguish as a result of witnessing his

children being injured in the accident.

While the appropriate amount of compensation for this pain and suffering is not subject to any fixed standard or formulae, a *per diem* analysis of the award serves to demonstrate its reasonableness under the facts of this case. *See e.g., Vogel v. Fetter Livestock Company*, 394 P.2d 766, 772-73 (Mont. 1964) (use of a *per diem* argument in fixing damages for personal injuries is within the sound discretion of the court). With a life expectancy of 43.7 years from the date trial, Bick will endure pain and concomitant limitations for 15,950 days. The court's award of $150,000 translates into $9.40 per day compensation for pain and suffering which will persist throughout his life. Considering that Bick earned $18.55 per hour at the time of trial, the court's award is equal to approximately one-half hour of his wages for each day of pain, suffering and detriment which he experiences, and will continue to experience, as a result of the accident.

Considering Bick's age and health before the accident, his life expectancy, the adverse effect on his established course of life, and his past and future pain and suffering resulting from his injuries caused by Pierce's negligence, we do not find that the amount awarded by the trial court is excessive. *Cf. Frisnegger v. Gibson*, 598 P.2d at 579, *supra*. Nor do we think the award is so out of proportion to the injuries Bick suffered as to "shock the conscience." Further, upon examining the record, we do not find any indication that the trial judge was actuated by passion or prejudice in determining the award, nor do we find any clear error.

The award of $150,000 for pain and suffering is therefore affirmed.

D. Trial Court's *Verbatim* Adoption of Plaintiff's Proposed Findings of Fact, Conclusion of Law and Judgment

As a final specification of error, Pierce argues that the trial court committed reversible error by adopting *verbatim* Bick's proposed findings of fact, conclusions of law and judgment. While as a general rule this Court frowns upon a trial court's *verbatim* adoption of a party's proposed findings, we must reject Pierce's contention in light of the particular facts and circumstances of this case.[5]

The Montana Supreme Court enunciated the standards for review of findings which a trial court adopts *verbatim* from a submission of one of the parties in *In re the Marriage of Jensen*, 631 P.2d 700, 703 (Mont. 1981):

> In her final specification of error, Sabre argues the District Court erred by adopting the proposed findings of fact, conclusions of law and decree submitted by Gary's counsel. She suggests that a lower standard for review should exist for the review of findings and conclusions drafted by counsel than exists under the "clearly erroneous" standard of Rule 52(a), M.R.C.P. We decline to adopt this suggestion. In *Schilling v. Schwitzer-Cummins Co.* (D.C. Cir. 1944), 142 F.2d 82, Justice Miller addressed this precise suggestion and

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[5] Appellate courts tend to eschew a trial court's wholesale adoption of the prevailing party's proposed findings because such can impugn the integrity of the judicial process. As Pierce suggests, this type of practice can create the appearance of "rubber-stamping," and thereby erode independent judicial decision-making. Moreover, it can lead to error. Attorneys are bound by the Code of Professional Responsibility to zealously represent their clients. Verbatim adoption of proposed findings can result in the adoption of over-zealous and inaccurate or erroneous proposed findings. For an excellent discussion of the pitfalls of verbatim adoption of proposed findings, see In re the Marriage of Jensen, 631 P.2d 700, 704-11 (D. Mont 1981) (Shea, J. dissenting).

persuasively explained reasons for allowing courts to ask for counsel's assistance in drafting findings of fact and conclusions of law:

> "Whatever may be the most commendable method of preparing findings--whether by a judge alone, or with the assistance of his court reporter, his law clerk and his secretary, or from a draft submitted by counsel--may well depend upon the case, the judge, and facilities available to him. **If inadequate findings result from improper reliance upon drafts prepared by counsel--or from any other cause--it is the result and not the source that is objectionable.** It is no more appropriate to tell a trial judge he must refrain from using or requiring the assistance of able counsel, in preparing findings, than it would be to tell an appellate judge he must write his own opinions without the aid of briefs and oral argument."

Our ultimate test for adequacy of findings of fact is whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision, and whether they are supported by the evidence presented.

> In Tomaskie v. Tomaskie (1981), Mont., 625 P.2d 536, 38 St.Rep. 416, we disapproved of wholesale adoption of proposed findings submitted by a party. Such a practice may lead to error...Once findings are adopted however, Rule 52(a) applies to support them on appeal, and there is no reason in the Rules or otherwise to give such adopted findings a lesser degree of weight, since once signed by the district judge they bear the imprimatur of the court. (Citation omitted) (emphasis added).

See also *Moore v. Hardy*, 748 P.2d 477, 480 (Mont. 1988); *Bowman v. Prater*, 692 P.2d 9, 12 (Mont. 1984); *Kravik v. Miller*, 691 P.2d 1373, 1378 (Mont. 1984); *Eaton v. Morse*, 687 P.2d 1004, 1009 (Mont. 1984) (district court's *verbatim* adoption of prevailing party's proposed findings upheld even though trial judge did not explain reasons for adoption of plaintiff's proposed findings and conclusions); *Sawyer-Adecor International, Inc. v. Anglin*, 646 P.2d 1194, 1198 (Mont. 1982); *City of Billings v. Public Service Comm.*,

631 P.2d 1295, 1301 (Mont. 1981).[6]

Rule 52(a) of the federal and Montana Rules of Civil procedure provides that findings of fact shall not be set aside unless they are clearly erroneous and requires due regard be given to the opportunity of the trial court to judge the credibility of the witnesses. Thus, once the trial court adopts findings and conclusions they become the court's own, and may not be set aside on appeal unless they are clearly erroneous. When the findings and conclusions are not clearly erroneous and are supported by the record, the trial judge has not abused his or her discretion by adopting the proposals of one of the parties, *verbatim* or otherwise. *See In re the Matter of R.L.S. v. Barkhoff*, 674 P.2d 1082, 1085-86 (Mont. 1983). *Cf. In re the Marriage of Wolfe*, 659 P.2d 259, 261 (Mont. 1983) (district court's near *verbatim* adoption of husband's proposed findings vacated because unsupported by

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[6] Pierce relies in part on Bean v. Board of Labor Appeals, 891 p.2d 516, 520 (Mont. 1995) to support her contention that the trial court erred in adopting Bick's submission as its own. However, *Bean* is not applicable to this case because it did not involve Rule 52(a), M.R.C.P., or a trial judge's adoption of one party's submission as his own. Rather, *Bean* involved an unemployment compensation proceeding before a state administrative body and was governed by the Administrative Rules of Montana (ARM). The particular rule at issue there (§24.7.306(1), ARM) required the Board of Labor Appeals (BOLA) to issue a written decision setting forth the findings of fact and the reasons for its decision. However, BOLA simply issued a one paragraph decision stating that, after reviewing the record and hearing the argument presented by Bean's counsel, it failed to find any evidence to warrant modification of a referee's decision. The BOLA then adopted the referee's findings of fact and decision as its own. The Montana Supreme Court held that BOLA's *verbatim* adoption of the referee's findings and decisions **without reviewing the record** violated §24.7.306(1), ARM. In any event, the Montana Supreme Court declined to prohibit BOLA from adopting the findings of a referee *verbatim* upon proper review of the record.

evidence presented, and trial judge did not consider facts and exercise his own judgment).

As set forth herein, the findings of fact and conclusions of law entered by the trial court in this case are comprehensive and supported by substantial evidence. They plainly give the basis for the court's judgment and are supported by applicable law. Further, they contain no clear error, nor do we discern that the trial judge "misapprehended" the effect of the evidence in his award to Bick. We uphold the trial court.

IV. CONCLUSION

The trial court's findings of fact challenged on appeal are supported by substantial credible evidence. We discern no misapprehension on the part of the trial court regarding the effect of the evidence, nor do we ascertain that a mistake has been committed with respect to any of the findings entered. In short, none of the findings upon which the judgment rests is clearly erroneous. We therefore affirm the trial court's award to Bick of $4,867.50 for loss of past earning capacity, $32,850 for loss of future earning capacity, $2,116.80 for past medical expenses,

$10,000 for future medical expenses, and $150,000 in general damages for pain and suffering for a total judgment of $199,834.30.

AFFIRMED

SO ORDERED this 20th day of May, 1996.

Robert M. Peregoy
Chief Justice

Brenda C. Desmond
Acting Associate Justice

Robert Gauthier
Associate Justice

CERTIFICATE OF MAILING

I, Abigail Dupuis, Appellate Court Administrator, do hereby certify that I mailed true and correct copies of the **OPINION AND ORDER** to the persons first named therein at the addresses shown below by depositing same in the U.S. Mail, postage prepaid at Pablo, Montana, or hand-delivered this 30th day of May, 1996.

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