COURT FILE NO.: 97-CU-135410
DATE: 20050127

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
JENNIFER-ANNE COWLES, JESSE COWLES, a minor by his Litigation Guardian, Jennifer-Anne Cowles, QUINTON COWLES, a minor by his Litigation Guardian, Jennifer-Anne Cowles and ANNE KELLY Plaintiffs	*L. Craig Brown*, for the Cowles Family Members as Plaintiffs
- and -	
DAVID BALAC, RANKO BALAC and THE AFRICAN LION SAFARI & GAME FARM LTD. Defendants	*J.A. Soule*, for David Balac and Ranko Balac, as Defendants *Douglas Wright* and *Martin Smith*, for The African Lion Safari & Game Farm Ltd.

COURT FILE NO.: 98-CV-139448

BETWEEN:	
DAVID BALAC, RANKO BALAC, SLAVKA BALAC and SANDRA BALAC Plaintiffs	*Bruce Haines, Q.C.*, *D. Christie* and *O. Jasen*, for the Balac Family Members as Plaintiffs
- and -	
AFRICAN LION SAFARI & GAME FARM LTD. and LIBERTY MUTUAL INSURANCE COMPANY Defendants	

COURT FILE NO.: 98-CV-139448A

BETWEEN:	)	
	)	
DAVID BALAC, RANKO BALAC, SLAVKA BALAC and SANDRA BALAC	)	
	)	
Plaintiffs	)	
	)	
- and -	)	
	)	
AFRICAN LION SAFARI & GAME FARM LTD. and LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Defendants	)	
	)	
- and -	)	*Lynne Carson*, for Jennifer-Anne Cowles as Defendant-by-Counterclaim and Third Party
JENNIFER-ANNE COWLES	)	
	)	
Third Party	)	
	)	
	)	**HEARD:** November 1, 2, 8-10, 12, 15-19, 22-26, 29, 30, December 1-3, 6-8, 13, 14, 2004

MacFarland J.

[1] On April 19, 1996 David Balac had been dating Jennifer Cowles for several months. At the time he was a student at Sheridan College and she was an exotic dancer. Classes although not yet over for the semester were beginning to wind down for David and so he and Jennifer decided to visit African Lion Safari (hereafter ALS) on what was a lovely warm spring day. The two had been out together the night before and on that occasion, they'd been to Mr. Sub. David recalled that he'd had an iced tea and Jennifer a ham and cheese sub which she had entirely consumed before he dropped her off when the evening ended. The empty pop tin and sandwich wrapper and/or napkins remained in the vehicle.

[2] While en route to ALS, Jennifer and David stopped for lunch at a Wendy's restaurant. They ate in the restaurant and took no food back to the car. Their evidence, which I accept, is that they had no food in the car with them when they went to ALS.

[3] On arrival at ALS they paid a reduced admit fee because Jennifer had a coupon book which contained a discount voucher. In addition to that, there was a further discount because not

all the exhibits were yet open. At the main gate they paid an admission fee, were given a receipt and a pamphlet which contained a map and nothing more.

[4] They first parked their car and walked about taking in Pets' Corner, the bird aviary, an elephant show and bought a couple of juices at the ALS restaurant. Jennifer had taken with her a disposable camera she'd acquired a few days before and the two took photos of one another and of the animals.

[5] After they finished in the walk about area, they returned to the car and headed to the animal reserves.

[6] David's car was a 1988 white Honda Prelude which had two doors and automatic windows. On the driver's side there were two buttons with which the driver could control both the driver's and passenger's window. On the passenger side there was but a single button from which one could control the passenger window only.

[7] As they entered the first reserve the passenger window was down just an inch or so to permit the entry of some fresh air – before the air-conditioning system began to cool the car. Jennifer took a photograph of an ostrich in this section and was then startled by the ostrich who ran at the car and tried to poke its beak through the open window as can be seen in photograph No. 7 at Tab 10 of Exhibit 1. This action startled Jennifer and either she or David then closed the window entirely.

[8] Both windows of the vehicle were entirely up when the car entered the tiger reserve known as Section Three. Balac and Cowles' evidence is to this effect as is that of Mr. Durrer, the ALS employee on duty at centre gate when Balac and Cowles entered Section Three.

[9] They proceeded into the Section slowly; Balac explained that they merely "rolled". His car was a standard shift and he "played" with the clutch and gas just enough to keep the vehicle from stalling. As they entered Section Three, an ALS zebra-stripped truck passed them and in that vehicle with the driver was a tiger cub which they briefly discussed as they continued into the Section.

[10] There was a single tiger on the passenger side of the vehicle (since identified as PACA) and Jennifer took a photograph of this tiger through her closed passenger window (Photo I of Exhibit 11 and No. 7 of Tab 10 of Exhibit 1). She then turned to her left to speak to David – heard a "bang-like noise" and the next thing she knew there was a tiger in her lap.

[11] David's evidence, which I accept, is that he felt the car rock violently such that his foot slipped off the clutch and the car stalled – whereupon the tiger jumped into the car. Before he saw the tiger David's right hand was on the gearshift and he was using his left to steer the car. His first awareness of the tiger was, as he faced forward, out of the corner of his eye he noticed a paw and at about the same time the window moved down quickly with the paw. The tiger came into the vehicle right across Jennifer and grabbed David by the right forearm, lifted him right out of his seat and attempted to pull him out of the vehicle, across Jennifer and out the passenger

window. Jennifer grabbed David around the waist and hung on tightly trying to prevent the tiger getting him out of the vehicle. David had noticed a gap in the tiger's teeth when it clamped down on his arm and he was able to twist his arm free through that gap and as a result fell back into his seat. The tiger then turned its attention to Jennifer, biting her first on hip as it tried to get her out

of the car through the passenger window. The tiger was unsuccessful on this attempt and Jennifer fell back into the car whereupon the tiger then grabbed her by the head and tried to pull her from the vehicle through the passenger window by her head and it nearly succeeded in doing so.

[12] The tiger dropped Jennifer either as the result of David restarting the car and "popping" the clutch at high acceleration which caused the car to jolt suddenly forward or as the result of an ALS truck arriving at the scene and driving the tigers off eventually.

[13] When David fell back into his seat after extricating his right arm from the tiger's mouth he became aware of two tigers at the driver's window, fighting to get into the vehicle. One or both had "nipped" his left hand. Fortunately their size prevented the two from being able to gain entry simultaneously. It was only then that David became aware that his driver's window was also down.

[14] Jennifer's version of the sequence of events is slightly different from David's as one might expect. Jennifer believes the tigers on David's side of the car had his left hand at the same time that the one on the passenger side had his right and they were trying to pull him, from different directions, out of the vehicle while she tried to hold him in the car. She says the tiger then on her side let go of David and grabbed her.

[15] One can only imagine the stark terror experienced by these young people during this horrendous event. The scene inside that vehicle can only have been utterly chaotic. That they would have a different perspective of how the events unfolded is understandable.

[16] I accept Jennifer's evidence that she took the photograph of the tiger, PACA, through her closed passenger-side window. I was impressed by both Jennifer and David as they gave their evidence, they were excellent witnesses in my experience. They were both on the stand for a number of days and were both closely and vigorously cross-examined – neither wavered. I thought they were both very forthright and did not see any tendency to overstate or exaggerate.

[17] There is no doubt on the evidence and indeed the parties are agreed, that the windows had to be down to admit the tigers into the vehicle. As might be expected, a number of explanations have been put forward to explain how the window came to be down.

[18] The engineers Leier and Raftery are agreed that if the window had been forced down from a closed or even partly closed position, the mechanism which lowers and raises the window would have been damaged and the window would not have functioned thereafter. Both windows operated without difficulty after the incident.

[19] The tigers at ALS are declawed on their front paws and so could not have gained a "toe-hold" on a fully closed window through the use of a claw. Only if the window were partially open would it have been possible for the tiger to have forced the window down with its front paw or paws. Had it done so, however, the mechanism would have been damaged unless the switch

was opened at and during the time the window was being forced down. Only in such circumstances could the window have been forced down without damage to the mechanism.

[20] Neither of the plaintiffs gave any evidence of efforts to put the windows up during the attack.

[21] In my view the only reasonable explanation on the facts, is that when the tiger, PACA, made its initial attack on the passenger side of the vehicle, the window was closed. Had it been open then the tiger would have entered the car. It did not and this fact is evidenced by the physical damage on the passenger door described by Mr. Leier in his evidence. There were four primary dents at the sill level, three smaller ones toward the centre of the panel and two similar vertical creases at the bottom of the door. David Balac's evidence was that this damage was not present on the door before the incident and was present when the vehicle was returned to him after the attack. His father's evidence is to the same effect. Ranko Balac, David's father, attended the ALS premises in the morning after the attack to retrieve the car. He noted the presence of a number of dents on the passenger door that had not been present the day before. Mr. Balac Sr. is a photographer on weekends; he often carries a camera with him and did so on this occasion. Exhibit 1, Tab 11 contains the photos taken by Mr. Balac Sr. Photos "A" and "B" in particular show the damage to the passenger door. Their evidence is corroborated in this respect by that of Steve Ashbee, head game warden of ALS then and now, who after the attack noted the presence of "lots of smears, scratches, and dents" on the passenger-side door. Mr. Leier's opinion, which I accept, is that this damage was NOT consistent with the type of damage that might be sustained with regular and usual usage and further that the multiple locations of the damage suggest repeated incidents or impacts. Mr. Leier concluded, quite reasonably in my view, that there had been repeated vigorous striking of the vehicle by the large animal trying to gain entry into the vehicle when the windows were up. This would coincide with David's evidence about the sudden rocking of the vehicle and Jennifer's evidence about the sudden "bang" and movement of the vehicle. The motion caused David's foot to slip from the clutch and in my view probably at the same time, although David was unaware of it, caused his arm or some part of his body to come into contact with the window switches inadvertently, and thereby lower the windows on both sides of the vehicle which allowed the tigers access to the passengers. In my view this is the most reasonable explanation for what occurred and it accords with the evidence which I accept.

[22] There was much evidence led a trial in relation to what may have been said by David and Jennifer to others about how the attack occurred.

[23] On the morning following the attack, David's father Ranko Balac went to the ALS premises where he retrieved David's car. Before taking the car, he took a number of photographs of the exterior and interior of the car before touching or cleaning anything. Jennifer's disposable camera was still in the vehicle. The glove box was opened and the contents thereof were on the floor of the passenger side of the vehicle and included napkins from Mr. Sub. In my view the presence of these items in the vehicle caused people to speculate about how this accident occurred and coloured their evidence.

[24] Both David and Jennifer suffered very serious injuries in the attack in shockingly terrifying circumstances. They both suffered significant loss of blood; they were in shock and a great deal of pain after the attack.

[25] ALS employees who attended David and Jennifer as soon as they exited Section Three, described David as being agitated and repeating over and over that they were in trouble and needed help. He was screaming about his arm and the pain; he was visibly very upset and panicked.

[26] Jennifer on the other hand was described as being very quiet, curled on the seat in a fetal position, almost in a light sleep, semi-conscious, drifting in and out of consciousness. When she spoke it was very quietly but there were times she was non-responsive.

[27] What either David or Jennifer may have said in such circumstances must be carefully considered.

[28] Neither Steve Ashbee nor Chris Durrer heard either David or Jennifer make any statement about how the accident had occurred. They were the first two ALS employees to the Balac car after the attack. While Ashbee soon left to go out to meet the ambulances, Durrer remained at the car until ambulance personnel arrived. Ashbee was relieved by Sue Mitchell.

[29] Sue Mitchell (and others) suggested it took about one half hour for the ambulances to arrive. She and Durrer remained with David and Jennifer until they were relieved by ambulance personnel. Mitchell said that David was very upset and vocal. He was angry, she said, and kept yelling at Jennifer words to the effect: "Why did you have to open the window?" "Why did you have to feed them?" "Why did you have to do that?" The female made no response to Balac she said. She says he told her (Mitchell) that the female passenger's window was down, he was not sure how his window came open and he stalled the car. He did not tell Mitchell directly that Jennifer had been feeding the tigers but he said it to Jennifer.

[30] Mitchell described the interior of the Balac vehicle as messy and dirty. She said she could "see food all over the place". There were french fries on the floor and bits of sandwich remains and leftover sandwich meat. She described seeing some sandwich part on Jennifer's lap. The rest was on the floor and mushed into the front passenger's seat.

[31] She also said that she drove over the location in Section Three where she believed the attack on Jennifer and David had occurred and looked at the ground area. She said there was some remains of food on the ground – including french fries that had been driven over and other small amounts of food. She said Susan (another ALS employee, Susan Beatty who had been called to Section Three after the attack to take over for Kedge and Mitchell) told her that the seagull's had been to the area to clean up.

[32] Mitchell's evidence is problematic in many respects.

[33] First, it is strange that Durrer did not hear David angrily yelling at Jennifer about opening her window and feeding the tigers. He was right at the vehicle assisting in the care of David in particular while awaiting the ambulance arrival. If David had made such statements and in the manner Mitchell described, he would have heard it and he has described no such statement.

[34] In addition Ms. Mitchell prepared an incident report for her employer after this occurrence. Tab 2 of Exhibit 85 is that document. Curiously there is nothing in that statement about feeding the tigers and in particular about David's alleged statement to Jennifer about it. The document does state:

> During this time the female passenger told us that her window was open so that she could take pictures of the cats.

[35] This was not Ms. Mitchell's evidence at trial and her explanation about the purpose of this report is questionable. She said the purpose of the report is simply to record "how we got the people safely away from the tigers and what we did to help". She was anything but clear about what instructions she'd been given in relation to the preparation of a report. She said the incident report was not intended to be an important statement about how the attack had occurred – yet she recorded that the window was open so the female passenger could take photographs. Mitchell was sure she'd told Ashbee and perhaps Dailley about her observations of the presence of food in the vehicle. Neither corroborate what she says. None of the photographs taken by Balac Sr. or by the police after the incident show any food remains in the vehicle. One would think, if such had been there, the police identification officer would have specifically photographed it as well as the food remains Mitchell claims were visible to anyone who looked on the road at the attack location. The police photographed the interior of the car and the road surface in the area of the attack. None of the photographs corroborate Mitchell's evidence. No one else noticed any part of a sandwich or sandwich remains on Jennifer's lap after the attack. The presence of such simply defies credulity having heard how Jennifer was pulled partly out of the car window by her head after the tiger's first unsuccessful attempt to pull her out hip first.

[36] In all of the circumstances, it would be, in my view, quite unsafe to accept her evidence which is quite materially different from that she recorded eight and a half years ago. I do not accept Ms. Mitchell's evidence.

[37] Neither Steve Ashbee nor Chris Durrer heard either passenger say anything about how the accident had occurred.

[38] The ambulance attendant John McCarthy was in the third ambulance to arrive. While he concedes that Jennifer had low blood pressure and pulse and was in shock, he described her as fully conscious and alert – a contrast to the description of those who were with her for the 30 minutes before his arrival. His conclusion was based on the fact that she knew her name and what day it was. Mr. McCarthy had no personal notes of the incident which he used to refresh his memory.

[39] He said Jennifer told him that she'd been in the passenger seat of the car. There was a tiger several feet away and she rolled down the window to take a picture. She didn't know if the tiger had swatted at her through the open window but that its paw had been sitting on the windowsill and her boyfriend pushed the power window up trapping the tiger's paw whereupon the window came down and the tiger jumped into the car. After that they (she and David) tried

frantically to get the tiger out of the car. David she said, got out of the car, walked around to her side where he opened her door and tried to pull the tiger out of the car. As he did this another tiger jumped into the car through his open door.

[40] The latter half of the statement McCarthy attributes to Jennifer simply accords with none of the observations made by others. It seemed to me from his facial expression as he gave his evidence – about David leaving the vehicle to pull the tiger out of the car – that even he thought this was pretty far fetched.

[41] I do not consider McCarthy's evidence reliable.

[42] Ms. Jones, the paramedic who looked after David said he told her he didn't know what happened.

[43] Linda Malcolm (then Coelho) was a 20-year-old paramedic student-in-training at the time and was there to assist Ms. Jones and Doug Matheson. She says it was she who attended to Jennifer while Jones and Matheson – both fully qualified paramedics at the time, attended to David. Jones' evidence was that she took over David's care while Matheson and Malcolm the student went to Jennifer.

[44] Malcolm says Jennifer told her she rolled the window down to take photographs. Jones did not overhear Jennifer say this and Matheson was not called. Not being the one in direct charge of either Jennifer or David, I am concerned that Malcolm may well have been influenced by what she heard from others at the scene and what she saw in the car.

[45] Lacey Lister is Jennifer's aunt and she gave a statement to an adjustor for ALS after the incident wherein she stated, among other things, that Jennifer had told her she had her window down taking a picture of the tiger. This she said Jennifer had told her in the hospital soon after the attack.

[46] Ms. Lister did not speak to Jennifer in the hospital after the attack and she has denied ever making the statement on occasion and on other occasions agreed she made the statement but said it was untrue. Ms. Lister has been in precarious health both physically and mentally for some years. Her evidence is quite unreliable.

[47] Dr. Wong recorded in his history taken in the Emergency Room of the hospital that Jennifer told him she was at ALS with her boyfriend in a 4 x 4 and she rolled down her window to photograph a tiger. He has no independent recollection of the incident and relies totally on his notes and the hospital record. He says his usual practice is to get the history directly from the patient and to record what the patient tells him. His notes and hospital records do not record the source of his information. He agreed on cross-examination it was possible an ambulance attendant told him what occurred – although he does not recall any such discussion. He agreed in 1996 it was common practice for ambulance attendants to come into the emergency room with the patients they were transporting. I am of the view that Dr. Wong probably did get the history from others on this occasion because his notes record that Jennifer and David were in a 4 x 4

vehicle – that is simply factually incorrect and Jennifer would have known she was not in a 4 x 4 being quite aware of the type of car David drove. I do not accept that Jennifer told Dr. Wong that she rolled her window down to take a photograph for these reasons.

[48] And lastly, neither Ashbee nor Durrer, both ALS employees at the time, overheard either Jennifer or David say anything about how the accident occurred.

[49] As for Mr. Durrer's evidence about seeing french fries on the floor of the vehicle after the attack, I reject that evidence for the same reason I did not accept Mitchell's evidence – no notation made of it at the time and the fact that it is not revealed in photos taken at the time.

[50] Later that same afternoon after David and Jennifer had been removed by ambulance, ALS employees accompanied the police and representatives of the press into Section Three.

[51] The police took a series of photographs which were filed in evidence on consent. No police officer testified at these proceedings. The police were summoned by ALS and came there to investigate the circumstances leading to the serious injuries to David and Jennifer. Had they concluded that the two had been feeding the tigers with food from their car, and there remained some of that food in the car and/or on the roadway in the vicinity of the attack – one would expect the police photographer would have photographed that food. Not one of these photos shows any food.

[52] While no member of the press spoke to David and Jennifer in the hours after the attack, one or more did tour the ALS facility with ALS staff members. In newspaper articles which later appeared, the local press suggested that David and Jennifer had been feeding the tigers. Where, I ask rhetorically, could that information have come from other than ALS?

[53] David and Jennifer have, I find, been consistent from the day of the attack and repeated over and over that they do not know how the window came down and they deny that Jennifer's window was opened so she could take photographs and I accept their evidence.

[54] I turn to the question of damages. The parties are agreed on non-pecuniary general damages for David in the sum of $225,000.00 and for Jennifer $210,000.00. In addition the parties are agreed on the *Family Law Act* claims for Anne Kelly in the sum of $20,000.00, Jesse Cowles in the sum of $15,000.00 and Quinton Cowles in the sum of $10,000.00.

[55] On the evidence it appears as though Anne Kelly, Jennifer's mother, took Jennifer's two boys under her wing and cared for them until Jennifer was finally able to resume her motherly duties on a full-time basis. Jennifer is a single mother and the sole provider for herself and her boys. Both her physical and mental health were such, following this incident, that she was unable to resume full care of her children for some time. She was most fortunate to have her mother close by and willing to take on the full care of the boys. I was not made aware of any out of the ordinary impact this incident had on the boys. I am satisfied the amounts for the children are within an appropriate range and I would approve the figures.

[56] There remains for determination the economic, special and future care damages for Jennifer and David as well as the *Family Law Act* claims of the Balac family members other than David.

[57] The three members of David's family who claim under the *Family Law Act* are his mother, father and his sister. David and his mother were particularly close. Mrs. Balac does not drive and David would take her anywhere she need to go, to work, grocery shopping, etc. This

incident has shattered the family. David because of the injury to his right forearm is unable to do many of the things he did before the accident. Where before the accident he was a good help to both of the parents, helping his mother with indoor chores and his dad with the outdoor maintenance, now he does nothing other than his own personal care. He no longer makes his bed or helps with the laundry by way of example. The brunt of the extra work is borne by Mrs. Balac and her husband. David's sister hasn't the close relationship she had with her brother before. I would assess these claims as follows:

1. Mrs. Balac $20,000.00

2. Mr. Balac $17,500.00

3. Sandra Balac $12,000.00

These numbers are before statutory deductibles are applied.

[58] Because non-pecuniary general damages have been agreed upon in respect of both main plaintiffs it will not be necessary to detail the injuries suffered to the extent I would otherwise. I infer from the quantum agreed to by the defence that it is accepted that Jennifer and David have suffered serious, significant and substantial injuries.

David Balac

[59] David was only twenty-three years of age at the time he was injured. David was right hand dominant and it is his right forearm that was so severely injured as the result of the tiger's bite. The preponderance of medical opinion in relation to the arm is that all has been done that can be done for the arm. Any further surgery to improve cosmetically entails a serious risk of further loss of function. David has, reasonably in my view, decided not to have more surgery.

[60] He is left with a grotesquely scarred and disfigured right forearm. And while functionally, considering the extent of his injury, he has had a reasonably good result, he is significantly disabled. David has some ability to use the arm for light activities which require only gross motor abilities. Activities which require fine motor skills are beyond him. The arm is a constant source of pain. His fingers do not move well and tend to swell. When he walks to the gym he keeps his right thumb hooked in the strap of his backpack, this keeps his arm elevated. If he lets the arm simply fall to his right side, it will swell and become painful.

[61] Before the accident David was very athletic, engaged in a number of sports and even taught squash at Sheridan College. All of that is lost to him now.

[62] In addition to his devastating physical injury David has suffered emotionally as well. When one considers the terrifying circumstances of the attack it is surprising that more attention was not paid to David's mental health earlier. I am in total agreement with Mr. Haines' observation at page 14 of his written submissions:

> In terms of assisting David as a patient, Dr. Comper's view was that Dr. Tysdale simply "dusted" David off and obviously no signal was sent back to Dr. Toffolo that David was in serious emotional trouble. As a consequence David was left to flounder until he was seen by a further psychiatrist Dr. Adrian Hanick in September, 1999 and by Dr. Neville Doxey the following year.

[63] It is hardly surprising that David did not succeed when he returned to Sheridan College in the fall of 1996 and 1997, in my view it was inevitable. Dr. Tysdale's "dusting off" of David could not have come at a worse time – a time when David was in desperate need of therapy.

[64] His physical difficulties with the right arm seemed to worsen over time and his psychological difficulties are entrenched. While the experts quibble over whether Mr. Balac is properly described as having post traumatic stress disorder, the fact is that he remains significantly disabled – both from a physical and psychological perspective. Dr. Hanick concluded in his June 9, 2004 report:

> It is now seen to be far more probable and far more likely that Mr. Balac will suffer his ongoing pain, altered sensation, significant physical limitations, and continuing emotional distress on a protracted and indefinite and likely even permanent basis and, again, it is clearly evident that he has been left with permanent and disfiguring scarring. There is substantial concern that Mr. Balac will continue to suffer his physical and emotional problems on a quite chronic and indefinite basis and, indeed, there is now substantial expectation that such problems both, physical and emotional, and his full disability might well continue on a permanent basis.

[65] David has made some effort to find employment since the incident but has been unsuccessful. Dr. Comper opined that for David competitive employment is unlikely to occur; neither vocational nor psychological counseling has helped. His injuries are permanent and it is unlikely there will be any improvement. I accept Dr. Comper's conclusion that while most persons who suffer post traumatic stress disorder recover, there are fifteen to twenty percent who do not and some of whom even worsen over time and that it appears David is in the latter category. It is I find unlikely that David will ever be gainfully employed.

[66] On this record I am unable to conclude that there is a reasonable possibility that David would have successfully completed college. His grades at the time of the accident suggest otherwise. He switched courses twice and never achieved passing grades. His evidence in this respect was contradicted by his transcript from Sheridan College. The more reasonable scenario is that David would not have completed college with a degree. While he may have had the intellectual capacity to successfully complete a two year or even a three year college program, provided it was one without a mathematical component, he did not demonstrate the necessary drive or determination to succeed. From his perspective he was content with his marks and considered his performance to be "average". The reality is he was failing.

[67] In my view the most realistic scenario upon which to calculate his loss of income claim is Mr. Wollach's Scenario 3 which considers a high school graduate with some post-secondary education. In his report which is Exhibit 51 at trial Mr. Wollach details his assumptions at page 4 thereof which include:

- Mr. Balac's life expectancy is equal to that of the general male population in Canada.

- As a consequence of his Incident related injuries he is totally and permanently disabled from gainful employment in a competitive employment environment.

- Absent the Incident, he would have secured full time employment effective July 1, 1998 and would thereafter have worked until his assumed normal retirement at age 65.

- His pre-Incident earning capacity should be based on the following:

  Scenario 1 - Inflation adjusted average earnings for semi skilled occupations as detailed in Dr. Comper's report;

  Scenario 2 - Inflation adjusted average earnings from potential occupations, as detailed in Dr. Comper's report, based on a measurement of Mr. Balac's intellectual and academic strengths;

  Scenario 3 - Inflation adjusted full time earnings of male workers in Ontario with a high school and some post-secondary education per Statistics Canada 2001 census data; and

  Scenario 4 - Inflation adjusted full time earnings of male workers in Ontario with a college diploma per Statistics Canada 2001 census data.

- Past loss of income calculations end on October 31, 2004, which is also the effective date of this report.

- In accordance with subclause 53.09(1) of the Ontario Rules of Civil Procedure, applicable to trials commencing in 2004, discount rates of 2.25% per annum for the first 15 years from the trial commencement date and 2.5% per annum thereafter are applicable to inflation indexed future amounts.

- There are no significant factors that bear on our calculations that we have not considered in reaching our conclusions as noted herein.

[68] In dealing with contingencies Mr. Wollach assumed that positive contingencies plus the value of employer paid employee benefits would equal negative contingency risks. There was no

evidence about any specific positive or negative contingency and accordingly such treatment is appropriate.

[69] In my view it is reasonable to assume a start date of July 1, 1998 for full time employment. I think it reasonable that absent the accident Mr. Balac would likely have continued at Sheridan for another year or two and then begin to search for permanent employment. The numbers used in his Scenario 3 are from Statistics Canada 2001 census data adjusted for inflation (downward for the years before 2001 and upward for the years after).

[70] Based on those assumptions and numbers Mr. Balac's past lost income from July 1, 1998 to October 31, 2004 is $247,053.00. The present value of his future loss of income as at October 31, 2004 to retirement at age 65 is $1,191,597.00. I accept Mr. Wollach's evidence in respect of these calculations and find Mr. Balac's losses to be in those amounts.

[71] I decline to award any additional sum for loss of competitive advantage although invited to do so.

[72] Mr. Balac has been fully compensated for his past and future income loss. Any further award in respect of pecuniary loss would in my view be duplicative.

[73] Special damages are claimed in the sum of $1,687.55 for prescription medications and Dr. Finlayson's accounts for therapy total $6,645.00 and those amounts are added to Mr. Balac's assessment. No reason has been raised why the OHIP subrogated claim sum should not be added to Mr. Balac's assessment. Accordingly, I conclude that his special damages are:

1.	Prescription Drugs	$1,687.55
2.	Dr. Finlayson	$6,645.00
3.	OHIP (subrogated)	$29,050.02
	TOTAL:	$37,382.57

[74] None of these amounts have been reimbursed to Mr. Balac by the automobile insurer to this point in time.

[75] I move then to consider the claims of Jennifer Cowles.

Jennifer Cowles

[76] At the time of the incident Ms. Cowles worked at Hanrahan's Tavern in Hamilton as an exotic dancer.

[77] As indicated earlier in these reasons, the parties are agreed that Jennifer's non-pecuniary general damages be assessed at $210,000.00. This sum is substantial. Mr. Wollach testified that the upper limit for non-pecuniary general damages adjusted to May 1, 2004 was $299,043.

[78] As the result I do not intend to review the medical aspects of Jennifer's claims in the detail I would otherwise. Instead the focus will be on the impact her injuries have had on her ability to work.

[79] In terms of her physical injuries Jennifer suffered deep and extensive lacerations to her scalp and right thigh. Her right ear and forearm also required suturing. Jennifer has been left with unsightly scars to her hip and scalp. While her long hair when worn up covers the scalp scars to some extent, they are clearly visible when her hair is worn down as they would be were she to wear her hair in a shorter style.

[80] Dr. Veronica Kekosz is a physiatrist at Sunnybrook and Women's College Health Sciences Centre and she saw Jennifer for a medicolegal assessment on referral from her lawyer. Dr. Kekosz's reports of August 9, 2001 and April 2, 2004, respectively Exhibits 31 and 32 at trial provide a very thorough and detailed history of Jennifer's injuries, treatment and the residual difficulties she continues to endure. At pages 9 and 10 of her April 2, 2004 report, Dr. Kekosz summarizes as follows:

> **PHYSICAL:**
>
> Ms. Cowles sustained a terrifying attack by a tiger while visiting the African Lion Safari on the 19th of April 1996. She had severe soft tissue injuries to her scalp which required extensive plastic surgical reconstruction. She has been left with extensive scars and areas of alopecia on the vertex, occipital, and right parietal regions of her head. She has been left with residual soft tissue tightness and pain in her right scalp, ear, and lateral neck regions, as a result of adherent scar tissue. She continues to suffer with recurrent tension headaches as well as an element of possible occipital neuralgia on the right side of her head and neck.
>
> In addition, she sustained deep, soft tissue wounds to the right lateral hip and thigh and she has had recurrent surgery for removal of scar tissue, as well as alleviation of a lateral femoral cutaneous nerve neuroma. Ms. Cowles continues to suffer with a chronic regional myofascial pain syndrome involving the right sacral, gluteal, lateral hip and thigh regions. She has an area of hyperesthesia, which has made it difficult for her to tolerate any direct pressure to the region, be it clothing, chairs, etc.
>
> **PSYCHOLOGICAL:**
>
> Ms. Cowles continues to suffer with symptoms of post-trauma stress disorder and she has been diagnosed with this problem by her treating Psychiatrist. She is still suffering with anxiety and depression and has suffered significant psychological trauma, as a result of the scars which are now permanent and have affected her ability to compete in the job market of stage performance. She has tried a number of various psychotropic medications, and at present, chooses to cope with these difficulties through education and the social support of family and friends.

VOCATIONAL:

> Ms. Cowles' ability to return to her previous work as an exotic nightclub dancer has been seriously affected by her injuries. She was no longer able to compete to the same degree as previously for various jobs and the appearance of her residual scars have affected her self-confidence and self-esteem. She has been determined and completed her High School education and has now been trained as a Personal Support Worker. However, she has found the work to be heavy in nature and she will need to continue her education and, at present, it appears that completing a training program as a Registered Practical Nurse will improve her job description and it will be physically easier to perform. Nonetheless, Ms. Cowles continues to do some part-time exotic dancing in order to provide financial support for her children. She has also shown initiative in taking further courses in Palliative Care and sign language, which will more than likely prove to be very beneficial in her future field of work in the Health Care System.
>
> Ms. Cowles still requires assistance for heavier household chores, and some aspects of childcare which have been provided for her by her mother. Due to her fearfulness, Ms. Cowles has not obtained her G License and her driving has been minimal. She has, therefore, become reliant on friends and family for transportation, as well as the Public Transport System and taxis.

[81] I found Dr. Kekosz to be a most impressive witness and accept her evidence.

[82] All of the difficulties referenced by Dr. Kekosz were attested to by Jennifer in her evidence in chief. As I have indicated earlier in my reasons I found Jennifer to be a most impressive witness. Her strength of character was evident during her time in the witness box. That she is a determined young woman is borne out by the reality of her life since this tragedy. As noted by Dr. Kekosz she completed her high school education and obtained a diploma as a personal support worker. Her wish is to eventually upgrade her qualifications to Registered Practical Nurse. There in no question that she has the intellectual ability to succeed in whatever program she chooses. She is bright and her marks have been excellent. Whether her choice is a wise one, considering the permanent physical impairments she has been left with is another matter.

[83] It is apparent to anyone who observes Jennifer when she speaks about her chosen profession that she loves her work and in particular enjoys working with the elderly.

[84] Jennifer had her first child, Jesse when she was just sixteen years of age and her second, Quinton just days before her eighteenth birthday.

[85] Over the years Jennifer has been fortunate to have had the support of her mother. She has lived with her mother for extended periods of time with her boys and her mother has for extended periods looked after and cared for Jennifer's boys when Jennifer was unable to do so.

[86] Jennifer's work history prior to the incident is brief. Following the births of her children she was in receipt of welfare and mother's allowance to support herself and her boys. She had not completed high school and had no job skills that would enable her to earn an income sufficient to support her and the boys.

[87] At the suggestion of her cousin she decided to try exotic dancing. In July 1995 she began to work as a dancer at Hanrahan's Tavern in Hamilton. Hanrahan's is known as a strip club. She described the three types of dancers who typically work out of such clubs; "scheduled dancers" are employed by the club and are paid $60.00 per shift and are scheduled for specific times. When not on stage scheduled dancers earn money doing lap dances for individual patrons. "Freelance dancers" come and go into the clubs as they choose; they are not paid by the club and do only lap dancing. At the top of the food chain in this particular genre are the "feature dancers". They perform in various clubs pursuant to contractual arrangements with the clubs. They are the highest paid among the dancers and rarely do lap dances.

[88] Jennifer considered that she had all the necessary physical attributes to do this job – she was young, pretty, large-breasted, not overweight and had long hair.

[89] In 1995 from her $60.00 per shift, Jennifer had to pay the club a disc jockey fee of $10.00 plus her bar tab (if she had one) and transportation. In that year Jennifer worked about six shifts a week and tried to work afternoons only so she could be home with her boys at night.

[90] An afternoon shift at Hanrahan's then was from 11:30 a.m. to 6:30 p.m. with four shows per shift and about three songs per show. Each show took about fifteen minutes. When not on stage the dancers would keep busy talking to customers and doing lap dances. Fees for lap dances then were $5 on the floor, $10 in the backroom and $20 in the backroom with contact.

[91] Jennifer estimated that in 1995 she made between $700 and $750 weekly net of expenses. In 1996 before the accident, she worked fewer shifts and made on average $300 to $350 weekly. She accounted for this difference by explaining that in January and for a time thereafter business falls off in the strip clubs and things are quieter. In addition to the cyclical slow down of the business, Jennifer was looking for a bigger place to live, packing up her then home and spending more time with David Balac (who she'd met October 15, 1995) and her children.

[92] The records from Hanrahan's show that Jennifer worked on average six shifts per week from July 31, 1995 to October 28, 1995. Thereafter to the time of the accident she averaged a little over two shifts per week.

[93] Money she earned from table dancing was paid directly to her in cash by the customer. The money did not go through Hanrahan's and Jennifer did not keep records of the money she earned from table dancing. Only the $60 shift fee paid by the club is recorded.

[94] Jennifer's evidence is that up to the time of the attack she was new in the strip club business, was just learning how it worked and how the women competed for customers. It was

around January, 1996 that she began to learn about feature dancers. Hanrahan's did not employ feature dancers but other clubs did. She thought she could be a feature dancer.

[95] To be a "feature" one needed to have a number of "credits" in addition to those attributes earlier referenced in relation to scheduled dancers. "Credits" are earned as a result of entering into competitions for beauty, dancing skills, etc. or could be earned for being a Sunshine girl, in Playboy Magazine or an x-rated movie for example. Women who work as feature dancers, Jennifer explained, have agents who find competitions for them to enter and arrange for their employment in the clubs. Jennifer had not yet made any effort to find an agent to represent her. On her evidence a feature dancer minimally earns $140.00 per show and does four to six shows daily.

[96] Jennifer's numbers are not borne out by Mr. Slavins' evidence. On Jennifer's numbers a feature dancer would – minimally earn $3,300 to $5,000 approximately per week. Mr. Slavins' evidence is that feature dancers at the high end clubs earn about $2,400 per week doing four shows a day six days a week.

[97] The earning life of an exotic dancer is a limited one. While some may continue to age 35, they are the exceptions. Most continue only to age thirty. Mr. Slavins thought an average scheduled dancer could earn between $400-$500 per evening and a good one from $800 to $1,000.

[98] Jennifer did not keep track of her income from lap dancing before this incident. In her 1995 Income Tax Return filed before the attack, she reported only the income earned as a scheduled dancer and paid to her by Hanrahan's. She declared none of her cash income from lap or table dancing.

[99] After the accident, she was obliged to refile a corrected return in order to qualify for income replacement benefits from the auto insurer of the Balac car.

[100] In her revised 1995 tax return Jennifer declared business income of $17,080 which she estimated by looking at the time of year and the number of days worked. The figures listed on the last page of Tab 13 of Exhibit 9 total $11,540 and represent Jennifer's estimate of the money she received from table or lap dancing and to that is added the money paid to her by the tavern of scheduled dancing from July 1995 when she started to the end of December, 1995 which is $5,540 for a total of $17,080 – the number reported to Revenue Canada.

[101] In the eighteen weeks she worked from July 31, 1995 when she started at Hanrahan's she averaged about $308 per week. In the fifteen weeks from January 1st, 1996 to April 13, 1996 she average $148 per week. This of course was exclusive of her table dancing income.

[102] In her 1996 tax return she reported income from employment in the sum of $4,750 of which $2,220 was from scheduled dancing. This leaves $2,530.00 for estimated income attributable to lap dancing.

[103] No independent evidence was called in relation to Jennifer's abilities and potential prior to the accident. Mr. Slavins observed Jennifer dancing in February of 2004 and said that he would not hire her as a feature dancer then but not having seen her before the accident could not opine as to whether he would have considered her for such work then. He suggested there was no reason she could not have continued to freelance and earn approximately $2,000.00 per week.

[104] Jennifer made it clear that her long-term goal was always to get into the nursing field as her mother had done.

[105] On the evidence, I find that had the accident not occurred, Jennifer may have continued as an exotic dancer for some time but not likely on any full time basis to her thirtieth birthday. It is apparent that when she began to see David Balac regularly, her hours at Hanrahan's fell of sharply. Part of that may have been due to the cyclical nature of the business but not all of it. Mr. Slavins suggested business "skyrockets" to use his term from mid-September through February and drops off from February through May; it increases in the summer then drops off at the beginning of September building up by mid-September.

[106] He suggested a dancer's earnings from September through December would not be representative of average earnings throughout the year but would be a little above average.

[107] Jennifer preferred to work afternoons as opposed to evenings and was not always available to work weekends. She is the sole parent of two boys to whom she is devoted. Her parental obligations alone would make it highly unlikely in my view, that Jennifer would ever have been in a position to earn income as an exotic dancer on any full-time basis. And while her relationship with Mr. Balac may not have survived even without the accident, I am satisfied she would have had another in her life to whom much of her attention would be devoted.

[108] It is reasonable in my view to consider that Jennifer would possibly have continued as an exotic dancer until she established a relationship of some permanence with a man – as she has with Terry in 2004. I accept that Jennifer would have continued to work three to four shifts per week for forty-six weeks per year for the years from the time of the accident through to the end of December 2003 and would have earned about $55,000 per year in so doing. I calculate that on Mr. Slavins' evidence, a freelancer like Jennifer could expect to earn $400 to $500 a night and Jennifer would likely work three to four shifts per week. I then discount that number somewhat to reflect the reality of Jennifer's life as a single parent and her preference to work afternoons as opposed to evenings. Had she not been injured I find Jennifer could and would reasonably have earned about $55,000 per year.

PAST LOST INCOME

Year	Income Earned	Income Potential	Difference
1996	$4,750	$55,000	$50,250
1997	$4,185	$55,000	$50,815
1998	$5,872	$55,000	$49,128

1999	$11,130	$55,000	$43,870
2000	$33,395	$55,000	$21,605
2001	$24,780	$55,000	$30,220
2002	$36,055	$55,000	$18.945
2003	$21,305	$55,000	$33,695
			$298,528

[109] I include no past loss of income for 2004 because Jennifer met her fiancé in January of 2004, moved in with him in his mother's home in February and began gradually to move the boys in thereafter. In addition Jennifer had obtained her Personal Support Worker diploma in 2002 and had begun to work in that capacity on a part-time basis. I find that she had pretty much decided to stop working as an exotic dancer at about the time she met her fiancé. She became pregnant in the fall of 2004 and has given up exotic dancing. She has not worked in any capacity since her pregnancy because of the difficulties she is having with her pregnancy.

[110] Jennifer's chosen work as a personal support worker is not without difficulty for her. It is physical work and she can only endure part-time hours because of her physical limitations as the result of this accident. Should she go on and realize her goal to become a Registered Practical Nurse, it too may prove to be physically difficult for her and she may not be able to endure full time hours.

[111] Nevertheless as indicated earlier in these reasons Jennifer is a very bright young woman who has, despite her difficulties completed her high school education and gone on to complete a post-secondary diploma. I am confident she would succeed at whatever she chose – she has both the intellect and the determination.

[112] I am satisfied there are many occupations for which Jennifer could easily qualify which would not require of her the physical demands of her chosen nursing field occupation. The evidence is that such other occupations would equal the remuneration of her chosen field. In my view any award for future income loss must reflect this fact, i.e. that there are other occupations which Jennifer could perform on a full time basis for remuneration equivalent to that of a personal support worker or registered practical nurse.

[113] By the same token the nature of her permanent disabilities preclude her from a number of occupations.

[114] In my view in Jennifer's case it is more appropriate to assess a lump sum to compensate her for this loss rather than attempt to calculate any precise sum on an actuarial basis. In my view the sum of $250,000.00 is an appropriate sum. The amount is substantial enough to reflect the fact that she is a young woman who will be precluded from certain types of work on a full time basis for the rest of her working life while recognizing there are many jobs she could do on a full-time basis. It is her loss of earning capacity that has been compromised and for which she is compensated.

OUT OF POCKET EXPENSES

1. Damaged Clothing

[115] The sum of $123.33 is claimed and there is no disputed amount proffered. Obviously the nature of her injuries and the extensive bleeding would have ruined her clothing. This sum is awarded as claimed.

2. Housekeeping

[116] Ms. Cowles' injuries are such that they preclude her from performing heavy housekeeping duties. She is able only to do very light housekeeping duties and then only for short periods before her pain in aggravated. Since the accident Jennifer has had help from her mother in housekeeping, laundry and with meals. For a time after the accident Jennifer moved to shared accommodation and went to live with a friend where she had no responsibilities for housekeeping. In her present relationship all household duties are performed by her fiancé's mother and Jennifer's expectation is that her mother-in-law-to-be will continue to perform such duties into the future.

[117] Mr. Lauries' evidence in respect of the cost of such services is essentially uncontradicted. Past heavy housekeeping is costed at $437.50 per year from April 19, 1997 to November 1, 2004 (8 years + 196 days: 437.50 x 3116/365) is $3,734.93. I decline to award any sum for home maintenance. Jennifer's choice of residential accommodation has always been either a rental apartment or a townhouse where such expenses are included in the rent. She lives in a home now but it is not her home, it is her future mother-in-law's home.

[118] Bi-weekly housekeeping is costed on the basis of four hours per week at $2,080 per year. The plaintiff claims only for March 1, 1997 to November 1, 2004 (7 years plus 245 days: $2080 x 2800/365) in the sum of $15,956.16.

MEDICAL AND REHABILITATION EXPENSES

[119] The first item here relates to prescriptions, gauze and a splint as per a claim made to Liberty Mutual in the sum of $911.75. Subject to the defence deductibility argument which I shall deal with later these items appear proper. In addition the plaintiff estimates prescription costs at $800.00 per year from 1999 through 2002. I find this sum to be reasonable. It is clear that a number of her treating physicians were trying different medications in an effort to alleviate Jennifer's symptomology in these years. I would not allow the tuition fees for Mohawk College and Grand Health Academy because they would have been incurred in any event when Ms. Cowles went on to obtain her diploma. Her evidence is that this was her goal irrespective of the accident. Similarly I would not allow anything for vocational retraining as a registered practical nurse. It has always been Ms. Cowles' intention to train as such and follow in her mother's path.

[120] I would allow the initial layout expenses for lower level laser therapy at $1,245.00 and transportation of $132.00 as well as a fitness program at $640.93. A psycho-vocational assessment has been performed by Dr. Comper and is more properly considered with the question of costs at this point.

[121] Lastly the OHIP subrogated account – subject to the defence argument in relation to the right to subrogate is allowed in the amount to September 20, 2004 at $31,097.11.

[122] In summary:

Damaged Clothing	$123.33
Past Heavy Housekeeping	$3,734.93
Bi-weekly Housekeeping	$15,956.16
Prescriptions – Liberty	$911.75
Prescriptions – Estimates	$800.00
Laser & Transportation	$1,377.00
Fitness Program	$640.93
OHIP	$31,097.11
TOTAL	**$54,641.21**

[123] There is little doubt on the overwhelming preponderance of medical evidence which I accept that Jennifer's physical and emotional disabilities are permanent. She will reasonably require assistance with housekeeping duties in the future including heavy housekeeping based on $435.50 per year and for bi-weekly housekeeping at $2,080.00 per year for a total per year of $2,515.00. Counsel will provide the present value for this figure.

[124] The evidence of Drs. Kekosz and Comper is that Jennifer is likely to require psychological treatment in the future which, according to Dr. Comper, is not likely to be covered by OHIP. The estimated cost of six interventions each of 10 to 12 sessions is $13,081.20 inclusive of transportation. Counsel will provide the present value for this item as well.

[125] I move then to consider liability.

LIABILITY

[126] The plaintiffs, Balac and Cowles, claims are advanced firstly on the basis of strict liability and alternatively in negligence and breach of the *Occupiers' Liability Act*.

[127] This case raises the question whether the keeper of a wild vicious animal will be strictly liable for damage caused by that animal regardless of fault and in effect whether the law of strict liability in such circumstances remains a part of law of Ontario today. For the reasons that follow I have concluded that it does.

[128] The learned authors of the tort texts distinguish between the two classes of dangerous animals. The first category is of animals *ferae naturae* such as bears and lions – and quite obviously tigers would be included in this first category and the second category is of animals *mansuetae naturae* like cows, dogs and horses. As Fleming notes at p. 400 (Fleming, John G., *The Law of Torts* 9th edition 1998):

> Animals of the first category are never regarded as safe, and liability attaches for the harm they may do without proof that the particular animal is savage.

and at p. 401:

> …as regards the second class, it must be shown that the *particular* animal was dangerous and that the defendant knew, or had reason to know, it.

and further:

> Classification of a particular species is a question of law for the court, to be decided either on the basis of judicial notice or expert evidence, …

and at p. 402:

> *Scienter*
>
> When an animal of harmless species betrays its own kind by perpetrating damage, its keeper will not be held to strict liability unless actually aware of its dangerous disposition. …

and at page 405:

> *Defences*
>
> The range of defences is exceedingly limited. Indeed, no excuse seems to be admitted except the plaintiff's own responsibility in exposing himself to injury.
>
> It is well-settled, for example, that the defendant may take advantage of the victim having brought the injury upon himself through his own fault, as by stroking a zebra that is improperly secured or actually teasing an animal, though not by merely walking close to it unless in unreasonable disregard of obvious danger. Authority is unclear on whether contributory negligence ever constituted a defence such as would now reduce damages. Voluntary assumption of risk remains a complete defence, though nowadays rarely applicable except to zookeepers, veterinarians and the like….

[129] The views of Professor Fridman do not, in this area, in my view differ from those of Professor Fleming. In his text, Fridman, G.H.L. *The Law of Torts in Canada* 2nd edition Carswell), Fridman notes at page 250-1:

> Under the *scienter* doctrine it is very relevant that harm has resulted from the keeping of an animal. The common law developed special rules to deal with the situation where damage was caused by animals, even before the emergence of the modern law of negligence, and quite distinct from the action for cattle-trespass, or under the much later doctrine of *Rylands v. Fletcher*. The *scienter* doctrine was, and remains a form of strict liability, that is to say, liability without proof of negligence. In this respect it is akin to both cattle-trespass and the *Rylands v.*

Fletcher doctrine. However, the decisions and the language of the judges do not always make clear whether liability for what an animal does is based on this version of strict liability that is peculiar and pertains to animals, or is nothing more than a type of instance of negligence in which, perhaps, negligence is established once the defendant knows or is presumed to know of the dangerous character of the animal concerned. Indeed, an Alberta judge suggested that as strict liability was out of fashion, liability for animals should be founded on negligence rather than on *scienter*.

and at page 254-255:

3. The *Scienter* Doctrine

(a) Common Law

(i) *The Doctrine Stated*

Where harm is caused by the behaviour of an animal, whether on the property of the defendant or elsewhere, this kind of liability depends upon the type of animal concerned. The law distinguishes between the wild animals, i.e., animals *ferae naturae*, and tame or domestic animals, i.e., animals *mansuetae naturae* or *domitae naturae*. For damage resulting from the act of a wild animal, the defendant is strictly liable, without proof of negligence or other wrongful conduct, and without the necessity of proving that the defendant was aware of the dangerous character of the particular animal that caused the harm, or of the class of animals to which it belonged. If the animal is mansuetae naturae, that is, one which ordinarily did not cause the kind of harm that is involved, the common law requires that the particular animal concerned have the dangerous or mischievous propensity to commit the harm or damage that it inflicted, and that the defendant knew of such propensity or characteristic of the individual animal. To keep such an animal with knowledge of its potential for causing harm is not in itself negligence, or indeed wrongful in any other way (any more than to keep a wild animal is *per se* unlawful or negligent). Indeed, despite some judicial discussion that appears to introduce elements of negligence into liability for animals, at common law there is no need to prove negligence in the way in which the animal in question was controlled or kept in order to establish liability, as long as the requisite elements of dangerous propensity or character and knowledge are present. Nor will negligence in controlling the animal, so that it is able to escape from the property of the defendant and cause harm, entail liability under the *scienter* doctrine in the absence of knowledge of the dangerous propensity, or if the animal is not normally dangerous. There might be liability based on negligence if other ingredients of such liability, such as a duty of care, exist, as frequently occurs where dogs or cattle escape onto the highway, or get out of control while on the highway, with consequent damage to other road users or adjoining landowners. Such liability, if it arises, is not strict as is the situation

where the *scienter* doctrine is applicable: it will depend upon the resolution of the issues of duty, remoteness and causation that are an integral part of the law of negligence.

The underlying rationale for the strict liability of the *scienter* doctrine is that anyone who maintains an animal that is known to be dangerous to humans or other animals or in any other way does so at his peril. He has created a dangerous, or potentially dangerous situation involving risk to others. In the case of the wild animals, such knowledge is irrebutably presumed by the law. Domestic animals are not normally harmful. Therefore, knowledge of the vicious nature of the particular animal must be established. In the days when pleadings in the common law courts were written in Latin, the allegation of the plaintiff was that the defendant knowingly kept (*scienter retinuit*) a dangerous animal which caused harm to the plaintiff. Hence arose the appellation of this kind of liability.

Sometimes it has been suggested that liability is absolute, where the animal is wild or a domestic animal known to be dangerous. This cannot be accurate, because it is clear that there are limits upon the liability of the defendant, for example, contributory negligence on the part of the plaintiff, voluntary assumption of risk or consent, the act of a stranger, or an act of God. Hence, liability although strict in the sense of without proof of negligence, is not absolute, which could mean that it would be imposed whatsoever the circumstances, as long as the animal caused the harm.

and p. 262:

The question of who is the owner or keeper, or the person whose duty it is to exercise control, is a question of fact. The real test of responsibility is not ownership. There may be many circumstances under which a person who is not the owner and indeed one who has not the actual possession of the animal may be under a duty to exercise control and will be responsible if it injures somebody.

What appears to be the crucial factor in liability is the issue of control. Hence, it has been suggested that liability is founded upon the failure of a defendant, who was under a duty to confine or control the offending animal, to maintain a sufficient degree of control to prevent the injury that occurred. Language of this nature carries overtones of negligence, i.e., the failure to exercise reasonable care. However, there is no doubt that, where the *scienter* doctrine applies, the duty is strict. Negligence in controlling the animal does not need to be proved. But reference to control suggests that it is escape from control that is vital to liability. Thus, if an animal is caged, chained or leashed, but nevertheless manages to inflict injury on a plaintiff, it has been held in some cases that the *scienter* doctrine is inapplicable, although some other form of action, such as negligence, might be invoked. In such instances, it is said that for *scienter* to

apply, the animal must have escaped from control. In *Maynes v. Galicz*, the plaintiff, aged seven, put her fingers inside a wolf cage constructed of heavy duty two-inch square mesh. The cage was located at the defendant's zoo. The wolf grabbed the child's fingers and pulled her hand into the cage, in the course of which the hand was split. The *scienter* doctrine was held to be inapplicable because the wolf had not escaped from the cage (and the person in charge of the wolf had sufficiently restrained the animal so that injury would not ordinarily happen). A similar view was taken in *Lewis v. Oeming*. There, the tiger which caused the plaintiff's injury was properly housed in a safe enclosure and never did escape from the custody and control of the owner. Moreover, the tiger was segregated into a part of the enclosure off from the main area where the cap, which the plaintiff sought inside the tiger's cage, was lying. For these reasons, Miller J. held that the concept of strict liability, i.e. *scienter*, did not apply.

and p. 263-4:

(vi) *Defences*

(A) *Contributory negligence* If the circumstances justify such a conclusion, a court may find that the injured plaintiff has brought about his injury, in part at least, by his own neglect for his safety. Indeed, the plaintiff may be totally responsible, as in *Dowler v. Bravender*, where the owner of a horse which kicked the plaintiff did not discharge the onus of proving that he lacked knowledge of the horse's dangerous propensity, yet the defendant was not liable because the plaintiff brought the injury on herself by shouting and frightening the horse. Whether a plaintiff is guilty of contributory negligence is a question of fact. Once such conduct is established, its effect in law depends upon the application of common law or statutory principles relevant to the apportionment of liability in consequence of contributory negligence.

(B) *Consent* Where the *scienter* doctrine is invoked, as in other situations, a defendant must plead that the plaintiff consented to the risk of being injured, or voluntarily assumed that risk: *volenti non fit injuria*. Whether a plaintiff has done so is a question of fact that depends on the circumstances. Such a plea was successful in *Young v. Green*, where the plaintiff, an odd-job man working with a traveling show or midway, volunteered to move a sign warning the public not to go near a lion cage. The sign was on top of the cage, from which position the plaintiff had previously retrieved it. On this occasion, while the plaintiff was trying to get hold of the sign, the lion put its paw through the bars and drew the plaintiff's arm into the cage, causing him injury. That plaintiff was denied an action on the ground that he was *volens*. He had consented to run the risk involved in his actions. Similarly, in *Hall v. Sorley*, the plaintiff failed in her action against the defendant whose dog bit her while she was visiting the defendant's backyard. The action founded on *scienter* failed because the defendant was not under an absolute liability, since the dog, a guard dog, was kept

> under proper restraint, and the plaintiff knew of its dangerous propensities. The action founded on negligence also failed because the defendant had taken adequate precautions and the dog had not acquired any aggressive characteristics by being tethered. Nor was the defendant's wife negligent in advising the plaintiff that it was safe for the plaintiff to pat the dog, because the defendant's wife honestly believed that the dog would not bite a stranger in the presence of the defendant's wife. Moreover, the plaintiff voluntarily assumed the risk of being injured in approaching the dog with knowledge of its character.

[130] Here the defendant ALS suggests that claims such as the one at bar should, in modern times, be resolved "within the modern and flexible parameters of negligence law" and in this respect relies on the Alberta decision *Acheson v. Dory,* [1993] A.J. No. 150 (Alta Q.B.) at p. 4, aff'd [1994] A.J. No. 779 (Alta. C.A.).

[131] In my view the *Acheson* decision is distinguishable from this case. The primary difference is that in this case we are concerned with a Siberian tiger; *Acheson* was concerned with a horse – a domesticated rather than a wild animal. In dealing with such an animal the court was obliged to consider whether the stallion had mischievous or vicious propensities and whether they were known to the defendant. It may be that where such inquiries are involved the preferable approach is to resolve the claim within the "modern, flexible parameters of negligence law". Such a claim however, is not before me and I leave that debate for another time.

[132] The ALS is a unique game farm experience in Canada and the United States. It is the only such facility to display tigers in an open environment. Tigers roam freely and patrons to the ALS drive in their vehicles among the animals. As it was described in the evidence – the patrons are caged and the animals roam freely – in contrast to the traditional zoo situation.

[133] In its Safari Mission Statement, ALS states:

> Our manner of exhibiting animals is completely different from the traditional approach; that is, the visitor is caged in a vehicle, and the animals roam in 2 to 20 hectare reserves. This approach stresses activity in captivity.

[134] The defence also relies on the decision in *Farrell* v. *1151400 Ontario Inc.*, [1999] O.J. No. 4580 (Sup. Ct.), aff'd [2001] O.J. No. 1349. In that case Shaughnessy J. was dealing with a traditional zoo situation where the offending animal was caged and the harm resulted from a child putting her hand into the cage. At paragraph 34 of his decision, Shaughnessy J. references the scienter doctrine but does not deal with it and simply says:

> … However, as in the present case, the plaintiff may claim alternatively liability for harm resulting from the acts of the animal.

and he went on to consider the case in negligence. In similar cases, involving caged animals in a traditional zoo setting courts have concluded that the strict liability doctrine has no application in such circumstances. See *Maynes* v. *Galicz* (1975), 62 D.L.R. (3d) 385 at p. 392.

[135] The situation at ALS is quite different; the tigers are not caged and are in the language of the cases "out of control" for the entire time the park is open to the public and the tigers are on display. There is no question both on earlier authorities and the evidence of Robert Lawrence that tigers are dangerous, unpredictable, wild predators. Persons who display such animals in out of control settings should in my view, be held strictly liable for any damage resulting from such display.

[136] It remains to consider whether any defence is, on the facts of this case available to the defendant, ALS.

[137] The defendant, ALS relies on three defences, contributory negligence, consent and/or voluntary assumption of risk and act of stranger.

Contributory Negligence

[138] The defence in this respect relies on the passage in Fridman referenced above at p. 255 of the text more fully discussed by the author at page 263 also set out above.

[139] It seems to me contradictory to hold a defendant strictly liable – i.e. whether negligent or not – and then to consider a plaintiff's "contributory" negligence. If one reads Fridman carefully I don't think he is really speaking of contributory "negligence" per se. He refers to the British Columbia decision of *Dowler* v. *Bravender* (1968), 67 D.L.R. (2d) 734. In that decision the court did not find the defendant liable under the scienter doctrine because it was not persuaded that she knew her horse was vicious or mischievous "in the sense that it would kick out purposely at human beings as alleged by the plaintiffs here". He concluded that the female plaintiff had "brought the accident upon herself" by doing something that upset the horse with the result that the accident did not flow from any failure to control the animal but from a quite different cause – i.e. the actions of the plaintiff.

[140] In any event, I have found that the injuries to and the damages suffered by both plaintiffs resulted from the unprovoked attack on their vehicle by the tiger PACA. That forceful assault on the vehicle caused Mr. Balac's body to inadvertently come into contact with the window switch resulting in the lowering of the windows on the vehicle which admitted the tiger into the vehicle. There was no conduct, in my view on the part of either David or Jennifer which would constitute contributory negligence on their part even if such defence were available. Their windows were up when they entered the Carnivore Section and were not deliberately put down for any purpose while in that Section before the attack, by either of them.

[141] *Farrell* was not decided on the basis of strict liability as indicated above and is no authority for the proposition the defence urges that contributory negligence is somehow a defence to strict liability.

Consent/Voluntary Assumption of Risk

[142] There is in my view on the factual findings made no basis for such a defence. Had the plaintiffs rolled their windows down or one of them, there might have been some basis for such a defence. On the facts as I have found them there is not.

[143] It is clear on the evidence that the plaintiffs were aware that tigers are dangerous animals and it would be dangerous to put one's car window down in close proximity to a tiger. That knowledge – absent a finding that the plaintiffs put the window down – does not absolve the defendant ALS of liability. Unlike the situation in *Lewis* v. *Oeming*, [1983] A.J. No. 734 (Q.B.) where the plaintiff did something he had no business to do – i.e. enter the tiger's locked cage at night to retrieve his girlfriend's ball cap – these plaintiffs I have found, did nothing they had no business doing. On the contrary, they were, as I have found, merely driving through the compound, in their own vehicle with the windows up stopping occasionally to take photos – just as the owners of ALS contemplated they should do.

[144] In *Crocker* v. *Sundance* the Supreme Court of Canada made it clear that the volenti defence will only apply where the plaintiff assumed both the physical risk and the legal risk of his/her activity. The court stated that this defence would rarely be applicable. The Supreme Court deals with the volenti defence at paragraphs 32 through 35 of the judgment as follows:

> 32. The defence of voluntary assumption of risk is based on the moral supposition that no wrong is done to one who consents. By agreeing to assume the risk the plaintiff absolves the defendant of all responsibility for it. As Fleming puts it in The Law of Torts, supra, at p. 264:
>
> > Obviously this defence bears much resemblance to contributory negligence. Most often, indeed, the two defences overlap: viz. whenever knowingly to assume a risk is also negligent, e.g. riding in a car with a drunk driver. But like intersecting circles, some cases support one defence without the other; thus to assume the risk may in some circumstances be perfectly reasonable or (per contra) the risk, though unreasonable, may not be fully appreciated.
> >
> > As long as either defence defeated the plaintiff entirely, precise demarcation served only academic interest, but the introduction of apportionment for contributory negligence has posed a serious problem concerning the future role of voluntary assumption of risk as a complete defence. It seems rather odd that a plaintiff who is himself negligent might now fare better than one who is not, e.g. that an intoxicated passenger should stand a better chance against a drunk driver than a passenger who is sober. The judicial response to this dilemma has been to impose ever stricter requirements for the defence [page 1202) of volenti to the point where it is now but rarely successful.

> Presumably the reason for not formally drawing the defence within the net of apportionment (or what would amount to the same, flatly abolishing it) is the feeling that the people should remain free to agree to waive their rights, at least under conditions of free and informed choice.

Since the volenti defence is a complete bar to recovery and therefore anomalous in an age of apportionment, the courts have tightly circumscribed its scope. It only applies in situations where the plaintiff has assumed both the physical and the legal risk involved in the activity (see: Car and General Insurance Corp. v. Seymour, [1956] S.C.R. 322; Dube v. Labar, [1986] 1 S.C.R. 649).

33. In the present appeal an attempt could be made to found a volenti defence either on (a) Crocker's voluntary participation in a sport that was obviously dangerous or (b) the fact that Crocker signed a waiver form two days before the competition. I will examine each of these bases in turn.

34. The first basis can be disposed of in short order. Crocker's participation in the tubing competition could be viewed as an assumption of the physical risks involved. Even this, whoever, is dubious because of the fact that his mind was clouded by alcohol at the time. It is well-nigh impossible to conclude, however, that he assumed the legal risk involved. Sliding down a hill in an oversized inner tube cannot be viewed as constituting per se a waiver of Crocker's legal rights against Sundance.

35. The argument that Crocker voluntarily assumed the legal risk of his conduct by signing a combined entry and waiver form is not particularly convincing either. The trial judge, having heard all the evidence, drew the following conclusion on the issue of the waiver at pp. 158-59:

> I find that no attempt was made to draw the release provision to Mr. Crocker's attention, that he did not read it, nor in fact, did he know of its existence. Therefore, Sundance had no reasonable grounds for believing that the release truly expressed Mr. Crocker's intention. In fact, in so far as he was signing anything other than an application form, his signing was not his act.

Given this finding of fact, it is difficult to conclude that Crocker voluntarily absolved the resort of legal liability for negligent conduct in permitting him, while intoxicated, to participate in its tubing competition. I would conclude, therefore, that Crocker did not, either by word or conduct, voluntarily assume the legal risk involved in competing. The volenti defence is inapplicable in the present case.

[145] By analogy to this case there were but two signs – both just outside the main gate leading to the game reserves – one on each side of the road that are relevant to this argument. They read

"All visitors enter the park at their own risk. No responsibility for damage to vehicle or person however caused is accepted". A photograph of one of the signs is found at photo "G" of Exhibit 22. Neither Jennifer nor David recalled seeing the signs and no one from ALS drew their attention to them.

[146] On the brochure probably handed to them when they paid the admit fee it is stated: "All persons entering the reserves do so entirely at their own risk" and "No responsibility is accepted for damage to vehicles or trailers, their car bras, tires, lights or canvas covers, vinyl roofs or other accessories…". Neither read the brochure and no one from ALS pointed out the stated limitation to them. Although the employees at the booth were instructed to warn patrons of the possibility of damage to their vehicle, the only evidence on this point came from Jennifer and David who said they received no such warning. ALS called no evidence to contradict them. I accept their evidence on this point and note that employees in any event were only ever instructed to warn about damage to vehicles – nothing was said in relation to any injury to person.

[147] There is simply no evidence – which it was the defence's burden to call – to support the argument that either David or Jennifer assumed any legal risk of their visit into the game reserves that day.

[148] In my view the volenti defence is inapplicable.

Act of Stranger

[149] On the factual findings I have made this doctrine can have no application. There is no intervening act.

[150] I conclude that ALS is strictly liable to the plaintiffs Balac and Cowles for the damages sustained.

Negligence and Occupiers' Liability

[151] While I have found that the defendant ALS is strictly liable to the plaintiffs on the particular facts had I been persuaded that the law of strict liability ought not to apply I would in any event find ALS liable in negligence.

[152] There is no question that ALS owed Balac and Cowles a duty of care indeed ALS has properly conceded that this is so.

[153] In my view they have breached that duty in a number of ways as hereinafter set out.

[154] When David and Jennifer entered Section Three (the Carnivore Section where the attacked occurred) he noticed an ALS vehicle pass him on the driver's side of his vehicle. In the vehicle with the driver was a tiger cub which was crawling about the cab of the truck. David observed this vehicle come from the vicinity of the slip road where it had been parked close to

another ALS vehicle which had been and remained parked there. The ALS vehicles are quite distinctive in that they are painted in black and white zebra-like stripes.

[155] Jennifer only noticed the vehicle at the gate leading into Section Three; she thought the driver of that vehicle was a male while David could not say whether the driver was male or female. Chris Durrer, the ALS employee on duty at centre gate that morning confirmed that Sue Mitchell had brought a tiger cub to centre gate because as he put it the cub was "driving her crazy". Durrer put this incident as some time before the accident involving David and Jennifer. He couldn't say if Mitchell arrived with the cub at the same time that the Balac vehicle entered Section Three nor could he say where she'd come from.

[156] The daily log entry for April 19th, completed by Mitchell confirms that three tiger cubs were moved into Section Three that day. Mitchell couldn't be sure when they were moved but suggested it would have to be either first thing in the morning before the reserves opened to the public or after they closed for the day. She explained that it took two employees to move the cubs and both could not be absent from the reserves at the same time when they were open to the public. She denied she would have taken a cub through Section Three knowing it would upset the tigers in that Section. This effect was confirmed in Mr. Lawrence's evidence when he suggested "…nothing could be more calculated to excite attention and/or attack in a drive through facility than having any other animal in one's vehicle".

[157] I accept David's evidence that he observed Mitchell's truck come from Section Three before it passed him by, driven by Mitchell. Durrer's evidence confirms that Mitchell was at centre gate with a tiger cub before the attack on David and Jennifer.

[158] In my view it was negligence in the extreme for Mitchell to be driving about in the vicinity of the tigers with a tiger cub in her vehicle. She was well aware of the effect it would likely have on those other tigers. Her actions may well have provoked the attack on the Balac vehicle – which unfortunately was white with a black stripe.

[159] As the Balac vehicle came into the Section, it proceeded slowly, as I have described earlier in these reasons. The vehicle stopped to permit Jennifer to photograph PACA – the tiger which precipitated the attack. Jennifer took her photo and turned her back to the tiger as she turned to speak to David. All of this would have taken a few seconds when suddenly there was a bang and the car jolted. Whether the flash from the photo or Jennifer turning her back on the tiger, or the fact that this was the first vehicle in after Mitchell left with the cub was the provocation for the attack we will never know.

[160] We do know, however, that it was Dawn Kedge's job that day to keep her attention focused on the vehicles and the cats in Section Three. When the Balac vehicle passed in front of PACA she lost sight of the passenger side of the vehicle and of the tiger PACA. She took no step to reposition her vehicle and in my view in so doing she was negligent in the extreme. Her primary function, according to her employer's "Cat Section Guidelines", was to "…monitor a collection of big cats in a manner that permits the public to safely view them" and to "keep cats

away from visitor's vehicles" – as per the Daily Check List for Lions 2 & 3 – in this she failed on April 19, 1996.

[161] There were no other vehicles in Section Three at the time. It would have been a simple thing to move her truck into a position where she could have kept PACA within her sight. Her failure to do so was as Mr. Lawrence states in his report "…this was a monumental and fundamental error of judgment" – on Ms. Kedge's part.

[162] Further I find that Ms. Kedge was inattentive at the time of the initial attack. The evidence discloses that she was unaware anything was amiss until she noticed three female tigers run toward the Balac vehicle – by then it is apparent that the attack on Jennifer and David was already underway. I accept Mr. Lawrence's evidence there would have been inevitable noise once the tiger(s) was/were engaged in the attack. While tigers are notably quiet and stealthy leading up to the attack – once they have attacked and "caught" their prey as it were, there is a lot of noise. She was only 60 meters away from Balac's vehicle – yet heard nothing. Had she been more attentive she would have heard the noise at the Balac vehicle and responded sooner than she did. This too was negligence on her part. By the time she got to the Balac vehicle the attack on Jennifer was well underway – the damage to David's arm had already been done – as noted in her own statement by the time she got there – the cats were trying to pull Jennifer out of the car by her hair. We know from David and Jennifer's evidence that they had already tried to pull her out of the vehicle by her hip and failed.

[163] I should add at this time that I preferred the evidence of Robert Lawrence over that of Mr. Sutton. In my view Mr. Lawrence has far more experience in the area of display of tigers than does Mr. Sutton. Mr. Sutton's expertise seems to be more in the shipment of exotic animals rather than in the display of them. Where their evidence differs I prefer that of Mr. Lawrence.

[164] In my view the standard of care required of ALS is a high one. They display dangerous wild predatory animals to the public for a fee. Theirs is a very high duty to see that the public is kept safe while viewing these animals.

[165] They are obliged to have enough staff on hand at any given time in the Carnivore Sections to ensure that staff have all cats on display in their sight at all times. In my view that is their minimum obligation.

[166] ALS is aware that visitors to their park habitually open their car windows, in the Cat Section Guidelines item 5 thereof notes:

> Visitors who roll their windows down in proximity to the cats are to be told to "keep your windows completely closed at all times". In general, vehicles with windows down a few inches are not to be pursued even though it is not permitted, as it is more important that your attention is directed to watching the cats.

ALS is also aware that the public on occasion try to feed the tigers in the Public Relations Memo Regarding Lion and Tiger Training (Exhibit 74) it states:

> The public is not permitted to feed our animals but it cannot be prevented…

Such knowledge should make them vigilant and ever alert in terms of noting any such conduct and correcting it when it is observed.

[167] In my view if Dawn Kedge had been more vigilant on April 19, 1996 the injuries suffered by David and Jennifer might never have occurred. Had she kept PACA in her sight she would have seen the tiger when it first attacked the Balac vehicle – causing the noise heard by the occupants and the dents observed by Mr. Leier and others. Had she responded then with loud hailer, truck and BB gun she may have succeeded in driving PACA off and prevented the attack.

[168] In addition to Ms. Kedge's and Ms. Mitchell's shortcomings on the day in question – for which ALS is responsible as their employer – ALS also bears responsibility for the nature of the set up.

[169] It recognizes the need for staff to keep tigers in view at all times. The staff on April 19th did not seem to appreciate this need. If more than one person was required in order to keep all tigers in the sight of at least one staff person then ALS had the obligation to supply those persons.

[170] Had the Carnivore Section had a number of towers of sufficient height to permit a person to see into the Section and all parts of it, it would assist those on the ground and provide necessary extra sets of eyes.

[171] ALS failed in its duty to properly train Ms. Kedge to keep all animals in sight at all times – she understood the priority to be watching the cars.

[172] Mr. Lawrence in his report made the following statement:

> Tigers are attracted to motor vehicles. They will lurk around them, jump on them and habitually bite vehicle tires. Given the well-known propensities of tigers, as extremely quick, vindictive and unpredictable, they are in a class of dangerous animals all of their own. The exposure of the public is fraught with danger.

[173] ALS was well aware of the reality of Mr. Lawrence's statement. They had incidents in the past where tigers had entered and tried to enter patron's vehicles and where tigers had attacked patrons' vehicles. They knew the danger tigers presented. If Ms. Kedge was unable to keep all of the tigers on display within her view at all times ALS ought to have either provided additional staff or not displayed the tigers.

[174] In my view the staffing on April 19th, 1996 was inadequate both in terms of quantity and quality and ALS is directly responsible for that shortcoming which is negligence.

[175] For these reasons I would have found ALS negligent on the occasion in question and to have been in breach of its duty under the *Occupiers' Liability Act* as well.

[176] There remains to consider the applicability of the provisions of the *Insurance Act*.

Whether the *Insurance Act* Provisions Apply

[177] Both Jennifer and David received accident benefits from Liberty Mutual Insurance Company which was at the time the auto insurer of the Balac vehicle. The incident took place during the currency of the Bill 164 regime.

[178] Section 267.1(1) of the relevant provisions of the *Insurance Act* provides:

> 267.1(1) Despite any other Act and subject to subsections (2) and (6), the owner of an automobile, the occupants of an automobile and any person present at the incident are not liable in a proceeding in Ontario for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of the automobile in Canada. ….

[179] The defendant ALS here relies on the provisions of section 267.1(7) of the *Insurance Act* which provides:

> (7) If, in the absence of subsection (1), the owner of an automobile, an occupant of an automobile or a person present at the incident would have been jointly and severally liable for damages for pecuniary loss with one or more other persons who are not relieved of liability by subsection (1), the other persons are liable for those damages only to the extent that they are at fault or negligent in respect of those damages.

[180] ALS argues that it cannot be liable for pecuniary losses beyond the extent of its own fault or negligence. The argument of course, presupposes a finding of fault or negligence on the part of the plaintiffs or one of them and ALS and/or its employee Kedge – the only employee who it might be argued was "a person present at the incident".

[181] Here ALS has been found liable to the plaintiffs on the basis of strict liability for keeping a vicious wild animal – a legal liability separate and apart from any notion of fault or neglect. In such circumstances I think subsection 7 can have no application because there is no joint and/or several liability found.

[182] Further, I am not satisfied that the injuries and damages for which claim is here made "…arise directly or indirectly from the use or operation of the automobile".

[183] ALS here takes the position that if in so far as Kedge is concerned, any negligence on her part as their employee, falls to them vicariously – they are in respect of that negligence protected by virtue of subsection (1) of section 267.1. It is only in respect of any additional or independent negligence on the part of ALS for which it can be held liable to the plaintiffs and then only to the extent it is found to be at fault irrespective of any joint and/or several liability finding by subsection (7) of section 267.1.

[184] While many of the cases dealing with the various no-fault schemes were cited in argument I have found the most helpful was the decision of the Ontario Court of Appeal in *Hernandez* v. *1206625 Ontario Inc.* (2002), 61 O.R. (3d) 584.

[185] The case is factually quite different from the present case in that it involved injuries sustained by a plaintiff in car crash where allegations were made against the taverner who'd served him liquor.

[186] In *Hernandez* the court reviews a number of cases where the courts have struggled in determining whether "damages were occasioned by a motor vehicle", - (*Heredi* v. *Fensom* (2002), S.C.C. 50) or whether "loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile" (*Derksen* v. *539938 Ontario Ltd.* (2001), S.C.C. 72).

[187] The court concluded in *Hernandez* that:

> …s.267.6(1) of the *Insurance Act* applies only to damages for vehicular negligence. While the facts and legislative provisions in *Heredi*, *Clost* and *Clark*

> differ from the present appeal, these cases endorse a substantive approach to limitation and exclusion provisions in an automobile insurance context that is of general application. Essentially, these cases held that courts should not rigidly apply past interpretations of a given legislative phrase, but rather should look to the nature of the cause of action and the purpose of the legislative provision, and determine whether the provision should be applied on the facts of the case. This approach is perfectly in keeping with the principles of statutory interpretation.

[188] Here the plaintiffs claim damages primarily on the basis of strict liability in law, of those who keep wild dangerous animals and alternatively in negligence and for breach of the *Occupiers' Liability Act* for the manner in which such animals were kept and/or controlled – there is no allegation of vehicular negligence.

[189] When I consider the nature of these facts and the nature of the action I must conclude that the fundamental nature of this action – it is not in its essence an action for damages occasioned by a motor vehicle. In the language of *Heredi* the presence of the motor vehicle in this case is a fact ancillary to the essence of the action. That being so section 267.1(7) is of no application on the facts of this case. ALS is liable for the full extent of the plaintiffs' damages as I have found them.

Collateral Benefits, Improvident Settlement and OHIP Subrogation Rights

Collateral Benefits

[190] As the court noted in *Cugliari* v. *White* (1998), 38 O.R. (3d) 641 at page 5 of the QuickLaw version thereof:

> It is a fundamental principle of recovery in tort that the injured party be compensated for the full amount of his or her loss, but no more. Damages in tort are designed to be compensatory and not punitive. It follows that an injured party has suffered no wage loss as a result of a tort if his employer continues to pay his salary while he or she is unable to work. The injured party should not be entitled to recover damages for loss of income in these circumstances since it would constitute double recovery. Double recovery offends the general principle of recovery in tort and therefore is not permitted.
>
> However, the courts have recognized exceptions to the rules against double recovery where the benefits received by the injured party came from a collateral source, independent of any claims against the tortfeasor. As noted by this court in Boarelli v. Flannigan, [1973] 3 O.R. 69 at p. 73, 36 D.L.R. (3d) 4:
>
> > Moneys received by an injured party as a result of a private or public benevolence have never been taken into consideration in assessing damages for loss of income or earning capacity.

> Hence the court held that benefits received as a result of social welfare legislation did not need to be deducted. Similarly, a claim for loss of earnings should not be reduced by reason of the injured party having received unemployment insurance benefits, collateral benefits pursuant to a collective agreement or benefits from a private contract of employment or a contract of insurance.

[191] The defendant ALS submits that it is entitled to deduct from any damage award, amounts received by the plaintiffs for no fault benefits.

[192] I note firstly that Bill 164 does not specifically provide for the deductibility of accident benefits for unprotected defendants (which all parties agree ALS is, in the circumstances of this case) whereas under the former regime the legislation specifically provided for such.

[193] Because the statute is silent on whether accident benefits are to be deducted, the common law governs. In this respect the defendant relies on the decision of *McCutcheon* v. *Chrysler Canada Ltd.*, [1999] O.J. No. 604. In that case Shaughnessy J. held that accident benefit payments made pursuant to a statutorily mandated scheme were not akin to private policies of insurance of the sort discussed by Cory J. in *Cunningham* v. *Wheeler*, [1994] S.C.J. No. 19 and were deductible. Cavarzan J. came to the opposite conclusion in *Dryden (Litigation Guardian of)* v. *Campbell Estate*, [2001] O.J. No. 829. He was of the view that a private contract of insurance does not cease to be so merely because some of its content is mandated by statute, not because drivers are mandated to have such a policy to operate a vehicle on a highway. Cavarzan J. referenced the Court of Appeal decision in *Cugliari* v. *White* (1998), 38 O.R. (3d) 641. In *Cugliari* the court concluded that Canada Pension Plan disability benefits were neither deductible under the relevant provision of the *Insurance Act* at the time nor at common law. In so far as the case at bar is concerned the court's comment in respect of common law deductibility are apposite. At pages 7-8 of the QuickLaw version of the report Charron J.A. noted:

> The common law principles on the deductibility of collateral benefits were reviewed recently by the Supreme Court of Canada in Ratych v. Bloomer, [1990] 1 S.C.R. 940, 69 D.L.R. (4th) 25, and Cunningham v. Wheeler, supra. The Supreme Court reiterated the general principle against double recovery. However, it is of relevance to this appeal to note that the private insurance exception was maintained. Simply put, the tortfeasor is not allowed to benefit, in effect, from the injured party's wisdom and forethought in making provision for the continuation of some income in case of disability. The majority in Cunningham v. Wheeler held that the private insurance exception should also apply where the disability benefits are obtained not privately but pursuant to a collective agreement, provided that there be evidence of some type of consideration given up by the employee in return for the benefit.
>
> The appellants argue that CPP disability benefits do not fall within the private insurance exception and are deductible at common law. They rely principally on the mandatory nature of the CPP scheme in support of their

contention. Since contributions to the Plan are mandatory, they argue that the policy reason behind the common law exception to deductibility does not exist. It cannot be said that the tortfeasor would be benefiting from the injured party's wisdom and forethought in making provision in case of disability.

The nature of CPP benefits was considered by the Supreme Court of Canada in the earlier case of Canadian Pacific Railway v. Gill, [1973] S.C.R. 654, 37 D.L.R. (3d) 229. Although the CPP benefits in question were death benefits and not disability benefits, the court made general comments regarding CPP benefits which, in my view, are relevant to this issue.

In Canadian Pacific v. Gill, the court was considering the deductibility of CPP benefits under the provisions of s. 4(4) of the Families' Compensation Act, R.S.B.C. 1960, c. 138, which provided that "[i]n assessing damages there shall not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance". The CPP benefits were payable to the plaintiff and her children as a result of the death of a family member caused by the tortfeasor. Spence J., in writing for the court, considered the pensions payable under the CPP and concluded that the benefits were not deductible pursuant to s. 4(4) of the Families' Compensation Act (at p. 670):

> I am therefore of the opinion that pensions payable under the Canada Pension Plan are so much of the same nature as contracts of insurance that they also should be excluded from consideration when assessing damages under the provisions of that statute.

The appellants submit that these words were not spoken in the context of the principles later considered in Ratych v. Bloomer, and Cunnigham v. Wheeler, where the injured party's prudence and aforethought in making provision for himself was considered. Therefore, they submit that the similarity drawn in Canadian Pacific v. Gill between CPP benefits and private contracts of insurance should not be maintained in the context of this case.

However, Canadian Pacific v. Gill was referred to in Cunningham v. Wheeler and the court did not find it necessary to depart from its reasoning. McLachlin J., in her dissenting judgment, in her review of the definition of indemnity and non-indemnity payments (a distinction which she viewed as "critical to a discussion of collateral benefits") stated at p. 371:

> Perhaps the best example of non-indemnity insurance is that of life insurance. The beneficiary, under a life-insurance policy collects a set amount upon the death of the policy holder without reference to any pecuniary loss. Pensions are also considered to be non-indemnity payments: Canadian Pacific Ltd. v. Gill.

(Emphasis added)

Cory J. in writing for the majority, also referred to Canadian Pacific v. Gill in these terms (at p. 400):

> In Canadian Pacific Ltd. v. Gill …this Court affirmed the principle first set out in Bradburn's case and adopted in Parry v. Cleaver that the proceeds of insurance should not be deducted from a plaintiff's damages.

In my view, notwithstanding the fact that contributions to the Plan are mandatory, CPP disability benefits fall within the exception to the rule against double recovery as set out in Cunningham v. Wheeler. On the authority of Canadian Pacific v. Gill, CPP disability benefits can be considered akin to a private policy of insurance. Further, by his contribution to the Plan, Cugliari has given up consideration in return for the benefits as required by the principle set out in Cunningham v. Wheeler.

Consequently, to the extent that common law principles may still apply, the CPP disability benefits receive by Cugliari are not deductible.

[194] While the court in *Cugliari* was dealing with the insurance regime in place immediately before Bill 164 (the relevant regime for this case) the principles of common law deductibility are in my view, applicable.

[195] I can see no principled way to distinguish between CPP benefits on the one hand (*Cugliari*) and benefits paid pursuant to the compulsory automobile policy on the other. While CPP benefits are funded both by employers and employees through a system of mandatory contributions, the premium for the auto policy is paid by the automobile owner.

[196] Clearly here the benefits are received from a collateral source (the auto insurer), independent of any claim against the tortfeasor (ALS).

[197] As Cory J. pointed out in *Cunningham* v. *Wheeler*, *supra*, at p. 19 of the QuickLaw version thereof:

> For over 119 years, the courts of England and Canada have held that payments received for loss of wages pursuant to a private policy of insurance should not be deducted from the lost wages claim of a plaintiff. The first question to be considered is whether the rationale for this exemption persists. In my view there are convincing reasons both for the existence of the policy and for its continuation.

He then went on to review the common law history of the "insurance exception" to the general rule that a plaintiff is not entitled to double recovery. That began with *Bradburn* v. *Great*

Western Rail Co., [1874-80] All E.R. Rep. 195. He specifically referred to the judgment of Lord Reid in *Parry* v. *Cleaver*, [1969] 1 All E.R. 555 at p. 558:

> As regards moneys coming to the plaintiff under a contract of insurance, I think that the real and substantial reason for disregarding them is that the plaintiff has bought them and that is would be unjust and unreasonable to hold that the money which he prudently spent on premiums and the benefit from it should enure to the benefit of the tortfeasor. Here again I think that the explanation that this is too remote is artificial and unreal. Why should the plaintiff be left worse off than if he had never insured?

and from *Shearman* v. *Folland* at p. 21:

> If the wrongdoer were entitled to set-off what the plaintiff was entitled to recoup or had recouped under his policy, he would, in effect, be depriving the plaintiff of all benefit from the premiums paid by the latter and appropriating the benefit to himself.

and from *Hussain* v. *New Taplow Paper Mills Ltd.*, [1988] 1 All E.R. 541:

> …where a plaintiff recovers under an insurance policy for which he has paid the premiums, the insurance moneys are not deductible from damages payable by the tortfeasor….

and he concluded at paragraphs 82-85 as follows:

> 82. I think the exemption for the private policy of insurance should be maintained. It has a long history. It is understood and accepted. There has never been any confusion as to when it should be applied. More importantly it is based on fairness. All who insure themselves for disability benefits are displaying wisdom and forethought in making provision for the continuation of some income in case of disabling injury or illness. The acquisition of the policy has social benefits for those insured, their dependants and indeed their community. It represents forbearance and self-denial on the part of the purchaser of the policy to provide for contingencies. The individual may never make a claim on the policy and the premiums paid may be a total loss. Yet the policy provides security.
>
> 83. Recovery in tort is dependent on the plaintiff establishing injury and loss resulting from an act of misfeasance or nonfeasance on the part of the defendant, the tortfeasor. I can see no reason why a tortfeasor should benefit from the sacrifices made by a plaintiff in obtaining an insurance policy to provide for lost wages. Tort recovery is based on some wrongdoing. It makes little sense for a wrongdoer to benefit from the private act of forethought and sacrifice of the plaintiff.

> 84. There is a good reason why the courts should be slow to change a carefully considered long-standing policy that no deductions should be made for insurance monies paid for lost wages. If any action is to be taken, it should be by legislatures. It is significant that in general no such action has been taken.
>
> 85. Although in Ontario the non-deductibility principle was abandoned in relation to motor vehicle accidents when a no-fault motor vehicle insurance regime was enacted, the general rule in other tort litigation of non-deductibility has not been altered: s. 267 of the Insurance Act, R.S.O. 1990, c. I.8. It is significant that this was done in the context of creating a new system for compensating victims of motor vehicle accidents, largely outside traditional tort law. …

The reference to the Ontario regime and s. 267 of the Ontario *Insurance Act* is to the OMPP/Bill 68 regime referable to accidents which occurred between June 22, 1990 and December 31, 1993 – that regime, as noted in *Cugliari* specifically provided for the deduction of all no fault benefits as well as other benefits. As noted earlier, the legislation in effect at the time of this incident replaced Bill 68 and is silent in respect of the deductibility of no fault benefits.

[198] The basis for the insurance exception, as it has come to be known seems to be that a tortfeasor should not be able to take advantage of a plaintiff's foresight in obtaining insurance coverage and paying a premium therefor. The plaintiff has paid premiums to obtain the benefit and a tortfeasor should not benefit from that sacrifice or payment by the plaintiff. Cory J. concluded at p. 25:

> In *Ratych* v. *Bloomer*, there was no evidence put forward that the plaintiff had paid for the disability benefits. What type of proof will be required to show that the benefits are in the nature of insurance? It is my opinion that what is required by the *Ratych* decision is that there be evidence adduced of some type of consideration given up by the employee in return for the benefit. The method or means of payment of the consideration is not determinative. ….

and at pages 28-29:

> Where the evidence demonstrates that the plaintiff paid for the wage indemnity or disability benefits, either monetarily by payroll deductions, or indirectly, through trade-offs such as lower wages, then the wage indemnity/disability benefits should not be deductible. …

and as Cavarzan J. noted in the *Dryden* v. *Campbell Estate* case at page 40 thereof:

> It is not solely the wisdom and foresight of the individual, but also the fact that the benefits had been 'paid for' by the insured that makes them non-deductible.

The only question for this court is whether the benefits are non-deductible where the premiums were paid by a person other than the plaintiffs.

[199] There is no direct evidence before the court about who paid the premiums for the policy on the car. David's father Ranko testified that the car was in his (Ranko's) name but that David drove it. Neither were asked if they paid the premium. The issue of deductibility seems to have been an afterthought by ALS. I think it a reasonable assumption that Jennifer did not pay the premium for the auto policy.

[200] In my view, the onus is on the defence to establish on the evidence, the propriety of any reduction to the damage award which it seeks.

[201] It is reasonable to assume that either David or his father paid the premiums for the policy through which David receive certain benefits which the defence asserts should be deducted from his damage award.

[202] I am of the view that whether David or his father paid the premium the benefits he received remain non-deductible – if David paid then clearly the payments fall within *Ratych* v. *Bloomer* and *Cunningham* v. *Wheeler*. In my view the same result should follow if his father paid the premium on his behalf.

[203] So far as David is concerned however, the argument is really an academic one because he did not receive income replacement benefits only education disability benefits for a period of time which precedes July 1, 1998 when David's claim in this suit begins. The only healthcare expenses claimed here are for items over and above those paid by Liberty Mutual.

[204] However, it seems to me if the benefits are non-deductible in David's hands, the same payments should be non-deductible in Jennifer's hands as well. Premium was paid for the policy albeit not by her. It is I think reasonable to suggest the premium paid was on behalf of any and all who would benefit from the policy. In any case it is I think, inappropriate – absent specific legislation – for the non-protected defendant to benefit from that policy of insurance. In my view the no fault payments which Jennifer received are not deductible.

Improvident Settlement

[205] The defence argument in relation to improvident settlement is very like the argument advanced in *Gray* v. *Macklin*, [2000] O.J. No. 4603. They say in essence if I find David has been permanently disabled as the result of injuries sustained, the evidence which supports that conclusion must be evidence that it is "beyond dispute" that there would be entitlement to accident benefits under the legislation. I disagree. The standard of proof a defendant is required to meet to establish entitlement to no fault benefits is very strict. It must be shown to be beyond dispute that the plaintiff qualifies for those payments in every respect. The defence led no such evidence here to demonstrate that even if the settlement could be set aside, the plaintiff would be entitled as the law requires. A plaintiff to recover for loss of future income need only establish a substantial possibility of the future loss. A defendant bears a much heavier onus. *Collee* v.

Kyriacou has been overruled by the Court of Appeal decision in *Chrappra* v. *Ohm* (1998), 38 O.R. (3d) 651. There is simply no evidentiary basis for the defence argument in this respect.

[206] Further I am of the view that having consented to the dismissal of the Balac action against Liberty Mutual on September 26, 2000 and raising no issue in respect of that settlement until during the course of trial I am of the view that it would be improper to permit the defendant to raise the issue at this late stage.

OHIP Subrogation

[207] Section 30(4) of the *Health Insurance Act*, R.S.O. 1990, c. H-6, reads:

> Despite subsection (1), the Plan is not subrogated to the rights of an insured person in respect of personal injuries arising directly or indirectly from the use or operation….of an automobile.

The defendant argues that the plaintiffs' injuries arose indirectly from the use of an automobile and hence the OHIP accounts are not recoverable. In this ALS relies on the Court of Appeal's decision in *Durant* v. *Blandford*, [2000] O.J. No. 1710. Both plaintiffs here suffered injuries occasioned as the result of tigers gaining access to their vehicle and biting them. For reasons earlier set out and cases cited I am of the view that the injuries suffered by these plaintiffs did not arise directly or indirectly from the use or operation of a motor vehicle. The motor vehicle was merely incidental or "ancillary", the term used by

the court in *Heredi* v. *Fensom*. Accordingly, in my view section 30(4) has no application in the circumstances of this case. The plaintiffs are entitled to recover the subrogated claims on behalf of OHIP.

[208] In summary the plaintiffs shall have judgment against the defendant ALS in the following sums:

DAVID BALAC	
General Damages	$225,000.00
Past Loss of Income	$247,053.00
Future Loss of Income	$1,191,597.00
Special Damages	$37,382.57
TOTAL:	$1,701,032.57

SLAVKA BALAC	$20,000
RANKO BALAC	$17,500
SANDRA BALAC	$12,000

JENNIFER COWLES	
General Damages	$210,000
Past Loss of Income	$298,528
Future Loss of Income	$250,000
Special Damages	$54,641.21
TOTAL:	$813,169.21

Future Heavy and Bi-Weekly Housekeeping	$2,515 per year*
Future Psychological Treatment	$13,081.20*

* present values to be provided by counsel and added to total for Jennifer Cowles.

ANNE KELLY	$20,000
JESSE COWLES	$15,000

QUINTON COWLES	$10,000

[209] In respect of the amounts awarded to the infant plaintiffs, an Order will issue requiring the net sum (after application of the appropriate deductible) be paid into Court to the credit of the infant to be paid out on majority or further order of this Court.

[210] In the Balac action the third party claim of ALS against Jennifer-Anne Cowles is dismissed. In the Cowles action, the action and the cross-claim of ALS against Ranko and David Balac are dismissed as is the counterclaim of David Balac against the plaintiff, Jennifer-Anne Cowles.

[211] Counsel may address interest and costs, if unable to agree, in brief written submissions on a schedule to which they are all in agreement.

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MacFarland J.

Released: January 27, 2005