# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Wolber v. Ivanova,*
2024 BCCA 203

Date: 20240529
Docket: CA49115

Between:

**Dr. Robert A. Wolber**

Appellant
(Defendant)

And

**Elena Ivanova**

Respondent
(Plaintiff)

Before: The Honourable Mr. Justice Harris
The Honourable Mr. Justice Abrioux
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated May 19, 2023 (*Ivanova v. Wolber*, Vancouver Docket S183590).

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| Counsel for the Appellant: | J.A. Morris<br>R.M. Gagnon |
| Counsel for the Respondent: | D.J. Renaud |
| Place and Date of Hearing: | Vancouver, British Columbia<br>January 31, 2024 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>May 29, 2024 |

**Written Reasons by:**
The Honourable Justice Skolrood

**Concurred in by:**
The Honourable Mr. Justice Harris
The Honourable Mr. Justice Abrioux

***Summary:***

*The appellant doctor was found negligent by a jury for misdiagnosing the respondent with cancer in her right breast. The respondent opted for a full mastectomy in response to the diagnosis, and when the excised tissue was examined after the surgery, there were no signs of cancer. A jury awarded the respondent $400,000 in damages. The appellant appeals the jury's findings on causation and argues that the damage award is inordinately high.*

*Held: Appeal allowed in part. With respect to causation, the key issue is whether there was sufficient evidence before the jury to support a finding that the respondent would not have chosen a full mastectomy, opting instead for less invasive treatment. The jury's finding is entitled to appellate deference. However, with respect to the quantum of damages, the jury's award was wholly disproportionate. An award near the upper limit is justified by debilitating injuries that have catastrophic effects on the plaintiff's ability to function. While significant, the appellant's injuries here do not rise to that threshold. Accordingly, the damage award is reduced to $250,000.*

**Reasons for Judgment of the Honourable Justice Skolrood:**

[1] On March 24, 2016, the respondent Elena Ivanova underwent a right mastectomy and right sentinel node biopsy following what she understood to be a diagnosis of a rare and aggressive form of breast cancer. That diagnosis was based on a pathology report prepared by the appellant, Dr. Robert Wolber.

[2] After the surgery was performed, the excised tissue was examined and it showed no sign of cancer.

[3] Ms. Ivanova sued Dr. Wolber, as well as the surgeon who performed the mastectomy, in negligence. The trial took place before a judge and jury and on May 19, 2023, a jury found that Dr. Wolber breached the standard of care and awarded Ms. Ivanova $400,000 in non-pecuniary damages. The jury also found that the surgeon was not liable for Ms. Ivanova's losses.

[4] Dr. Wolber now appeals to this Court. For the reasons that follow, I would allow the appeal only to the extent of reducing the damage award to $250,000.

## Background

[5] The issues on appeal revolve around a fairly narrow set of facts. Accordingly, it is not necessary to review the entire background in great detail. I will provide an overview of the most salient facts and then will canvass additional facts as needed when dealing with the issues.

[6] On January 31, 2016, Ms. Ivanova noticed a lump in her right breast. She consulted her family physician and was referred for further diagnostic testing.

[7] On February 11, 2016, Ms. Ivanova underwent a mammogram and breast ultrasound. The reviewing radiologist indicated in their preliminary report that Ms. Ivanova had one large mass (referred to as the "Index Lesion") and a number of smaller masses and cysts (referred to as the "Satellite Lesions") in her right breast. On March 1, 2016, the same radiologist conducted a right breast ultrasound guided

core biopsy and extracted a small tissue specimen. The specimen was sent to Dr. Wolber for assessment.

[8] Before completing his assessment, Dr. Wolber sent the specimen for review by six other pathologists at Lions Gate Hospital. The consensus view of the other pathologists was that the specimen contained invasive carcinoma, but they disagreed on the subtype of carcinoma.

[9] On March 10, 2016, Dr. Wolber completed a surgical pathology report that included a diagnosis of invasive metaplastic carcinoma. However, Dr. Wolber was not able to determine the grade of the carcinoma and indicated that a further excisional biopsy would be required to obtain more tissue so that a more precise diagnosis could be made.

[10] On March 15, 2016, Ms. Ivanova met with Dr. Dingee, a general surgeon, who discussed treatment options with Ms. Ivanova. Those options included:

a) A partial mastectomy;

b) A full mastectomy with reconstruction; and

c) A full mastectomy without immediate reconstruction.

[11] Ms. Ivanova understood from Dr. Dingee that she had an “aggressive” form of cancer that led her to believe that removing the cancer was a matter of life or death. She also believed that her only way to survive was to proceed with a full mastectomy as soon as possible.

[12] On March 24, 2016, Dr. Dingee performed a right mastectomy and right node biopsy on Ms. Ivanova.

[13] The tissue sample obtained from the biopsy was examined by a pathologist at the BC Cancer Agency. In a report dated April 7, 2016, that pathologist concluded that the tissue sample showed no signs of cancer.

[14] On April 11, 2016, Dr. Wolber added an addendum to his original surgical pathology report in which he wrote: “Based on the subsequent resection specimen, it is clear that the diagnosis of metaplastic carcinoma, low grade adenosquamous-type, was incorrect. However, specific recommendations for excisional biopsy for complete diagnostic purposes were made in that report”.

[15] On April 27, 2016, Ms. Ivanova met with an oncologist at the BC Cancer Agency who confirmed that Ms. Ivanova did not have cancer.

[16] Later in 2016 and early 2017, Ms. Ivanova underwent three surgeries to reconstruct her right and left breasts. The surgery on her left breast was to make it symmetrical with her reconstructed right breast.

**Expert Evidence on Liability**

[17] On appeal, Dr. Wolber does not challenge the jury’s finding that he breached the standard of care. Accordingly, it is not necessary to review the expert evidence on that issue in detail and I will simply highlight the central points emerging from the evidence.

[18] Ms. Ivanova relied on the expert opinion evidence of a pathologist, Dr. Cimino-Matthews. It was Dr. Cimino-Matthews’ opinion that:

> …the original core biopsy report rendered by Dr. Wolber …was written in such a way that it unequivocally communicated the presence of a metaplastic breast carcinoma. This was below the standard of care of a practicing surgical pathologist. The microscopic description indicates that an “excisional biopsy” is recommended to definitely classify the lesion, and by that, the phrase refers to previous sentences of whether or not there is an associated invasive ductal or adenosquamous carcinoma component to the metaplastic carcinoma. The standard of care management for a metaplastic carcinoma of the breast requires a cancer staging surgical procedure for adequate local control. This would include either a lumpectomy specimen, followed by radiation therapy to the breast, or a mastectomy, both of which would be accompanied by sentinel lymph node excisions most commonly from the ipsilateral axilla…An excisional biopsy removes a smaller portion of tissue than a cancer procedure such as a lumpectomy or mastectomy. Excisional biopsies are performed for pathological diagnoses atypia, high-risk lesions, equivocal findings, and selected other non-cancer indications; an excisional biopsy is not standard of care, and would be substandard treatment, for metaplastic carcinoma.

[19] During cross-examination, Dr. Wolber testified that his intention was for the surgeon to perform a simple surgical excision to obtain more tissue for analysis and that he did not intend the surgeon to perform a mastectomy.

[20] Dr. Wolber tendered the expert opinion evidence of Dr. Kos, a pathologist, who opined that had Ms. Ivanova undergone excisional biopsy or lumpectomy, the true nature of the Index Lesion would have been apparent. However, Dr. Kos also opined:

> …This was a difficult biopsy to interpret and showed unusual features. Dr. Wolber, as per best practice, consulted with all six other pathologists within his department. There was unanimous consent that the biopsy showed invasive carcinoma, although some differences in opinion as to the type of invasive carcinoma. Because no one had any doubts as to the presence of an invasive carcinoma, it was not required to send the case out for external consultation. Dr. Wolber indicated this uncertainty as to the precise type of cancer by stating that an excisional biopsy was required to permit examination of the entire lesion for precise classification.
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> …
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> In my opinion, Dr. Wolber took all reasonable steps in rendering his diagnosis on Ms. Ivanova's breast biopsy specimen. It was a reasonable interpretation for a practicing pathologist in British Columbia, based on the features in the biopsy sample. In fact, all six other pathologists working in that particular department, his direct peers, also interpreted the features in the biopsy as invasive carcinoma.

[21] The expert evidence also established that the Satellite Lesions would have had to have been removed in any event, which would have required surgery on Ms. Ivanova's right breast. There was, however, disagreement about the extent of the surgery that would be required to do so. Dr. Turner, a general surgeon called by Dr. Wolber, opined that if Ms. Ivanova had undergone a partial mastectomy including excision of the Satellite Lesions, there would have been significant deformity to the breast due to the volume of tissue removed.

[22] Ms. Ivanova obtained a response report from Dr. Simpson, a breast surgical oncologist, who was of the opinion that the Satellite Lesions could have been removed as separate specimens, thereby preserving breast tissue as well as the nipple, the most cosmetically significant feature of the breast.

### Expert Evidence on Damages

[23] Dr. Axler, a psychiatrist called as a witness by Ms. Ivanova, diagnosed Ms. Ivanova with an adjustment disorder with mixed anxiety and depressed mood. Dr. Axler observed that Ms. Ivanova's condition had not improved with psychotherapy and that her prognosis was therefore guarded.

[24] Dr. Pawliuk, a psychiatrist retained by Dr. Wolber, provided a response report to Dr. Axler's report. Dr. Pawliuk agreed with the diagnosis of an adjustment order, although he offered a positive prognosis for improvement.

### Ms. Ivanova's Evidence

[25] Ms. Ivanova testified that she experienced significant emotional pain as a result of the mastectomy to her right breast. She considered herself disfigured and ashamed of her body. Physical intimacy with her husband was adversely impacted. These feelings were not ameliorated by the reconstructive surgery.

[26] Ms. Ivanova testified to experiencing constant pain following the mastectomy and reconstructive surgeries. She also testified to the loss of culture and traditions resulting from the removal of her breast, specifically attendance at saunas which is common in her Northern European culture. She said she has developed a fear and mistrust of physicians as a result of her experience.

[27] What Ms. Ivanova's testimony did not address was whether, if the original diagnosis had been of an atypical, equivocal or suspicious finding of cancer, i.e., that the analysis of the original tissue sample was inconclusive, she would have chosen a different treatment. Specifically, whether she would have undergone a partial mastectomy rather than a full mastectomy. The absence of this evidence is central to the appellant's argument on causation.

### The Judge's Instructions to the Jury

[28] The judge's instructions to the jury on the issue of causation were succinct. The key portion said:

> The plaintiff must prove on the balance of probabilities that she suffered injuries that would not have occurred but for the defendant's breach of the standard of care.
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> In order to answer this question, you will have to consider what would have occurred in any event of the diagnosis. The question can be posed as follows: If the defendant failed to meet the standard of care, then what loss, if any, was caused to Ms. Ivanova that would not have been caused otherwise?
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> You have heard from aa number of witnesses that regardless of the diagnosis, all of the lesions and masses in Ms. Ivanova's breast had to be removed. Consequently, breast tissue would have been removed, which would lead to disfigurement, scarring, and pain. You have also heard from some witnesses…that a mastectomy is an acceptable treatment, even if the lesions or masses are benign.
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> The causation question is essentially a practical question of fact that can best be answered by ordinary common sense. You must decide on all the evidence if Ms. Ivanova suffered injury as a result of a breach or breaches that you have found to have occurred. Put another way, but for the breach, whether Ms. Ivanova would have suffered the injuries, you find that she has suffered.

[29] No objection was raised at trial to this instruction, nor is it challenged on appeal.

**The Verdict**

[30] The jury found:

> The pathology report was confusing by positively diagnosing metaplastic carcinoma (MPC). Both Dr. Kos…and Dr. Cimino-Matthews…agree treatment for MPC is cancer staging. Yet Kos…wrote the pathology report did not rule out cancer staging. But…Wolber wrote that ALL he was seeking was a "simple" excision. He testified to surprise that this did not happen. He diagnosed one illness and recommended treatment for another. This was unclear, contradictory and below the standard of care for a reasonably prudent pathologist.

[31] The jury awarded Ms. Ivanova $400,000 in non-pecuniary damages.

## Issues on Appeal

[32] Dr. Wolber submits that the jury erred:

a) in finding that Dr. Wolber's breach of the standard of care caused Ms. Ivanova to undergo a mastectomy rather than a partial mastectomy; and

b) in awarding damages that were disproportionately high.

## Standard of Review

[33] Jury verdicts are entitled to a high degree of deference on appeal. As stated by the Supreme Court of Canada in *McCannell v. McLean*, [1937] S.C.R. 341 at 343:

> The principle has been laid down in many judgments of this Court to this effect, that the verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it.

[34] *McCannell* has been cited and applied in this Court numerous times: see for example, *Melgarejo-Gomez v. Sidhu*, 2002 BCCA 19 at para. 9; *Moskaleva v. Laurie*, 2009 BCCA 260 at para. 112; *Bailey v. Jang*, 2011 BCCA 146 at para. 2.

[35] The standard of review for damages awards made by juries is even more deferential than the standard applied to judge-alone awards. An appellate court will interfere only where the award is "wholly disproportionate or shockingly unreasonable" or "so exorbitant or grossly out of proportion to the overall circumstances of the plaintiff's case": *McCliggot v. Elliott*, 2022 BCCA 315 at paras. 50–52.

[36] Despite this highly deferential standard, the issue of whether there is evidence to support a jury's verdict is a question of law, reviewable on a correctness standard, and an appellate court may intervene where it finds that there is *no* evidence to support the jury's verdict: *Rhodes v. Surrey (City),* 2018 BCCA 281 at para. 15; *McKinley v. BC Tel*, 2001 SCC 38 at para. 60.

## Discussion

### Causation

[37] While Dr. Wolber does not take issue with the finding of the jury that he breached the standard of care, he does challenge the finding that the breach caused the damages suffered by Ms. Ivanova. He submits that the evidence at trial was

insufficient to establish causation under the modified objective test that Dr. Wolber argues applies in medical negligence cases.

[38] That test emanates from the leading Supreme Court of Canada decisions in *Reibl v. Hughes*, [1980] 2 S.C.R. 880 and *Arndt v. Smith*, [1997] 2 S.C.R. 539. In *Arndt*, Justice Cory reviewed the reasons for judgment of Chief Justice Laskin in *Reibl*, and then described the modified objective test in these terms (at 547):

> The test enunciated relies on a combination of objective and subjective factors in order to determine whether the failure to disclose actually caused the harm of which the plaintiff complains. It requires that the court consider what the reasonable patient in the circumstances of the plaintiff would have done if faced with the same situation. The trier of fact must take into consideration any "particular concerns" of the patient and any "special considerations affecting the particular patient" in determining whether the patient would have refused treatment if given all the information about the possible risks.
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> [Emphasis in original.]

[39] In *Warlow v. Sadeghi*, 2021 BCCA 46, this Court confirmed the application of the modified objective test in respect of a claim by a patient alleging a failure by a physician to adequately inform her of the risks associated with a medical procedure. Justice Goepel for the Court noted that the plaintiff had the burden of proving the two elements of her claim (at para. 33):

a) A material, special, or unusual risk was not disclosed to her in advance of the surgery; and

b) A reasonable person in her position would not have agreed to the surgery if she had been sufficiently advised of such risk.

[40] Justice Goepel indicated that the second element involves a two-part test; the first part being subjective and the second part objective. As to the subjective element, Goepel J.A. said (at para. 36):

> To meet the subjective part of the modified objective test, Ms. Warlow needed to testify that if the material risks or treatment alternatives had been adequately disclosed, she would not have consented to the surgery. There can be no finding on what she would have done if she is not asked what she would have done had she been properly advised…

[41] Justice Goepel agreed with the trial judge's finding that the plaintiff had not met that burden. Justice Goepel said (at para. 39):

> Ms. Warlow had the burden to prove what she would have done if she had been properly warned. In this case…Ms. Warlow was not asked what she would have done if properly warned. She did not provide the testimony necessary to meet her burden on the subjective aspect of the modified objective test. Faced with this dearth of evidence, the trial judge could not infer what Ms. Warlow would have done. The insufficiency of the evidence means the plaintiff failed to meet her burden, and the trial judge did not err in dismissing the action.

[42] As I alluded to at paragraph 27 above, Dr. Wolber argues that the similar absence of evidence from Ms. Ivanova about what she would have done had she received an accurate diagnosis is fatal to her claim. Dr. Wolber submits that for this reason, the jury erred in finding causation.

[43] Dr. Wolber relies on two decisions of the Supreme Court of British Columbia in which the modified objective test was applied in circumstances involving a misdiagnosis rather than a failure to properly inform the patient of likely risks.

[44] In *Kooijman v. Bradshaw*, 2016 BCSC 2316, the plaintiff alleged that the defendant doctors, who were pathologists, negligently diagnosed her with cancer in her left neck lymph nodes, as a result of which she underwent dissection surgery during which she suffered injury to her spinal accessory nerve. The plaintiff argued that if she had been given a proper diagnosis—specifically that the tissue sample assessed was merely "suspicious" or "atypical" rather than positive for cancer—she would have been offered additional treatment options.

[45] The central question on the causation issue was whether the plaintiff would have pursued different treatment had the accurate diagnosis been given. The judge held that this question was to be determined by applying the modified objective test: at para. 212, citing *Reibl* at p. 899.

[46] On this point, the judge noted that the plaintiff testified that she would not have elected to proceed with the neck dissection surgery (at para. 207). Nonetheless, the judge reviewed numerous other factors and concluded that even

had the plaintiff received an atypical or suspicious diagnosis, she would more likely than not have proceeded with the dissection surgery (at paras. 213–214).

[47] In *O'Connor v. Wambera*, 2018 BCSC 886, the plaintiff suffered a stroke as a result of a bleeding arteriovenous malformation ("AVM") which left her with brain damage and partial paralysis. The plaintiff sued the defendant neurologist alleging a breach of the standard of care for failing to diagnose the AVM. The causation issue revolved around the question of whether the plaintiff would have undergone treatment if the AVM had been discovered earlier. Chief Justice Hinkson, citing *Kooijman* and *Reibl*, held that this issue should be determined using a modified objective analysis (at paras. 272–274).

[48] Similar to *Kooijman*, the plaintiff in *O'Connor* testified that had the AVM been diagnosed, she would have been anxious if left untreated and would have wanted surgery even if she was feeling fine and notwithstanding the risks associated with treatment (at para. 283).

[49] Despite the plaintiff's testimony, Chief Justice Hinkson reviewed the evidence as a whole and concluded that "a reasonable person in the position of the plaintiff…to whom proper disclosure of attendant risks had been made would have carefully weighed the risks and benefits of both options, and would have deferred the decision as to whether to pursue intervention, and if so, what intervention" until a later date (at para. 289). The claim was therefore dismissed.

[50] Ms. Ivanova submits that it is not established law that the modified objective test, developed in informed consent cases, applies to cases involving negligent misdiagnosis. She notes that no appellate courts have considered or determined this issue. Ms. Ivanova also submits that this issue need not be decided on this appeal. She says that the jury was properly instructed on the but for causation test and no challenge is made to the jury charge on appeal.

[51] In my view, it is unnecessary and beyond the scope of this appeal to determine the extent to which the modified objective test applies outside the context

of informed consent cases. Rather, the issue here is whether there was sufficient evidence to satisfy the but for test on which the jury was, as both parties acknowledge, properly charged.

[52] In determining whether the plaintiff met the evidentiary burden necessary to satisfy that test, it is important to consider the nature of the claim advanced. Ms. Ivanova again submits that had she been given accurate information, she would have chosen a different treatment path and not suffered the damages she claims resulted from undergoing a mastectomy.

[53] Framed in this manner, the claim necessarily engages Ms. Ivanova's subjective beliefs and intentions, which in turn leads into Dr. Wolber's submission that direct testimony from Ms. Ivanova was required on the choice she would have made had she not received the misdiagnosis.

[54] On this point, Ms. Ivanova submits that it is not settled law that a plaintiff in her situation must answer a "self-serving hypothetical question" (Respondent's factum at para. 63) in order to satisfy the subjective element of the test.

[55] Ms. Ivanova points to divergent views in the Ontario courts. For example, in *Jaskiewicz v. Humber Regional Hospital*, 2001 CarswellOnt 3 (S.C.), [2001] O.J. No. 6, additional reasons 2000 CarswellOnt 3975 (S.C.), [2000] O.J. No. 4178, cited by Dr. Wolber, the court said (at para. 109):

> On the facts of the case at bar, I am of the view that the failure of the plaintiff to give subjective evidence as to whether she would have consented upon being properly informed creates a serious lacuna in the requirement to prove, on the balance of probability, the tortious conduct and the causation necessary to recover damages.

[56] In contrast, the Divisional Court in *Hartjes v. Carman*, 2004 CarswellOnt 9807, [2004] O.J. No. 5597 expressly disagreed with the view expressed in *Jaskiewicz:*

> 24. If *Jaskiewicz* is submitted for the proposition that a plaintiff must fail if the plaintiff does not testify that she would not have had a procedure if she had been aware of the risks, then I respectfully disagree. It is, of course, entirely proper for a trial judge to draw an adverse inference from the

> plaintiff's failure so to testify. However, this ability to draw an adverse inference should not be converted to an absolute rule of evidence disentitling a plaintiff to recovery. It well may be that in most instances, a failure to so testify will result in the adverse inference being drawn. Nevertheless, it is open to a trial judge to consider other evidence within the meaning of the modified objective test in considering the causal connection between the lack of an informed consent and the injuries resulting from a procedure.

[57] In my view, the prevailing law does not go so far as to demand, as an absolute requirement and prerequisite to a finding of causation, that a plaintiff must testify about what they would have done had they been provided with accurate information (or in the case of someone like Ms. Ivanova, had the misdiagnosis not been made). While the absence of such testimony in a specific case may well create a lacuna in the evidence (*Jaskiewicz)* or lead to an adverse inference being drawn (*Hartjes*), the role of the trier of fact is to make the necessary determination on the basis of the evidence as a whole whether the causal relationship has been established between the tortious conduct and the injuries sustained. To hold otherwise would amount to a victory of form over function. Furthermore, it would be inconsistent with the directive from the Supreme Court of Canada that courts must take a “robust and pragmatic” approach to causation: *Benhaim v. St-Germain*, 2016 SCC 48 at para. 54, citing *Snell v. Farrell*, [1990] 2 S.C.R. 322 at 330–331.

[58] I would add that I do not read Goepel J.A.’s reasons in *Warlow* as establishing an absolute rule that the absence of such evidence from the plaintiff will be fatal. Rather, he agreed with the trial judge that because the plaintiff did not testify what she would have done had she been properly informed, there was a “dearth of evidence” that rendered it impossible for the judge to infer what she would have done. In other words, Goepel J.A.’s finding was limited to the particular evidentiary matrix in that case.

[59] In my view, the key issue in this case is whether there was a similar dearth of evidence that rendered it impossible for the jury to infer that but for Dr. Wolber’s misdiagnosis, Ms. Ivanova would not have chosen a full mastectomy but instead would have pursued alternate treatment. I am satisfied that there was sufficient evidence before the jury to support that finding.

[60] As a starting point, and as I have discussed, Dr. Wolber's position on appeal was that Ms. Ivanova's failure to provide subjective evidence as to what she would have done but for Dr. Wolber's misdiagnosis meant that she had failed to establish causation. Beyond that stark contention, which I have rejected, Dr. Wolber did not address whether there was other evidence on which the jury could draw the necessary inference.

[61] In contrast, Ms. Ivanova submits that there was a considerable body of evidence before the jury that supported their finding, including:

a) Ms. Ivanova testified that the diagnosis of metaplastic carcinoma was shocking and caused her to experience panic attacks;

b) She testified that Dr. Dingee described the form of cancer as "aggressive". Dr. Dingee denied using that term, however it was open to the jury to accept Ms. Ivanova's evidence;

c) Ms. Ivanova understood "aggressive" cancer to mean one that spreads quickly and that could cause her to "die very soon";

d) Ms. Ivanova believed that removing the carcinoma was a matter of life or death. She believed that a mastectomy was her only option to live, and her life was more important than her appearance;

e) More minimally invasive surgery involving excision of only the Index Lesion and the Satellite lesions would have produced a better cosmetic outcome in that more breast tissue and the nipple would have been preserved; and

f) Ms. Ivanova's breast was important to her and a significant part of her sexual identity.

[62] It was also open to the jury to consider another relevant factor: upon receiving the misdiagnosis, Ms. Ivanova opted for arguably the most drastic option—a full mastectomy without immediate reconstruction. Subsequently, upon learning that she

did not have cancer, she opted to undergo reconstructive surgery. This supports the inference that she would have chosen a different option but for the misdiagnosis.

[63] Further, the theory postulated by Dr. Wolber—that Ms. Ivanova would have chosen a mastectomy in any event—was put to the jury by Dr. Wolber's counsel in closing submissions. The judge repeated that theory when summarizing counsel's submission in her final jury instructions. It is clear that the jury rejected this theory which, in my view, it was open to them to do. The jury's finding is entitled to considerable deference.

[64] Ultimately, the jury was properly asked to determine whether, on the balance of probabilities, Ms. Ivanova suffered injuries that would not have occurred but for Dr. Wolber's breach of the standard of care. The jury answered that question in the affirmative and Dr. Wolber has not demonstrated any reversible error in that conclusion.

[65] I therefore would not accede to the first ground of appeal.

**Damages**

[66] As noted above (at para. 35), the jury's award of damages is entitled to a high degree of deference. In considering whether appellate intervention is warranted, the courts have often applied the "comparative approach", which involves consideration of damages awards made by judges in comparable cases. In *McCliggot*, Justice Dickson reviewed in some detail the origin and evolution of this approach, including the criticism directed at the approach in numerous authorities. This review was prompted in part by the respondent's submission that "the comparative approach is illogical and should be discarded" (at para. 3). In respect of this submission, Dickson J.A. was of the view that the comparative approach is sufficiently well-established in the jurisprudence that arguments for its wholesale abandonment should more properly be made to a five-justice division of this Court (at para. 75).

[67] Justice Dickson then described the appropriate analysis under the comparative approach, keeping in mind some of the difficulties identified in the authorities:

> [79] As stated in [*Boyd v. Harris,* 2004 BCCA 146], in applying the comparative approach the first task "is to determine whether the decisions cited … are reasonably comparable … and whether they suggest a range of acceptable awards": *Boyd* at para. 41. In my view, it follows that the level of regard this Court should have to decisions cited as comparators is directly linked to the degree of comparability between their circumstances and those of the plaintiff in the case under review. The closer the proposed comparators are in material respects, the greater the heed this Court should pay to the conventional range they suggest would be appropriate. Conversely, the less comparable they are, the less heed is due to that suggested range.
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> [80] Where, as here, the plaintiff's non-pecuniary loss is not amenable to close comparison in material and important respects to losses suffered by other plaintiffs in other cases, applying the comparative approach is less directly helpful than it can be in more common cases. Nevertheless, to the extent that material and important aspects of a loss can be meaningfully compared, doing so provides a helpful starting point on appellate review of a jury award. However, the review should then go on to account for the additional unique aspects of the loss, considered at their highest from the perspective of the plaintiff. It should also do so in a generous manner, bearing in mind the perspective of the jury as reflected by its award.

[68] In *McCliggot,* the jury awarded non-pecuniary damages of $350,000 to a plaintiff who suffered soft tissue injuries in a motor vehicle accident which resulted in a chronic condition involving constant discomfort in her back and shoulders, tension and stiffness in her neck, interrupted sleep, and daily low-grade headaches. The plaintiff's injuries resulted in her losing her daycare business and her rental home and adversely affected her housekeeping, recreational, and other activities, including most notably her ability to fully support her special needs' children (at paras. 12 and 19).

[69] On appeal, the appellants relied on a number of judge-alone decisions that they submitted provided useful comparisons for the non-pecuniary award. According to the respondents, those decisions supported an upper limit of $100,000 for non-pecuniary damages.

[70] The respondent (plaintiff) submitted that the award of $350,000 should be maintained as it could not be said that the award was so shockingly unreasonable that no jury could have reasonably made the award. Alternatively, the respondent submitted that if a reduction was warranted, it should be done in a "restrained manner that reflects due deference to the determination of the jury". She proposed an award of between $200,000–250,000 (at para. 104).

[71] In Dickson J.A.'s view, the comparator cases cited by the appellants were unhelpful in that none shared the "central and unique feature" of the respondent's non-pecuniary loss, namely the emotional suffering caused by the combined loss of her home, her chosen career, and her ability to fully parent her special needs children (at para. 108).

[72] Nonetheless, Dickson J.A. concluded that the award of $350,000 was "wholly disproportionate" and "shockingly unreasonable" such that appellate interference was warranted. Justice Dickson reduced the award to $250,000, which she held properly reflected the most favourable view of the evidence that was before the jury (at para. 111).

[73] Justice Groberman dissented in part. He would have reduced the non-pecuniary award further, to $200,000. While that was the point of difference between him and the majority, he described a central purpose of his reasons as to "decry the lack of guidance given to juries as to the appropriate level of non-pecuniary damages". He said:

> [126] …It is unfortunate that we fail to provide juries with information about the range of non-pecuniary damages awarded in similar cases. The result is a lack of consistency and predictability in awards that is intolerable in a system of justice. While it is beyond the powers of this division to revisit the reasoning in *Brisson v. Brisson*, 2002 BCCA 279, there is a need for that to occur in one way or another: either through legislative change or the overruling of that case by a court competent to do so. Juries must be furnished with the appropriate tools to allow them to make their assessments if they are to treat litigants justly.

[74] In *Brisson v. Brisson*, 2002 BCCA 279, the trial judge was asked to instruct the jury on conventional non-pecuniary damage ranges and did so. On appeal, a

majority of this Court held that the judge erred in providing this instruction. Justice Thackray, for the majority, stated that juries should not be instructed on ranges of non-pecuniary damages as "judicial guidance fetters a jury's right to independently make this decision" (at para. 57). Justice Huddart dissented, stating:

> [86] …if the civil jury system is to be retained, as I believe it should be, trial judges need the capacity to focus a jury's decision-making on a range of general damages an appellate court is unlikely to find excessively low or excessively high.

[75] I do not intend to repeat Groberman J.A.'s thorough and compelling discussion of the background to *Brisson* and his rationale for why the law as settled by the majority in that case should, in his view, be revisited (see paras. 163–191). I will say that I agree with his observation that juries are put in the unenviable position of having their awards reviewed on appeal by application of the comparative approach without having any information about the conventional range of damages that will form the basis for the comparative review in the first place. Justice Groberman said:

> [153] Unfortunately, though we must gauge non-pecuniary loss by previous decisions, we do not allow juries to access or consider such decisions. In effect, we are asking them to assess non-pecuniary damages without allowing them access to the appropriate tools. The gauge of previous decisions is what differentiates an arbitrary decision from one that is better described as "conventional". In the result, jury decisions on non-pecuniary loss are apt to be genuinely arbitrary.
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> …
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> [158] Nonetheless, no system of justice can countenance arbitrary decision making. The compromise that the Court has reached is the one endorsed in *Little*: we allow juries a margin of deviation from conventional awards made by judges. To prevent their awards from being wholly arbitrary, however, we adopt the comparative approach and treat massive deviations from conventional awards as errors.
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> [159] I agree that it is disrespectful of juries to overturn their assessments because they do not conform with established norms when we systematically deprive them of information reflecting those norms. The solution adopted by the courts is to give enhanced deference to jury assessments. Somewhat ironically, then, the fact that juries are deprived of an essential tool in assessing damages lies behind our reluctance to interfere with their assessments.
>
> [160] In my view, these considerations explain the comparative approach adopted by our Court. We recognize that it is the jury that is empowered to

> assess damages, and therefore defer to its assessment. We further recognize that the jury has no information with respect to conventional damage ranges and grant it extra leeway to make up for its lack of appropriate tools.
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> [161] The comparative approach could, as I will indicate, be improved by providing juries with greater guidance on existing norms. While juries must be permitted to depart from those guidelines, the degree of leeway afforded to them, both on the high and low sides, could be reduced.

[76] As both Dickson J.A. and Groberman J.A. observed, any change to the existing approach to instructing juries can only be brought about by a five-justice division or through legislative intervention.

[77] Turning then to the comparative approach, Dr. Wolber cites two decisions involving plaintiffs who underwent an unnecessary mastectomy. In *Down v. Royal Jubilee Hospital*, 1980 CanLII 723 (BCSC), the plaintiff was 51 years old at the time of the surgery. As a result of the surgery, the plaintiff had diminished strength and range of motion in one arm, scarring, numbness and pain in her arm and breast, and developed depression. The judge awarded $23,000 in non-pecuniary damages, which Dr. Wolber says equates to $77,000 taking account of inflation.

[78] In *Kiley-Nikkel v. Danais*, 1992 CarswellQue 100 (S.C.), the plaintiff underwent a left-side mastectomy at age 36 based on an incorrect diagnosis of cancer. The plaintiff suffered anxiety and depression and developed a hernia as a result of reconstructive surgery. That, in turn, triggered problems with a pre-existing medical condition which caused her to experience instability in her hip and knee joints. The plaintiff was awarded non-pecuniary damages of $100,000, which Dr. Wolber says equates to $174,000 in the present.

[79] Dr. Wolber also cites *Husain v. Daly*, 2012 ONSC 919, where the plaintiff underwent a converted hysterectomy without her consent. The court in that case reviewed a number of decisions involving similar unnecessary surgery resulting in loss of reproductive capacity and related psychological injuries. Those cases suggested a range of non-pecuniary damages of $75,000–$120,000 in 2004 dollars,

adjusted for inflation to $97,000–$155,000. The court in *Husain* awarded $75,000 (adjusted to $97,000).

[80] Dr. Wolber submits that Ms. Ivanova's non-pecuniary damages should not exceed an award of damages for an unnecessary hysterectomy. Dr. Wolber says that the award of $400,000 is wholly disproportionate and that a proper award is in the range of $30,000–$90,000. He submits that an award in excess of $90,000 is unsustainable on the evidence.

[81] Ms. Ivanova submits that the cases involving unnecessary mastectomies cited by Dr. Wolber are too few to provide a valid sampling and, in any event, are several decades old and do not provide a useful reflection of today's community standards. Ms. Ivanova further underscores the high degree of deference owed to a jury's award of non-pecuniary damages. For example, in *Moskaleva*, this Court declined to interfere with a jury award of $245,000 for non-pecuniary damages ($339,000 adjusted for inflation) despite it deviating from awards in comparative cases of $75,000–$110,000. Justice Rowles referred to the "powerful expressions of the deference to be accorded to jury damage awards" found in the case law, which acknowledge the "unique qualities of the jury that require its findings be respected above those of a trial judge". Justice Rowles also observed that since the amount of the jury award did not reach the upper limit established by the Supreme Court of Canada in the Trilogy (*Andrews v. Grand & Toy Alberta Ltd*., [1978] 2 S.C.R. 229; *Arnold v. Teno*, [1978] 2 S.C.R. 287; *Thornton v. Board of School Trustees of School District No. 57 (Prince George*), [1978] 2 S.C.R. 267), the amount of that limit and how the injuries in those cases compare to the respondent's injuries are irrelevant considerations (at para. 132).

[82] I agree with Ms. Ivanova that *Down* and *Kiley-Nikkel* are unhelpful comparators given that they provide only a small and dated sample of similar cases. As Justice Abrioux observed in *Valdez v. Neron*, 2022 BCCA 301 at para. 58, taking dated damage awards and simply adjusting for inflation is generally inappropriate given that damage awards have increased over time, even aside from inflation.

[83] In *Stapley v. Hejslet*, 2006 BCCA 34, Justice Kirkpatrick, for the majority, set out a now oft-cited list of factors, emanating in part from *Boyd v. Harris,* 2004 BCCA 146*,* that may inform the determination of an appropriate award of non-pecuniary damages (at para. 46). Before doing so however, Kirkpatrick J.A. reiterated the underlying purpose of non-pecuniary damages:

> [45] Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from *Lindal v. Lindal,*[ [1981] 2 S.C.R. 629] at 637 is a helpful reminder:
>
> > Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (*Thornton* at p. 284 of S.C.R.).

[84] *Stapley* was a case in which this Court was asked to review a non-pecuniary award given by a jury. As Kirkpatrick J.A. made clear, in engaging in that exercise, it is important to keep in mind the particular and individualized circumstances of the specific plaintiff. Moreover, it is not the nature of the injury that is the focus of the analysis but the impact on the plaintiff. Respectfully, Dr. Wolber relies on the approach decried by Kirkpatrick J.A. by focussing on similar unnecessary mastectomies rather than grounding the analysis in the consequences of the procedure for Ms. Ivanova.

[85] A more useful comparison would be to cases in which the plaintiffs experienced similar physical, psychological, and social consequences to Ms. Ivanova, albeit as a result of different types of conduct. Such an approach would enable the Court to arrive at a general range of damages awarded by judges for similarly situated plaintiffs. However, neither party provided such comparators.

[86] How then can the Court grapple with the central issue on an appellate review of a jury's award of damages of whether the award is "wholly disproportionate or shockingly unreasonable" (*Moskaleva* at para. 27)?

[87] The starting point must be, as Kirkpatrick J.A. said in *Stapley*, the specific circumstances of Ms. Ivanova, who testified about the significant impacts she experienced as a result of the mastectomy. I have described those impacts in general terms at paras. 25–26 above. This Court will assume that the jury found the facts most favourable to the plaintiff (*McCliggot* at para. 107, citing *Taraviras v. Lovig*, 2011 BCCA 200 at para. 36). Indeed, it is apparent from the magnitude of the award that the jury accepted Ms. Ivanova's evidence. As discussed, the jury's findings and its assessment of the appropriate damages is entitled to a high degree of deference (*Moskaleva* at para. 132).

[88] That said, this Court still exercises an important supervisory function and there is no question that the non-pecuniary damages of $400,000 awarded by the jury represents an extraordinary award. It is approaching the upper limit established by the Trilogy (as adjusted for inflation). I acknowledge Rowles J.A.'s comment in *Moskaleva* that where an award falls short of the upper limit, it is not appropriate to compare the types of injuries that warrant an upper limit award to the injuries of the plaintiff in the present case. Nonetheless, this Court can take note of the fact that damages awards in the range of $400,000 are generally reserved for cases in which the plaintiff has suffered truly devastating consequences. By way of example, in *McCliggot*, Dickson J.A. justified the reduction of non-pecuniary damages in part on the basis that, considering the plaintiff's circumstances, her injuries were "significant but not devastating" (at para. 110).

[89] Recently, in *Michael v. Bergeron*, 2024 BCSC 715, the court awarded the plaintiff non-pecuniary damages of $350,000. The judge described the debilitating effects of the injuries on the plaintiff's life in these terms:

> [75] With respect to Ms. Michael's mental health, she is, as Dr. Smith observed, "seriously ill". Her frequent and ongoing suicidal ideations are very concerning and illustrate the severity of her condition. I accept that there is

> reason to anticipate improvement if Ms. Michael is able to get regular treatment from a psychiatrist but the wait time for a referral could be considerable and, even then, it is difficult to assess her prospects for improvement. The fact Ms. Michael has regularly received cognitive behavioral therapy, albeit not with a psychologist with the level of education Dr. Smith believes in necessary, suggests a persistence with her mental health challenges. There are days when Ms. Michael's depression or PTSD is so severe as to be debilitating, to the point she is unable to get out of bed or leave the house. Most days, fortunately, she is able to get herself up and going but it is a struggle.
>
> [76] I am persuaded that Ms. Michael's depression and/or PTSD that was caused by the accident is particularly severe and, at times debilitating but not constantly so. It is, however, more severe than even the significant levels of depression and PTSD described in *Steinlauf*, *Moges*, and all the cases cited by the plaintiff herself. Thus, while I am not persuaded that it tops out the upper limit of non-pecuniary damages, I agree that, when considered along with Ms. Michael's permanent physical injuries and the overall disruption and impact of all the injuries on Ms. Michael's life, an award in the higher range of non-pecuniary damages is appropriate. I award Ms. Michael $350,000 in non-pecuniary damages. I include in this a non-pecuniary element for future loss of housekeeping capacity that has not been provided for in the future care costs.
>
> [Emphasis added.]

[90] As is evident from these paragraphs, the injuries experienced by the plaintiff in *Michael* interfered with her day-to-day routine and functioning. The judge described the plaintiff's injuries as "debilitating", noting that the "overall disruption and impact of all the injuries on Ms. Michael's life" justified an award towards the upper limit. Similar language has been used in other cases in which significant non-pecuniary damages have been awarded. For example, in *Pevach v. McGuigan Estate*, 2021 BCSC 1505 at para. 138, varied on other grounds, 2024 BCCA 106, damages of $388,177 were ordered for injuries the judge described as "severe and devastating". See also *Wilhelmson v. Dumma*, 2017 BCSC 616, where damages of $367,000 were awarded for injuries characterized as "catastrophic" (at para. 89).

[91] While no two cases are the same, it is clear that the types of injuries that typically justify an award towards the upper limit are of a different magnitude than what Ms. Ivanova experienced. Her injuries have undoubtedly had a profound

impact on her life, however she has not been impacted to the same degree as the plaintiffs in these cases.

[92] In the circumstances, notwithstanding the high degree of deference owed, I find that the jury's award is indeed wholly disproportionate. However, like Dickson J.A. in *McCliggot*, it is not in my view necessary to remit the issue of non-pecuniary damages to the trial judge. Rather, I would substitute an award of non-pecuniary damages in the amount of $250,000. Such an amount is likely above what would be awarded by a judge alone, but such deviation is permitted based again on the respect shown for the jury's findings. In my view, an amount of $250,000 maintains sufficient deference for those findings while avoiding an award that is shockingly unreasonable and unsustainable.

**Conclusion**

[93] For the reasons stated, I would allow the appeal to the extent of reducing the non-pecuniary damage award from $400,000 to $250,000.

"The Honourable Justice Skolrood"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Mr. Justice Abrioux"