Court File No. 32735

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF THE NORTHWEST TERRITORIES)

BETWEEN:

SHEILA FULLOWKA, DOREEN SHAUNA HOURIE, TRACEY NEILL, JUDIT PANDEV, ELLA MAY CAROL RIGGS, DOREEN VODNOSKI, CARLENE DAWN ROWSELL, KAREN RUSSELL and BONNIE LOU SAWLER

Appellants
(Respondents)

-and-

PINKERTON'S OF CANADA LIMITED, THE GOVERNMENT OF THE NORTHWEST TERRITORIES AS REPRESENTED BY THE COMMISSIONER OF THE NORTHWEST TERRITORIES, NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA, TIMOTHY ALEXANDER BETTGER AND ROYAL OAK VENTURES INC. (formerly ROYAL OAK MINES INC.)

Respondents
(Appellants)

AND BETWEEN:

JAMES O'NEIL

Appellant
(Respondent)

-and-

PINKERTON'S OF CANADA LIMITED, THE GOVERNMENT OF THE NORTHWEST TERRITORIES AS REPRESENTED BY THE COMMISSIONER OF THE NORTHWEST TERRITORIES, NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA AND TIMOTHY ALEXANDER BETTGER

Respondents
(Appellants)

FACTUM OF THE RESPONDENT TIMOTHY ALEXANDER BETTGER

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada)*

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TABLE OF CONTENTS

PART I OVERVIEW AND STATEMENT OF FACTS 1

A) Labour dispute at Yellowknife's Giant Mine 1
B) Roger Warren Murders Nine Men 1
C) Duty of Care... 2
D) No Evidence of Causation by Bettger.. 5
E) Facts Relevant to the O'Neil Appeal 7

PART II STATEMENT OF POINTS IN ISSUE 16

PART III STATEMENT OF ARGUMENT... 17

A) DUTY OF CARE... 17

i) Foreseeability.. 18
a) Copy cat killings 22
iii) Proximity... 25
a) Defining the class to whom a duty is owed 26

B) CAUSATION 28

i) 'But For' Test.. 28
ii) Failure to Perform Independent Analyses of Causation 30
iii) Summary 31

C) DAMAGES CLAIMED BY THE APPELLANT O'NEIL...................... 31

D) PERSONAL CONSUMPTION RATIOS IN THE APPELLANTS' DEPENDENCY CLAIMS.. 36

E) TAX GROSS-UP AND MANAGEMENT FEES 36

PART IV SUBMISSION AS TO COSTS 37

PART V ORDER SOUGHT.. 37

PART VI TABLE OF RESPONDENTS' AUTHORITIES... 38

PART VII STATUTORY PROVISIONS 41

PART I OVERVIEW AND STATEMENT OF FACTS

A) Labour dispute at Yellowknife's Giant Mine

1. In 1992, Royal Oak Mines Inc. ('Royal Oak') owned and operated the Giant Mine in Yellowknife, N.W.T.

2. Local 4 of the Canadian Association of Smelter and Allied Workers ('Local 4') was certified at the time as the exclusive bargaining agent of the Giant Mine's unionized employees.

3. On May 22, 1992, Local 4 commenced a legal strike and established picket lines at various locations at the Giant Mine.

4. After the strike commenced, Royal Oak engaged the services of the Respondent Pinkerton's of Canada Limited ('Pinkerton's') to provide security services at the mine.

5. The Respondent, Timothy Alexander Bettger ('Bettger') was one of the miners on strike.

6. Roger Warren ('Warren') was also one of the miners on strike.

B) Roger Warren Murders Nine Men

7. On September 18, 1992, while the strike as ongoing, Warren murdered nine men at the Giant Mine.[1]

8. Although Warren initially denied any involvement, he ultimately confessed and accepted sole responsibility for his actions, saying 'Nobody was involved in that, just me;'[2] 'I'm the one

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[1] **Exhibit 1063, Warren Certificate of Conviction, E8392 (Respondents' Joint Record ('RJR'),** Vol. 8,Tab 1)

[2] **Exhibit 935,** Warren interview transcript October 16, 1993, E5927 (RJR, Vol. 5, Tab 1); **Exhibit 1185**, Warren interview transcript October 16, 1993, E9242-3, E9255 (RJR, Vol. 8, Tab 9); **Exhibit 1016**, Warren interview transcript August 6, 1993, E6928 (RJR, Vol. 7, Tab 2); **Exhibit 1186**, Warren interview transcript October 16, 1993, E9313 (RJR, Vol. 8, Tab 10); **Warren** Evidence: E7339:17 - 7341:42; E7417:26 – 35; E7456:1 – 32; E7557:29 - 31 and E7592:42 - 7593:16 (RJR, Vol. 2, Tab 9). See also **Exhibit 937**, Warren interview transcript October 15, 1993, E6287-88 (RJR, Vol. 6, Tab 1)

that caused that, nobody else did;'[3] 'That is my act contributed and not only contributed but were the primary cause and the only cause of their death;'[4] and 'Well I'm the fucken guy who was responsible for that.'[5]

9. The Trial Judge found that Warren 'admitted his role in the deaths of the miners' and noted that 'I accept that Warren set the fatal blast that took the lives of the nine miners as this is clearly established by his own admission and adequately supported by other evidence.'[6]

10. The evidence at trial was unequivocal, consistent and emphatic that the murders were committed by Warren acting alone.

C) Duty of Care

11. The evidence before the Trial Court emphasized that the class of risk which was foreseen prior to the murders was of a different calibre than the danger created by Warren. Typically, those risks related to potential picket line confrontations, property damage, and the risk of injuries, should fights erupt there or in the City of Yellowknife.[7]

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[3] **Warren** Evidence: E7593:15 (RJR, Vol. 2, Tab 9)

[4] **Warren** Evidence: E7341:40 (RJR, Vol. 2, Tab 9)

[5] **Exhibit 935**, Warren interview transcript October 16, 1993, E5914 (RJR, Vol. 5, Tab 1)

[6] **Reasons for Judgment at Trial ('RFJ')**, ¶ 2, 588 (Appellants' Joint Record ('AJR'), Vol. 1, Tab 2, p. 6, 184); ¶ 965 (AJR, Vol. 2, Tab 2, p. 103)

[7] **Ballantyne** Evidence: E4457:27 – E4458:23; E4476:11 – 22 (RJR, Vol. 1 Tab 24); **Byberg** Evidence: E6160:1 – 16; E6176:40 - E6177:3; E6178:11 – 20; E6189:34 - E6190:25; E6223:7 – 31; E6298:29 – 36; E6326:1 – 19; E6338:46 - E6339:11 (RJR, Vol. 2, Tab 2); **Exhibit 1028**, Code transit slip report, E7008 (RJR, Vol. 7, Tab 4); **Code** Evidence: E5059:36 - 5060:42 (RJR, Vol. 1 Tab 29); **Dales** Evidence: E3417:18 – 42; E3425:31 - E3426:11 (RJR, Vol. 1 Tab 18); **E. Defer**, Evidence: E3751:26 – 35 (RJR, Vol. 1 Tab 20); **Exhibit 803**, Defer Continuation report, E5049 (RJR, Vol. 4, Tab 2); **Exhibit 812**, Defer Notes, E5070 (RJR, Vol. 4, Tab 4); **N. Defer**, Evidence: E4979:26 – 33 (RJR, Vol. 1 Tab 28); **McBride** Evidence: E685:31 – 0686:8 (RJR, Vol. 1 Tab 6); **Murray** Evidence: E4579:27 – 4580:12 (RJR, Vol. 1 Tab 25); **Neill** Evidence: E2106:7 – 36 (RJR, Vol. 1 Tab 14); **Pandev** Evidence: E1434:26 – 42 (RJR, Vol. 1 Tab 11); **Power** Evidence: E6060:46 - E6061:36 (RJR, Vol. 2, Tab 1) **Riggs** Evidence: E2581:40 - E2582:11; E2584:3 – 27 (RJR, Vol. 1 Tab 16); **St. Amour** Evidence: E6777:3 – 21; E6731:24 – 39 (RJR, Vol. 2, Tab 5); **Vodnoski** Evidence: E1147:25 - E1148:11; E1149:40 – 45; E1151:14 – 29 (RJR, Vol. 1 Tab 10)

12. Conspicuously absent from the pre-September 18, 1992 record is any mention of Warren's plan to commit murder. This is not surprising, since the evidence was uncontradicted that Warren maintained a shroud of secrecy over his intention to plant a bomb targeting human life, such that no one was capable of stopping him before he carried out his plan. Warren was emphatic: 'I just never told anybody.'[8]

13. Michael Ballantyne, one of the most experienced and respected politicians and citizens of Yellowknife, described the bombing as 'a huge leap into insanity' which 'was in no way a logical progression of the lesser violence already tearing Yellowknife apart. … This … goes right into another dimension, this is so insane you cannot draw any kind of connection between this act and a labour dispute.'[9]

14. Basil Hargrove, former national president of the CAW, testified that 'I'd never experienced anything like this in my, in my time in the labour movement.'[10]

15. Warren described his actions as 'retarded', 'craziness', 'stupid' and 'insane.' 'It was just like out of my mind, it wasn't even in my mind.'[11]

16. Warren's bombing was all the more unexpected because it violated the belief generally held by miners that the underground was sacrosanct. Warren confirmed this 'credo' when he first confessed his crime in 1993:

> A: And you're thinking you know, guys think you know, like fuck I work with guys that I just despised the pricks and I never laid a finger on and I mean I

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[8] **Warren** Evidence: E7340:43 - 7341:27 (RJR, Vol. 2, Tab 9); See also: **Exhibit 937**, Warren interview transcript October 15, 1993, E6258-9 (RJR, Vol. 6, Tab 1); **Legge** Evidence E3556:22 – 28 (RJR, Vol. 1 Tab 19)

[9] **Exhibit 948**, Blatchford newspaper article, E6407 (RJR, Vol. 7, Tab 1)

[10] **Hargrove** Evidence: E7881:39 - 44 (RJR, Vol. 2, Tab 10)

[11] **RFJ, ¶** 281 (AJR, Vol. 1, Tab 2, p. 93); **Warren** Evidence: E7320:43 – 44; E7321:8 - 9, 25-28; E7322:35 – 38; E7554:34-47 (RJR, Vol. 2, Tab 9); **Exhibit 937**, Warren interview transcript October 15, 1993, E6235 (RJR, Vol. 6, Tab 1)

could fucken hurt somebody when I was down there.

W: Yeh.

A: Gee you'd never think of hurting a guy underground.

M: Yeh.

A: Last thing in your head.

M: It's that old time miners kinda credo ah.

A: Just fucken horrible.[12]

….

R: There's a thing in the underground that guys they don't like you there not gonna work with you and after you might punch hi[m] out in town or something but.

UC: No violence in the underground?

R: No the just the guys just don't do it. I'm sure it has happened the odd time but nobody noticed it because it was a fucken mine. Yeah, but I worked with guys despised the fucke[rs] but I wouldn't do nothing to him. You know I just wouldn't do it.[13]

17. Numerous other witnesses, including the Appellant O'Neil, gave evidence confirming the sanctity of the underground and that they felt safe while underground.[14]

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[12] **Exhibit 937,** Warren interview transcript October 15, 1993, E6324 (RJR, Vol. 6, Tab 1)

[13] **Exhibit 935**, Warren interview transcript October 16, 1993, E5920-21 (RJR, Vol. 5, Tab 1). See also: **Warren** Evidence: E7321:25 – 29 (RJR, Vol. 2, Tab 9)

[14] **O'Neil** Evidence: E1534:13 - E1535:16 (RJR, Vol. 1, Tab 12); **Hourie** Evidence: E957:29-33 (RJR, Vol. 1, Tab 8); **Vodnoski** Evidence: E1191:39 - E1191:41 (RJR, Vol. 1, Tab 10); **Fullowka** Evidence: E1098:1-9, E1098:32-41 (RJR, Vol. 1, Tab 9); **Neill** Evidence: E2106:7-36 (RJR, Vol. 1, Tab 14); **Tuma** Evidence: E2239:3-36; E2247:4-9; E2256:21-23 (RJR, Vol. 1, Tab 15); **Dales** Evidence: E3432:27-39 (RJR, Vol. 1, Tab 18); **Exhibit 948**, Blatchford newspaper article, E6407 (RJR, Vol. 7, Tab 1)

D) No Evidence of Causation by Bettger

18. The cause-in-fact of the nine miners' deaths on September 18, 1992 was the bomb placed by Warren. This is uncontroverted.

19. The idea of venturing underground was presented to Warren by a fellow miner named Lou Whalen in May 1992, a month *before* Bettger went underground in what became known as the 'graffiti run'.[15]

20. Moreover, the Trial Judge observed that Warren was contemplating action as early as June 7, 1992, well before the graffiti run.[16] Whether or not Warren had started planning as early as June 7, the trial record revealed that he did not discuss his plans with Bettger or anyone else. Indeed, Bettger had the same level of knowledge of Warren's plans as the miners who Warren murdered.

21. Although the Appellants seek to convince this Court that Bettger 'scouted' the route into the mine for Warren, or provided him with information about it,[17] this is a distortion of the facts. The Trial Judge made no such finding in describing the purpose of the graffiti run.[18] Nor was there any evidence of any sharing of information between Bettger and Warren. Although the Appellants state in their factum[19] that Bettger's 'team' 'told Warren what they had discovered', the evidence cited in support of this proposition does not reveal any communication between them. On the contrary, Warren's evidence was that Brian Drover 'was the one that even told me where

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[15] **Warren** Evidence: E7456:21 – 7458:19 (RJR, Vol. 2, Tab 9)

[16] **RFJ**, ¶ 652 (AJR, Vol. 2, Tab 2, p. 8)

[17] **Fullowka factum,** ¶ 3, 13, 86

[18] **RFJ,** ¶ 116 (AJR, Vol. 1, Tab 2, p. 41)

[19] **Fullowka factum**, ¶ 86

this Akaitcho was I didn't even know how to get to it that was the truth.'[20]

22. Warren specifically confirmed that there was no connection between the explosions which occurred prior to September 18, 1992 and the bomb which he planted underground that day. He expressly denied any sort of 'progression' of events:

> Well there [sic] were trying to for along time connect all that to that one underground finally said it was a progression but it was nothing to do with those fucken guys…[21]

23. Warren emphatically *denied* that Bettger influenced his perverse decision to commit murder.[22] Warren also cast scorn on the vandalism committed by Bettger and others, describing them as 'retarded.'[23] It defies comprehension to suggest that Warren was inspired to commit murder by individuals whose conduct he so clearly held in contempt.

24. Further, there is no evidence that Bettger acted in concert with Warren in any way or that they jointly engaged in any activity. Such evidence was critical to hold Warren and Bettger jointly liable. The Trial Judge made no finding that Bettger and Warren were engaged in any conspiracy or a common plan to commit acts of violence.[24]

25. Although Warren was examined extensively for discovery and testified at trial, he was never asked whether he would have murdered the nine men if Bettger had not done the things he did.

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[20] **Exhibit 937,** Warren interview transcript October 15, 1993, E6262-63, E6312-3, E6315, (RJR, Vol. 6, Tab 1)

[21] **Exhibit 935**, Warren interview transcript October 16, 1993, E5976 (RJR, Vol. 5, Tab 1)

[22] **Exhibit 1016,** Warren interview transcript August 6, 1993, E6919-20 (RJR, Vol. 7, Tab 2); **Exhibit 1186,** Warren interview transcript October 16, 1993, E9313 (RJR, Vol. 8, Tab 10); **Warren** Evidence: E7306:29 – 42; E7339:17 - E7341:42; E7417:26 – 35; E7456:1 – 32; E7557:29 – 31; E7592:42 - E7593:16 (RJR, Vol. 2, Tab 9)

[23] **Exhibit 1016,** Warren interview transcript August 6, 1993, E6920 (RJR, Vol. 7, Tab 2); **Warren** Evidence: E7301:29 – 39; E7554:34-47 (RJR, Vol. 2, Tab 9)

[24] **Memorandum of Judgment of the Court of Appeal ('MOJ')**, ¶ 179 (AJR, Vol. 3, Tab 6, p.174)

E) Facts Relevant to the O'Neil Appeal

26. As the O'Neil action arises from the same events as the Fullowka action, each of the Respondents rely upon the facts as expressed in their individual *facta* with respect to their alleged liability for the bombing.

27. At the time of the trial, O'Neil, was 43 years of age, unemployed and, '…living a beloved lifestyle on Vancouver Island, enjoying his freedom and time spent with family, friends and his dog…'.[25]

28. O'Neil is originally from Ontario. He repeated grade six; did not complete high school; and moved to Yellowknife in 1980, at age 19.

29. While in Ontario, he held a variety of labouring positions, including cheese-making, teaching swimming and lifeguarding. While in Yellowknife, he worked as a swimming pool co-ordinator; trained a competitive lifeguard team; organized Red Cross programmes; taught first aid; worked as a ramp attendant at Pacific Western Airlines; and obtained his private and commercial pilot's license. In April of 1984, he began work at Giant Mine and worked in a variety of positions in the mine. The Trial Judge found that while working at Giant, O'Neil assumed an active role as a mine rescuer.[26] He was no stranger to violent death, as he was part of a first response team at the site of a plane crash in 1985, in which there were three fatalities.[27] The Trial Judge found that O'Neil quite properly, as result of extensive training and personal experiences, saw himself as having had professional experience conducting rescues in life-threatening situations.'[28]

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[25] **RFJ**, ¶ 1226 (AJR, Vol. 2, Tab 2, p. 180)

[26] **RFJ,** ¶ 1105 (AJR, Vol. 2, Tab 2, p. 148)

[27] **RFJ,** ¶ 1102 (AJR, Vol. 2, Tab 2, p. 148), **Exhibit 373,** Dr. Gervais Report, E2805 (RJR, Vol. 3, Tab 2)

[28] **RFJ,** ¶ 1102 (AJR, Vol. 2, Tab 2, p. 148)

30. On joining Giant, O'Neil became a member of Local 4. He disagreed with Local 4's philosophy of filing excessive grievances, slacking at work and with its anti-American, pro-communist sentiment.[29]

31. In the spring of 1992, O'Neil's initial support for the strike began to wane when he realized that Local 4's executive was preventing further negotiations with management at the mine. He attempted to raise awareness of this issue by writing letters to the editor of the local newspaper critical of Local 4. The Trial Judge found that he began to receive threats that caused him distress, which led to his leaving Yellowknife for a week as recommended by police.[30] Upon his return, he instigated a petition to have another vote on the tentative agreement. As a result of this initiative, he received further threats.[31]

32. Believing that the strike was cooling, O'Neil returned to work at Giant Mine on August 4, 1992.[32] The Trial Judge stated '… I find that O'Neil was distraught, distressed, agitated and discouraged with his working environment prior to September 1992.'[33]

33. O'Neil was one of the first on the scene following the September 18, 1992 bombing.[34]

34. The Trial Judge found that O'Neil concluded that the men had been killed by a bomb that had been set by a radical element within Local 4.[35] The Trial Judge found that O'Neil was infu-

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[29] **RFJ,** ¶ 1227 (AJR, Vol. 2, Tab 2,, p. 180)

[30] **RFJ,** ¶ 1114 (AJR, Vol. 2, Tab 2, p. 150)

[31] **RFJ,** ¶ 1114 (AJR, Vol. 2, Tab 2, p. 150)

[32] **RFJ,** ¶ 1115, 1116 (AJR, Vol. 2, Tab 2, p.151)

[33] **RFJ,** ¶ 1228 (AJR, Vol. 2, Tab 2, p.180)

[34] **RFJ,** ¶ 1119 and 1120 (AJR, Vol. 2, Tab 2, p.152)

[35] **RFJ,** ¶ 1121 (AJR, Vol. 2, Tab 2, p. 152)

riated with Local 4[36] and decided to create an employees' association at Giant to replace Local 4. In January of 1993, five months after the bombing and before an arrest had been made, O'Neil filed an application with the Canada Labour Relations Board ('CLRB'), seeking to have the Giant Mine Employees Association ('GMEA') certified as the bargaining agent for the hourly workers at Giant.[37] O'Neil told the Respondents' medical/psychiatric expert, Dr. Blashko, that in this post-blast period, from October 1992, to April-May of 1995, he felt that he had become a marked man; that he could not be seen in the community, that his life was endangered.[38]

35. The CLRB hearing to decertify Local 4 was held in March of 1993. Dr. Blashko testified that from a review of a note written by O'Neil's wife, there were 200 people at the CLRB hearing -- all but four were in opposition to O'Neil.[39] The remainder of the O'Neil/GMEA supporters stayed away, as they did not want to be recognized as supporters of O'Neil/GMEA and experience retaliation.[40] Those who attended in opposition demonstrated significant tension and hostility.[41] In the end, the CLRB refused the application. The Trial Judge repeated O'Neil's evidence that the failure of the GMEA certification application was a personal blow for him.[42] Dr. Blashko recorded in his report that when he asked O'Neil about the effect of his GMEA work, he

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36 **RFJ,** ¶ 1121 (AJR, Vol. 2, Tab 2, p152)

37 **RFJ,** ¶ 1121 (AJR, Vol. 2, Tab 2, p. 152)

38 **Blashko** Evidence: E5523:1-45 (RJR, Vol. 1, Tab 31); **Exhibit 1047,** Dr. Blashko report, E8193-4 (RJR, Vol. 7, Tab 6)

39 *Ibid*., and E5694;10-15 (RJR, Vol. 1, Tab 31)

40 **Exhibit 1047,** Dr. Blashko report, E8224 (RJR, Vol. 7, Tab 6)

41 **RFJ** ¶ 1229 (AJR, Vol. 2, Tab 2, p. 180)

42 **RFJ**, ¶ 1121 (AJR, Vol. 2, Tab 2, p. 152)

paused for a long time and was extremely distraught.[43] In contrast, when asked about his post blast experience, he was calm, relaxed and willing to provide extensive detail.[44]

36. Following the unsuccessful CLRB application, GMEA became insolvent; bill collectors were demanding payment from O'Neil. The Trial Judge found that O'Neil's involvement in GMEA and its financial woes caused O'Neil concern and personal hardship.[45]

37. The Trial Judge accepted O'Neil's testimony that throughout this period, O'Neil continued to work full-time at Giant Mine, and that following the failure of GMEA to be certified, he felt very fatigued and was losing focus on his family life.[46] O'Neil attempted to interest the Canadian Steelworkers Union in taking control over Local 4, but was told by mine management that if he persisted with this initiative, or with GMEA, he would be fired.[47]

38. The Trial Judge concluded that '… there was no question these just recited events brought him stress, most of which were his own doing…'.[48] Further, the Trial Judge stated '…clearly, O'Neil was met with antagonism and animosity from all sides. Finally, in January 1995, his wife informed him that she and their daughter were leaving. They did so in May, 1995, thereby stripping away his pride as a family man.'[49] The Trial Judge stated that, '… losing his

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[43] **Exhibit 1047,** Dr. Blashko report, E8188 (RJR, Vol. 7, Tab 6)

[44] **Exhibit 1047,** Dr. Blashko report, E8175 (RJR, Vol. 7, Tab 6). Dr. Blashko testified that contrary to most presentations of PTSD, O'Neil talked about his blast experience very openly; he was not 'avoidant' about his experience. In fact, he stated '… you can't get Jim to stop talking about it…' **Blashko** Evidence: E5505:35 (RJR, Vol. 1, Tab 31). At E5605:20-39 (RJR, Vol. 1, Tab 31), Dr. Blashko testified that O'Neil was asked to leave group therapy as there was a boastful quality to his tendency to talk about his experience in the aftermath of the blast.

[45] **RFJ,** ¶ 1236 (AJR, Vol. 2, Tab 2, p. 182)

[46] **RFJ,** ¶ 1122 (AJR, Vol. 2, Tab 2, p. 153)

[47] **RFJ,** ¶ 1229 (AJR, Vol. 2, Tab 2, p.180)

[48] **RFJ,** ¶ 1230 (AJR, Vol. 2, Tab 2, p.181)

[49] **RFJ,** ¶ 1229 (AJR, Vol. 2, Tab 2, p.180)

family appears to have been the 'last straw' and the development of anxiety and depression ensued; following this, he did not return to work.'[50]

39. Two themes connect O'Neil's work life experiences prior to May 1995: The need to be a rescuer (pool coordinator, lifeguard coach, mine rescue team member, 'rescuing' Local 4 from the control of its executive), and a member of a union. The Trial Judge stated '[T]he fact that O'Neil was on the mine rescue team leaves me with some skepticism about the extent to which the blast impacted on his mental and physical health.'[51] As the Trial Judge stated, O'Neil's employment and union experience (in particular, his anti-CASAW attitude) is vital to an understanding of the nature and underpinnings of his claims in this litigation.[52]

40. In April 1995, O'Neil was diagnosed with post-traumatic stress disorder ('PTSD'). O'Neil went to Edmonton for a treatment program and remained in Edmonton for the next five years. From May of 1995, through to February of 2000, O'Neil received a monthly benefit paid by the Workers Compensation Board of the Northwest Territories (WCB).

41. Dr. Blashko, a practicing psychiatrist, conducted an assessment and concluded that several stressors contributed to the development of O'Neil's disorder. In order of occurrence, they were: crossing the picket line; exposure to the aftermath of the bombing; and the GMEA initiative, which resulted in O'Neil becoming isolated and the victim of retaliation, and the threats that resulted from that retaliation, as well as the breakdown of his marital relationship.[53]

42. Various vocational counselors were assigned by the WCB to encourage and lead O'Neil back to the work force, but O'Neil rebuffed all efforts. The Trial Judge found that O'Neil's education and training could not place him in a position that would match the level of income that he

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[50] **RFJ,** ¶ 1236 (AJR, Vol. 2, Tab 2, p. 182)

[51] **RFJ,** ¶ 1239 (AJR, Vol. 2, Tab 2, p.196)

[52] **RFJ**, ¶ 1103 (AJR, Vol. 2, Tab 2, p.148)

[53] **Blashko** Evidence: E5547:36-45 (RJR, Vol. 1, Tab 31)

had at the mine. In fact, the Trial Judge accepted that O'Neil's earning capacity was likely $30,000-$35,000 per year and he was earning $31,000, tax-free dollars on his WCB pension.[54] The Trial Judge held 'I am satisfied that this is the main reason why O'Neil did not want to return to the workforce…'.[55] The Trial Judge specifically found that non-psychological factors were preventing O'Neil from cooperating and gaining from vocational rehabilitation.[56]

43. The WCB decided to terminate O'Neil's benefits in February 2000.[57] No longer able to afford his apartment in Edmonton, O'Neil moved to Vancouver Island. He obtained a job as an RV salesman; bought an RV on a line of credit; exercised; had romantic relationships with women; continued to have a relationship with his daughter. The Trial Judge found that O'Neil voluntarily quit his job as a salesman; the bank foreclosed on him.[58] This left O'Neil with a substantially reduced income.[59] After leaving his job, O'Neil and his acquaintance, Judy Benjamin, took steps to apply to the WCB to have his pension reinstated.[60]

44. The Trial Judge carefully reviewed the circumstances that led to the application to reopen the WCB file and, in the course of this review, made key findings of fact and assessments of credibility. The Trial Judge found that O'Neil was referred to a mental health clinic in Victoria, British Columbia for a specific form of treatment.[61] While he was undergoing this treatment,

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[54] **RFJ,** ¶ 1237 (AJR, Vol. 2, Tab 2, p.189)

[55] **RFJ,** ¶ 1237 (AJR, Vol. 2, Tab 2, p.189)

[56] **RFJ,** ¶ 1237 (AJR, Vol. 2, Tab 2, p.191)

[57] **RFJ,** ¶ 1166 (AJR, Vol. 2, Tab 2, p.165)

[58] **RFJ,** ¶ 1168, 1200 (AJR, Vol. 2, Tab 2, p. 165, 173)

[59] *Ibid.*

[60] **RFJ**, ¶ 1200 (AJR, Vol. 2, Tab 2, p.173)

[61] **RFJ,** ¶ 1199 (AJR, Vol. 2, Tab 2, p.173)

Benjamin told a psychiatrist, Dr. Wanda Crouse, who consulted with that clinic, that O'Neil's WCB claim should be reopened.[62] Benjamin asked if Dr. Crouse and the clinic would support this by advising that O'Neil's condition had deteriorated and that he needed treatment as well as a pension for his loss of earnings.[63] Dr. Crouse received a report authored by Dr. Hartman, who had consulted with O'Neil in the past. Parts of the copy of Dr. Hartman's report that Dr. Crouse received had been deliberately obliterated.[64] Without the benefit of any other previous medical reports, Dr. Crouse confirmed a diagnosis of PTSD. The Trial Judge stated:[65]

> … I accept that, while Dr. Crouse's evidence shows that she did not act in O'Neil's interest to regain WCB benefits, she was well aware that she was being used as a conduit for this purpose. There is little question but that Benjamin and O'Neil were pressuring Dr. Crouse to aid O'Neil in that respect.
>
> Furthermore, I am puzzled as to how Dr. Crouse could be, as she testified 'very confident' with her diagnosis in the face of her acknowledgment of her consideration of other troublesome events in O'Neil's life other than the discovery of the deceased miners bodies. She spent little time with him, and was deprived of the full medical information available. In consideration of Dr. Crouse's acknowledgment that compensation neurosis is a possibility, I am skeptical of O'Neil's motives and his credibility.

45. O'Neil's July 14, 2001 application, to have his WCB pension reinstated, was supported by Dr. Crouse and the opinion of Dr. Passey, a psychiatrist, who concluded that O'Neil was not capable of working, nor would rehabilitation be appropriate at that time; that he might never re-

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[62] **RFJ,** ¶ 1200 (AJR, Vol. 2, Tab 2, p.173)

[63] **RFJ,** ¶ 1200 (AJR, Vol. 2, Tab 2, p.173)

[64] **RFJ,** ¶ 1201 (AJR, Vol. 2, Tab 2, p.174)

[65] **RFJ,** ¶ 1202, 1203 (AJR, Vol. 2, Tab 2, p.174); **Crouse** Evidence: E4685:20-45; E4686:1-15 (RJR, Vol. 1, Tab 26), where the Trial Judge examined Dr. Crouse, and received her agreement that O'Neil may have a case of compensation neurosis.

cover. Further, the application was supported by medical opinion from O'Neil's general practitioner, Dr. James, who adopted Dr. Passey's opinion.[66]

46. Sometime after his interview with O'Neil and prior to trial, Dr. Passey determined that there were some discrepancies in the information that O'Neil provided to him.[67]

47. In the face of this opinion, the WCB awarded a temporary partial disability payment and provided payments retroactive to June 13, 2001.[68] As a consequence, O'Neil's income was $2,300 per month in tax-free WCB benefits and $895 in CPP income. The Trial Judge stated, '…. that $3,195 monthly income could not be bettered with …[O'Neil's]… educational and work experience, leading me to conclude that little desire existed for him to seek employment.'[69]

48. The specialist opinions and testimony proffered by Drs. Crouse and Passey, in support of reinstatement of the WCB pension, are contrary to the earlier assessments provided by Dr. Gervais, a psychologist, who both assessed and treated O'Neil when he was living in Edmonton; the opinion of Dr. Hartman, a neuropsychologist who assessed O'Neil at the request of the WCB in August of 1999; and, the subsequent conclusion of the Respondents' consulting psychiatrist, Dr. Blashko, who reviewed almost all of O'Neil's records and assessed him on January 17, 2003.

49. Dr. Gervais, concluded in February of 1999 that O'Neil's PTSD had resolved and was no longer problematic.[70]

50. Dr. Hartman determined in August of 1999 that O'Neil manifested no psychological or psychiatric disorder that would prohibit him from returning to full-time work.[71]

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[66] **RFJ**, ¶ 1168, 1169, 1170 and 1171 (AJR, Vol. 2, Tab 2, p.165, 166)

[67] **RFJ**, ¶ 1206 (AJR, Vol. 2, Tab 2, p.175)

[68] **RFJ**, ¶ 1170 and 1171 (AJR, Vol. 2, Tab 2, p.166)

[69] **RFJ**, ¶ 1225 (AJR, Vol. 2, Tab 2, p.180

[70] **RFJ,** ¶ 1154 (AJR, Vol. 2, Tab 2, p.161)

51. Dr. Blashko concluded from his examination of most of O'Neil's records, and his January 17, 2003 interview of O'Neil, that from September 2000 to the date of his interview, there was no evidence of PTSD in O'Neil's records and presentation.[72]

52. As to the cause-in-fact of the PTSD, the Trial Judge accepted the testimony of Dr. Blashko, whom the Trial Judge stated had '…. extremely impressive qualifications and a deep insight into PTSD…'.[73] Dr. Blashko carefully reviewed O'Neil's records, and the opinions of the medical doctors, psychologists, vocational consultants, and psychiatrists whose opinions and testimony were entered into evidence at the trial on behalf of O'Neil. Dr. Blashko disagreed with the opinions of some of O'Neil's treating and consulting professionals that O'Neil's exposure to the blast site was the sole reason why O'Neil suffered from PTSD. The Trial Judge accepted Dr. Blashko's conclusion that it is well-established that the duration of the traumatic stressors has a direct relationship to the psychological impact on an individual. Accordingly, the relatively short-lived exposure to the September 18, 1992 blast scene was a minor factor in the development of O'Neil's PTSD. The Trial Judge agreed with Dr. Blashko that O'Neil's two and a half year campaign against the radicals within Local 4 was the primary reason why he developed PTSD.[74]

53. Following a thorough review of all available evidence, the Trial Judge found as fact that O'Neil was symptom-free and ready for the workforce in January of 2000;[75] that from that date

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[71] **RFJ**, ¶ 1160 (AJR, Vol. 2, Tab 2, p.163)

[72] **RFJ,** ¶ 1160, 1232 (AJR, Vol. 2, Tab 2, p.163, 181)

[73] **RFJ**, ¶ 1217 (AJR, Vol. 2, Tab 2, p.177)

[74] **RFJ**, ¶ 1235 and 1236 (AJR, Vol. 2, Tab 2, p.182); **Exhibit 1047,** Dr. Blashko report, E8200 (RJR, Vol. 7, Tab 6)

[75] **RFJ**, ¶ 1243 (AJR, Vol. 2, Tab 2, p.197)

onwards, O'Neil began to feign the symptoms of PTSD;[76] and accepted Dr. Blashko's opinion that O'Neil did not manifest any psychiatric disorder at any time after September 2000.[77]

53. Follow a consideration of the authorities, the Trial Judge awarded O'Neil general damages of $45,000; income loss from May 1995 to January of 2000 of $343,075, premised upon the expert evidence of O'Neil's economist, Cara Brown, who, in turn, provided calculations as to the income that O'Neil would have earned had he continued to work at the Giant Mine during that period;[78] cost of care and expenses in the amount of $195,715.89 and agreed to out-of-pocket expenses of $2,945.58.

PART II STATEMENT OF POINTS IN ISSUE

54. The fundamental issue in this appeal is whether anyone other than Warren should be held civilly liable for the murders that Warren committed on September 18, 1992.

55. Bettger respectfully submits that:

a. The Trial Judge erred in assessing Warren's murders as foreseeable, and that this error warranted the reversal of the Trial Judge's finding of liability against Bettger.

b. The Court of Appeal was correct in concluding that Bettger did not owe Warren's victims a duty of care due to the absence of the required proximate relationship between Bettger and Warren's victims.

c. The Court of Appeal was correct in concluding that the Trial Judge failed to apply the correct test of causation as determined by this Court, and that the Appellants failed to establish that Bettger caused the nine men to die on September 18, 1992.

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[76] **RFJ**, ¶ 1240 (AJR, Vol. 2, Tab 2, p.196)

[77] **RFJ**, ¶ 1231 (AJR, Vol. 2, Tab 2, p.181)

[78] **RFJ**, ¶1266 (AJR, Vol. 2, Tab 2, p.202)

d. The Trial Judge failed to perform a separate analysis of causation respecting each of the Respondents, concluding instead that all of the actions of all of the Respondents caused the deaths in question. It is submitted that this failure to perform an independent causal analysis respecting each of the Respondents was a reviewable error.

e. If the Respondents are liable for the fatal blast, which liability the Respondents contest, then the Trial Judge's findings of fact and credibility with respect to the extent and duration of the post-traumatic stress disorder contracted by the Appellant O'Neil, are not palpably erroneous and, therefore, are not reviewable by this Court.

PART III STATEMENT OF ARGUMENT

A) Duty of Care

56. The law takes no cognizance of carelessness in the abstract. Canadian, British and American authorities consistently note that there is no duty owed to the public at large.[79] As Cardozo C.J. observed in *Palsgraf v. Long Island Railroad Co.* (N.Y. Ct. App. 1928)[80] (a decision cited on multiple occasions by this Court, including in *Bazley v. Curry* and *Whiten v. Pilot Insurance Co.*, and by the House of Lords in *Home Office v. Dorset Yacht Co. Ltd.)*[81]:

> Proof of negligence in the air, so to speak, will not do. …Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all.

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[79] See Lord Macmillan's observation in ***Donoghue v. Stevenson*** [1932] A.C. 562 (H.L. 1932) at p. 618 (Respondents' Joint Authorities ('RJA'), Vol. 1, Tab 26); ***Dobson (Litigation Guardian of) v. Dobson*** [1999] 2 S.C.R. 753 at ¶ 59 (S.C.C.) (RJA, Vol. 1, Tab 25); ***Odhavji Estate v. Woodhouse*** [2003] 3 S.C.R. 263 at ¶ 45, 47-48 (S.C.C.) (RJA, Vol. 3, Tab 5); ***Palsgraf v. Long Island Railroad Co.*** (1928) 248 N.Y. 339 (N.Y. Ct. App. 1928) (RJA, Vol. 3, Tab 8); ***Graves v. Warner Bros***., (2003), 656 N.W. 2d 195 at p. 201, (Mich. Ct. App.) (RJA, Vol. 2, Tab 2)

[80] ***Palsgraf v. Long Island Railroad Co*** , supra, at pp. 341, 345 (RJA, Vol. 3, Tab 8)

[81] *Bazley v. Curry* [1999] 2 S.C.R. 534; *Whiten v. Pilot Insurance Co.* [2002] 1 S.C.R. 595; *Home Office v. Dorset Yacht Co. Ltd.* [1970] A.C. 1004; *Palsgraf* is also cited in *Car & General Insurance Corp. v. Seymour* [1956] S.C.R. 322 and *Campbell v. Royal Bank* [1964] S.C.R. 85.

57. Absent a duty of care, Bettger cannot be found liable for the deaths of Warren's victims, however grievous those losses were. As the House of Lords observed in *Glasgow Corporation v. Muir* (H.L. 1943):[82]

> The court must be careful to place itself in the position of the person charged with the duty and to consider what he or she should have reasonably anticipated as a natural and probable consequence of neglect, and not to give undue weight to the fact that a distressing accident has happened.

58. To determine whether a duty of care exists, the Court must consider the elements of foreseeability and proximity. If that analysis supports a *prima facie* duty of care, it must then consider whether any policy reasons exist for not imposing a duty.[83]

i) Foreseeability

59. The Trial Judge found that Warren's murders were 'but another unlawful act, elevated from earlier unlawful acts' which met the test of foreseeability.[84]

60. The Court of Appeal concluded that 'Warren's act was not necessarily foreseeable in law… The improbability of the scenario, combined with the intervention of an intentional act of another party (Warren), pushes the legal concept of foreseeability to the edge, and overlaps with the policy reasons why one defendant should not be liable for the intentional tort of another.'[85] Without agreeing with the Trial Judge, however, the Court ruled that the Trial Judge's foreseeability ruling did not disclose a palpable and overriding error and proceeded on the basis that the finding of foreseeability was maintained.

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[82] ***Glasgow Corporation. v. Muir,*** [1943] A.C. 448 at p. 454 (H.L.) (RJA, Vol. 2, Tab 1)

[83] ***Anns v. Merton London Borough Council*** [1978] A.C. 728 (H.L.); ***Kamloops v. Nielsen*** [1984] 2 S.C.R. 2; ***Cooper v. Hobart,*** [2001] 3 S.C.R. 537 at ¶ 29-31 (RJA, Vol. 1, Tab 20)

[84] **RFJ**, ¶ 664 (AJR, Vol. 2, Tab 2, p.11)

[85] **MOJ,** ¶ 55 (AJR, Vol. 3, Tab 6, p. 107)

61. Bettger respectfully submits that the Trial Judge's foreseeability ruling did constitute a palpable and overriding error which should be overturned.

62. If an injured person is an unforeseeable plaintiff outside a normal range of apprehension, no duty is owed. As Cardozo C.J. observed in *Palsgraf v. Long Island Railroad Co.* (N.Y. Ct. App. 1928): [86]

> One who jostles one's neighbor in a crowd does not invade the rights of others standing at the outer fringe when the unintended contact casts a bomb upon the ground. The wrongdoer as to them is the man who carries the bomb, not the one who explodes it without suspicion of the danger. Life will have to be made over, and human nature transformed, before prevision so extravagant can be accepted as the norm of conduct, the customary standard to which behavior must conform.

63. Hindsight and knowledge of subsequent events are not to infuse the court's assessment of a risk, which is to be undertaken 'with reference to the circumstances as they existed at the time of the alleged negligence:' *McArdle Estate v. Cox* (Alta. C.A. 2003)[87]

64. Further, the test is not what is merely possible at that time but what is reasonably foreseeable. Lord Denning emphasized this point in *Lamb v. London Borough of Camden*[88]:

> Few things are less certainly predictable than human behavior, and if one asked whether in any given situation a human being may behave idiotically, irrationally, or even criminally, the answer must be that it is a possibility, for every society has its proportion of idiots and criminals. It cannot be said that you cannot foresee the possibility that people will do stupid or criminal acts, because people are constantly doing stupid or criminal acts. But the question is not what is foreseeable merely as a possibility but what would the reasonable man actually foresee if he thought about it, and all that Lord Reid seems to me to be saying is that the hypothetical reasonable man in the position of the tortfeasor cannot be said to reasonably foresee the behavior of another person unless that behavior is such as would, viewed objectively, be very likely to occur.

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[86] ***Palsgraf v. Long Island Railroad Co.,*** supra, at p. 343 (N.Y. Ct. App. 1928) (RJA, Vol. 3, Tab 8)

[87] ***McArdle Estate v. Cox,*** (2003), 327 A.R. 129 at ¶ 31 (Alta. C.A.) (RJA, Vol. 2, Tab 28)

[88] ***Lamb v. London Borough of Camden*****,** [1981] Q.B. 625 at p.642 (C.A.) (RJA, Vol. 2, Tab 18)

65. The more grievous and repulsive the tortious activity which causes the injury, the more uncommon and less foreseeable it is. In the case at bar, the unexpected nature of Warren's actions was confirmed by the shock and revulsion which greeted the news about his bombing.

66. When confronted with comparable conduct which exceeds reasonable norms of human behaviour, Courts do not hesitate to find that the element of foreseeability is not made out. Examples include: *Bradford v. Kanellos* (S.C.C. 1974),[89] and *Trevison v. Springman* (B.C.C.A. 1997)[90]. In the latter case, the Plaintiffs' claim in negligence was dismissed with the following observation germane to the case at bar:

> Here, the manner of causing damage to the plaintiffs by arson was entirely different in type from what Mrs. Springman ought to have considered as a possibility. Theft and break-in were her son's propensities. …There had never been a suggestion in his previous conduct that he might commit arson. … The setting afire of the plaintiff's house was completely beyond the realm of possibilities that should have been within Mrs. Springman's contemplation. She should have contemplated damage by break-in and theft but not that her son might return to the house and burn it.[91]

67. The Trial Judge did not find as a fact that Bettger and others had advance knowledge of Warren's plans. Rather, he inferred that Bettger and the other Respondents were 'deemed to know there was *a Warren* out there.'[92] (emphasis added)

68. It is submitted that this conclusion was speculative, contrary to the evidence and in error. There was no evidence that Bettger knew there was 'a Warren out there' or of Warren's actual plans to commit murder. Evidence of his *lack* of knowledge was repeated multiple times and was uncontradicted.

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[89] ***Bradford v. Kanellos*** [1974] S.C.R. 409 at ¶ 7, 12 (RJA, Vol. 1, Tab 11)

[90] ***Trevison v. Springman*** [1996] 4 W.W.R. 760 (B.C.S.C.); aff'd 1997 CarswellBC 2362 (B.C.C.A.) (RJA, Vol. 3, Tab 31)

[91] ***Trevison v. Springman*** (B.C.S.C.) at ¶ 30 (RJA, Vol. 3, Tab 31)

[92] **RFJ**, ¶ 963 (AJR, Vol. 2, Tab 2, p. 103)

69. In *Caswell v. Powell Duffryn Associated Collieries Ltd.,* (H.L. 1940),[93] the House of Lords distinguished between the drawing of proper inferences and conjecture such as this:

> Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.

70. As Vancise J.A. noted in *Kozak v. Funk* (Sask. C.A. 1998),[94] the absence of an evidentiary underpinning is fatal to inferences drawn by triers of fact.

71. Being unsupported by and contrary to the evidence, it is submitted that the Trial Judge's inference of knowledge of 'a Warren out there' constituted speculation, or conjecture, not founded upon observed or proven facts, and was therefore a clear and palpable error.

72. Moreover, it is submitted that the test of foreseeability is not whether *any* criminal activity was foreseeable but whether murder of miners while underground was foreseeable. As the Trial Judge observed in *Trevison v. Springman*[95]**:**

> The doctrine of foreseeability is not so wide as to embrace the situation in the case at bar where the means and type of injury caused to the plaintiffs was of a totally different type from anything the son had done before and anything which the defendants could have had in contemplation.

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[93] ***Caswell v. Powell Duffryn Associated Collieries Ltd.***, [1940] A.C. 152 (H.L.) at p.169 - 70 (RJA, Vol. 1, Tab 15). This statement has been approved in *Lee v. Jacobson* (1994), 120 D.L.R. (4th) 155 (B.C. C.A.); ***Kozak v. Funk*** (1997), 158 Sask. R. 283 at ¶ 22 (Sask. C.A.) (RJA, Vol. 2, Tab 17); and *Squires v. Corner Brook Pulp & Paper Ltd.* (1999), 537 A.P.R. 202, 44 C.C.E.L. (2d) 246 (Nfld. C.A.)

[94] ***Kozak v. Funk,*** supra, at ¶ 22 (Sask. C.A.) (RJA, Vol. 2, Tab 17)

[95] ***Trevison v. Springman*,** supra, at ¶ 32 (B.C.S.C.) (RJA, Vol. 3, Tab 31)

73. In the case at bar, the 'means and type of injury' was a massive, deliberately-placed bomb causing mass death. Warren was convicted of nine counts of second degree *murder*.[96] In contrast, Bettger engaged in abusive rhetoric, trespass, graffiti and damage to *property*.

74. It is submitted that Warren's mass murder was neither 'highly likely' nor 'the very kind of thing which is likely to happen' under the circumstances and was not reasonably foreseeable.

75. Using the terminology of *Trevison,* Bettger submits that mass murder was 'a totally different type from anything … done before' and in a different realm altogether than trespass and property damage.

76. Using the terminology of *Sanders v. Acclaim Entertainment Inc. et al*, (D. Colo. 2002),[97] a case which arose out of the Columbine High School shooting on April 20, 1999, it cannot be said that mass murder was 'the natural and probable consequence' of Bettger's actions, or that mass murder was a 'normal response' to Bettger's conduct.

a) Copy cat killings

77. The essence of the claim against Bettger is that he created the background circumstances in which Warren chose to commit his tort. As this Court found in *Childs v. Desormeaux,* merely facilitating someone else's tort is not sufficient to found liability.[98]

78. In the absence of evidence that Bettger incited Warren to set the bomb, or that they acted in concert, there is no basis to impose liability on Bettger.[99]

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[96] **Exhibit 1063,** Warren Certificate of Conviction, E8392 (RJR, Vol. 8, Tab 1)

[97] ***Sanders v. Acclaim Entertainment Inc. et al*,** 188 F. Supp. 2d 1264 at p. 1276 (D. Colo. 2002) (RJA, Vol. 3, Tab 22)

[98] ***Childs v. Desormeaux*** [2006] 1 S.C.R. 643, at ¶ 33 (RJA, Vol. 1, Tab 19); **MOJ,** ¶ 166 (AJR, Vol. 3, Tab 6, p. 166)

[99] **MOJ**, ¶ 180 (AJR, Vol. 3, Tab 6, p.174)

79. Similar claims alleging third-party influences have been advanced in the United States in cases involving murderers who took their 'inspiration' from others. Two examples follow.

80. In *Sanders v. Acclaim Entertainment Inc. et al* (D. Colo. 2002),[100] the responsible students had been avid consumers of violent video games and movies. One such movie was 'The Basketball Diaries'.

81. The Plaintiffs sued, among others, the makers and distributors of that movie, claiming that, in it, 'the protagonist inexplicably guns down his teacher and some of his classmates in cold blood, among other acts of gratuitous violence.' Purportedly, this had the effect of 'harmfully influencing impressionable minors such as Harris and Klebold [the students who committed the murders] and of thereby causing the shootings.'[101]

82. The claim failed. As Babcock C.J., observed:[102]

> In the circumstances alleged here, the Video Game and Movie Defendants … had no reason to suppose that Harris and Klebold would decide to murder or injure their fellow classmates and teachers. Plaintiffs do not allege that these Defendants had any knowledge of Harris' and Klebold's identities, let alone their violent proclivities. Nor, for that matter, did the Video Game and Movie Defendants have any reason to believe that a shooting spree was a likely or probable consequence of exposure to their movie or video games. …these Defendants might have speculated that their motion picture or video games had the potential to stimulate an idiosyncratic reaction in the mind of some disturbed individuals. A speculative possibility, however, is not enough to create a legal duty.

83. In *James v. Meow Media Inc.* (U.S. Dist. Ct. 2000, Kentucky),[103] Michael Carneal, then fourteen years of age, killed three of his fellow students and wounded five others, at his high school. Following the killings, the police learned that Carneal was a consumer of violent com-

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[100] ***Sanders v. Acclaim Entertainment Inc. et al*,** supra (RJA, Vol. 3, Tab 22)

[101] ***Sanders v. Acclaim Entertainment Inc. et al*,** supra, at p. 1269 (RJA, Vol. 3, Tab 22)

[102] ***Sanders v. Acclaim Entertainment Inc. et al*,** supra, at p. 1272 (RJA, Vol. 3, Tab 22)

[103] ***James v. Meow Media Inc.*** 90 F.Supp.2d 798 (U.S. Dist. Ct. 2000, Kentucky) (RJA, Vol. 2, Tab 12)

puter and video games, dubious Internet sites and violent movies, including the same 'Basketball Diaries' mentioned in *Sanders*. A psychiatrist concluded that Carneal was influenced by his exposure to violent/pornographic media.

84. Carneal, like Roger Warren, was convicted of second degree murder.

85. Not unlike the Appellants in the case at bar, the plaintiffs in *Meow Media* alleged that the Defendants knew or should have known that copycat violence would ensue, and that they knew, or should have known that their products created an unreasonable risk of harm because others would be influenced by them to cause harm.

86. The Court disagreed, concluding that nothing the defendants did or failed to do could have been reasonably foreseen as a cause of injury. As Johnstone J. noted:[104]

> Reasonable people would not conclude that it was foreseeable to Defendants that Michael Carneal…would murder his classmates. Even accepting the pleaded facts as true, that Michael Carneal was … influenced by all of these events, does not make the murders foreseeable to the Defendants.

87. In both *Sanders* and *Meow Media,* the murderers were free-thinking individuals who had simply been exposed to ideas prior to their killing sprees. For the reasons expressed in both of these decisions, it is submitted that the case at bar cannot survive the test of foreseeability.

88. Further, restoring the trial decision as against Bettger on the basis that his actions influenced Warren, a free-thinking individual, to commit a tort, with no evidence of direct involvement by Bettger, would create the spectre of liability in an indeterminate amount, for an indeterminate time, to an indeterminate class.[105]

89. If applied generally, imposing such liability on Bettger would expose virtually any community, religious and cultural group, educational or research organization, corporation or association, to liability. Examples which readily come to mind include the potential liability of a

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[104] ***James v. Meow Media Inc,***. supra, at p.804 (RJA, Vol. 2, Tab 12)

'pro-life' organization when one of its members vandalizes an abortion clinic, or that of a political party when one of its members attacks an opponent. In each of these cases, exposure to liability would flow not from participation in the act which causes the loss, but from the mere fact that one of its members may have been exposed to or supported its goals.

90. This, it is submitted, would represent an unjustifiable extension of the test of foreseeability imposed upon ordinary citizens, and the clash between the civil and criminal determinations of his case would place the law into disrepute: *State Rail Authority v. Wiegold* (New South Wales C.A.).[106]

91. This Court should be loath to weave such an extension of civil liability into the fabric of the law.

iii) Proximity

92. To establish the presence of a duty of care, there must be a relationship of *proximity* between the alleged tortfeasor and the party suffering damage.

93. What, if any, combination of factors will satisfy the requirement of proximity is a question of law: *Canadian National Railway v. Norsk Pacific Steamship Co.* (S.C.C. 1992).[107]

94. Where there is an allegation that a person was negligent due to a failure to prevent the acts of a third party, this Court observed in *Childs v. Desormeaux* that:[108]

> Although there is no doubt that an omission may be negligent, as a general principle, the common law is a jealous guardian of individual autonomy. Duties to take

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[105] ***Cooper v Hobart***, supra, at ¶ 54 (RJA, Vol. 1, Tab 20)

[106] ***State Rail Authority v. Wiegold*** (1991), 25 N.S.W.L.R. 500 at p. 514 (New South Wales C.A.) (RJA, Vol. 3, Tab 25); cited in ***L. (H.) v. Canada (Attorney General)*** [2005] 1 S.C.R. 401 at ¶ 344 (RJA, Vol. 2, Tab 21)

[107] ***Canadian National Railway v. Norsk Pacific Steamship Co.*** [1992] 1 S.C.R. 1021 at pp. 1055-1059 (RJA, Vol. 1, Tab 13)

[108] ***Childs v. Desormeaux***, supra, at ¶ 31 (RJA, Vol. 1, Tab 19)

> positive action in the face of risk or danger are not free-standing. Generally, the mere fact that a person faces danger, or has become a danger to others, does not itself impose any kind of duty on those in a position to become involved.

95. Similarly, Oliver L.J. observed in *Lamb v. London Borough of Camden* (C.A. 1981)[109] that:

> the courts would require a degree of likelihood amounting almost to inevitability before it fixed a defendant with responsibility for the act of a third party over whom he has and can have no control.

96. This principal has been expressed with equal force by the Courts of Australia and the United States. In the case of the former, the Court observed in *Smith v. Leurs* (Aust. H.C. 1945)[110] that:

> It is … exceptional to find in the law a duty to control another's actions to prevent harm to strangers. The general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third.

97. In the case of the latter, the Court observed in *Graves v. Warner Bros.* (Mich. Ct. App. 2003)[111] that:

> [A]n individual has no duty to protect another from the criminal acts of a third party in the absence of a special relationship between the defendant and the plaintiff or the defendant and the third party.

a) Defining the class to whom a duty is owed

98. As the Court of Appeal observed in the case at bar, the proximity of each of the Respondents to the Appellants is subject to a separate analysis.[112]

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[109] ***Lamb v. London Borough of Camden*,** supra, at p. 644 (RJA, Vol. 2, Tab 18)

[110] ***Smith v. Leurs*** (1945) 70 C.L.R. 256 at p. 262 (Aust. H.C.) (RJA, Vol. 3, Tab 23). This case has been widely cited in Canada including: *Rose v. Pettle* (2004), 43 C.P.C. (5th) 183; (O.S.C.); *Swanson c. Canada* [1990] 2 F.C. 619 (F.C.T.D.); *Toews v. Mackenzie* [1980] 4 W.W.R. 108 (B.C.C.A.); *Hatfield v. Pearson* (1956), 20 W.W.R. 580 (B.C.C.A.); *Ryan v. Hickson* (1974), 55 D.L.R. (3d) 196 (O.S.C.) and *Schmidt v. Munch* [1947] 3 D.L.R. 159 (O.C.A.).

99. In *Cooper v. Hobart*, Major J. observed that 'sufficiently proximate relationships are identified through the use of categories. The categories are not closed and new categories of negligence may be introduced. But generally, proximity is established by reference to these categories.'[113]

100. Bettger does not fall into the category of liability in which 'the defendant's act foreseeably causes physical harm to the plaintiff.' As the Court of Appeal succinctly noted, 'it was, however, Warren's act, not Bettger's act, that caused physical harm to the [Appellants], so Bettger does not fall into this established category.'[114] Additionally, he does not fall into any of the relevant categories recognized to date by the courts.

101. With regard to analogous categories yet to be established, the underlying themes of those recognized to date include the ability of the alleged tortfeasor to exercise control, combined with the vulnerability of the parties to whom the duty is owed.[115] Bettger, however, did not occupy any position of influence or authority which he could have brought to bear on Warren or Warren's victims. He had no actual or legal ability to exercise control over them. He could not control the miners' decision to return to work. He had no influence over their work assignments. He had no authority over the work systems and methods which brought them to the location of Warren's bomb at that particular time.

102. In the absence of the essential element of control, there was neither a special relationship, nor sufficient proximity to impose a duty on Bettger to come to the aid of Warren's victims, or to provide protection for them against assailants, such as Warren, operating outside the normal range of foreseeability.

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[111] ***Graves v. Warner Bros***., supra, at p. 200 (RJA, Vol. 2, Tab 2)

[112] **MOJ** ¶ 56 (AJR, Vol. 3, Tab 6, p.107)

[113] ***Cooper v Hobart*,** supra, at ¶ 31, 36 (RJA, Vol. 1, Tab 20)

[114] **MOJ,** ¶ 177 (AJR, Vol. 3, Tab 6, p.173)

B) CAUSATION

103. Warren planted the bomb which killed the nine miners on September 18, 1992. As a result, the Court of Appeal observed that 'Bettger's liability must have been ancillary and must have arisen out of a duty on Bettger's part to exercise reasonable care to prevent Warren's tort.'[116]

104. Despite this, the Appellants do not assert that Bettger is responsible for Warren's actions. This is expressly acknowledged in the facta which the Appellants filed with this Court:

> The Plaintiffs never sought to have the Defendant Respondents held liable for Roger Warren's tort (apart from the CAW, which was found vicariously liable).[117]

105. As the only source of the miners' injuries on September 18, 1992, was the bomb placed by Warren and the Appellants do not seek to attribute liability for that bomb to Bettger, it is submitted that no further analysis is required. The Court of Appeal properly dismissed the claim against Bettger.

i) 'But For' Test

106. Should the Appellants now resile from the position stated in the O'Neil factum and assert that Bettger was indeed liable for Warren's tort, it is submitted that the Trial Judge applied an incorrect test of causation, and in so doing, committed a further error in law.

107. As this Court made clear in *Resurfice,* any analysis of causation must begin with the 'but for' test.[118]

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[115] ***Childs v. Desormeaux*,** supra, at ¶ 35-37 (RJA, Vol. 1, Tab 19)

[116] **MOJ**, ¶ 177 (AJR, Vol. 3, Tab 6, p.173)

[117] **Factum of the Appellant, James O'Neil,** at ¶ 28. Adopted at ¶ 62 of the **Factum of the Fullowka Appellants**

[118] ***Resurfice Corp. v. Hanke,*** [2007] 1 S.C.R. 333 at ¶ 21 – 28 (RJA, Vol. 3, Tab 18)

108. It is only in special circumstances that the law permits reliance of the 'material contribution' test. The first example offered by the Court – *'where it is impossible to say which of two tortious sources caused the injury* – does not apply. It is undisputed that Warren's bomb was the sole cause-in-fact of his victims' deaths.

109. In the second example proffered by the Court in *Resurfice,* a trial court may rely on the 'material contribution' test if it is *impossible to prove what a particular person* in the causal chain *would have done* had the defendant not committed a negligent act or omission. This impossibility must be due to factors outside the plaintiff's control.

110. The Trial Judge did not attempt to ascertain whether Warren would have set the blast that killed the miners if any of the Respondents had acted differently. He failed to consider why the primary 'but for' test was unworkable and, as a result, did not provide any justification for his acceptance of the more relaxed test of causation. No attempt to conduct a 'but for' analysis is apparent from the Trial Reasons.[119]

111. At all times, it lay within the Appellants' power to lead direct and circumstantial evidence to establish what Warren would have done 'but for' Bettger's conduct. The 'but for' test is not rendered unworkable simply because the inquiry involves another person's reaction to the conduct of a defendant as an element in the chain of causation.[120]

112. To satisfy the burden which they carried, the Appellants proffered Dr. Arboleda-Florez, a psychiatrist, to testify about such matters as epidemiology, terrorism and 'behaviour-influencing factors.'[121] The Trial Judge concluded that Dr. Arboleda-Florez was 'not properly qualified to

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[119] **MOJ,** ¶ 202, 203 (AJR, Vol. 3, Tab 6, p.184). Although the Appellants represent in the Fullowka factum (¶ 66) that the Trial Judge used the phrase 'material contribution test' only once in the Reasons for Judgment (**RFJ** (¶ 961 - AJR, Vol. 2, Tab 2, p.103), the Trial Judge also referred to 'material contribution' in **RFJ** ¶ 609 (AJR, Vol. 1, Tab 2, p.191) and **RFJ** ¶ 635, 746, 747, 756, 841, 901, 908, 930-931 and 940 (AJR, Vol. 2, Tab 2, pp.2, 37, 39, 68, 86, 88, 95 and 97)

[120] **MOJ**, ¶ 196, 201 (AJR, Vol. 3, Tab 6, p.182, 183); ***B.S.A. Investors Ltd. v. Mosly***, 283 D.L.R. (4th) 220 at ¶ 41 (B.C.C.A.) (RJA, Vol. 1, Tab 12), leave to appeal refused, S.C.C. #32148, 2008 CarswellBC 124

[121] **Trial Judge:** E5966:5-43 (AJR, Vol. 9, Tab 99-131, p. 135)

give evidence in any of the areas proffered' and refused to allow his evidence on the basis that it was irrelevant.[122]

113. The exclusion of Dr. Arboleda-Florez did not deny the Appellants the ability to tender other evidence on this pivotal issue.

114. Prior to trial, Warren had advised the parties that 'my cooperation with the [Appellants] and their counsel is unequivocal and assured.'[123] Warren testified at trial and was cross-examined by the Appellants.

115. Instead of adducing evidence on this pivotal issue, from Warren, or others, and inviting the Trial Judge to rule upon its credibility, the Appellants chose not to ask the question.

116. As this Court found in *Stewart v. Pettie,*[124] the result of this evidentiary gap is that the Appellants failed to discharge the onus placed upon them and the within appeal against Bettger should be dismissed accordingly.

ii) Failure to Perform Independent Analyses of Causation

117. This Court also made clear in *Resurfice* that the plaintiff bears the onus of showing that 'but for' the negligent act or omission of *each* defendant, the injury would not have occurred.[125] The Trial Judge was required to perform a separate analysis of causation respecting Bettger's actions apart from those of the other Respondents.

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[122] **Trial Judge:** E5969:17; E5981:30; E5982:8-15 (AJR, Vol. 9, Tab 99-131, pp. 138, 150, 151)

[123] **Exhibit 1195,** Letter from Warren dated May 26, 2003, E9384 (RJR, Vol. 8, Tab 11); **Exhibit 1196**, Letter from Warren, dated June 4, 2003, E9385 (RJR, Vol. 8, Tab 12)

[124] ***Stewart v. Pettie*** [1995] 1 S.C.R. 131, at ¶ 67, 69, 72 (RJA, Vol. 3, Tab 26)

[125] ***Resurfice Corp. v. Hanke,*** supra, at ¶ 21(RJA, Vol. 3, Tab 18)

118. The Court of Appeal held[126] that the Trial Judge failed to do so, and instead, rested his decision on a finding that all of the Respondents' actions taken together caused the deaths in question. The Trial Judge stated: ''I reiterate, it is the *cumulative effect* and the progression of the acts of negligence *of all the Defendants* … that materially contributed to Warren's act'[127](emphasis added). He further stated: 'Mr. Polsky's attempt to isolate Warren's act and argue that it be treated singly does not accord with the evidence. It was but *a part of a series of connected criminal activities*'[128](emphasis added). This was an error in law.

iii) Summary

119. To summarize, it is submitted that Bettger did not owe a duty of care to the miners who died on September 18, 1992. Their deaths were not a reasonably foreseeable consequence of his actions, and the required relationship of proximity between Bettger and the miners was absent. Further, the Appellants failed to satisfy the burden of proving causation which they alone carried. For all of these reasons, it is submitted that the decision of the Trial Judge was unsupportable and that the within appeal should be and must be dismissed.

C) DAMAGES CLAIMED BY THE APPELLANT O'NEIL

120. O'Neil alleges that the Trial Judge made several errors. In particular, he alleges that the Trial Judge erred in accepting the evidence of the Respondents' medical expert, Dr. Blashko. O'Neil argues that it was wrong for the Trial Judge to conclude that he has recovered from the disorder; that he has 'compensation neurosis'; and that his vocational options no longer include working as a miner or a commercial pilot.

121. In reply, the Respondents state that the Trial Judge's findings that are impugned by O'Neil are findings of fact and credibility made by the Trial Judge. The rules governing appellate

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[126] **MOJ**, ¶ 182-206 (AJR, Vol. 3, Tab 2, p.176-185)

[127] **RFJ,** ¶ 901 (AJR, Vol. 2, Tab 2, p.86)

[128] **RFJ,** ¶ 960 (AJR, Vol. 2, Tab 2, p.103)

intervention in Canada on matters of fact and credibility have been set out and reaffirmed in an unbroken line of cases over the last 30 years.[129] Deference is required to all findings of fact made on direct evidence, or on inferences drawn from facts proved directly. An appeal court is only entitled to intervene on questions of fact, where the court can 'put its finger' on the critical error; in other words, where the error is palpable and overriding.[130] The Respondents submit that the Trial Judge did not commit any palpable errors in his findings of fact and credibility regarding the diagnosis, treatment and consequences of O'Neil's PTSD.

122. Further, the Respondents state that is well settled that a damage award is not to be altered by an appeal court merely because the appeal court would have reached a different decision on the same facts. It is only where a trial judge proceeds upon a mistaken or wrong principle, or where the result reached at the trial was wholly erroneous, that a Court of Appeal is entitled to intervene.[131] A trial judge is tasked with weighing and evaluating the evidence. Where there is evidence to support a finding, a claim that there was evidence to the contrary, which supports a different conclusion, will not justify a reversal of a trial judge's finding.[132]

123. The Trial Judge concluded that '…the blast had some influence on the development of PTSD…';[133] '….O'Neil has established a causal connection disablement to the September 18, 1992, blast to the extent illustrated by Dr. Blashko';[134] 'Dr. Blashko said this and I endorse this opinion: 'It is my opinion that Jim's observations and involvements relevant to the immediate aftermath of the blast of September 18, 1992, was a minor stressor as compared to the antiunion

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[129] ***L. (H.)* v. *Canada (Attorney General),*** supra, at ¶ 62 (RJA, Vol. 2, Tab 21)

[130] *Ibid*., at ¶ 62-76.

[131] ***Woelk* v. *Halvorson*,** [1980] 2 S.C.R. 430, at ¶ 9-10 (RJA, Vol. 3, Tab 35)

[132] *Ibid*., at ¶ 10-11

[133] **RFJ**, ¶ 1239 (AJR, Vol. 2, Tab 2, p.196)

[134] **RFJ**, ¶ 1241 (AJR, Vol. 2, Tab 2, p.197)

activities that he undertook;'[135] 'I have found that O'Neil had recovered from PTSD as of January 31, 2000 and that the blast scene, while traumatic, played a minor role compared to other factors of self-induced trauma as illuminated herein';[136] ' I accept Dr. Blashko's opinion in that respect as expressed and illuminated herein; in particular, while counsel for O'Neil would have the Court conclude that Dr. Blashko was improperly out of sync with all of O'Neil's treatment providers, that is the conclusion with which I strongly disagree…'.[137]

124. There was evidence to support the Trial Judge's finding that O'Neil's prolonged anti-union activities, and the hostility and alienation produced by those activities, was the predominant reason why O'Neil developed PTSD and that his exposure to the fatal blast was a minor stressor.[138] It is evident from his reasons that the Trial Judge carefully reviewed O'Neil's evidence and that of his medical experts. It is to be noted that with the exception of those treatment providers that assessed and treated O'Neil after he moved to Vancouver Island (which assessment and treatment coincided with his application for reinstatement of his WCB pension), O'Neil's treatment providers, and those that provided assessments, agreed that the PTSD was multi-factorial in origin, even though their opinions were largely based upon incomplete information and O'Neil's subjective presentation.[139] More importantly, two of those professionals concluded that O'Neil's PTSD had resolved prior to O'Neil's move to Vancouver Island in 2000.

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[135] **RFJ**, ¶ 1237 (AJR, Vol. 2, Tab 2, p.194)

[136] **RFJ**, ¶ 1288 (AJR, Vol. 2, Tab 2, p.209)

[137] **RFJ**, ¶ 1240 (AJR, Vol. 2, Tab 2, p.196)

[138] **Blashko** Evidence: E5523: 6-10 (RJR, Vol. 1, Tab 31) ('By setting up GMEA, he was sort of a lightning rod for the strikers.'); E5523:16-24 (RJR, Vol. 1, Tab 31) ('As result of his GMEA activity he could not go for a walk, going to town meet with anybody and was asking for RCMP protection.'); E5523:35-40 (RJR, Vol. 1, Tab 31) ('It was like living in a war zone.')

[139] The first medical practitioner to diagnose O'Neil with posttraumatic stress, Dr. Wheeler, reported that the reasons for the onset of O'Neil's PTSD were the strike and secondarily, exposure to the underground explosion with the murder of coworkers (**Wheeler** Evidence: E1825:5-10 (RJR, Vol. 1, Tab 13)). Further, it was noted on cross-examination that at the time of Dr. Wheeler's first interview with O'Neil that O'Neil was tearfully relating that his wife was leaving him (**Wheeler** Evidence: E1827-8 (RJR, Vol. 1, Tab 13) and **Exhibit 395** Dr. Wheeler notes E2926 (RJR, Vol. 3, Tab5), **Exhibit 374,** Dr. Copus letter, E2818 (RJR, Vol. 3, Tab 3): the acute trauma is associ-

125. In support of the conclusion that O'Neil's PTSD was chronic and severe, O'Neil offered the opinion of his general practitioner, Dr. James and two psychiatrists, Drs. Passey and Crouse.

126. Dr. James' testified at trial, and simply endorsed Dr. Passey's opinion that O'Neil had chronic and severe PTSD.

127. It is reasonable for the Trial Judge to reject Dr. Passey's opinion as to the origin and duration of O'Neil's PTSD, given that there was evidence that his opinion was premised, in part, upon unreliable and contradictory information.[140]

128. Further, it was reasonable for the Trial Judge to disregard the opinion of Dr. Crouse who, founded her conclusions upon the subjective statements of O'Neil and his acquaintance, Judy Benjamin, as well as the report of Dr. Hartman that contained sections that were clearly blacked-out.

129. It is completely within the Trial Judge's jurisdiction to choose to favour Dr. Blashko's evidence over other evidence on the basis of his qualifications, and the particular factual assumptions grounding his opinion, which mirrored the Trial Judge's own findings of fact, together with Dr. Blashko's objectivity and forthrightness in providing the opinion.[141] As this Court stated in *Toneguzzo-Norvell (Guardian ad litem of)* v. *Burnaby Hospital*, '[i]t is trite law that the trier of fact may accept such evidence as he or she finds convincing, and that an appellate tribunal ought

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ated with the explosion and the deaths of a number of coworkers and its involvement in their discovery and extraction from the mine. However, his description also indicates that for some time afterwards there was a state of chronic tension in which he felt his life might be at risk because of the Union politics surrounding the event. **Exhibit 373**, Dr. Gervais Report, E2813 (RJR, Vol. 3, Tab 2): '… the prolonged post-explosion atmosphere of hostility and potential threat posed by the mine Union would also have to add be seen as a contirbuting [*sic*] factor which has continued to the present with his ongoing distrust and discomfort with Unions in the workplace.' **Exhibit 385**, Dr. David Hartman, E2848 (RJR, Vol. 3, Tab 4): '… Etiology of symptom development is complicated by a variety of stressors which parallel the patient's symptom development, including chronically hostile company relationships and his own developing marital difficulties…'

[140] **RFJ**, ¶ 1237 (AJR, Vol. 2, Tab 2, p.193), where the Trial Judge reviews Dr. Blashko's analysis of Dr. Passey's opinion.

[141] ***Toneguzzo-Norvell (Guardian ad litem of)* v. *Burnaby Hospital***, [1994] 1 S.C.R. 114 at ¶ 21-22 (RJA, Vol. 3, Tab 30) and ***Carrier* v. *Wan*;** unreported, 2008 CarswellAlta 1264; 2008 ABCA 318 September 23, 2008; (Alta. C.A.), Docket: Calgary Appeal 0701-0291-AC, at ¶ 8 (RJA, Vol. 1, Tab 14)

not to interfere unless it is persuaded that the result amounts to a 'palpable or overriding error.'[142] For the reasons stated, as Dr. Blashko's analysis and the Trial Judge's findings that supported that analysis were couched in the evidence, no such error occurred.

130. The Trial Judge noted that Dr. Blashko, who was found to be highly qualified to provide opinion evidence as to PTSD, received and reviewed nearly all of O'Neil's previous medical reports, data, records, personal memos, and voluminous information, since the date of the blast. The Trial Judge explained that this gave Dr. Blashko the advantage of some important material that other experts who testified did not have.[143] The Trial Judge explained the commonality amongst the opinions of O'Neil's treatment providers and therapists on the basis that they were simply reporting O'Neil's subjective symptoms.[144] As a consequence, it was reasonable for the Trial Judge to rely on Dr. Blashko's evidence to address the issues in this litigation.

131. Accordingly, it was reasonable for the Trial Judge to accept Dr. Blashko's opinion that coincided with his own findings of fact and credibility to conclude that O'Neil was ready for the workforce in January of 2000 and no longer manifested any significant symptoms of any psychiatric disorder including PTSD as of September 2000. Further, the Trial Judge made a specific finding of fact and credibility that O'Neil was malingering or, to use his term, afflicted with 'compensation neurosis', in order to perpetuate his WCB funded, leisurely and much beloved lifestyle.[145] As there was evidence to support these findings, the Trial Judge was completely within his jurisdiction to make these non-reviewable findings of fact and credibility.

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[142] ***Toneguzzo-Norvell (Guardian ad litem of)* v. *Burnaby Hospital*,** supra, at 21 (RJA, Vol. 3, Tab 30)

[143] **RFJ**, ¶ 1218 (AJR, Vol. 2, Tab 2, p.178)

[144] **RFJ**, ¶ 1240 (AJR, Vol. 2, Tab 2, p.197)

[145] **RFJ**, 1202, 1203 (AJR, Vol. 2, Tab 2, p.174); ¶ 1242-44 (AJR, Vol. 2, Tab 2, p.197) and E4685:20- 4686:15¶

132. The Trial Judge specifically found as fact that O'Neil was ready for the workforce in January 2000, ending his pecuniary loss at that time,[146] and, that he had had fully recovered from PTSD as of September 2000.[147] Damages for loss of income from May 1995 through to January of 2000 were awarded on the evidence and the conclusions of O'Neil's own economist, Cara Brown.[148] As these findings of fact are grounded in the evidence, they are reasonable and non-reviewable. In light of these findings, the Trial Judge's conclusions regarding O'Neil's inability to work in an unionized environment, or as a commercial pilot, or a miner, are *obiter dicta* and do not found a reviewable error.

133. For these reasons, the Respondents submit that the O'Neil appeal should be dismissed.

D) PERSONAL CONSUMPTION RATIOS IN THE APPELLANTS' DEPENDENCY CLAIMS

134. Bettger supports and endorses the submissions respecting damages presented herein by the Respondent GNWT.

E) TAX GROSS-UP AND MANAGEMENT FEES

135. Bettger supports and endorses the submissions respecting damages presented herein by the Respondent GNWT.

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[146] **RFJ,** ¶ 1244 (AJR, Vol. 2, Tab 2, p.197)

[147] **RFJ,** ¶ 1243 (AJR, Vol. 2, Tab 2, p.197)

[148] **RFJ,** ¶ 1266 (AJR, Vol. 2, Tab 2, p.202)

PART IV SUBMISSION AS TO COSTS

136. Bettger seeks costs of this appeal as well as costs in the courts below.

137. Bettger seeks costs of this appeal on a substantial indemnity basis in excess of the costs permitted under Rule 83 and Schedule B of the Supreme Court of Canada Rules[149], and an opportunity to make submissions in support of a substantial indemnity cost award.

138. In respect of the costs of trial and of the appeal proceedings below, Bettger seeks the costs previously awarded by the Northwest Territories Court of Appeal in this matter.[150]

PART V ORDER SOUGHT

139. Bettger respectfully requests that the within appeal be dismissed.

All of which is respectfully submitted, this _______ day of April 2009.

MACPHERSON LESLIE & TYERMAN LLP

Solicitors for the Respondent Timothy Alexander Bettger

Per: ________________________________
S. LEONARD POLSKY

Per: ________________________________
HEATHER A. SANDERSON

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[149] *Rules of the Supreme Court of Canada,* r. 83 (RJA, Vol. 3, Tab 46)

[150] ***Fullowka v. Royal Oak Ventures Inc.***, 2008 NWTCA 9, [2008] 12 W.W.R. 60 at ¶ 37-42 (N.W.T.C.A.) (RJA, Vol. 1 Tab 34)

PART VI TABLE OF RESPONDENTS' AUTHORITIES

Volume & Tab		*Para. of case referred to*	*Para. where cited in factum*	*Footnote where cited in factum*
Vol. 1, Tab 11	***Bradford v. Kanellos*** [1974] S.C.R. 409 (S.C.C. 1974)	7, 12	66	89
Vol. 1, Tab 12	***B.S.A. Investors Ltd. v. Mosly*** (2007), 283 D.L.R. (4th) 220 (B.C. C.A.), leave to appeal refused, S.C.C. #32148, 2008 CarswellBC 124	41	111	120
Vol. 1, Tab 13	***Canadian National Railway v. Norsk Pacific Steamship Co.*** [1992] 1 S.C.R. 1021	46-47	93	107
Vol. 1, Tab 14	***Carrier v. Wan*** 2008 CarswellAlta 1264; 2008 ABCA 318; Alberta Court of Appeal; September 23, 2008; Docket: Calgary Appeal 0701-0291-AC	8	129	141
Vol. 1, Tab 15	***Caswell v. Powell Duffryn Associated Collieries Ltd.*** [1940] A.C. 152 (H.L.)	p.169 - 70	69	93
Vol. 1, Tab 19	***Childs v. Desormeaux*** [2006] 1 S.C.R. 643	31, 33, 35-37	77, 94, 101	98, 108, 115
Vol. 1, Tab 20	***Cooper v Hobart*** [2001] 3 S.C.R. 537	29-31, 36, 54	58, 88, 99	83, 105, 113
Vol. 1, Tab 25	***Dobson (Litigation Guardian of) v. Dobson*** [1999] 2 S.C.R. 753	59	56	79
Vol. 1, Tab 26	***Donoghue v. Stevenson*** [1932] A.C. 562 (H.L.)	p. 618	56	79

Volume & Tab		***Para. of case referred to***	***Para. where cited in factum***	***Footnote where cited in factum***
Vol. 1, Tab 34	***Fullowka v. Royal Oak Ventures Inc.*** 2008 NWTCA 9, [2008] 12 W.W.R. 60 (N.W.T.C.A.)	37-42	138	150
Vol. 2, Tab 1	***Glasgow Corporation. v. Muir*** [1943] A.C. 448 (H.L.)	p. 454	57	82
Vol. 2, Tab 2	***Graves v. Warner Bros.,*** (2003), 656 N.W.2d 195 (Mich. Ct. App.)	p. 200-201	56, 97	79, 111
Vol. 2, Tab 12	***James v. Meow Media Inc.*** (2000), 90 F.Supp.2d 798 (U.S. Dist. Ct., Ky.)	p.804	83, 86	103, 104
Vol. 2, Tab 17	***Kozak v. Funk*** [1998] 5 W.W.R. 232 (Sask. C.A.)	22	69, 70	93, 94
Vol. 2, Tab 18	***Lamb v. London Borough of Camden*** [1981] Q.B. 625 (C.A.)	p.642, 644	64, 95	88, 109
Vol. 2, Tab 21	***L. (H.) v. Canada (Attorney General)*** [2005] 1 S.C.R. 401	62, 344	90, 121	106, 129
Vol. 2, Tab 28	***McArdle Estate v. Cox*** (2003)327 A.R. 129 (Alta. C.A.)	31	63	87
Vol. 3, Tab 5	***Odhavji Estate v. Woodhouse*** [2003] 3 S.C.R. 263	45, 47-48	56	79
Vol. 3, Tab 8	***Palsgraf v. Long Island Railroad Co.*** (1928), 248 N.Y. 339 (N.Y. Ct. App.)	pp. 341, 343, 345	56, 62	79, 80, 81, 86
Vol. 3, Tab 18	***Resurfice Corp. v. Hanke*** [2007] 1 S.C.R. 333	21 – 28	107, 117	118, 125

Volume & Tab		***Para. of case referred to***	***Para. where cited in factum***	***Footnote where cited in factum***
Vol. 3, Tab 22	***Sanders v. Acclaim Entertainment Inc. et al*** (2002), 188 F. Supp. 2d 1264 (D. Colo.)	pp. 1269, 1272, 1276	76, 80, 81, 82	97, 100, 101, 102
Vol. 3, Tab 23	***Smith v. Leurs*** (1945) 70 C.L.R. 256 (Aust. H.C.)	p. 262	96	110
Vol. 3, Tab 25	***State Rail Authority v. Wiegold*** (1991), 25 N.S.W.L.R. 500 (New South Wales C.A.)	p. 514	90	106
Vol. 3, Tab 26	***Stewart v. Pettie*** [1995] 1 S.C.R. 131	67, 69, 72	116	124
Vol. 3, Tab 30	***Toneguzzo-Norvell (Guardian ad litem of)* v. *Burnaby Hospital*** [1994] 1 S.C.R. 114	21-22	129	141, 142
Vol. 3, Tab 31	***Trevison v. Springman*** [1996] 4 W.W.R. 760 (B.C.S.C.); aff'd 1997 CarswellBC 2362 (B.C.C.A.)	BCSC: 30, 32	66, 72	90, 91, 95
Vol. 3, Tab 35	***Woelk* v. *Halvorson*** [1980] 2 S.C.R. 430	9-10	122	131

PART VII STATUTORY PROVISIONS

Volume & Tab		***Provision relied upon***	***Para. where cited in factum***	***Footnote where cited in factum***
Vol. 3, Tab 46	***Rules of the Supreme Court of Canada***	83	137	149