NOVA SCOTIA COURT OF APPEAL
Citation: *Cameron v. Pratt*, 2023 NSCA 90

Date: 20231220
Docket: CA 516492
Registry: Halifax

Between:

David Samuel Cameron and D & T Heating and Plumbing

Appellants/Respondents on Cross-Appeal

v.

Robert Matthew Pratt

Respondent/Appellant on Cross-Appeal

Judge:	The Honourable Justice David P. S. Farrar
Appeal Heard:	October 6, 2023, in Halifax, Nova Scotia
Subject:	Personal injury – minor injury cap pursuant to s. 113E of the *Insurance Act* and of the *Automobile Accident Minor Injury Regulations* – assessment of damages – application of *Smith v. Stubbert*, (1992), 117 N.S.R. (2d) 118 to concussion injuries – onus of proof of whether an injury is a minor injury
Summary:	On August 3, 2017, the respondent, Robert Pratt, and the appellant, David Cameron, were involved in a motor vehicle accident in Truro, Nova Scotia. Mr. Cameron was driving a van owned by the appellant D & T Heating and Plumbing Limited. As a result of the accident, Mr. Pratt suffered various abrasions and bruising, broken ribs, soft tissue injuries of the neck and back, a sprain to the lateral collateral ligament of his knee and a concussion. The appellants acknowledged fault for the accident at trial but denied causation and damages.

The matter proceeded to trial, before Justice Mona Lynch, over six days in March 2021. At the conclusion of the trial, the judge found that all of Mr. Pratt's injuries, with the exception of the rib fractures and concussion, were captured by the minor injury cap and awarded him general damages for those injuries in the amount of $8,486.00.

For the concussion and rib injuries, the trial judge awarded Mr. Pratt general damages of $55,000.00, finding that the injuries were "persistently troubling, but not totally disabling" and awarded damages based on the range set out in *Smith v. Stubbert*. The trial judge also awarded damages for cost of future care, diminished earning capacity and loss of valuable services.

In her consideration whether the injuries fell within the minor injury cap, the trial judge found the onus was on the defendants to prove, on a balance of probabilities, Mr. Pratt's injuries were subject to the minor injury cap.

The appellants appeal the quantum of all the damages awarded to Mr. Pratt. They also appeal the trial judge's determination the onus of proof rested on them to prove the minor injury cap applied.

The respondent cross-appeals, arguing that the trial judge erred in awarding damages under the range set out in *Smith v. Stubbert* and further that the injuries to Mr. Pratt's left knee were a "serious impairment" as that term was defined in the *Regulations* and should not be caught by the minor injury cap.

Issues:

(1) Did the trial judge err in her award for diminished earning capacity?

(2) Did the trial judge err in her award of costs of future care?

(3) Did the trial judge err in her award of general damages for non-capped injuries? This ground of appeal identifies two sub-issues:

  (i) Did the trial judge consider the impact of Mr. Pratt's capped injuries in assessing general damages for his non-capped injuries?

  (ii) Were the general damages awarded for the concussion inordinately high?

(4) Did the trial judge err in applying Smith v. Stubbert when assessing damages for Mr. Pratt's concussion?

(5) Did the trial judge err in determining Mr. Pratt's left knee injury did not result in a serious impairment?
(6) Did the trial judge err in law by placing the onus on the defendant to prove the application of minor injury cap *Regulations* to Mr. Pratt's injuries?

Result: The trial judge erred in placing the onus of proving the injuries fell within the minor injury cap on the appellants'/defendants at trial. The appellants were unsuccessful on any other ground of appeal. With the exception of the damages awarded for the non-capped injuries, the amounts ordered under the other heads of damages were entitled to deference.

The respondents were successful on the cross-appeal. The trial judge erred in using the *Smith v. Stubbert* range for assessing damages for the non-capped injuries. The general damages were increased by $15,000.00 from $55,000.00 to $70,000.00. In all other respects, the cross-appeal was dismissed, including the argument that Mr. Pratt's left knee injury was a serious impairment.

As the cross-appellant/respondent was largely successful on the appeal, costs were awarded to him in the amount of $5,000.00, inclusive of disbursements.

NOVA SCOTIA COURT OF APPEAL
Citation: *Cameron v. Pratt*, 2023 NSCA 90

Date: 20231220
Docket: CA 516492
Registry: Halifax

Between:

David Samuel Cameron and D & T Heating and Plumbing
Appellants/Respondents on Cross-Appeal

v.

Robert Matthew Pratt
Respondent/Appellant on Cross-Appeal

Judges:	Farrar, Bryson and Van den Eynden JJ.A.
Appeal Heard:	October 6, 2023, in Halifax, Nova Scotia
Held:	Appeal allowed in part; cross-appeal allowed in part with costs payable to the respondent in the amount of $5,000.00, per reasons for judgment of Farrar J.A.; Bryson and Van den Eynden J.A. concurring
Counsel:	Michelle Kelly, K.C. and Peter McVey, K.C., for the appellants/respondents on cross-appeal Lathia Stubbs-Deveaux and Madison Veinotte, for the respondent/appellant on cross-appeal

Reasons for judgment:

Background

[1] On August 3, 2017, Mr. Pratt was travelling on Brunswick Street in Truro, Nova Scotia on his motorcycle. The appellant, David Cameron, was parked along the shoulder of the road in a van owned by D & T Heating and Plumbing Ltd. As Mr. Pratt approached, the van pulled out from its parking spot in the path of Mr. Pratt's motorcycle, resulting in collision.

[2] Mr. Pratt was taken by ambulance to the emergency department of the Colchester Regional Hospital where he was examined and had CT scans taken of his head, cervical spine, chest, abdomen, and pelvis.

[3] The appellants acknowledged, at trial, Mr. Pratt suffered various abrasions and bruising, broken ribs, soft tissue injuries of the neck and back, and a sprain to the lateral collateral ligament of his knee. They denied he suffered any further injuries in the accident, in particular, any other injuries to his knees, neck and back or a concussion. I will discuss Mr. Pratt's injuries in more detail later.

[4] At the time of the accident, Mr. Pratt had been working as a truck driver for Alta Fuel Distributors ("AFD") in Alberta on a 28-day on/14-day off rotation. He started working in Alberta in 2016 after his own trucking business failed that same year.

[5] On September 5, 2017, Mr. Pratt started an electrician course at the Nova Scotia Community College which he continued until April of 2018, followed by a four-to-five week work placement. He could not find work as an electrician in Nova Scotia.

[6] In the summer of 2018, Mr. Pratt returned to Alberta in an attempt to find work as an electrician.

[7] Unable to secure employment as an electrician, in August 2018 he returned to work with AFD for about four weeks. In November 2018, Mr. Pratt returned to work full-time with AFD on the same schedule he was working at the time of his accident.

[8] On January 27, 2019, Mr. Pratt was involved in a single vehicle accident during the course of his employment in Alberta. As a result of that accident, he

suffered two crushed vertebrae in his mid-back. He has been off work since that time and is in receipt of benefits through the Alberta workers' compensation system.

[9] On December 5, 2017, Mr. Pratt commenced action against the appellants seeking general damages for pain and suffering, loss of earning capacity or loss of future income, loss of valuable services, cost of care, special damages for medical expenses and past wage losses, prejudgment interest, and costs.

[10] The matter proceeded to trial for six days in March 2021 before Justice Mona Lynch. In a written decision dated July 13, 2021 (*Pratt v. Cameron*, 2021 NSSC 129), the trial judge awarded Mr. Pratt damages as follows:

General Damages (capped $8,486; non-capped $55,000):	$63,486
Pre-Judgment Interest (43.5 months):	$5,753
Cost of Future Care:	$10,000
Future Income/Diminished Earning Capacity:	$25,000
Loss of Valuable Services:	$15,000
TOTAL:	**$119,239**[1]

[11] The parties were able to reach an agreement on costs.

[12] At trial, the appellants admitted they were at fault for the accident, but did not admit causation or damages.

[13] One of the issues the trial judge had to grapple with was whether Mr. Pratt's injuries were captured by the minor injury cap pursuant to s. 113E of the *Insurance Act*, R.S.N.S. 1989, c. 231 (the "*Act*") and s. 13 of the *Automobile Accident Minor Injury Regulations*, N.S. Reg. 94/2010 (the "*Regulations*").

[14] In her consideration of whether the injuries fell within the cap, the trial judge found the onus was on the defendants to prove, on a balance of probabilities, the plaintiff's injuries were subject to the minor injury cap.

[15] The appellants appeal, arguing the trial judge erred in law in determining the defendant had the onus to prove Mr. Pratt's injuries fell within the minor injury cap.

---

[1] *Pratt* at ¶114.

[16] The appellants also argue the damages awarded by the trial judge were in error.

[17] Mr. Pratt cross-appeals saying the trial judge erred in her interpretation of "serious impairment" as that term is used in the *Regulations*, and erred by applying *Smith v. Stubbert* (1992), 117 N.S.R. (2d) 118, when assessing non-pecuniary general damages for Mr. Pratt's concussion.[2]

[18] For the reasons that follow, I would allow the appeal in part by setting aside the trial judge's finding that the onus was on the defendants to prove Mr. Pratt's injuries were subject to the minor injury cap. I would also allow the cross-appeal in part by finding that the trial judge erred in applying *Smith v. Stubbert* to her assessment of damages for Mr. Pratt's concussion. I would increase Mr. Pratt's non-capped injuries general damages award to $70,000.00. As Mr. Pratt was mainly successful on the appeal and cross-appeal, I would award him costs of $5,000.00, inclusive of disbursements.

[19] I would dismiss all other grounds of appeal and cross-appeal.

Issues

[20] The Notice of Appeal and Cross-Appeal raise a number of issues. The appellant outlined the issues they wished to raise in their factum as follows:

1. Did the trial judge err in law by placing the onus on a defendant to prove the application of the Minor Injury Cap to a plaintiff's general damages?
2. Did the trial judge err in law or fact in her general damages award for the non-capped injuries?
3. Did the trial judge err in law or fact in her award for diminished earning capacity?
4. Did the trial judge err in law or fact in her award for cost of future care?

[21] In Mr. Pratt's cross-appeal factum, he lists the following issues:

[2] At various times in the decision and in the submissions of the parties, Mr. Pratt's head injury is referred to as a concussion, a mild traumatic brain injury or a traumatic brain injury. For ease of reference, I will refer to it as a concussion.

1. Whether the learned trial judge applied an incorrect interpretation of the *Automobile Accident Minor Injury Regulations* in determining whether Mr. Pratt's left knee injury had resulted in a serious impairment?
    a. What is the correct interpretation of "serious impairment" and, more particularly, the terms "substantial inability" and "normal activities of the claimant's daily living"?
    b. Whether Mr. Pratt's left knee injury meets the definition of "serious impairment" under the *Automobile Minor Injury Regulations*?
    c. If Mr. Pratt's left knee injury meets the definition of "serious impairment", then what are his non-pecuniary general damages?
2. Whether the learned trial judge erred in law and fact in assessing non-pecuniary general damages for Mr. Pratt's traumatic brain injury?
3. Whether the learned trial judge erred in law by applying *Smith v. Stubbert* when assessing non-pecuniary general damages from Mr. Pratt's traumatic brain injury?

[22] I would reword the issues on this appeal and cross-appeal and address them in the following order:

1. Did the trial judge err in her award for diminished earning capacity?
2. Did the trial judge err in her award of costs of future care?
3. Did the trial judge err in her award of general damages for non-capped injuries? This ground of appeal identifies two sub-issues:
    (i) Did the trial judge consider the impact of Mr. Pratt's capped injuries in assessing general damages for his non-capped injuries?
    (ii) Were the general damages awarded for the concussion inordinately high?
4. Did the trial judge err in applying *Smith v. Stubbert* when assessing damages for Mr. Pratt's concussion?
5. Did the trial judge err in determining Mr. Pratt's left knee injury did not result in a serious impairment?

6. Did the trial judge err in law by placing the onus on the defendant to prove the application of minor injury cap *Regulations* to Mr. Pratt's injuries?

[23] I will address the standard of review when dealing with the individual grounds of appeal.

Analysis:

Issue 1: Did the trial judge err in her award for diminished earning capacity?

Issue 2: Did the trial judge err in her award of costs of future care?

[24] I will address these two grounds of appeal together.

Standard of Review

[25] When reviewing the quantum arrived at for damages, the standard of review is whether the award is so high as to be wholly erroneous. In *Tibbetts v. Murphy*, 2017 NSCA 35, Oland J.A. succinctly set out the standard of review:

> [60] Unless the judge applied a wrong principle of law, or the damages awarded are so inordinately low or high as to constitute a wholly erroneous assessment, an appellate court will not intervene. It should consider whether the findings that led to the award are reasonable and supported by the evidence and within the range of acceptable awards: *Abbott v. Sharpe*, *supra*, at ¶109.

Diminished Earning Capacity

[26] In addressing Mr. Pratt's diminished earning capacity, the trial judge first set out the law:

> [90] Mr. Pratt has the onus to prove his diminished earning capacity but as was noted in *Leddicote v. Nova Scotia (Attorney General)*, 2002 NSCA 47 at para. 57, the burden is not as stringent as losses that occurred in the past. Diminished earning capacity cannot be measured precisely, and it could be compensation for a loss which may never occur (*Newman v. LaMarche*, 1994 NSCA 193). In many cases the Plaintiff will not be able to show, on the balance of probabilities, the extent of the loss and it is impossible to determine with arithmetic precision the extent of the loss. It is considered as a loss of an asset (*Gaudet (by his Guardian*

> *Ad Litem) v. Doucet et al.*, 1991 CanLII 2708 (NSSC)). The principle of full compensation applies.

[27] Mr. Pratt was looking for loss of future earning capacity in the range of $219,000 to $239,000.

[28] At trial, the appellants took the position that Mr. Pratt was not under any limitation as a result of the accident and any diminished earning capacity was attributable to the 2019 accident.

[29] The trial judge reviewed some of Mr. Pratt's evidence on his work limitations:

> [30] Mr. Pratt was able to complete his electrician course at NSCC, but accommodations had to be made for him for things such as his inability to crouch because of his knee.
>
> […]
>
> [68] On September 5, 2017, Mr. Pratt commenced an electrician course at NSCC. He completed that course and he then completed a four to five-week work placement. He was given accommodations, such as a special chair and accommodations for the labs he had to complete. Prior to attending the course, Mr. Pratt contacted the college to explain his limitations and to ask if he should attend the course. Mr. Pratt testified that he was uncomfortable but was able to complete the course. His discomfort in sitting in class is noted in the physiotherapy notes in October of 2017. For the work placement, Mr. Pratt testified that he was unable to complete some of the work. He was unable to climb ladders and he was unable to crouch down to pull wires. These limitations made his work slow. From the testimony of Mr. Pratt, I understand his limitations to be associated with his physical injuries.

[30] The trial judge did not set out all of Mr. Pratt's evidence on his work limitations. He also gave evidence such tasks as wiring a junction box, doorbell and electric heater needed to be adjusted for him to complete at eye level.

[31] The trial judge made the following findings in support of her award of loss of diminished earning capacity:

- The ongoing injuries from the motor vehicle accident are the effects of his concussion and his knee injury. These injuries were caused by the defendants and not the 2019 injury (¶95).

- Mr. Pratt's knee injury diminished his ability to earn income. She accepted Mr. Pratt's evidence that his knee prevented him from crouching and caused difficulty performing other work tasks (¶97).
- Mr. Pratt continues to suffer from the effects of his knee injury and is at high risk to develop osteoarthritis. She also found he is likely to need knee replacement surgery in the next 10 to 15 years (¶100).
- Mr. Pratt's knee injury has diminished his earning capacity (¶101).
- The evidence does not establish that the 2019 accident would preclude Mr. Pratt from working in the future (¶103).

[32] As a result of these findings, the trial judge awarded Mr. Pratt the relatively modest sum of $25,000 for diminished earning.

[33] I am satisfied the trial judge's award was supported by the evidence and is not so inordinately high as to constitute a wholly erroneous assessment.

[34] I would dismiss this ground of appeal.

Cost of Future Care

[35] Similarly, with respect to the cost of future care, the trial judge found there was evidence to support a claim for costs of future care, in particular, the cost of craniosacral massage which Mr. Pratt was paying for himself:

> [111] Mr. Pratt testified that he was attending for craniosacral massage and finding some relief for his post-concussion symptoms. The funding was in place for this treatment twice a week in January and February 2021, but it ended. Mr. Pratt has been paying the $93.00 per session since that time. Mr. Pratt was unable to afford this treatment twice per week, so he cut it back to once a week. While I do not have evidence of how long this treatment should last, I accept that it is giving Mr. Pratt some relief and he should continue to attend.

[36] The trial judge went on to award Mr. Pratt, again, a relatively modest amount of $10,000 for cost of future care.

[37] The appellants' argument the award for cost of future care was made without an evidentiary basis (which would be an error of law) is without merit. Mr. Pratt's testimony provides a sufficient factual basis to ground the damages awarded. I would dismiss this ground of appeal.

Issue 3: Did the trial judge err in her award of general damages for non-capped injuries?

Standard of Review

[38] The standard of review for this ground of appeal is twofold. The appellants allege that the trial judge considered the severity of the capped injuries when arriving at a general damages award for the non-capped injuries. This involves a consideration of ss. 9 and 14 of the *Regulations*.

[39] Section 9 of the *Regulations* provides:

> **Injuries must be assessed separately**
>
> 9 If a claimant suffers more than one injury as a result of an accident, each injury must be assessed separately to determine whether the injury is or is not a minor injury.

[40] Section 14(1) of the *Regulations* provides that the general damages for the capped and non-capped injuries are to be assessed separately and the general damages for the two categories of injuries are then stacked:

> **Damages recoverable for non-monetary loss for minor and non-minor injuries**
>
> 14 (1) In this Section, "non-minor injury" means an injury other than a minor injury.
>
> (2) If a claimant suffers one or more minor injuries and one or more non-minor injuries as a result of an accident, the assessment of damages for non-monetary loss for all injuries suffered by the claimant is subject to the following rules:
>
> […]
>
> (b) if the non-minor injury or injuries, when assessed separately from the minor injury or injuries, would result in an award for non-monetary loss of more than the minor injury amount, the total amount recoverable as damages for non-monetary loss for all injuries suffered by the claimant must be calculated as the total of all of the following:
>
> (i) the amount of damages assessed for non-monetary loss for the non-minor injury or injuries,
>
> (ii) subject to Section 13, the amount of damages assessed for non-monetary loss for the minor injury or injuries.

[41] If the trial judge failed to individually assess the injuries and allowed the severity of the capped injuries to bleed into her assessment of general damages for non-capped injuries that would be an error of law and reviewable on a correctness standard.

[42] If she did not commit the legal error as suggested by the appellant, the same standard of review set out above for the first two grounds of appeal would apply.

Issue 3(i): Did the trial judge consider the impact of Mr. Pratt's capped injuries in assessing general damages for his non-capped injuries?

[43] The trial judge found that Mr. Pratt suffered injuries to his neck, shoulder, knees, ankles and back, fractures to his right fourth to sixth ribs, and a concussion. She found that the ankle, neck, shoulder, knees and back injuries were capped injuries, the ribs and concussion were not. In reaching these conclusions, she heard from a number of experts.

[44] Relevant to this ground of appeal is the evidence of Dr. Charalabos Karabatsos, an orthopedic surgeon, and Dr. Dale Robinson, a neurologist.

[45] The appellants say that the trial judge accepted evidence of Dr. Karabatsos which was outside his area of expertise where he opined on the seriousness of the injuries to Mr. Pratt.

[46] In their factum, the appellants explain it as follows:

> 143. The trial judge clearly considered [Dr. Karabatsos'] opinions more broadly [than] to speak only to sprain, strain and WAD injuries, as she referenced his opinions as follows:
>
> > "Some of Mr. Pratt's physical injuries would not be described as a sprain, strain, or whiplash-associated injury. **His ribs were fractured. He suffered a traumatic brain injury.** These injuries do not fall under the definition of sprain, strain or whiplash-associated disorder and do not fall under the minor injury cap. **Dr. Karabatsos' opinion, which I accept, is that Mr. Pratt's impairments are permanent and his prognosis for recovery is poor.** In Dr. Robinson's opinion, which I accept, the prognosis is poor for Mr. Pratt to return to his pre-indexed collision baseline level of function."[3] [Footnote omitted; emphasis in original.]

[3] The appellants are referring to ¶66 of the trial judge's decision.

> 144. Dr. Karabatsos acknowledged that he assessed the Plaintiff's injuries globally when offering the judge opinions, rather than only within his area of qualification. ***However, it was not open to the trial judge to consider those opinions when assessing the rib fractures and concussion symptoms*** by saying, "Dr. Karabatsos' opinion, which I accept, is that Mr. Pratt's impairments are permanent and his prognosis for recovery is poor." [Footnote omitted.]
>
> 145. The Appellants submit that by doing so, the trial judge erred in law. She accepted opinions outside the scope of Dr. Karabatsos' admissible opinions. ***He was not qualified to speak to fractures*** or head injuries, or anything beyond the (capped) soft tissue injuries. The "prognosis" for the capped injuries must be considered in the ruling on whether they are or are not minor injuries. If they are minor injuries, that ends their use in determining an appropriate quantum of general damages. [Emphasis added.]

[47] Addressing Dr. Karabatsos' qualifications—which the appellants say did not extend to speaking to fractures or head injuries—there is no dispute he was not qualified to give opinion evidence on neurological issues. But he was qualified to give opinion evidence on fractures.

[48] At trial, the qualification of Dr. Karabatsos was very short. His report and qualifications were submitted, and the court asked plaintiff's counsel:

> **THE COURT:** So I'm assuming you ... you're asking that he give opinion evidence in relation to orthopedics.
>
> **MS. SWINAMER [for the plaintiff]:** Yes, My Lady.
>
> **THE COURT:** Okay. Is that acceptable?
>
> **MS. KELLY [for the defendants]:** Yes, My Lady.

[49] Dr. Karabatsos then gave his evidence.

[50] In cross-examination, Dr. Karabatsos was asked the following question and responded as follows:

> Q. And so my question to you, Dr. Karabatsos, is his back pain may not have resolved completely but you saw nothing in the records, pre-January 2019, that suggested his back pain was limiting him in any way. Did you?
>
> A. No. I think that the nature of his ... the nature of his back pain ... well I think the nature of his back pain is not one that is going to provide severe, severe disability for this gentleman. However, if you look at all his injuries in

> combination, you know, his evidence to me is that he was limited. He wasn't fully able to do his job and he was struggling. […]

[51] The appellants say this response shows Dr. Karabatsos was opining on all the injuries, including the concussion injury, when he made his assessment. It follows, they say, by accepting this evidence, the trial judge used the effect of the capped injuries for the purpose of assessing the non-capped general damages claim.

[52] As I read Dr. Karabatsos' evidence and his report, he was simply opining on matters on which he was qualified. The suggestion that he was not qualified as an expert in orthopedics to give evidence on Mr. Pratt's rib injuries is unfounded. His report clearly addresses the rib and other muscular skeletal injuries. It states:

> **1. The nature of the injuries initially sustained by Mr. Pratt arising out of the motor vehicle accident on August 3, 2017 and your opinion as to the severity thereof.**
>
> Based on this assessment and from an orthopaedic perspective, it is my professional opinion that Mr. Pratt sustained undisplaced fractures of his right 4th to 6th ribs, soft tissue injuries of his cervicothoracic spine, both shoulders and lumbar spine, significant sprain and contusive injury of his left knee, and soft tissue injury of his right knee and right ankle as a result of the MVC of August 3, 2017. The injuries are serious.
>
> […]
>
> **4. Your opinion as to the prospects for any further or future recovery and if probable, the time for same and the extent thereof.**
>
> It is unlikely that there will be any further recovery as a result of injuries sustained in the collision in question. Some improvement would be expected for a period of one year from the time of the second motor vehicle accident dated January 27, 2019.

[53] In the paragraph cited by the appellants, the trial judge was simply accepting Dr. Karabatsos' opinion on those items on which he had been qualified to give expert evidence.

[54] Earlier in her decision, the trial judge made it clear what evidence she was accepting from Dr. Karabatsos:

> [31] Mr. Pratt suffered a severe left knee injury, a torn LCL and a torn ACL ligament, which would not have occurred but for the negligence of the

> Defendants. I accept Dr. Karabatsos's opinion that Mr. Pratt sustained a significant sprain and intra-articular injuries of his left knee from this accident.

[55] The trial judge also accepted the evidence of Dr. Robinson, who was qualified as an expert in the field of neurology, capable of giving opinion evidence on the subject of concussions and traumatic brain injury.

[56] In his report, Dr. Robinson opined Mr. Pratt sustained a mild traumatic brain injury in the collision:

> **RESPONSE TO QUESTIONS:**
>
> **1. The nature of the injuries initially sustained by Mr. Pratt arising out of the motor vehicle accident and your opinion as to the severity thereof:**
>
> As described above, in my opinion, Mr. Pratt sustained a mild traumatic brain injury in the indexed collision. He did not follow the usual recovery trajectory but went on to a constellation of symptoms which may be grouped together under post-concussive symptoms involving three spheres: physical, cognitive and psychoemotional. Further details of his specific difficulties are described above. Mr. Pratt also has chronic myofascial pain syndrome.

[57] In her decision, the trial judge accepted the evidence of Dr. Robinson that Mr. Pratt had suffered a mild traumatic brain injury:

> [51] While the late onset of symptoms is not typical for a brain injury, I am satisfied that Mr. Pratt suffered a mild traumatic brain injury in this accident. I base that finding on all of the evidence, particularly the opinion of Dr. Robinson and the finding of Dr. Robertson. An expert witness in neurology was not called by the Defendants. Mr. Pratt would not have suffered the mild traumatic brain injury but for the negligence of the Defendants.

[58] In the impugned paragraph cited by the appellants, the trial judge is simply confirming the evidence which she had accepted in her decision based on the evidence of Drs. Karabatsos and Robinson.

[59] The trial judge correctly assessed the non-capped injuries and capped injuries separately as required by the *Regulations*, arrived at general damages

awards for each and then combined the two general damages awards as mandated by s. 14(2)(b) of the *Regulations*.[4] The appellants' argument on this issue fails.

Issue 3(ii): Were the general damages awarded for the concussion inordinately high?

[60] The appellants argue that the general damages awarded for the concussion are inordinately high. The appellants make three arguments on this point.

[61] First, the appellants contend that any opinions from Mr. Pratt's family doctor, Dr. Mashallah Masoumi and Dr. Travis Robertson, his optometrist, regarding the concussion were limited to the documents in the trial exhibits. They argue the trial judge was not permitted to rely on any elaboration or statement of opinions found in the doctors' oral evidence that goes beyond their medical records.

[62] The appellants do not identify in the record where they say that Drs. Masoumi and Robertson inappropriately elaborated on their evidence with respect to the concussion. Their argument on this point encompasses two paragraphs in their factum:

> 150. The Appellants submit Dr. Robertson (the optometrist) and Dr. Masoumi (the family doctor) were not qualified by the trial judge to offer any opinion not found in their medical records. In particular, the trial judge correctly said she may use Treating Physicians Narratives (as they then were called) by considering the opinions found in the records, but those treating witnesses when testifying were not qualified as experts by the Court to give any further opinions during their oral testimony.
>
> 151. The opinions of Dr. Masoumi and Dr. Robertson regarding the concussion were therefore limited to what is found in Trial Exhibit #1, not any elaboration or statement of opinions found in their oral evidence that goes beyond their records.

[63] The appellants also do not identify where the judge relied on this so-called inadmissible evidence in her decision.

[64] Dealing with Dr. Masoumi, the trial judge discusses the concussion injury at ¶39-51 of her decision. The only reference to Dr. Masoumi in that portion of her decision is as follows:

---

[4] *Pratt* at ¶75-76.

> [44] Beginning on September 26, 2018 forward there are many reports in Dr. Masoumi's records of dizziness, headaches, blurry vision, memory losses, sensitivity to light, and problems concentrating. He attended a concussion clinic to assist with his symptoms and was placed on Prozac to assist with his mood.

[65] The trial judge is simply reciting what Dr. Masoumi had observed or what had been reported to him. She does not reference any opinion by Dr. Masoumi regarding Mr. Pratt's concussion. I have also reviewed Dr. Masoumi's evidence in its entirety and cannot identify the appellants' complaint. There were no objections to his evidence by the appellants at trial.

[66] With respect to Dr. Robertson, on his examination of Mr. Pratt he noticed exophoria which he testified was consistent with a concussion. The trial judge had this to say about Dr. Robinson's evidence:

> [50] Dr. Masoumi sent Mr. Pratt to see an optometrist regarding his concussion symptoms. Dr. Travis Robertson examined Mr. Pratt on October 11, 2020 and noted exophoria which he testified was consistent with post-concussion.
>
> [51] While the late onset of symptoms is not typical for a brain injury, I am satisfied that Mr. Pratt suffered a mild traumatic brain injury in this accident. I base that finding on all of the evidence, particularly the opinion of Dr. Robinson and the finding of Dr. Robertson. An expert witness in neurology was not called by the Defendants. Mr. Pratt would not have suffered the mild traumatic brain injury but for the negligence of the Defendants.

[67] Dr. Robertson, in giving his evidence, was referred to a letter which he wrote to Dr. Masoumi after seeing Mr. Pratt on October 11, 2018:

> Q. All right. And can you describe what your observations were that you made of Mr. Pratt on October 11th, 2018 when you saw him?
>
> A. Yeah, so we ... we saw him, and he ... he had, you know, reduced reading vision, which can be typical due to getting older, unfortunately, and it ... and he also had some ... some alignment issues which can ... which can be consistent with having a concussion.
>
> Q. Okay. And I see the term "exophoria" here. Can you explain what that term means, please?
>
> A. An exophoria is dealing with the alignment. Usually when we ... when we look out in the distance, our two eyes will diverge or turn out. When we look up close, they converge or turn in. And his ability for his eyes to turn in was weaker for somebody ... compared to somebody his age, which can be something you can see after a concussion.

[…]

Q. All right. And do you indicate anywhere in your chart notes that Mr. Pratt sustained a concussion?

A. I ... I say he had some symptoms that were consistent with a concussion.

Q. I see. But did you ever tell Mr. Pratt in that interview or, sorry, in that appointment with him in October 2018, did you ever tell him or anyone else that he sustained a concussion?

A. No.

[68] Again, I am at a loss to see what the appellant finds objectionable. The only reliance placed by the trial judge on Dr. Robertson's evidence was his reference to exophoria, which he said was consistent with a concussion—something he had noted in his notes as well as in his letter to Dr. Masoumi.

[69] Further, a court can rely on the oral testimony given by witnesses to assist in explaining their treatment records, so long as it relates to a fact, finding, or treatment that is summarized in their records. The former version of *Civil Procedure Rule* 55.14(5), which was in effect at the time of Mr. Pratt's trial, did not restrict the trial judge solely to the exhibit when assessing the evidence of Dr. Masoumi or Dr. Robertson. *Rule* 55.14(5), as it then was, stated:

> "(5) A party who calls a treating physician at a trial, or presents the affidavit of a treating physician on an application, may not advance evidence from the physician about a fact, finding, or treatment not summarized in a narrative or covered in an expert's report."

[70] The former version of *Rule* 55.14(5) simply prohibited a treating physician from advancing evidence about a fact, finding, or treatment not summarized or covered in a narrative. So long as the finding is contained within a narrative, a party may advance evidence on it from the treating physician. This would include an explanation of evidence contained within a narrative. Therefore, even if I could identify the source of the appellants' complaint, the trial judge was not restricted solely to the trial exhibit when assessing the evidence of Dr. Masoumi or Dr. Robertson.

[71] The appellants' argument on this point fails.

[72] The appellants' second argument under this ground of appeal is the trial judge failed to distinguish *Smith v. Doucette*, 2006 NSSC 67, a case they relied on

to support their position on general damages at trial. The general damages awarded to Mr. Pratt were almost double the amount awarded in that case.

[73] The trial judge was entitled to make her own assessment of damages based on the evidence before her. The fact that the trial judge's award is higher than the one in *Doucette* does not necessarily mean it is inordinately high compared to awards given in other cases. Although the trial judge did not distinguish *Doucette* in her reasons, it is clear she considered the case in assessing damages. She acknowledged the appellants had "provided one case with general damages in the amount of $34,000" (¶71). The trial judge was not required to explicitly distinguish *Doucette*, nor was she required to assess damages based on that case.

[74] In *Doucette*, the plaintiff's primary issues were neck pain, tension headaches, and numbness in her chest and collar bone. There was no indication she suffered from dizzy spells, personality changes, or memory loss, and no findings were made attributing the headaches to her concussion. The judge in *Doucette* did not comment on the plaintiff's prognosis and recovery with respect to her concussion. Mr. Pratt testified he continued to suffer from ongoing symptoms of dizzy spells, headaches, and memory loss at the time of trial. The trial judge found his prognosis for recovery was poor (¶66).

[75] The trial judge was aware of the decision in *Doucette* and it is apparent from her award she considered the concussion sustained by Mr. Pratt was obviously more serious than the concussion sustained by the plaintiff in *Doucette*.

[76] I am not satisfied the trial judge erred in either failing to distinguish *Doucette* or by not following it.

[77] Thirdly, the appellants argue that the damages are excessive because when capped and non-capped injuries are stacked the global award cannot exceed the maximum of the *Smith v. Stubbert* range.

[78] The appellants' novel argument on this point is as follows:

> 155. The bulk of the Plaintiff's injuries were "capped", yet the trial judge's general damages award in total goes beyond what she defined as a "high end" award under *Smith v. Stubbert*. Put another way, it is an error to make a general damages award **beyond** the "high end" of *Smith v. Stubbert*, but $63,486 is just that. This defeats the purpose of the Minor Injury Cap: rather than limiting general damages, the "cap" is adding to

> them, taking the total outside the range at common law. [Emphasis in original.]

[79] The appellants' argument is contrary to the approach mandated by ss. 9 and 14(2) of the *Regulations*, which requires injuries to be assessed separately and prescribes how damages are awarded by stacking capped and non-capped injuries. To limit the assessment of the non-capped injuries to fit the total damage award within the *Smith v. Stubbert* range would prevent the court from assessing the capped and non-capped injuries separately and would create an arbitrary cap on the court's general damages assessment.

[80] I will have more to say later about *Smith v. Stubbert* and its applicability to concussion injuries.

[81] In conclusion, I am not satisfied that the $55,000.00 general damages awarded for the non-capped injuries is so inordinately high that we ought to intervene. I would dismiss this ground of appeal.

Issue 4: Did the trial judge err in applying Smith v. Stubbert when assessing damages for Mr. Pratt's concussion?
Standard of Review

[82] Once again, there are two potential standards of review with respect to this ground of appeal. If *Smith v. Stubbert* was intended to be confined to cases involving soft tissue injuries and associated sequelae, then to apply it to assess damages for a concussion would be an error of law and reviewable on a correctness standard.

[83] If it does apply to concussion-type injuries, deference is owed to the trial judge's assessment of damages.

Analysis

[84] The trial judge's reliance on *Smith v. Stubbert* is set out in one paragraph of her decision:

> [75] I find that Mr. Pratt's injuries were "persistently troubling but not totally disabling" (*Smith v. Stubbert*, *supra*) prior to his January 2019 accident. Mr. Pratt still suffers the effects of this accident in his post-concussion syndrome. This has had a significant impact on his life, both professional and personal. While *Smith v. Stubbert* related to soft tissue injuries the range has been used for other types of

> injuries (for example: *Mawdsley v. McCarthy's Towing & Recovery Ltd*, 2010 NSSC 168 and *Tibbetts v Murphy*, 2017 NSCA 35). I find that Mr. Pratt's injuries are at the high end of the *Smith v. Stubbert*, *supra*, range and award him $55,000 in general damages.

[85] In *Smith v. Stubbert*, the plaintiff suffered a cervical neck sprain and some general bruising of the spine. The Court of Appeal assessed the plaintiff's general damages, reducing the trial award of $100,000 to $40,000. In reaching its decision, the Court reviewed relevant authorities and established a range for persistently troubling but not totally disabling soft tissue injuries. The Court held that, based on the authorities reviewed, the range for such injuries was $18,000 to $40,000.

[86] A review of the authorities cited in *Smith v. Stubbert* reveals they all involve cases where the plaintiff suffered soft tissue injuries with persistent pain. Some of the cases cited involve psychological injuries as well. Importantly, none of the cases cited by the Court in *Smith v. Stubbert* involved plaintiffs who sustained concussions (or even fractures).

[87] *Smith v. Stubbert* was intended to be confined to cases involving soft tissue injuries, which can include chronic pain and psychological injuries. The range was not intended for concussions, even if those injuries are not totally disabling.

[88] The trial judge referred to *Mawdsley v. McCarthy's Towing and Recovery Ltd.*, 2010 NSSC 168, to support her conclusion *Smith v. Stubbert* was applicable to concussions.

[89] With respect, *Mawdsley* does not support the trial judge's approach. In *Mawdsley*, the plaintiff sustained multiple injuries to his shoulders, neck, back, jaw, and mild brain trauma in an accident where his head and upper body were crushed between two trucks. At the time of trial, the plaintiff had regained much of his pre-injury function, with the exception of lifting heavy objects.

[90] In assessing damages, Bryson J. (as he then was) addressed the plaintiff's brain injury separately from his other physical injuries. He found that the plaintiff's physical injuries alone placed him at the higher end of the *Smith v. Stubbert* range (in 2010, the range was $24,979.59 to $55,510.20):

> [66] The seminal decision in Nova Scotia dealing with injuries which are "persistently troubling but not totally disabling" is *Smith v. Stubbert*, 1992 N.S.J. No. 532. In *Stubbert*, the Court of Appeal established a "range" of general damages in such cases of $18 - $40,000. This court considered the *Stubbert* range

> of damages in *Merrick v. Guilbeault*, 2009 NSSC 60. LeBlanc, J. "updated" the *Stubbert* range for inflation to $27,000.00 to $54,000.00. In that case, an award of $45,000.00 was made, increased to $52,000.00 by way of aggravation for an unprovoked and brutal assault. *Stubbert* can be contrasted with the approach of Justice Moir in *Marinelli et al v. Kiegen*, 1998 N.S.J. No. 155, aff'd 1999 N.S.J. No. 23 (C.A.), in which the Court found that the plaintiff's enjoyment of life had been "substantially if not totally curtailed." In *Marinelli*, the plaintiff suffered severe whiplash injuries in a motor vehicle accident. She developed chronic pain which prevented her from working as a registered nurse. She could only do light housework in slow stages. She was awarded $80,000.00 (approximately $100,000.00 in 2009). In addition to these cases, the plaintiff has cited *Dillon v. Kelly*, 1996 N.S.J. No. 143, as well as other cases involving brain trauma. In my view, both *Marinelli* and *Dillon* involved physical injuries that had a greater impact on the plaintiffs' life and capacity to enjoy life than is disclosed in this case. ***Mr. Mawdsley's physical injuries alone, what he has endured, what he is left with and the challenges going forward, place him at the higher range of Stubbert.*** [Emphasis added.]

[91] Bryson J. then went on to consider the evidence of the plaintiff's brain injury. He ultimately awarded the plaintiff $100,000 in non-pecuniary general damages. In making this award, he explicitly acknowledged that he was considering both the plaintiff's physical injuries and mild brain trauma:

> [88] Notwithstanding the unsatisfactory nature of some of the evidence on this point, but taking all the evidence into account, I accept that Mr. Mawdsley has sustained some mild but permanent brain trauma from his accident.
>
> [89] I accept the evidence of Mr. Mawdsley and his mother that his memory and concentration impairment post-dated the accident, did not have other potential causes and most probably arose from the accident.

[92] Bryson J. did not assess both types of injuries under the *Smith v. Stubbert* range.

[93] In *Hayward v. Young*, 2013 NSCA 64, Saunders J. approved the approach taken by Bryson J. in *Mawdsley*:

> [55] I agree with Mr. Chipman, counsel for the defendant, when he said that establishing a claimant's soft tissue injuries as falling within the **Smith v. Stubbert** range does not constitute a "free pass" to greater damages for lost future income or diminished earning capacity. ***Such additional claims must be pleaded and quantified and proved to a civil standard in accordance with this Court's longstanding jurisprudence*** (see for example, **Leddicote v. Nova Scotia (Attorney General)**, 2002 NSCA 47).

> [56] ***That was precisely the approach taken by Justice Bryson in Mawdsley, supra which Robertson J. cited and distinguished from Mr. Hayward's circumstances***. [Emphasis added.]

[94] Any contrary interpretation would contradict the approach taken in *Mawdsley* and approved by this Court in *Hayward*. It would create ambiguity and inconsistency by expanding the *Smith v. Stubbert* range into a universal standard for all persistently troubling, non-totally disabling injuries in personal injury cases. Such an application deviates from the intended purpose of the range.

[95] The trial judge's reliance on *Mawdsley* in support of her decision to assess damages for Mr. Pratt's rib fractures and mild traumatic brain injury under the *Smith v. Stubbert* range was in error. Under a proper application of *Mawdsley*, *Smith v. Stubbert* should not have been used to assess damages for Mr. Pratt's concussion.

[96] Having found that *Smith v. Stubbert* is not the appropriate benchmark for determining general damages for the non-capped injuries, what is the appropriate amount of damages to be awarded in this case?

[97] The respondent has referred to a number of cases where general damages were awarded for concussions. The injuries in all of the cases cited were more serious than Mr. Pratt's and, therefore, are not helpful.

[98] Some parallels can be drawn between this case and *Mawdsley*. In *Mawdsley*, Bryson J. found that the soft tissues and other injuries would be at the upper range of *Smith v. Stubbert*. At that time, the upper range was approximately $55,000. He awarded general damages of $100,000, which suggests he considered the general damages award for the concussion to be in the range of $45,000.

[99] In *Mawdsley*, the plaintiff was found to have a mild brain trauma similar to the diagnosis for Mr. Pratt. The trial judge here found that Mr. Pratt still suffers the effects of the accident and has post-concussion syndrome which has a significant impact on his life both professionally and personally (¶71).

[100] Keeping in mind the similarities between the two cases and the fact that *Mawdsley* was determined eleven years before the trial in this matter, I find the appropriate amount of damages for Mr. Pratt's non-capped injuries (including his rib injury) is $70,000.00. This reflects an increase of $15,000.00 over the amount awarded by the trial judge.

[101] The $15,000 increase shall have interest at 2.5% for 75 months ($2,343.75) for a total of $17,343.75.

[102] I would allow this ground of the cross-appeal.

Issue 5: Did the trial judge err in determining Mr. Pratt's left knee injury did not result in a serious impairment?

[103] Mr. Pratt argues that the trial judge erred in her interpretation or application of the *Minor Injury Regulations* with respect to his left knee injury.

Standard of Review

[104] The trial judge's application and interpretation of the *Insurance Act* and *Regulations* are reviewable on a standard of correctness.

Analysis

[105] Section 113E of the *Insurance Act* provides the following:

> **Accident claims**
>
> […]
>
> (d) "minor injury", with respect to an accident, means
>
> (i) a sprain,
>
> (ii) a strain, or
>
> (iii) a whiplash-associated disorder injury,
>
> caused by that accident that does not result in a serious impairment.

[106] The applicable *Regulations* are:

> **8** **(1)** In this Part, "minor injury amount" means the total amount recoverable under Section 13 as damages for non-monetary loss for all minor injuries suffered by a claimant as a result of an accident.
>
> […]
>
> **11** **(1)** The determination as to whether an injury suffered by a claimant as a result of an accident is or is not a minor injury must be based on the following:
>
> (a) a determination as to whether the injury is a sprain, strain or whiplash-associated disorder injury; and

(b) if the injury is determined to be a sprain, strain or whiplash-associated disorder injury, a determination as to whether the sprain, strain or whiplash-associated disorder injury results in a serious impairment.

(1A) For the purpose of clause (1)(a), the determination as to whether an injury is a sprain, strain or whiplash-associated disorder injury must be based on an individual assessment of the claimant in accordance with the *Automobile Accident Diagnostic and Treatment Protocols Regulations* made under the Act.

(2) For the purpose of clause (1)(b), the determination as to whether a sprain, strain or whiplash-associated disorder injury results in a serious impairment must take all of the following into account

(a) the claimant's pre-existing medical history;

(b) the matters referred to in subclause (i) of the definition of "serious impairment" in subsection 8(2) that relate to the claimant.

[…]

8 **(2)** In Section 113E of the Act and this Part,

"serious impairment", in respect of a claimant, means an impairment of a physical or cognitive function that meets all of the following:

(i) the impairment results in a substantial inability to perform any or all of the following:

(A) the essential tasks of the claimant's regular employment, occupation or profession, despite reasonable efforts to accommodate the claimant's impairment and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's employment, occupation or profession,

(B) the essential tasks of the claimant's training or education in a program or course that the claimant was enrolled in or had been accepted for enrolment in at the time of the accident, despite reasonable efforts to accommodate the claimant's impairment and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's training or education,

(C) the normal activities of the claimant's daily living,

(ii) the impairment has been ongoing since the accident, and

> (iii) the impairment is expected not to improve substantially,
>
> […]
>
> **9** If a claimant suffers more than one injury as a result of an accident, each injury must be assessed separately to determine whether the injury is or is not a minor injury.

[107] With respect to Mr. Pratt's left knee injuries, the trial judge instructed herself as to how she was to approach her analysis. First, she had to determine whether the injury was a minor injury and then, second, determine whether that injury was a serious impairment as defined in the *Regulations*.

[108] Section 11(1)(A) of the *Regulations* requires the first stage of this inquiry be based on an individual assessment of the claimant, applying the *Automobile Accident Diagnostic and Treatment Protocols Regulations*, N.S. Reg. 20/2013.

[109] The trial judge identified this as the first step in her analysis:

> [63] Mr. Pratt's LCL and ACL in his left knee were torn. On first consideration, there would appear to be significant and serious injuries to his left knee. However, the determination of a minor injury under s. 11 of the regulations requires the use of the *Automobile Accident Diagnostic and Treatment Protocols Regulations*, N.S. Reg. 20/2013. Section 10(3) of those regulations include "all fibres of ligament torn" in […] defining the degree of sprain as a third-degree sprain. Therefore, the tearing of Mr. Pratt's LCL and ACL are categorized as a sprain. Having found the ligament tears to be a sprain, I have to consider under the minor injury cap regulations whether the sprain results in a serious impairment (s. 11(1)).

[110] Having found that the ligament tears were a sprain, she then proceeded to consider whether it resulted in a serious impairment. After setting out the definition of a serious impairment, as I have done above, she concluded:

> [65] Mr. Pratt started the electrician course at NSCC a month after this accident and he completed the course. Mr. Pratt returned to his regular employment in the fall of 2018 and worked for about a month in August to September 2018. Mr. Pratt was able to perform the activities of his daily living. I cannot find that the left knee injury resulted in a substantial inability to perform the essential tasks of his regular employment, the essential tasks of his education program or the normal activities of his daily living. Therefore, I cannot find that the left knee injury resulted in a serious impairment as defined in s. 113E of the *Regulations*.

[111] Mr. Pratt does not take issue with the trial judge's finding that his knee injury was categorized as a sprain under the *Diagnostic and Treatment Protocols*. His issue is with the trial judge's finding that it did not result in a serious impairment.

[112] Mr. Pratt's complaint, in essence, is that the trial judge should have concluded, on the evidence before her, that his left knee injury resulted in a substantial inability to perform:

1. the essential tasks of his regular employment;
2. the essential tasks of his education program; or
3. the normal activities of his daily living.

[113] The trial judge's conclusions were supported by the evidence and the factual determinations she made. In particular, Mr. Pratt was able to return to his previous employment at AFD, and was able to complete an electrician course at NSCC, albeit with accommodation. He was also able to perform the essential tasks of his regular employment at AFD until he suffered a work-related injury in 2019.

[114] I see no error in the trial judge's interpretation of the *Regulations* or her application of them. I would dismiss this ground of appeal.

Issue 6: Did the trial judge err in law by placing the onus on the defendant to prove the application of minor injury cap Regulations to Mr. Pratt's injuries?

Standard of Review

[115] The determination of the burden of proof is a question of law and is reviewable on a correctness standard.

Analysis

[116] For some unknown reason, the trial judge embarked on an analysis of who bore the onus to prove Mr. Pratt's injuries fell under the minor injury cap. This was not raised by any party at trial nor on the particular facts of this case was it an issue. Nor, at the end of the day, did it make any difference to the judge's analysis.

[117] The trial judge found it was the defendant who asserted and relied on the minor injury cap and, therefore, they had the onus of showing that Mr. Pratt's injuries fell within the cap:

> [60] It is the Defendants who assert and rely on the minor injury cap under s. 113E of the *Act*, not the Plaintiff. I therefore find that the ordinary common law rule or principle applies. The onus is on the Defendants to prove, on a balance of probabilities, that the Plaintiff's injuries fall under the minor injury cap.

[118] Immediately preceding this paragraph, the trial judge, correctly, in my view, stated the law:

> [59] Is this a case where the subject matter of the allegation lies particularly within the knowledge of one party? The Plaintiff bears the burden of proving the extent of his injuries and damages. […]

[119] The plaintiff always bears the burden of proving the nature and extent of their injuries. Whether the injuries fall within the cap is a determination to be made by a trial judge based on all of the evidence led at trial by any party about the plaintiff's injuries. Mr. Pratt's position, as stated by his counsel in response to a question at the appeal hearing, was if the plaintiff puts in their evidence, and the defendant declines to offer any evidence, the trial judge would have to conclude the cap did not apply. That is not the law.

[120] In finding that the onus of proof shifted to the defendant, the trial judge relied on the legislative debates when the *Regulations* were amended. The previous version of the minor injury cap *Regulations* explicitly stated that the plaintiff bears the onus of proving their injuries were not minor injuries.

[121] The present minor injury cap *Regulations* do not contain such a provision. Section 113E(7)(g) provides that the Governor in Council may make *Regulations* "respecting the onus of proof relating to minor injuries". No such *Regulation* has been made.

[122] In the legislative debates relating to the amendment, when referring to the removal of the explicit reference to the onus of proof, it was stated "it is the intention of the government that ordinary common-law rules respecting onus should apply".

[123] The trial judge relied on those debates and this Court's decision in *MacNeil v. Kajetanowicz*, 2019 NSCA 35 to conclude the ordinary common law rules respecting onus of proof would place the onus on the defendant. In her decision she said:

[57] Legislative debates and speeches can be used to determine the background, context, and purpose of legislation (*R. v. Morgentaler*, [1993] 3 S.C.R. 463). When the *Act* was amended in 2010, the removal of explicit reference to the burden of proof was referred to in the Nova Scotia Legislative Assembly, *Debates*, 30 April 2010, at 1727:

> We also propose to remove explicit reference to the burden of proof from the regulations. The 2003 regulations put the burden of proof on the plaintiff. By removing this provision from the regulations, ***it is the intention of the government that ordinary common-law rules respecting onus should apply***.

The Legislature removed the provision placing the burden of proof on the injured person and expressed the intention that "the ordinary common-law rules respecting onus should apply." ***The ordinary rules respecting the burden or onus are set out by Fichaud J.A. in MacNeil v. Kajetanowicz, 2019 NSCA 35***:

> [47] In *Snell v. Farrell*, [1990] 2 S.C.R. 311, at p. 321, Justice Sopinka for the Court stated two principles for assigning the legal burden of proof:
>
> > ... The legal or ultimate burden of proof is determined by the substantive law "upon broad reasons of experience and fairness": 9 Wigmore on Evidence, # 2486, at p. 292. In a civil case, the two broad principles are:
> >
> > > 1. that the onus is on the party who asserts a proposition, usually the plaintiff;
> > >
> > > 2. ***that where the subject matter of the allegation lies particularly within the knowledge of one party, that party may be required to prove it***.
>
> This remains the test: e.g., see *Braile v. Calgary Police Service*, 2018 ABCA 109, para. 23.

[58] It is the Defendants who assert that the Plaintiff's injuries fall under the minor injuries cap. The ordinary common law rule, as set out in *MacNeil* and *Snell*, *supra*, would place the burden on the Defendants (principle 1 in *Snell*). The former s. 6 of the *Regulations* contained a reverse onus by requiring the Plaintiff to prove that the injury was not a minor injury. [Emphasis added.]

[124] The trial judge then concludes:

> [59] ***Is this a case where the subject matter of the allegation lies particularly within the knowledge of one party?*** The Plaintiff bears the burden of proving the extent of his injuries and damages. The question is whether the Plaintiff has particular knowledge of whether his injuries fall under the minor injuries cap? He does not. Placing the onus on the injured party or Plaintiff puts him in a position to prove a negative – that his injuries do not fall under the cap. The Defendants

> have been provided with all of the medical records of the Plaintiff. The Defendants can have an independent medical assessment of the Plaintiff. ***Therefore, I do not find that the subject matter of the minor injury cap lies particularly within the knowledge of the Plaintiff, requiring him to prove that his injuries are not minor injuries.*** [Emphasis added.]

[125] First, I would point out the trial judge mischaracterized the subject matter as the minor injury cap. The subject matter is the nature and extent of the plaintiff's injuries, not the minor injury cap. Further, the trial judge relied on the second principle in *Snell v. Farrell*, [1990] 2 S.C.R. 311 in finding the onus rests on the defendant. *MacNeil* was not decided on the second principle in *Snell*. Fichaud J.A. found that the burden turned on the first principle:

> [49] Here the assignment of the burden turns on Sopinka J.'s first principle. Who asserted the proposition? The fault of the Settling Defendants, particularly the IWK, was in play from two perspectives. The first related to Dr. Kajetanowicz's liability, before any consideration of *Pierringer* apportionment. The second, if he was liable, involved the apportionment of responsibility given the *Pierringer* Agreement. I will discuss them separately.

[126] A *Pierringer* Agreement is an agreement whereby the plaintiff's claim is settled with one or more defendants and leaves the remaining defendants responsible only for its proportionate share, if any, of the plaintiff's loss. If any of the remaining defendants are negligent, the trier of fact must apportion any fault between the remaining and settling defendants. The issue in that case was whether the plaintiff, having settled with some defendants, was required to prove negligence on the part of those settling defendants for the purpose of proving liability and apportionment against the non-settling defendant.

[127] In that case, a doctor asserted that the IWK was negligent. This Court concluded:

> [54] *Snell's* first principle is "the onus is on the party who asserts a proposition". For the IWK's alleged failures, insofar as they supported Dr. Kajetanowicz's defence to liability, the asserting party was Dr. Kajetanowicz.

[128] In this case, the asserting party is Mr. Pratt. *Snell's* first principle applies.

[129] This Court returned to the question of the onus of proof in *Pettigrew v. Halifax Regional Water Commission*, 2020 NSCA 82. In *Pettigrew*, the appellants' houses suffered sewage backup following trenching on the storm water system

done by the Halifax Regional Water Commission, during which the Commission's equipment damaged the appellants' sewer laterals.

[130] The *Halifax Regional Water Commission Act*, S.N.S 2007, c. 55 limited the Commission's liability as follows:

> **Exemption from liability re negligence**
>
> 26 The Commission, its officers and employees, are not liable for damages caused
>
> (a) directly or indirectly by
>
> (i) the design, construction, operation, maintenance, repair, breaking or malfunction of wastewater facilities, a stormwater system or a water system, or
>
> (ii) interference with the supply of water through a water system,
>
> unless the damages are shown to be caused by the gross negligence of the Commission or its officers or employees; […]

[131] The appellants were unable to identify specific failures on the part of the Commission. They argued that if a loss could not have happened without negligence and the cause of the loss was entirely within the defendant's control the burden shifts to the defendant to disprove gross negligence.

[132] Justice Fichaud, again writing for the Court, found that the first principle in *Snell* applied:

> [21] In this Court, Ms. Pettigrew and Ms. Poole rely on *Snell v. Farrell*, [1990] 2 S.C.R. 311. Justice Sopinka for the Court said (page 321):
>
> … In a civil case, the two broad principles are:
>
> 1. that the onus is on the party who asserts a proposition, usually the plaintiff;
>
> 2. that where the subject matter of the allegation lies particularly within the knowledge of one party, that party may be required to prove it.
>
> [22] Ms. Pettigrew and Ms. Poole submit that the evidence respecting causation of their sewer backups lies entirely within Halifax Water's knowledge and Halifax Water should have the burden to disprove gross negligence.
>
> [23] I respectfully disagree.
>
> [24] In *Snell*, Justice Sopinka said there were two broad principles.

> [25] The first is that the party who asserts should prove. Ms. Pettigrew and Ms. Poole assert.
>
> [26] The second is that where the subject matter lies within the knowledge of one party, that party may have the onus. For a negligence claim, the second principle formerly took the form of *res ipsa loquitur*. In *Fontaine*, issued eight years after *Snell*, the Supreme Court held *res ipsa loquitur* did not shift the legal burden of proof to the defendant. *Fontaine* is the governing precedent on the former principle of *res ipsa loquitur* in negligence claims.
>
> [27] In *Johansson v. General Motors of Canada Ltd.*, 2012 NSCA 120, paras 61–74, this Court discussed the effect of *Fontaine*. I incorporate the detailed analysis from *Johansson*.

[133] It is Mr. Pratt who asserts his injuries fall outside the statutory mandated cap; the onus is on him to prove the nature and extent of his injuries are not capped.

[134] This issue arose before Chipman J. in *Gibson v. Julian*, 2016 NSSC 15. He found that despite the removal of the provision that placed the onus on the injured person, the onus remained on the injured person:

> [78] Absent specific reverse onus wording from the Legislature, I am not prepared to accept that it is for a defendant to marshal evidence to, in effect, prove a negative. Rather, it is my determination that when it comes to the New Cap the standard remains the same. That is to say, she who asserts must prove (on a balance of probabilities).

[135] Robertson J. came to the same conclusion in *Warnell v. Cumby*, 2017 NSSC 88.

[136] I agree with both Chipman J. and Robertson J.—absent specific wording or a clear legislative intent to reverse the onus of proof in a personal injury claim, the onus remains with the plaintiff.

[137] This was more of an academic exercise than it was a practical one. The only circumstance where the onus would bite is in the unlikely event the evidence is so evenly balanced that a determination cannot be made whether it falls within the cap or not. In those circumstances, the plaintiff's assertion their injuries fall outside the cap would fail.

[138] I would allow this ground of appeal.

Conclusion

[139] I would allow the appellants' appeal in part and find the plaintiff bears the onus of proving that his injuries fall outside the minor injury cap.

[140] I would dismiss all other grounds of appeal.

[141] I would allow the cross-appellant's appeal and find that *Smith v. Stubbert* does not apply to the assessment of damages for concussions. I would increase the general damages award by $15,000, with interest at 2.5 percent for 75 months ($2,343.75) for a total of $17,343.75.

[142] I would dismiss all other grounds of the cross-appeal.

[143] I would award costs of $5,000.00 to the cross-appellants, inclusive of disbursements.

Farrar J.A.

Concurred in:

Bryson J.A.

Van den Eynden J.A.