

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: French v. Hodge, 2005 NSSC 44

Date: 20050225

Docket: SH 171237

Registry: Halifax

Between:

Robin Kevin French and Judith Ann Zinck

Plaintiffs

v.

Gregory Allen Hodge

Defendant

Judge: The Honourable Justice Arthur W.D. Pickup

Heard: January 17 to 26, 2005, in Halifax, Nova Scotia

Final Written Submissions: February 4, 2005 - Jamie Chipman
February 16, 2005 - Peter Rumscheidt

Written Decision: February 25, 2005

Counsel: Peter Rumscheidt and Martha Mann, for the plaintiff
Jamie Chipman and Mark Gorbet (Article Clerk), for the defendant

Pickup J.:

[1] On December 24th, 1999, the Plaintiffs, Robin Kevin Maxwell French and Judith Ann Zinck, and their four children were proceeding in the family automobile south on Brigadoon Avenue in Dartmouth, Nova Scotia. The Defendant, Gregory Allen Hodge was driving his father's 1993 Ford Tempo north on the same street in the opposite direction. As Mr. French passed the intersection of Brigadoon and Charlotte Street, he noticed the Defendant's vehicle. Just past the intersection the cars collided. The Plaintiffs, Robin French and Judith Zinck were injured and have brought this action claiming damages against the Defendant, Gregory Hodge. The Defendant, Hodge, claims that the Plaintiffs were contributorily negligent.

[2] Issues:

1. Was there any contributory negligence by Mr. French with respect to the accident or did Mr. Hodge's actions alone cause the accident?
2. What damages should be awarded to Mr. French.
3. What damages should be awarded to Ms. Zinck.

Issue #1 - Was there any contributory negligence by Mr. French with respect to the accident or did Mr. Hodge's actions alone cause the accident?

[3] The Plaintiff French has the onus of proving on a balance of probabilities that Hodge owed him a duty of care; that Hodge breached the requisite standard of care; and that Hodge's conduct was the proximate cause of the injuries to Mr. French and Ms. Zinck.

[4] Under s. 100(1) of the *Nova Scotia Motor Vehicle Act* R.S.N.S., 1989, c. 293, every person driving a motor vehicle on a highway shall drive in a careful and prudent manner having regard to all the circumstances.

[5] Further, s. 110(1) provides that on all highways of sufficient width, except upon one-way streets, the driver of a vehicle shall drive on the right side of the highway.

[6] The Defendant, Mr. Hodge, in his post-trial submission acknowledges that Mr. Hodge owed a duty of care to Mr. French; that Mr. Hodge did not meet the requisite standard of care; and that the accident was the proximate cause of certain injuries sustained by the plaintiff.

[7] However, the Defendant, Hodge, submits that Mr. French was contributorily negligent for failing to operate his vehicle in a careful and prudent manner and for failing to notice Mr. Hodge's vehicle, and that the totality of the evidence does not present any clear and accurate basis for a precise

determination as to liability for either party. Accordingly, Mr. Hodge submits that Mr. French has failed to prove on a balance of probabilities that Mr. Hodge was the sole cause of the accident.

[8] With respect, upon a review of all of the evidence I have come to the opposite conclusion.

ROBIN FRENCH

[9] Mr. French testified that as he passed the intersection of Brigadoon and Charlotte Street he noticed the Defendant's tan-coloured vehicle. He testified there was no left turning signal visible. He testified that just past the intersection Mr. Hodge turned his vehicle into the path of his vehicle and hit it on its left side. The speed limit on the road is 50 kilometres per hour. Mr. French estimates that he was "just getting up to target speed" presumably meaning he was driving at close to the posted speed limit. He further testified he had no warning of the Defendant's action and had no opportunity to take evasive action and that he was, at the time of impact, completely within his lane of travel.

JUDITH ZINCK

[10] Ms. Zinck testified that she recalled Mr. French turning on to Brigadoon Avenue and said he was not driving at an excessive rate of speed. She testified that Mr. French was not speeding because things weren't "zipping by". The trip that day was described by Ms. Zinck as "a nice leisurely drive on a Christmas eve day". Ms. Zinck testified she did not notice a turn signal on the Hodge vehicle.

GREGORY HODGE

[11] Mr. Hodge was on his way to pick up his brother at a residence just off of Charlotte Street. His last recollection is slowing down at Brigadoon Avenue to prepare to turn left onto Charlotte Street. Mr. Hodge testified that he had no recall if his signal light was on or not but that it was his "common practice" to signal a turn. Mr. Hodge had no recollection of seeing the French vehicle and testified that at the time of impact he had slowed down and was preparing to turn left on Brigadoon, and that is the last that he remembers.

JEFFREY CHARLES LALANNE

- [12] Mr. Lalanne is a teacher who was visiting his sister who lived in Dartmouth. He was jogging on Brigadoon Avenue at the time of the accident. He was running northbound on the sidewalk in the same direction as Mr. Hodge's vehicle. He had an unobstructed view of the accident scene. He recalls a vehicle passing him travelling northbound towards Charlotte. He could not make any comment as to the speed of the vehicle. The vehicle which passed Mr. Lalanne was the Hodge vehicle.
- [13] He recalls the Hodge vehicle turning in on the French vehicle. In his words "I observed the car that had just passed me turn left into the path of an oncoming car".
- [14] Responding on direct to a question as to where on the road the Plaintiff vehicle was situate, Mr. Lalanne responded, "Oh, it's in its lane coming towards me". While Mr. Lalanne on cross-examination agreed he did not see the station wagon, owned by Mr. French, until the impact, upon further questioning he suggested, "I didn't observe the station wagon to be, even though there are no lines on the road, to be disoriented as far as where we would assume it to be." I accept Mr. Lalanne's testimony to be that the French vehicle was on its own side of the road at the time of impact. Mr. Lalanne was clear in his recollection of noticing a left turning motion being undertaken by the Hodge vehicle at the time of the impact.
- [15] I accept the evidence of Mr. French and Ms. Zinck and Mr. Lalanne as to the circumstances of the accident. Mr. Lalanne testified that he saw the Hodge vehicle turn towards the French vehicle. The evidence of Mr. Lalanne is consistent with that of Mr. French. Mr. Hodge has no recollection of the accident other than he was turning left onto Charlotte Street and had slowed down to make his turn. The next thing he remembered was the impact. I am satisfied on the evidence that there was no contributory negligence on the part of Mr. French and that Mr. Hodge's actions were the sole cause of the accident. I find as a fact that this accident occurred because Mr. Hodge turned his vehicle left into the path of Mr. French's oncoming vehicle. The evidence of Mr. French, Ms. Zinck and Mr. Lalanne was that the French vehicle was proceeding straight and it was entirely within its lane of travel. Mr. Hodge himself confirms it was his intention to make a left hand turn from Brigadoon onto Charlotte and this is consistent with the evidence of Mr. Lalanne, that the Hodge vehicle made a left turn in towards the French vehicle.

Issue #2 - What damages should be awarded to the plaintiff, Mr. French?

- [16] Mr. French is 40 years old. For the majority of his working life he performed a variety of labour type jobs, including working with a marine cargo surveyor between 1988 and 1993. His last employment appears to have been in a roof truss manufacturing business. He graduated in June of 1997 with a recreational vehicle mechanic's certificate from the Nova Scotia Institute of Technology.
- [17] From approximately 1993 until the December 1999 accident, Mr. French was not employed and was on social assistance.
- [18] Following the accident on December 24, 1999, Mr. French was transported to the Dartmouth General Hospital. X-rays revealed a fracture of the right ankle which was placed in a cast. Mr. French was then transferred to the Queen Elizabeth II Health Sciences Centre, where he remained until January 7, 2000. On December 26, 1999 Dr. David Petrie performed an open reduction internal fixation surgical procedure in an effort to reduce the fracture. The results of this initial procedure were not satisfactory and a second procedure was performed by Dr. Petrie and Dr. Ross Leighton, an orthopaedic surgeon, on January 3, 2000. During that operation a plate and screws were inserted into Mr. French's ankle. At the time of Mr. French's discharge, he was prescribed Tylenol 3 for the pain and was directed to be non-weight bearing.
- [19] The cast was removed from Mr. French's ankle on January 19, 2000 and replaced with a below the knee cast, which was removed on February 16, 2000. On February 26, 2000 Mr. French began physiotherapy at the Q.E. II which continued on a regular basis until September 7, 2000.
- [20] Following his discharge from physiotherapy at the hospital, Mr. French began a further regime of physiotherapy at Maritime Physiotherapy, which lasted from November 21, 2000 until February 14, 2001. This physiotherapy was followed by a round of massage therapy between February 16 and March 23, 2001. The focus of the physiotherapy and massage was to strengthen Mr. French's upper body, as he now had to place greater reliance on his upper body to assist him with mobility. In addition, Mr. French was given home exercises to perform, including weights, stretches and later a treadmill and weight machine. These exercises were done three or four times per week until March of 2003, when he began to do them once a week.
- [21] In a March 1, 2004 report Dr. Leighton summarized Mr. French's injuries as follows:

He had a nasty pilon fracture which required an open reduction internal fixation and a realignment of it because of the severe nature of the articular injury.

He has gone on to develop a post-traumatic osteoarthritis, as well as soft tissue injuries involving his neck and upper back as well as a soft tissue injury involving his lower back.

He has associated arthritis within the mid-foot area of his foot, secondary to the post-traumatic changes of his pilon fracture.

At this stage there is no particular treatment needed for him other than orthotics and a heel lift in the right shoe, a weight loss program and physiotherapy would help his back and upper back, as well as his neck and shoulder area, but it would do nothing for his foot.

The foot itself will probably require an ankle fusion some time in the future when the pain gets bad enough to warrant it.

In the meantime, he has a disability similar to an ankle fusion in that he has stiffness and pain which may be traded off for just stiffness sometime in the future.

PROGNOSIS: The prognosis for him in the future is very guarded. He was injured in 1999 and it is presently 2004 and really he still remains disabled as far as his previous work is concerned. He would require a sitting job, or sedentary job at best and would require retraining to get into this type of job.

- [22] As Dr. Leighton explains, in addition to the pilon fracture, Mr. French sustained soft tissue injuries, including injuries involving his neck and upper back, as well as soft tissue injury involving his lower back.
- [23] Mr. French testified that despite two surgeries, physiotherapy and diligently performed home exercises, he is left with a seriously disabled foot.
- [24] Medical evidence suggests ongoing worsening of the post-traumatic arthritis and it is possible that an ankle fusion may be required. The fusion would be expected to reduce the level of Mr. French's pain, but, it would also result in an elimination of mobility.
- [25] Mr. French described ongoing pain in his upper body, particularly his back, neck and shoulder regions. He testified that because of the ankle injury, he must rely on his upper body to get around, which appears to exacerbate the upper body pain.

- [26] Mr. French testified that he is more reliant on his left leg because of the injuries to his right and is now experiencing symptoms in his left leg and knee. He testified that his physical interaction with his children is limited because of the injuries and although he was previously very involved in all aspects of his children's day-to-day routine, he now finds himself unable to participate in some of the more physical activities, such as riding a bike, or flying a kite. He testified that he finds this upsetting.
- [27] Mr. French testified that before the accident he was an avid fisherman, enjoyed walks in the park with his children and activities such as playing catch. He testified that he cannot now take part in such activities, or if he can, his ability to do so is greatly diminished. He testified he cannot do outside chores as he did previously. For example, window washing and mowing are difficult, although in testimony Mr. French indicated he does do a "few passes" with the lawn mower and some grass trimming with a "whipper snipper".
- [28] He testified that doing inside work such as cleaning the upstairs bathroom is difficult because of his inability to move around. Prior to the accident Mr. French was diagnosed with panic attacks and anxiety disorder. Mr. French testified that his anxiety disorder has been significantly exacerbated because of the accident. Dr. Banks, Mr. French's family physician, is of the opinion that, but for the accident, the anxiety disorder would have improved to the point that it would no longer have prevented Mr. French from making efforts at returning to the workforce. Dr. Banks testified that he had minimal involvement with respect to the assessment and treatment of Mr. French's ankle fracture but was involved in the post-accident care of Mr. French with respect to the soft tissue injuries.
- [29] Dr. Banks testified that the soft tissue injuries were consistent with the nature of the car accident and consistent with the changes in gait and weight distribution as a result of the ankle fracture. Dr. Banks further confirmed his opinion that Mr. French would no longer be able to undertake activities such as lawn mowing and shovelling snow, and that other household activities would be rendered much more difficult.
- [30] Mr. French has a history of physical and psychological problems which pre-date the accident. In the early 90's, he was diagnosed with panic attacks and anxiety disorder, which continued up to the time of the accident. He was in a previous motor vehicle accident in July 1994, wherein he suffered soft tissue injuries to his neck. In addition, Mr. French had other medical

conditions prior to the accident which included gout, phlebitis, cellulitis and occasional lumbar back pain.

- [31] On cross-examination Mr. French conceded that his pre-accident injuries prevented him from working. In addition to the panic attacks and anxiety disorder, the gout, cellulitis and swelling in the foot and ankle on occasion caused him mobility problems. In fact, because of the lack of circulation and its effect on his mobility prior to the accident Mr. French occasionally used a cane. These conditions also affected his long distance walking and he had been prescribed arches for his shoes before the accident. Mr. French conceded that in the fall of 1997 he had trouble with his legs and agreed that during that time it would have affected his ability to walk and interact with his children in activities such as throwing a ball and visiting the park.
- [32] The Plaintiff claims general damages for pain and suffering in the amount of one hundred twenty five thousand (\$125,000.00). The Defendant suggests that the appropriate award would be in the range of forty-five thousand (\$45,000.00). I have been directed by counsel for the Plaintiff to the following cases:

Rhyno v. MacFarlane (2004) NSSC 123

Mader v. Lahey, [1997] N.S.J. No. 569

Campbell-MacIsaac v. Deveaux (2003), 214 N.S.R. (2d) 129

- [33] The Defendant's counsel has referred to the following cases:

Currie v. Stirling Fruit Farms Ltd. (2000), 185 N.S.R. (2d) 359 (S.C.)

Breau v. Amherst (Town) (1996) 155 N.S.R. (2d) 161 (S.C.)

MacIntyre v. Beaton (1994), 135 N.S.R. (2d) 11 (S.C.)

Scott v. Moore (1989), 89 N.S.R. (2d) 47 (S.C.)

Mills v. Bourgeois Estate (1995), 138 N.S.R. (2d) 296 (S.C.)

Baker v. O'Hanley (2001), 191 N.S.R. (2d) 179 (S.C.)

Leahy v. Day, 1999 Carswell NS 189 (S.C.)

Taylor v. Nice, 1999 Carswell NB 169 (N.B.Q.B.)

Smith v. Stubbart (1992), 117 N.S.R. (2d) 118 (C.A.)

Porter v. Langille (2001), 195 N.S.R. (2d) 11 (S.C.)

- [34] The Plaintiff quotes *Rhyno v. MacFarlane supra* and *Mader v. Lahey supra* in support of its claim for general damages in the amount of one hundred twenty-five thousand (\$125,000.00).
- [35] In *Rhyno* the Plaintiff suffered significant head injuries as well as physical injuries including a crushed femur, which required a plate, leg screws and cadaverous bone fragments to restore the crushed femur. In addition to the physical complaints, the Plaintiff in *Rhyno*, had difficulty with concentration, attention span and memory as a result of a head injury sustained in the same accident. Similarly in *Mader v. Lahey supra*, Justice Edwards found that Mr. Mader had sustained a brain injury as well as the physical injuries he complained of. Mr. French did not suffer any head injuries resulting from the accident as did Mr. Rhyno and Mr. Mader.
- [36] I have reviewed the remaining cases cited by the parties. I accept the evidence of Dr. Leighton and the evidence of Mr. French that he suffered a pilon fracture as well as a soft tissue injury which included his neck and upper and lower back. I have also considered that Mr. French has a significant history of physical and psychological problems which pre-date the accident, including the panic attacks and anxiety disorder as well as other medical conditions, including gout, phlebitis, cellulitis and occasional lumbar back pain.
- [37] I award for pain and suffering the sum of eighty-two thousand dollars (\$82,000.00). I award pre-judgment interest of 2.5% for the period December 24, 1999 to January 26, 2005 in the amount of ten thousand four hundred thirty-five dollars thirty-four cents (\$10,435.34) bringing the total award for general damages for Mr. French to ninety-two thousand four hundred thirty-five dollars and thirty-four cents (\$92,435.34).

LOSS OF INCOME CLAIM

- [38] Mr. French was employed from 1988 to 1993 on a part-time basis. Although he completed a recreational vehicle mechanic course in 1997, he has not worked in that field. From approximately 1993 until the date of the accident in 1999, Mr. French was unemployed. During this time, he suffered from anxiety and panic attacks and other physical ailments such as gout and cellulitis. The Plaintiffs take the position that in the absence of the accident,

Mr. French would have returned to the workforce in the first few months of 2001 as a recreational vehicle mechanic.

- [39] To support this position, the Plaintiffs rely on a report prepared by Dr. John V. Banks, a family physician. The report is dated March 8, 2001. Dr. Banks wrote:

It is my opinion that in the absence of this motor vehicle accident the patient would be able to return to work in the first couple of months of 2001 as his anxiety disorder/panic disorder seemed well controlled with medication and supportive psychotherapy.

- [40] The Defendant challenges this opinion by Dr. Banks, arguing that, given the overall evidence, there is no viable loss of income claim.
- [41] The first issue to be determined is whether there is a loss of income claim. If the Plaintiff has met this burden, the issue then becomes how the losses shall be calculated, and the amount of the loss.
- [42] The authors of *Remedies in Tort, vol. 4 (2004/8)* write at Chapter 27, para. 71:

Where the plaintiff was unemployed at the time of the accident, the court must establish a basic income level by estimating the earnings the plaintiff would have earned if he had been employed. Such estimates are usually based on the earnings from the plaintiff's previous employment. The possibility that the plaintiff would have encountered further periods of unemployment is a factor taken into account when assessing possible fluctuations in income level or when determining contingency deductions. **However, when an unemployed plaintiff fails to establish that he would have acquired a position but for the injury, no award is made for loss of earning capacity.... [Emphasis added]**

- [43] The Defendant suggests that the Plaintiff has not established that he would have returned to work but for the injury sustained in the accident and therefore there is no loss of earning capacity. Generally a plaintiff's projected salary loss forms the bulk of his claim for loss of earning capacity. A plaintiff's source of income is identified and the Court would then assess the amount of money the plaintiff would have received from these sources had the injury not been sustained. Here there is no recent relevant information as to income earned by Mr. French as he had not been employed for a period of approximately six years prior to the accident.
- [44] The Plaintiff has relied on the opinion of Dr. Banks in his letter of March 8, 2001. The Defendant suggests that this statement is overly optimistic and submits that the cross-examination of Dr. Banks revealed pre-accident opinions which were similarly optimistic. For example referring to a

- November 21, 1996 medical report Dr. Banks felt the patient would “ be able to accept employment by July 1, 1997”, less than a year later. Mr. French did not obtain employment nor did he seek employment during this period. Dr. Banks acknowledged this statement on cross-examination.
- [45] Also in cross-examination Dr. Banks acknowledged a September 16, 1997, medical report where he stated that the patient “will be able to accept employment by March 1, 1998”. This period was approximately six months from the date of the preparation of the form . The evidence is Mr. French did not obtain employment nor did he seek employment up to March 1, 1998.
- [46] I find that Dr. Banks was overly optimistic regarding Mr. French’s ability to return to work. Despite his suggestions that Mr. French would be able to accept employment by July 1, 1997 and then by March 1, 1998, by the time of the accident Mr. French had made no effort to obtain employment.
- [47] Mr. French agreed on cross-examination that from 1993 up to the time of the accident on December 24, 1999, he had not worked nor had he sought employment.
- [48] His last work appeared to be a short period in 1993 at Hemmings Homes. The evidence before me is that Mr. French quit this job because of his anxiety disorder and the fact that he had to work nights.
- [49] In addition, Mr. French suffered from numerous other physical ailments. For example, on forms completed in November 1999, approximately one month before the accident, under “Description of Disability(s)”, Dr. Banks checked off the following:
- Psychiatric disorders - primary - generalized anxiety disorder with panic attacks.
- Peripheral vascular diseases (arteries, veins and circulatory) - secondary - thrombo phlebitis right and left legs with venous insufficiency.
- Diseases of the bone, joint and musculoskeletal system - secondary - mechanical back pain.
- [50] In his testimony, Dr. Banks described Mr. French as obsessive in respect of his medical problems. He agreed that various conditions such as sinusitis, phlebitis, generalized anxiety disorder, acute panic attacks, mechanical back pain, and veinous insufficiency have been present for many years and varied in intensity over the years.
- [51] Dr. Banks further testified that because of Mr. French’s generalized anxiety disorder he obsessed over some of these physical complaints. In addition to

seeing Dr. Banks, Mr. French saw numerous specialists for a variety of complaints and had several medical tests completed by medical professionals. He had attended in the Emergency Department of the Dartmouth General Hospital on more than one occasion. He has had nutrition counselling. The medical evidence reveals an incredible array of specialists and other health care providers who have seen Mr. French for a constellation of physical complaints prior to the accident of December 24, 1999.

- [52] I am not persuaded on the evidence that Mr. French would have returned to work absent the accident. He had not worked for approximately six years prior to the accident nor had he made any effort to obtain employment.
- [53] At the time of the accident he had panic attacks and generalized anxiety disorder which prevented him from working. In addition, he had a myriad of other symptoms and complaints. Except for Dr. Banks' assertions which I find to be overly optimistic, the evidence is clear that for a period of approximately six years prior to the accident Mr. French was unemployed and that he made no effort to seek any type of employment during that time.
- [54] Having come to the conclusion that there is no loss of income claim I need not deal with the issue of the calculation and quantification of such a loss.

LOSS OF HOUSEKEEPING CAPACITY

- [55] Mr. French claims for diminished housekeeping capacity. Mr. French testified that before the accident he took responsibility for house maintenance and outside responsibilities such as lawn maintenance and snow removal, as well as minor interior projects.
- [56] Since the accident, Mr. French testified that he is unable to do many of the tasks he previously did, and said the work that he is able to do has been significantly reduced. He has required the assistance of his wife and older children to do this work that he previously completed on his own, such as snow shovelling and some mowing. Mr. French testified that he was able to do some mowing and "whipper snipping" and assisting with raking and lawn cleanup. With respect to snow removal he is able to brush off the steps and deck.
- [57] The Plaintiffs called Larry Clement of Assist Rehabilitation to provide an assessment of vocational impact, assistance/support needs, and loss of valuable services. Mr. Clement is a registered rehabilitation specialist and was qualified as an expert in vocational rehabilitation and future care assessment. He prepared a report dated October 21, 2004.

[58] The report outlined a number of tasks that Mr. French did previously but can no longer do:

Lawn Maintenance

Driveway Snow Removal

Excess Snow Removal

Interior Painting (Labour)

Exterior Maintenance

Housecleaning

Miscellaneous Services

[59] Mr. Clement provided an annual cost for each of these tasks to enable Mr. French to hire outside assistance. The total cost on an annualized basis is two thousand fourteen dollars and thirty cents (\$2,014.30) per year.

[60] The Plaintiff called Jessie Gmeiner an Actuary, who was qualified as an expert in Actuarial Sciences. Ms. Gmeiner prepared an actuarial report which calculated the present value of the annual cost associated with household services, as determined by Mr. Clement. Using the amount as determined by Mr. Clement of two thousand fourteen dollars and thirty cents (\$2,014.30) Ms. Gmeiner concluded that the present value of the loss was forty thousand seven hundred and forty-nine dollars (\$40,749.00) to age 70 and forty-four thousand four hundred and six dollars (\$44,406.00) to age 75. This included a provision for income tax gross-up.

[61] The Plaintiffs argue that in the absence of the accident, Mr. French would be unable to undertake these household activities until he attained the age of 75, and sought at the time of trial the sum of forty-four thousand four hundred and six dollars (\$44,406.00). In its post trial submission the Plaintiff has revised the amounts being sought for lawn and ground maintenance and for housecleaning. The revised amount sought for lawn and ground maintenance on an annual basis is five hundred six dollars fourteen cents (\$506.14) and on an annual basis seventy-five dollars (\$75.00) for the loss of housecleaning ability. As a result, the Plaintiff seeks the sum of forty thousand three hundred sixty-four dollars and thirty-three cents (\$40,364.33). In addition, the Plaintiff claims the sum of three thousand

four hundred and fifty dollars (\$3,450.00) as the initial cost with respect to interior painting.

- [62] Ms. Gmeiner's report is based on Mr. Clement's conclusions being adopted in their entirety although the multiplier figures provided by Ms. Gmeiner can be readily applied to any reduced amount attributed to loss of future housekeeping capacity.
- [63] I am satisfied and find on the evidence that due to the accident there is a loss of valuable services, albeit a smaller loss than that set out in the Clement report. I have taken into consideration Mr. French's pre-accident medical condition which at times limited his physical capabilities.
- [64] I have also considered that on cross-examination Mr. Clement acknowledged that he did not have Mr. French's pre-accident medical file. Likewise, he acknowledged he was unaware of Judith Zinck's testimony that pre-accident she did the majority of the interior housework.
- [65] I am prepared to allow the following amounts.

Lawn Maintenance

- [66] The present front lawn is quite small, approximately 20 by 20 feet. There is a small lawn in back of the house. Mr. French testified he did a "few passes" on the lawn. He does the "whipper snipping". His daughter presently assists. His daughter will not always be available to do so and therefore I am prepared to allow the sum of two hundred dollars (\$200.00) per annum for lawn and grounds maintenance.

Driveway Snow Removal/Excess

- [67] I am satisfied that assistance is needed for snow removal for a small walkway and an area that houses one car in the driveway and for a path to the oil tank which must be cleared. I allow the sum of two hundred fifty dollars (\$250.00) per annum for snow removal.

Interior Painting (Labour)

- [68] Mr. French testified that he has been in his present premises for six years and no interior painting has been carried out except for a small portion of the kitchen cabinet. I am not satisfied on the evidence that it is appropriate to allow an annual amount under this heading or the sum of three thousand four hundred and fifty dollars (\$3,450.00) as the initial cost with respect to interior painting.

Exterior Maintenance

[69] I am not persuaded that an amount should be awarded for exterior maintenance. Mr. French lives in rented premises and the landlord is responsible for exterior maintenance.

Housecleaning

[70] From the evidence I am satisfied these services have been traditionally provided by Ms. Zinck and therefore no award will be made for housecleaning services. The Plaintiffs in its post trial submission confirms that Ms. Zinck did the majority of the heavy housecleaning.

Miscellaneous

[71] I am not satisfied on the evidence that an award should be made under this heading.

[72] In total I award four hundred and fifty dollars (\$450.00) per annum for loss of housekeeping capacity.

[73] Using the multiplier which takes into account income tax gross-up as set out in Ms. Gmeiner's report and using the limiting age of 75 I award the amount of present value loss of future valuable services of nine thousand nine hundred and eight dollars and thirty-three cents(\$9,908.33).

COST OF FUTURE CARE

[74] The Plaintiffs argue that Mr. French has certain needs which were not present before the accident and which would not have been required but for the accident. For example, the Plaintiffs argue Mr. French now requires orthotics, medication, exercise and weight control programs.

[75] Mr. Clement, in his October 21, 2004 report, puts forward an annualized cost for these items of five thousand three hundred fifty-two dollars (\$5,352.00). Ms. Gmeiner's evidence was that Mr. French's life expectancy would take him to approximately 78 years of age. At an annual loss of five thousand three hundred fifty-two dollars (\$5,352.00) to age 78, the present value multiplier including gross-up is 26.2948, which results in a present value of one hundred and forty thousand seven hundred twenty-nine dollars and seventy-six cents (\$140,729.76). The Plaintiff claims this amount.

[76] Mr. Clement in his report completes a comprehensive assessment for the cost of future care. I find that due to the accident and the resulting injuries to Mr. French's ankle, he requires special footwear, orthotics and other future care needs.

- [77] I have considered Mr. Clement's report which sets out in detail the relevant costing for these future care needs.
- [78] In cross-examination it became apparent that Mr. Clement had not considered Mr. French's previous accident medical condition; that Mr. French had undergone previous nutrition counselling; that his pre-accident medical condition sometimes affected his ability to walk and carry out other activities; and that although he, Mr. Clement, appeared to maintain aggressive wear estimates for Mr. French's footwear, he had not considered the relatively sedentary lifestyle of Mr. French prior to the accident.
- [79] I award the following amounts for future care costs:

FOOTWEAR

- [80] Mr. Clement's report summarizes the different types of footwear that Mr. French will require, as well as the frequency with which this footwear should be replaced. He also provides suggested costs which include the need to buy two pair of shoes at one time in order to have one usable pair as Mr. French has different size feet as a result of the accident. Dr. Leighton's evidence was to the contrary in that one pair of shoes could be used with different size orthotics. I accept the evidence of Mr. Clement that a practical alternative is the purchasing of two pairs of shoes of different sizes to make one functioning pair.

Sneakers

- [81] Mr. Clement suggests that sneakers be replaced every five months. Given Mr. French's post accident sedentary lifestyle I suggest annually would be more realistic. The cost for sneakers is four hundred and thirty-six dollars and eighty-nine cents (\$436.89) annually less an amount of forty-five dollars (\$45.00) which is an approximation of the pre-accident cost to Mr. French for sneakers. I allow the amount of three hundred ninety-one dollars and eighty-nine cents (\$391.89) annually for sneakers.

Standard Casual Wear Shoes

- [82] Mr. Clement suggests that standard casual wear shoes be replaced every six months. Considering Mr. French's sedentary lifestyle replacement is more appropriate every four years.
- [83] Costs provided by Mr. Clement for these type of shoes are in the amount of three hundred sixty-seven dollars and eighty-nine cents (\$367.89). From this amount will be deducted fifty dollars (\$50.00) which is an approximate

cost of pre-accident footwear, for a cost of three hundred seventeen dollars and eighty-nine cents (\$317.89) which is seventy-nine dollars and forty-seven cents (\$79.47) per year, allowing for replacement every four years.

Dress Shoes

[84] The cost of dress shoes as provided by Mr. Clement is four hundred and fourteen dollars (\$414.00) per year less the pre-accident cost of seventy-five dollars (\$75.00) which is three hundred thirty-nine dollars (\$339.00). Mr. Clement suggests replacement every twenty-four months. Given the evidence as to Mr. French's lifestyle I suggest replacement every four years is more realistic with an annual cost of eighty-four dollars and seventy-five cents (\$84.75).

Winter Boots

[85] I allow the sum of five hundred dollars (\$500.00) for winter boots with a realistic replacement every three years. From this amount will be deducted the amount of ninety dollars (\$90.00) for the pre-accident boot cost for a total of four hundred and ten dollars (\$410.00). Considering replacement every three years, the annual cost is one hundred and thirty-six dollars and sixty-six cents (\$136.66).

Cane

[86] Mr. Clement explains in his report that a cane would normally last indefinitely. Because of the frequency of its use Mr. Clement recommends re-tipping twice annually. As well, in winter an ice pick attachment is used for enhanced safety and needs to be replaced annually at a cost of fifteen dollars and eighty cents (\$15.80). Re-tipping should be done twice annually at a cost of three dollars and thirty cents (\$3.30) per re-tipping for a total of six dollars sixty cents (\$6.60)

[87] I accept the evidence of Mr. Clement and award an annual cost of re-tipping and ice pick replacement of twenty two dollars and twenty cents (\$22.20).

Medication

[88] Mr. French testified that he uses over-the-counter medication for daily pain and arthritis control. I award an allowance of one hundred and twenty dollars (\$120.00) annually for the cost of this medication.

Exercise and Weight Control

- [89] Due to his physical limitations Mr. French must be concerned about his weight as at a higher weight he places more stress on his ankle. Dr. Heitzner, a physiatrist, who did an independent medical examination of Mr. French, recommended a pool exercise program to maintain cardiovascular fitness. Mr. Clement suggests yearly membership in a facility such as Cole Harbour Place at an annual cost of four hundred and seventy dollars (\$470.00). Dr. Heitzner's testimony was that more limited pool therapy would be beneficial for Mr. French. Given the need for weight control arising from the accident I am prepared to allow the amount of four hundred and seventy dollars (\$470.00) as the annual cost for membership in a facility where a pool exercise program would be available. Given the injury to Mr. French's ankle other cardiovascular activity is limited.
- [90] I also award the sum of nine hundred dollars (\$900.00) per annum as an annual allowance for travel to the exercise facility. Mr. Clement has testified that most facilities would be within a fifteen kilometre radius of most residents of the Halifax Regional Municipality. This amount should allow Mr. French to travel several times per week to enjoy the use of the facility.

Orthotics

- [91] Dr. Ross Leighton in his report of March 1, 2004 discussed the need for orthotics:
- ...He will require special shoes for both summer and winter, as winter boots being necessary and probably requiring a special back entry boot in order to allow him to get his foot in because of the stiffness of his ankle. As far as his shoes are concerned, he requires insoles in whatever shoe he wears to support the longitudinal and transverse arches, plus a heel lift to bring him into a dorsi flexion plantar flexion position.
- [92] Mr. Clement testified that on average an allowance of three hundred dollars (\$300.00) for casting and orthotic was appropriate along with one hundred and fifty dollars (\$150.00) for replacement orthotic every five years and twenty-five dollars (\$25.00) a year to cover re-posting the orthotic on those years the orthotic wasn't replaced.
- [93] He further testified that should Mr. French's right ankle be fused his right shoe will need to be capable of being modified to a "rocker" sole to prevent the retention of a more normal gait as well as minimize strain on his knee, hip joints and low back. According to Mr. Clement the present footwear will be capable of the "rocker" sole modification.

- [94] Mr. Clement has testified that the provincial medical plan pays for the labour costs of the orthotics and prosthetics and that the Q.E. II Hospital would perform the modification but the cost of materials is not covered. This amount is currently twenty-eight dollars (\$28.00).
- [95] I therefore allow a one time cost for casting, orthotic and modification of three hundred and twenty-eight dollars (\$328.00).
- [96] I award on an annual basis the sum of fifty-five dollars (\$55.00) which covers the one hundred and fifty dollars (\$150.00) for replacement of the orthotic every five years and twenty-five dollars (\$25.00) to cover re-posting of the orthotics on those years the orthotic isn't replaced.

[97] In summary I award the following annual amounts for the cost of future care:

Sneakers	\$ 391.89
Casual Wear Shoes	\$ 79.47
Dress Shoes	\$ 84.75
Winter Boots	\$ 136.66
Winter Ice Pick Attachment & Re-tipping	\$ 22.40
Medication	\$ 120.00
Exercise and Weight Control	\$ 470.00
Travel Allowance To And From Exercise Facility	\$ 900.00
Orthotics	<u>\$ 55.00</u>
TOTAL	<u>\$2,260.17</u>

[98] I award a one time cost of footwear and modification in the amount of three hundred twenty-eight dollars (\$328.00).

[99] Ms. Gmeiner's evidence was that Mr. French's life expectancy would take him to approximately age 78. At an annual loss of two thousand two hundred sixty dollars and seventeen cents (\$2,260.17) to age 78, the present value multiplier including gross-up is 26.2948. The result is a present value of fifty-nine thousand four hundred thirty dollars and seventy-two cents (\$59,430.72). I so award.

QUANTUM MERUIT CLAIM - MS. ZINCK, JESSICA HAIGH AND JENNIFER HAIGH

[100] Individuals who provide services and/or assistance to an injured plaintiff/family member above and beyond what might reasonably be anticipated under normal circumstances are sometimes awarded damages on a quantum meruit basis.

[101] Mr. French claims Ms. Zinck made her best efforts to be of assistance to him, particularly in the immediate post-accident time frame after his return from hospital, when his needs were at their greatest. Ms. Zinck assisted Mr. French with washing his feet, transporting things up and down the stairs on his behalf, washing his hair, assisting with setting up the bathroom and generally all the activities Mr. French was unable to do for himself.

[102] As well, the evidence of Mr. French is that Jessica Haigh and Jennifer Haigh, their two daughters, were called upon to do much more than their normal share for many months after the accident. The Plaintiff claims the sum of seven thousand five hundred dollars (\$7,500.00) as an appropriate amount for Jessica Haigh, an amount of ten thousand dollars (\$10,000.00) for Jennifer Haigh and an additional sum to Ms. Zinck of three thousand dollars (\$3,000.00).

[103] I am satisfied that as a result of the accident Ms. Zinck had to assist Mr. French daily with his activities of living. Because of the injuries to Mr. French I am satisfied that the daughters, Jessica and Jennifer Haigh were called upon to do more than their normal share of household duties, both inside and outside the house. I award Ms. Zinck the sum of fifteen hundred dollars (\$1500.00). I award five hundred dollars (\$500.00) to Jessica Haigh and the sum of one thousand dollars (\$1,000.00) to Jennifer Haigh recognizing the additional services she performed after Jennifer Haigh moved out of the family home on 2002 which further increased the burden on her.

JUDITH ZINCK

General Damages

- [104] As a result of the motor vehicle accident, Ms. Zinck testified that she suffered headaches, neck soreness on the right side and sometimes the left, inflammation in her right shoulder and loss of sleep. She said that it has been a very stressful and emotional time since the accident.
- [105] To treat these injuries and symptoms, Ms. Zinck undertook physiotherapy at Portland Physiotherapy Clinic between February 21, 2000 and August 1, 2000. In addition, at the same clinic, she did a work conditioning program between March and August of 2000. She underwent massage therapy sessions at Maritime Physiotherapy between October 12, 2000 and March 19, 2001.
- [106] Dr. Rayma MacPherson, Ms. Zinck's family physician in referring to the physio and massage treatments received by Ms. Zinck, testified that "She worked hard at it".
- [107] Dr. A.M. Finlayson, a specialist, with the Department of Anaesthesia at the Dartmouth General Hospital saw Ms. Zinck on September 20th, 2002 and commented as follows:

On examination today, she is tender to palpation over T4/5; she is tender over the right occipital area. She is tender over the right medial scapular border and is tender over the right trapezius muscle. She has a full range of movement of her shoulder with no tenderness over the AC joint or over the deltoid insertion. She has normal neurological function on both sides.

It certainly appears as if this lady has ongoing myofascial pain following her injury. Unfortunately after this length of time, these things are usually very difficult to treat. What she can do for herself is exactly what she is doing - exercising and physiotherapy, and keeping the area strong will alleviate some of the pain. In addition, it may be worthwhile doing an occipital block and trigger point injections with Marcaine and steroid.

- [108] Ms. Zinck received these injections on July 22nd, 2003. On a follow-up visit with Dr. Finlayson on October 24th, 2003 he commented:

On clinical examination today, she had definite trigger points in the trapezius muscle. She was tender over both occipital areas. She had some tenderness in the right neck and the paraspinal muscles.

- [109] Ms. Zinck has self-treated with extra strength Tylenol, ice, mediflow pillow and a program of home exercises including weights and treadmill.

- [110] Ms. Zinck testified that she continues to experience significant discomfort and pain. She said she has complied with all the recommended treatments, but her activities still remain limited. While she is able to undertake certain of her household activities, she must do these at a much reduced rate. If she attempts to do these activities as she did prior to the accident, she experiences a significant increase in her level of discomfort.
- [111] Dr. MacPherson, who was Ms. Zinck's family physician for a number of years summarized Ms. Zinck's condition in a report dated April 29, 2004:

Judith was reviewed by myself on August 12, 2002, April 2003, June 2, 2003, December 2, 2003 and April 6, 2004 regarding injuries she sustained in her MVA. She has made no progress in her recovery during this time. She has symptoms of headaches, cervical and posterior shoulder/inter scapular pain. Her most consistent pain is described as a burning sensation that in recent months has been most pronounced in her right posterior shoulder area. This pain is consistent with myofascial pain of her shoulder girdle area. She also on x-ray of her cervical spine (last done November 2003) has degenerative disc disease at C4-5 and C5-6 which could be contributing to some of her cervical symptoms.

...

Judith's injuries continue to be compatible with a Grade 2/4 whiplash injury as assessed previously by Dr. Mahar. Unfortunately, it has resulted in chronic pain which has plateaued in the past several months of her rehab. She does not report any improvement during the time that this report came in.

Judith reports doing much of her own housework but has difficulty with tasks that involve overhead work or more strenuous exertion, e.g. cleaning her bathrooms, wall, folding clothes, vacuuming. She does these activities in short bursts and the activities cause increased burning sensation particularly of her right posterior shoulder and inter scapular area.

- [112] X-rays conducted on Ms. Zinck indicate a degenerative disc disease. Dr. MacPherson testified that the soft tissue injuries experienced by Ms. Zinck were not related to this degenerative disc disease. Dr. MacPherson acknowledged that a few months after the accident Ms. Zinck had a relatively normal range of motion although she did complain of pain. Dr. MacPherson agreed that the complaints of pain were a subjective response by Ms. Zinck.
- [113] As to the symptoms being reported by Ms. Zinck it was Dr. MacPherson's opinion that her reports had been "consistent" and "she's being honest".

- [114] Dr. John Heitzner is a trained specialist in physical medicine and rehabilitation and was retained by the Defendant to conduct a medical examination. Dr. Heitzner prepared a report of March 24, 2004 which is in evidence. Dr. Heitzner's examination on December 15, 2003 (as reported in his March 24, 2004 report) was consistent with that of Dr. MacPherson's having found relatively normal range of motion.
- [115] Dr. Heitzner testified that Ms. Zinck presented quite well with no abnormalities and in particular he did not observe any pain behaviour during his physical examination.
- [116] Dr. Heitzner in his report commented on Ms. Zinck's ability to return to her previous activities of daily living:

As there is no evidence of any impairment or pathology, Ms. Zinck is able to return to her previous activities of daily living. The only limiting factor to full return to activities of daily living is Ms. Zinck's subjective complaints of pain and poor cervical posture.

- [117] Ms. Zinck testified as to the ongoing pain she experiences. I accept her testimony in that regard. I accept that Ms. Zinck suffers from a soft tissue injury not related to her degenerative disc condition. Dr. MacPherson has testified to her honesty and straightforwardness in reporting her condition. Dr. MacPherson confirmed the ongoing myofascial pain following the accident. Dr. MacPherson has treated her since 1989 and would have first hand knowledge of Ms. Zinck's condition. Dr. A.M. Finlayson, in his September 20, 2002 report, confirms that Ms. Zinck has ongoing myofascial pain following her injury. She has shown a willingness to reintegrate herself into the workforce by volunteering at her son's school, teaching Sunday School and working with students on computer, all on a voluntary basis. She has continued her activities of daily living, albeit in stages.
- [118] The Defendant submits that the activities that Ms. Zinck takes part in do not fit with a Plaintiff who is suffering from chronic pain. With respect I disagree.
- [119] Ms. Zinck appears to be trying to maintain as active a lifestyle as possible even though she does experience ongoing pain. She began volunteering at her son's school and church and from the evidence I accept that she has moderated her activities so as not to exacerbate her ongoing pain conditions.

- [120] She has worked on a part-time basis and I accept her evidence that the work that she has undertaken is such that it allows her to sit and stand, so as not to aggravate her condition.
- [121] The Plaintiff claims on behalf of Ms. Zinck non-pecuniary damages in the amount of fifty thousand dollars (\$50,000.00). The Defendant submits that thirty thousand dollars (\$30,000.00) is appropriate.
- [122] I award thirty-seven thousand dollars (\$37,000.00) for non-pecuniary damages.

LOSS OF INCOME/DIMINISHED EARNING CAPACITY

- [123] Ms. Zinck testified that her plan following the birth of her youngest son, was to return to the workforce once he had reached pre-school age. She testified that he would have reached this age in or about the summer of 2001. It is from this date forward that Ms. Zinck submits an income loss has been suffered.
- [124] From 1996 until the date of the accident Ms. Zinck was a stay-at-home mother.
- [125] The Plaintiffs submit that Ms. Zinck be awarded compensation for her loss of income and diminished earning capacity as a component of general damages.
- [126] A report prepared by Mr. Clement dated August 17, 2004 with respect to Ms. Zinck and her prospects of returning to the workforce is in evidence.
- [127] Mr. Clement is of the opinion that Ms. Zinck will have to upgrade her education level to grade 12 and thereafter, obtain a more specialized diploma or certificate before she could competitively make an attempt to enter the workforce. He anticipates that this would take two to five years. Therefore, the Plaintiff suggests, even before Ms. Zinck might be able to make an attempt at returning to the workforce, a period of between eight to ten years will have passed between when Ms. Zinck might otherwise have been able to get back to work (2000-2008/2010).
- [128] Dr. Heitzner, who saw Ms. Zinck on December 15, 2003 was of the following opinion:

Ms. Zinck was a stay-at-home mother prior to the accident. Based upon the examination, review of history and documentation, there are no musculoskeletal impairments preventing her from re-entering the workforce if she chooses to do so.

- [129] This opinion does not take into consideration the fact that Ms. Zinck suffers from a soft tissue injury.
- [130] Dr. Heitzner conceded in cross-examination that it is possible for a patient such as Ms. Zinck to suffer pain even though there are no evident musculoskeletal impairments.
- [131] The Plaintiff seeks an award for Ms. Zinck in the seventy to eighty thousand dollar (\$70,000.00 to \$80,000.00) range to reflect the income losses sustained by Ms. Zinck to date and in the future.
- [132] I award the sum of forty-one thousand dollars (\$41,000.00) to Ms. Zinck for diminished earning capacity.
- [133] In reaching my conclusion I have considered that Ms. Zinck was out of the work force for a period of four years prior to the accident and that she would have difficulty returning to the workforce. In cross-examination Mr. Clement acknowledged that even without the accident Ms. Zinck would have had a difficult time returning to the workforce because of her limited education and time away from the workforce.
- [134] I have also considered that she has slowly begun to return to the workforce and she testified that she recently took on remunerative work as a substitute educational program assistant for the Halifax District School Board. Ms. Zinck wishes to continue with this work. Ms. Zinck's efforts at volunteering and now remunerative work through the school clearly demonstrates her interest in reintegrating into the workforce.

LOSS OF HOUSEKEEPING CAPACITY

- [135] The Plaintiff does not suggest an actuarial approach with respect to the quantum of the award to be made to Ms. Zinck under this heading. The Plaintiff suggests that an award in the thirty to thirty-five thousand dollar (\$30,000.00 - \$35,000.00) range would be appropriate.
- [136] Ms. Zinck testified that she remains restricted with respect to certain household activities including heavier activities such as bathroom cleaning, vacuuming, handling heavy groceries and any other task that requires extended standing and/or static arm or shoulder positioning. The defendant argues that Ms. Zinck is capable of homemaking tasks and that this is not a case where this Court should make a separate award for loss of housekeeping capacity.
- [137] In support of its position the Plaintiff had Mr. Clement prepare a report dated August 17, 2004 which dealt in part with the quantification of this

loss. The Plaintiff has since suggested an actuarial approach would not be appropriate.

[138] In her report of April 29, 2004, Dr. MacPherson comments:

Judith reports **doing much of her own housework** but has difficulty with tasks that involve overhead work or a more strenuous exertion, e.g. cleaning her bathrooms, wall, folding clothes, vacuuming. She does these activities in short bursts and the activities cause increased burning sensations, particularly of her right posterior shoulder and inter scapular area.

[139] I am satisfied there has been some reduction in Ms. Zinck's ability to do housework. I accept her evidence in that regard.

[140] I award the sum of twelve thousand five hundred dollars (\$12,500.00) under this heading.

COST OF FUTURE CARE

[141] Ms. Zinck claims the sum of five thousand dollars (\$5,000.00) for cost of future care. Considering Ms. Zinck's future requirement for Tylenol, I award the sum of three thousand dollars (\$3,000.00).

[142] The Plaintiffs are entitled to the following damages:

Mr. French

General damages	\$ 92,435.34
Loss of housekeeping capacity	\$ 9,908.33
Cost of future care	\$ 59,430.72
One Time Cost of Footwear Modification	<u>\$ 328.00</u>
TOTAL	<u>\$ 162,102.39</u>

Quantum Meruit Claim

Ms. Zinck	\$1,500.00
Jessica Haigh	\$ 500.00

Jennifer Haigh	<u>\$ 1,000.00</u>
TOTAL	<u>\$ 3,000.00</u>

Ms. Zinck

General damages	\$ 37,000
Loss of Housekeeping capacity	\$12,500
Loss of income/ diminished earning capacity	\$ 41,000
Cost of future care	<u>\$ 3,000</u>
TOTAL	<u>\$ 93,500</u>

[143] The Plaintiffs shall have their costs to be taxed.

Pickup, J.