

IN THE SUPREME COURT OF NOVA SCOTIA  
**Citation:** Grundy v. Boudreau, 2006 NSSC 223

**Date:** 20060829  
**Docket:** SH-178469  
**Registry:** Halifax

**Between:**

Dale F. Grundy

Plaintiff

v.

Paul Boudreau and Sun Bakery & Food Equipment Sales Ltd.

Defendants

**Judge:** The Honourable Justice Gordon A. Tidman

**Heard:** June 12, 13, 14, 15, 16, 19, 20, 2006,  
in Halifax, Nova Scotia

**Written Decision:** August 29, 2006

**Counsel:** Dale F. Grundy, self, Plaintiff

Murray Ritch, Q.C. and Roger Shepard, for the  
Defendants

**Tidman, J.:**

[1] This is a claim for damages suffered in a motor vehicle accident. The plaintiff, now aged 37 years, was involved in a motor vehicle accident on February 23, 2001 at Burnside, Halifax County. At the time, the plaintiff was stopped behind a left turning vehicle waiting for approaching traffic to pass before commencing a left turn. While stationary, the plaintiff's motor vehicle was struck from the rear by a motor vehicle operated by the defendant, Boudreau.

[2] The plaintiff says he was stopped approximately 8-10 feet behind the left-turning vehicle and after being struck from the rear his motor vehicle then crashed into the left-turning vehicle. He says he heard a screeching of brakes before the crash and then a crunching of metal. He says as a result of the two impacts, he was dazed but his head soon cleared. He was wearing a seat belt at the time of impact, but his motor vehicle was not equipped with a headrest.

[3] The plaintiff's motor vehicle was a write-off and the estimated cost of repairing the damage was approximately \$3,400.00. The defendant admits liability leaving only the quantum of damages in issue.

**Plaintiff's Injuries**

[4] An ambulance attended the accident scene but the plaintiff did not require medical treatment at the time and was driven home by a tow truck operator, who also towed the plaintiff's motor vehicle to his home.

[5] That evening the plaintiff says he was feeling worse and attended at outpatients at the Dartmouth General Hospital. He complained of neck pain which he said was immediate at the time of the collision but that the neck pain resolved soon after the collision. He says that two hours after the accident he had a tingling sensation under his chin and over both cheeks under his eyes. He reported an occipital headache, stiff neck with pain on movement and right scapula pain. On examination he had decreased range of motion of the neck due to pain and stiffness with tender paraspinal. He was prescribed Ibuprofen for the pain.

[6] On March 5, 2001 the plaintiff was attended by Dr. Chris Ozere, his family doctor. At that time the plaintiff related the details of the motor vehicle accident of February 23, 2001. The plaintiff stated he had a pain in the neck right away. He reported a burning sensation and pain in his shoulders, and his left arm was sort of

numb. The plaintiff returned to Dr. Ozere on March 12, 2001 and complained of pain in the neck and upper and lower back.

[7] Unfortunately, Mr. Grundy represented himself at trial. He was cooperative with the Court and opposing counsel and did the best he could under the circumstances. However, it was difficult for him, as it would be for most layman, to conduct his own personal injury case. The situation was exacerbated because of Mr. Grundy's unrealistic view of the financial worth of his claim, along with his lack of understanding of the law and trial procedure.

[8] Mr. Grundy was represented by counsel shortly after the accident of February 23, 2001, but dismissed his then counsel and later retained new counsel. He eventually also dismissed that counsel. Although Mr. Grundy was strongly advised to retain counsel, in the final analysis he decided to conduct his own trial.

[9] Mr. Grundy did his best to provide pre-trial material, conduct the trial and argue post-trial, however, his failure to retain counsel placed him in a distinctly disadvantageous position. The Court is indebted to Mr. Ritch who, while properly discharging his duties as defence counsel, was helpful to both the Court and Mr.

Grundy procedurally in the conduct of the trial and was exceedingly fair and patient in his dealings with Mr. Grundy.

[10] Mr. Grundy has a long medical history both physically and psychologically. It may be that the root of his difficulties was planted during his youth when his criminal activities led on two occasions to incarceration at the Shelburne Youth Correctional Centre, where allegedly, he was sexually abused.

[11] Mr. Grundy has had and still continues to have psychological difficulties, suspected drug dependencies and a paranoid distrust of medical and legal professionals. In the Court's view, he has an exaggerated view of his medical-legal difficulties and suspects that those professionals, with whom he had dealings as a result of the accident, did not do justice to his claims. The severity of the injuries received by Mr. Grundy in the February 23, 2001 car accident which were soft tissue injuries, at best, can be described only as moderate to severe. However, Mr. Grundy is seriously asking the Court for a monetary award of almost \$3,000,000.00.

[12] Mr. Grundy seeks specific amounts under the following headings:

- pain, suffering and loss of enjoyment of life	\$110,000.00
- loss of valuable services	\$40,000.00
-loss of consortium	\$30,000.00
- future loss of income	\$2,782,080.00
- or future loss of earning capacity	\$51,000.00
- past loss of income	\$30,000.00

[13] Mr. Grundy claimed for both future loss of income and loss of future earning capacity. When the Court suggested this was an overlap of claims, Mr. Grundy's return suggestion was that the Court could pick one or the other.

**General Damages for pain and suffering and loss of enjoyment of life.**

[14] At trial Mr. Grundy says he was consumed with pain when he started physiotherapy. He says his back was curved forward from the pain. He says he has limped on and off for 5 years which affects his hip. He says it is painful to walk uphill and climb stairs. He says he cannot sit on the floor with legs crossed,

and his right leg gives out at times and he can feel it buckling. He says his right shoulder blade sticks out and sags.

[15] He says that as a result of the straight grip on the steering wheel of his vehicle at the time of the February 23 collision, he injured his wrists on impact and now suffers pain from carpal tunnel syndrome, mostly in the right side. He says he cannot, without pain, lift heavy objects with his right hand and he says he cannot lift with the left hand because the pain is too severe. He says he was told to wear splints on his wrists but he couldn't because they chafed his arms in the day time and he had trouble sleeping when wearing them at night.

[16] The plaintiff also complains of pain in the temporomandibular ("TMJ") joint. He says he has difficulty chewing and his "muscles won't let the food down" and he chokes on his food. He says he suffers from migraine headaches.

[17] He says he has pain at the base of his spine as well as in his shoulder blades. He says as a result of the pain he can no longer ride a bicycle without pain, he cannot swim without pain, he can no longer play sports with his children without

pain and it is painful to operate a computer and take the garbage down a flight of stairs from his apartment.

[18] He says his injuries have affected his relationship with his 3 children and his spouse, Linda, because his pain makes him irritable and impatient. He says he cannot go walking anymore with his spouse because of the pain. He says he is nervous driving in a motor vehicle.

[19] He says it is painful to have sexual relations with his spouse and because of this, his spouse feels she is unattractive because he does not have sexual relations with her as he did in the past.

[20] He says he can no longer socialize as he did in the past. He says he did not have these difficulties before the accident of February 23, 2001.

### **Medical Evidence**

[21] Following the accident of February 23, 2001, the plaintiff retained counsel. His counsel referred the plaintiff to Dr. E.G. Nurse, an occupational health



consultant, for a full medical examination to determine the plaintiff's injuries from the accident and his prognosis with respect to those injuries.

[22] Dr. Nurse, in his report dated June 21, 2001 (Exhibit 5, page 411), concluded that the plaintiff's accident, which in error he states occurred in May 23 rather than February 23, 2001, "appears to have caused a Whiplash Associated Disorder Type II injury to the neck and perhaps a hyperextension injury to his lumbar spine. His right shoulder may have made contact with the wheel which had produced the right arm pain".

[23] He agreed that the plaintiff was being appropriately treated for those injuries with physiotherapy and massage as prescribed by Dr. Ozere, the plaintiff's family physician, and provided by Burnside Physiotherapy. Dr. Nurse stated that he was deeply concerned over the plaintiff's apparent cognitive dysfunction but was not able to state the cause.

[24] Dr. Nurse suggested the plaintiff should see a psychologist, Dr. Charles Hayes, however the plaintiff did not see Dr. Hayes. Also, although referred by Dr.

DeCroos, another family physician, to Jacqueline Milner-Clerk, a registered psychologist, the plaintiff failed to attend on Ms. Milner-Clerk for examination.

[25] Dr. David King, a neurologist, was engaged by the defendants to perform an independent medical examination of the plaintiff in order to determine the extent of the injuries sustained by the plaintiff in the motor vehicle accident of February 23, 2001.

[26] Dr. King was qualified as an expert in the field of neurology. Dr. King has been practising and teaching in his field for a number of years and has been accepted as an expert in many personal injury cases in this court and elsewhere.

[27] Dr. King, over a 5 1/4 hour period on November 10, 2004, examined the plaintiff. Dr. King also had the benefit of an extensive medical file on the plaintiff including the plaintiff's family doctor's notes and reports of medical and para-medical persons who had treated to the plaintiff following the motor vehicle accident of February 23, 2001. He also had the plaintiff's medical history before the February, 2001 accident.

[28] In Dr. King's opinion the plaintiff's medical status had improved to the point where although he still described symptoms of the injuries received, Dr. King found no objective indicia of those symptoms. Dr. King was of the view that the plaintiff's complaints of tenderness and pain in the temporomandibular joint, shoulder and neck were genuine. In Dr. King's opinion there has been a slight reduction in the quality of the plaintiff's life as a result of the accident and that he has a mild handicap. Dr. King pointed out that the plaintiff was not working at the time of the accident and had not worked for some time before the accident. The plaintiff related to him that he had worked in the construction and moving businesses.

[29] The plaintiff cross-examined Dr. King extensively in relation to his alleged right shoulder which the plaintiff has described as "winging" and which protrudes from his back more than is normal. Dr. King agreed that one shoulder was slightly lower than the other and that there was tenderness in the soft tissue in the shoulder area. However, Dr. King described the prominence of the shoulder blade as being congenital. In Dr. King's opinion there was no limitation in the functioning of the plaintiff's shoulders.

[30] In Dr. King's opinion, the plaintiff suffered from a personality disorder which he defined as "paranoid ideation", although Dr. King hastened to add that his opinion would defer to psychiatry.

[31] Dr. King says that he formed that opinion from speaking with the plaintiff who complained about his lawyers and doctors, all of whom the plaintiff said had exacerbated rather than relieved his problems. Dr. King says the plaintiff had the perception of being "hard done by" and in Dr. King's opinion the plaintiff amplified his perception of his injuries.

[32] Dr. King allowed that muscle pain could be exacerbated by stress and that muscle pain conversely could cause stress. Dr. King was of the view that the plaintiff exhibited a great deal of stress which was not all accident related.

[33] Dr. King says that in the injury recovery process, it is important to have consistent treatment. Dr. King summarizes his medical findings at page 45 of his report (Plaintiff's Exhibit 6, page 818).

Mr. Grundy was involved in a motor vehicle accident on the 23 February 2001. He was struck twice from behind and had a secondary

collision with the car ahead. There were no head restraints in his vehicle. It is likely that he sustained soft tissue injuries to the anterior and posterior neck musculature. He had a soft tissue injury to the thorax. He developed secondary myofascial pains around his jaw joints. The arrest of forward motion in the accident may have extended his wrists resulting in a mild carpal tunnel syndrome bilaterally.

Normally one would have expected a gradual improvement of symptoms with time, but Mr. Grundy's course has been influenced by a pre-existing paranoid personality disorder, which has interfered with management and occasioned him to believe that the professionals who looked after him were negatively influenced by outside commercial forces. This has also led to self diagnosis and unrealistic appreciation of the nature of his injuries. I doubt that there is any meaningful intervention in this regard but would defer to psychiatry.

His physical circumstances have improved. He is left with residual discomfort, which should not preclude most of his pre-accident activities though he may have discomfort with heavy work. This should not have a detrimental long term effect. He should be

encouraged to normalize his activities and t(sic) maintain a regular exercise program. ...

[34] In January, 2003 Dr. DeCroos referred Mr. Grundy to Dr. Roger McKelvey, an adult neurologist. Dr. McKelvey examined Mr. Grundy on January 23, 2003 and prepared a report dated that same day. (Exhibit 5, pg. 425) Dr. McKelvey's opinion of the plaintiff's injuries is similar to Dr. King's. At page 2 of his report, Dr. McKelvey states:

...Certainly his symptoms suggest the possibility of cervical radiculopathy, particularly bilateral C-6 radiculopathies. There is no evidence of severe nerve root entrapment, but some degree of entrapment is certainly possible. I think peripheral nerve entrapment such as carpal tunnel is also possible, although less likely. I have asked for an MRI of the cervical spine looking for a cervical disc. I will also arrange EMG studies. I do not expect, however, that we will find surgical disease. ...

[35] In relation to Mr. Grundy's complaint of carpal tunnel syndrome, he was seen by Dr. J.J.P. Patil who conducted an examination of Mr. Grundy and prepared an Electrodiagnostic Medicine Report dated August 16, 2004. Dr. Patil's conclusion in his report is "the findings are suggestive of a very mild carpal tunnel syndrome."

[36] Dr. McKelvey had earlier referred Mr. Grundy to the Q.E. II Health Sciences Centre Neuroelectrodiagnostic Unit where testing was performed by Dr. I. Grant. In relation to carpal tunnel syndrome Dr. Grant, in his report dated May 23, 2003, stated:

...The findings are those of bilateral median neuropathies at the wrist, consistent with carpal tunnel syndrome. The electrophysiologic changes are mild on the right and very mild on the left. ...

[37] At the request of the defence, Mr. Grundy was also seen by a psychiatrist, Dr. E.M. Rosenberg who also gave evidence at trial. Dr. Rosenberg prepared a medical report dated December 16, 2004. In his report, Dr. Rosenberg repeats the physical findings as a result of the accident and deals with the psychological difficulties associated with the physical injuries. He also deals with aspects of Mr.

Grundy's personality which, in his view, impacted on the assessment of Mr. Grundy's injuries and the effect of those injuries. In paragraph 1 of page 6 of his report (Exhibit 6, page 845) Dr. Rosenberg states, "Throughout the interview, there was an attitude of self-entitlement (an unreasonable expectation that his wishes and desires will be atomically complied with.)" and later on the same page of his report, "Mr. Grundy has also voiced thought content of a suspicious and paranoid nature, believing that he has been singled out for unfair treatment..." Dr. Rosenberg stated, however, that Mr. Grundy was not delusional and that Mr. Grundy had no disorders of perception.

[38] In his evidence at trial, Dr. Rosenberg says that Mr. Grundy, apparently because of his physical injuries, stated he could not do physical work and expressed his wish to be a guidance counsellor. Dr. Rosenberg suggested that Mr. Grundy's previous work history in the trucking business, his lack of education, Grade X or XII G.E.D. and his limited understanding of the meaning of words that he was not equipped to become a guidance counsellor and suggested testing to determine what occupation Mr. Grundy may be suited to.



[39] Dr. Rosenberg's conclusion regarding Mr. Grundy's medical condition is set out at page 7 of his report:

...It is my opinion that Mr. Grundy is suffering with pain disorder with psychological factors and a general medical condition; and that this disorder is manageable, by means of psychological intervention, with a good prognosis for Mr. Grundy's return to the workplace, albeit not necessarily in the position that he has chosen for himself at this time (guidance counsellor)...

### **TMJ Injury**

[40] Mr. Grundy says that he experienced pain in the TMJ joint from the time of the accident in issue up to the present time. Mr. Grundy has seen several dentists, periodontists and dental surgeons. He claims that he now requires medically prescribed periodontal work and dental surgery as a result of the accident in issue. His Section B insurers have agreed to the extent that they have approved a payment of \$7,400.00 for dental surgery.

[41] Dr. Edward Hannigan, a periodontist, gave evidence on behalf of the defence. He also provided a report dated April 5, 2004 and a follow-up dated April 25, 2004.

[42] In Dr. Hannigan's opinion neither Mr. Grundy's periodontal ailments nor proposed jaw surgery are related to the accident. In Dr. Hannigan's opinion the periodontal problems are associated with dental hygiene and the surgery is designed to deal with a congenital jaw misalignment.

[43] At page 4 of Dr. Hannigan's report (Exhibit 6, page 854) he gives his opinion as to the cause, treatment and prognosis of the TMJ injury.

...It is my opinion based upon later findings including those of a normal temporomandibular functional range of movement by Dr. King in his November 16, 2004 report, that Mr. Grundy suffered a sprain of the temporomandibular joint mechanism, essentially a soft tissue injury. This jaw muscle contraction was perpetuated by neck and shoulder strain of a cervical nature, as alluded to in the diagnosis by Dr. King.

With a soft tissue injury such as that sustained by Mr. Grundy, it would be more advisable to have physiotherapy and supportive medication along with the processed acrylic jaw orthopedic appliance, or bite plate. There are many different designs, but in his case a common jaw stabilizing appliance would be appropriate and would serve probably 90% of these injuries as they resolve over a period of one or two years post-trauma. The need for comprehensive orthodontic correction for this type of injury is not supported in the literature. However the need for orthodontics to correct the jaw relationship stands on its own as an orthodontic goal but not one necessary for jaw pain and dysfunction resolution.

There is therefore a small chance there was a primary injury to the left temporomandibular joint mechanism and supporting musculature.

There is a strong possibility that referred pain from the neck and upper shoulder yoke and scapular areas would cause sympathetic co-contraction of jaw muscles, increasing jaw clenching, which along with the stresses of this legal action and prolongation of resolution in the eyes of Mr. Grundy would increase jaw pain and dysfunction including magnification of pain symptoms in his mind, creating a

threat that he would have more severe problems. However this type of jaw pain and dysfunction is not significantly disabling in his case, in my opinion. The utilization of a lower jaw or mandibular bite plate (due to his prognathic lower jaw-class III relationship) would be useful in assisting in the resolution of his symptoms, but the underlying psychosocial problems may be a great impediment to the satisfactory resolution of these matters, at least in Mr. Grundy's eyes. For your information, dental professional fees for the type of jaw orthopedic appliance (bite plate) that Mr. Grundy requires, following the current guidelines of the Nova Scotia Dental Association Fee Guide for Specialists, are approximately \$650.00 - \$750.00 plus laboratory costs of \$150.00-\$250.00, and would be less by one-third if rendered by a general dentist. These are suggested fees, not mandatory fees, and may be adjusted for special circumstances.

[44] I found Dr. Hannigan to be an exceptionally helpful witness who gave his evidence in a straightforward and understandable manner which even Mr. Grundy on his cross-examination of Dr. Hannigan appeared to accept.

[45] I accept the opinions of Dr. Hannigan previously set out without hesitation as factual.

[46] Dr. Hannigan, in giving his opinion of the treatment required to correct the injury related to the car accident and to relieve the associated TMJ pain, agreed with the bite plate treatment prescribed for Mr. Grundy by his dentist Dr. J.D. MacNeil. Unfortunately, Mr. Grundy after being provided with a bite plate by Dr. J.D. MacNeil failed to use it as prescribed.

[47] Dr. Hannigan says, using the Nova Scotia Dental Association Fee Guide for Specialists, the cost of a bite plate would be between \$650. - \$750.00 plus laboratory costs between \$150 and \$250.00.

[48] Dr. Hannigan says that in addition to the fitting and manufacturing of the bite plate, follow-up treatment and maintenance would be required and that manipulative therapy and jaw exercise prescribed and supervised by physiotherapists with some massage therapy would be helpful. He says that 3 or 4 one-half hour visits may be required at the start and then on a monthly basis during the first year following the initial wearing of the bite plate. He says that

physiotherapists usually charge about \$60.00 for a half-hour visit. He also says it may be helpful to have a half-dozen treatments by a massage therapist following physiotherapy .

[49] Dr. Hannigan also says that the bite plate would require several adjustments at the outset and then should be checked once a year. He says that bite plate adjustments usually require a 20-45 minute appointment which would charge out at approximately \$125 - \$150.00 per visit to a specialist. He says that 6, or perhaps more, monthly visits would generally be required and then maybe every second month for the first year. If the patient continues to wear the bite plate Dr. Hannigan says it should be checked each year.

[50] Again, I accept Dr. Hannigan's evidence as to the cost of the initial bite plate work and the cost and frequency of follow-up treatments.

[51] I would allow as special damages for this work the sum of \$7,000.00.

[52] There are two major factors that add to the complexity of this case. Firstly, the psychological problems which allegedly have contributed to the plaintiff's

pain, suffering and loss of enjoyment of life, and secondly, the failure of the plaintiff to follow medical instructions in mitigation of his damages. I now deal with the psychological factors and will later deal with mitigation.

### **Psychological Factors**

[53] Mr. Grundy urges the Court to apply the “thin skull doctrine” and find that all of his present complained of circumstances resulted solely from the auto accident in issue. The term “thin skull doctrine” connotes by word-play the impression of a thinner than normal skull being shattered by a mild blow. The doctrine assumes that had the blow not been struck, a normal skull could have survived and thus the blow is fully responsible for any and all resulting damage, or applying the similar “but for” doctrine, if it had not been for the accident Mr. Grundy would not be in his present state of health.

[54] Mr. Ritch submits that the thin skull doctrine does not apply here and argues that a defendant is responsible in damages only for the harm caused by the negligent act. I accept the latter submission and find no evidence to support Mr. Grundy’s contention that the injuries from the accident in issue caused his present psychological and emotional state.

[55] However, as suggested by both Dr. Rosenberg and Dr. King in their reports, the court is satisfied that the injuries suffered in the motor vehicle accident exacerbated Mr. Grundy's pre-existing psychological and emotional difficulties and thus I would factor in an additional allowance for this finding in assessing general damages.

### **Quantum of General Damages**

[56] I now deal with quantum of general damages. As previously stated, the plaintiff was injured as a result of his vehicle being struck in the rear end by the defendant Boudreau's vehicle. At the time of impact, the plaintiff's motor vehicle was stationary while the plaintiff was waiting to make a left turn in the face of approaching vehicles. The impact caused the plaintiff's vehicle to strike the rear end of another vehicle. These were two separate impacts. The plaintiff's motor vehicle was a write-off, its value being approximately \$3,400.00. The plaintiff was wearing a seat belt at the time.



[57] As a result of the impact, the plaintiff suffered injuries to the cervical spine (whiplash), right shoulder, wrists and “TMJ” joint. Mr. Grundy had been injured in previous accidents including a whiplash injury in 1999. I find that the physical injuries preceding the motor vehicle accident in issue had, for the most part, resolved. The several medical practitioners who saw or treated Mr. Grundy variably categorized his injuries as mild to moderate and moderate to severe. Upon consideration of all the evidence, I would categorize all Mr. Grundy’s injuries resulting from the motor vehicle accident as moderate tending to severe soft tissue injuries.

[58] In determining quantum, as well as considering all of the medical evidence, Mr. Grundy’s evidence and the legal arguments of both parties as to how the injuries have affected Mr. Grundy, I have reviewed the following cases referred to the Court by defendant’s counsel:

- **Mitchell v. Mason Estate**, 2002 Carswell Ont 3452
- **Kornfeld v. Leong**, 2001 Carswell Alta 1349 (Q.B.)
- **Halliday v. Wigmore**, 1996 Carswell BC 1633 (S.C.)

- **Gaudet v. Keay** (2002), 202 N.S.R. (2d) 130 (S.C.)
- **Kelly v. Hadley** (1995), 138 N.S.R. (2d) 272 (T.D.)
- **MacLeod v. Smits** (1994), 135 N.S.R. (2d) 389 (S.C.)
- **Dorie v. Williams** (1994), 127 N.S.R. (2d) 29 (S.C.)
- **MacGillivray v. Butler**, [1994] 129 N.S.R. (2d) 175
- **Berry v. Poteri**, [1997] N.S.J. No. 247 (S.C.)
- **Ross v. Isaacs, Ross v. Isaacs**, 2001 NBQB 234
- **Smith v. Stubbert** (1992), 117 N.S.R. (2d) 118 (S.C.A.D.)

[59] In **Gaudet v. Keay** (2002), 202 NSR (2d) 13 c, MacLellan J. found that the plaintiff had suffered whiplash and shoulder injuries and emotional problems (post traumatic stress and depression ) and that they resolved in approximately 2 years. Justice MacLellan awarded general damages of \$30,000.00.

[60] In **Ross v. Isaacs** (2001), NBQB 440, Creaghan, J. found that the plaintiff suffered whiplash and tempormandibular joint disorder in 1995. The whiplash injury had resolved by the time of trial. The tempormandibular joint injury had not resolved at time of trial. Prior to the accident, the plaintiff, a 21-year-old college

student, had temporomandibular joint problems and was wearing a bite plate. The Court found that the trauma resulting from the motor vehicle accident had exacerbated her condition and caused inflammation in the joint that had not been present before the accident. Although surgery had been suggested and an arthroscopic procedure had been performed to more properly understand the problem, no surgery had been performed or was anticipated at time of trial. The Court found that the plaintiff had suffered ongoing pain with the condition.

[61] In **Ross**, the Court, in assessing general damages, awarded separate amounts for the plaintiff's two major injuries. It seems that Creaghan, J. took that unusual step because it was the "TMJ" joint injury which caused the matter to go to trial. Presumably there had been agreement as to the amount of damages for the whiplash but not for the temporomandibular joint injury. Justice Creaghan awarded general damages of \$12,000.00 for whiplash and \$48,000.00 for the temporomandibular joint injury.

[62] In this case because of the inconsistency of the plaintiff's evidence in describing his injuries and their effect and also in describing the effect of his injuries to his caregivers, it is difficult to determine with accuracy the extent and

duration of the plaintiff's pain. Mr. Grundy complained to both the Court and his medical caregivers of severe ongoing pain since the accident. The type of pain suggested by Mr. Grundy, in the Court's view, would have been more debilitating than demonstrated. Some of his medical caregivers and examiners commented that the plaintiff was able to stand and sit for relatively long periods of time without apparent discomfort. The trial of this matter extended over eight sitting days. Although Mr. Grundy asked on 2 or 3 occasions to sit when addressing the Court or examining witnesses and did wince on a few occasions, for the most part he did not seem to be in pain or discomfort during the course of the trial. However, the Court is satisfied that, as a result of his injuries, Mr. Grundy did experience pain and discomfort and that he will, from time to time, continue to experience some pain and discomfort.

[63] After considering the evidence, argument and the above noted cases, I would award general damages for pain, suffering and loss of enjoyment of life in the amount of \$60,000.00. However, I would reduce that amount for Mr. Grundy's failure to mitigate his own damages and now consider that element.

## **Mitigation**

[64] Throughout Mr. Grundy's medical difficulties, both before and after the accident in issue, he has consistently either refused or neglected to follow medical advice and pursue prescribed treatment.

[65] I have not heard a case where failure to mitigate was so overt and extreme. Such to the point that the Court feels that a deduction from the general damage award should be precisely considered.

[66] Even before this accident the plaintiff often failed to follow medical advice from his family doctor. Following the accident, Dr. Ozere referred the plaintiff to Burnside Physiotherapy, physiotherapist Heather MacAuley treated Mr. Grundy. She was conscientious in her treatment and Mr. Grundy seemed to have confidence in Ms. MacAuley, but she acknowledged in her letter of April 16, 2002 to Dr.

Ozere (Exhibit 7) that Mr. Grundy did not regularly attend sessions and was a difficult patient.

[67] Mr. Grundy then attended Portland Physiotherapy, which he says was a more convenient location for him. His attendance was again sporadic. He then attended Scotia Physio, but for only one treatment. He then sporadically attended Maritime Physiotherapy for massage therapy.

[68] Dr. DeCroos, Mr. Grundy's then family doctor, referred him to physiotherapy at the Q.E.II . Although Mr. Grundy was booked for two appointments, he failed to appear on both occasions.

[69] Mr. Grundy was provided with a bite plate by his dentist, Dr. J.D. MacNeil, which was recommended later by Dr. Hannigan as a solution to his "TMJ" joint problems, but Mr. Grundy would not follow instructions on its use and eventually stopped wearing it.

[70] Mr. Grundy was prescribed splints to wear for his carpal tunnel syndrome but he failed to wear them as prescribed and eventually ceased wearing them altogether.

[71] In January 2003, Mr. Grundy was seen by Neurologist, Dr. McKelvey, but failed to follow Dr. McKelvey's advice that he increase his physical activities. Mr. Grundy refused to see Dr. McKelvey again. Dr. DeCroos, because of the pain complaints, referred Mr. Grundy to an anaesthesiologist, Dr. Finlayson, in an attempt to provide relief for the complaints of pain. Although an appointment was made for Mr. Grundy, he failed to keep the appointment and never did see Dr. Finlayson.

[72] Mr. Grundy was referred to several psychologists and psychiatrists including Drs. Hayes, Millner-Clerk, Reuben and Steele. He failed to see those doctors except for one appointment with Dr. Steele and did not return as recommended to Dr. Steele.

[73] Even Dana Marcon, a medical exercise specialist who Mr. Grundy called to give evidence on his behalf, admitted that Mr. Grundy missed appointments for

exercise therapy. Ms. Marcon could not recall how many appointments were missed but said Mr. Grundy missed more than one appointment. Ms. Marcon says she billed Mr. Grundy's insurers for all appointments whether or not Mr. Grundy attended. Ms. Marcon records showed she billed for 31 sessions, but only had chart notes for 12 or 13, and Mr. Grundy did not attend for any appointments between December 19, 2001 and August 7, 2002 and between June 2003 and September 25, 2003.

[74] In light of this evidence I have no difficulty in finding that Mr. Grundy failed to exercise reasonable diligence and ordinary care in attempting to minimize the damage caused by the motor vehicle accident. Because of the consistency of that failure I would reduce the general damage award by 25% resulting in a final award of monetary damages of \$45,000.00.

### **Remainder of Claims**

[75] As referred to earlier, Mr. Grundy also claims for loss of valuable services, loss of consortium, future and past loss of income and loss of income capacity.



[76] Mr. Grundy has failed to prove any of those claimed losses.

[77] There is no evidence to support a loss of valuable services and as the Court advised Mr. Grundy at trial, any loss of consortium could only be claimed by his partner who is not a party to the action. The Court also informed Mr. Grundy that his alleged failure to enjoy all of the benefits of his partner relationship would be considered in assessing his loss of enjoyment of life and I have done so.

[78] Mr. Grundy, as evidenced by his income tax returns, has had no income other than social assistance for the eight years preceding trial. Consequently, no loss of income has been proven. Although Mr. Grundy says he has been involved in the trucking industry in the past, there is no reliable evidence that he would again have been employed in the trucking industry, but for the injuries suffered in the motor vehicle accident.

[79] Mr. Grundy says that he intends to become a guidance counsellor because the pain resulting from his motor vehicle injuries prevents him from performing manual labour. Dr. Rosenberg questioned whether Mr. Grundy has the background, education and intelligence to become a guidance counsellor. From

my view of the evidence, I agree with Dr. Rosenberg's assessment. There is no acceptable evidence of future loss of income or earning capacity. Although Dr. King suggests that Mr. Grundy may be left mildly handicapped there is no evidence to suggest that such a mild handicap would interfere with any work Mr. Grundy may have in the future.

[80] Consequently the Court makes no awards for these categories of claim.

### **Summary**

[81] In summary the Court awards the following damages:

-	Special damages for temporomandibular joint injury	\$7,000.00
-	General damages for pain, suffering and loss of enjoyment of life	<u>\$45,000.00</u>
	Total Award	\$52,000.00

The plaintiff shall have judgment in that amount.

[82] If the parties are unable to agree on the issues of costs and pre-judgment interest, I shall expect to hear from them.

J.