IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Romkey v. Metropolitan Transit Authority, 2003 NSSC 250

Date: 20031219
Docket: 153112C
Registry: Halifax

Between:

Darrell Romkey

Plaintiff

v.

Metropolitan Transit Authority

Defendant

Judge:	The Honourable Justice Frank Edwards
Heard:	December 1 - 4, 2003, in Halifax, Nova Scotia
Written Decision:	December 18, 2003
Counsel:	Peter Rumscheidt, Esq., for the Plaintiff Matthew G. Williams, Esq., for the Defendant

By the Court:

[1] This is an action for damages arising out of a motor vehicle accident in 1997. The issue is whether the Defendant was negligent and, if so, whether that negligence caused the Plaintiff's injury. Quantum of damage is also very much in issue. There was a second accident and injury in April 2000. The Plaintiff also had a previous medical history of mechanical back pain.

[2] ***The 1997 Accident:*** The incident from which this litigation arose occurred at approximately 7 a.m. on January 29, 1997, on the Main Road with runs east/west between Dartmouth and Eastern Passage. A portion of the Main Road is intersected by Bonaventure Avenue and then, moving easterly, by Hines Road.

[3] The Bonaventure intersection is regulated by traffic lights. Eastbound traffic approaching Bonaventure enjoy two lanes, an inside lane and a passing lane. Once past Bonaventure, the passing lane immediately becomes a left turn lane for the Hines Road intersection. Immediately to the east of Hines Road, there is only one east bound lane.

[4] The speed limit in the area was 60 kph at the relevant time. The inside travel lane is bordered by a concrete curb. The weather was clear but it was still not light. Vehicles had their headlights on.

[5] The Plaintiff, Darrell Romkey (Romkey), was twenty-seven years old at the time. He was accompanied by his spouse, Susan Fellows (Fellows), who was also twenty-seven. Romkey was driving his father's 1997 Cavalier. Fellows was in the front passenger seat. Fellows was nine months pregnant. The couple were returning to their home in Eastern Passage from the Grace Maternity Hospital in Halifax. Fellows had had false labour the night before and they had been at the hospital between 1 a.m. and 6:30 a.m. Romkey had gotten a few hours sleep on a cot.

[6] Anthony Keith (Keith) was driving an access bus for his employer, the Defendant Metropolitan Transit Authority. He had started work at 6 a.m. He had been driving this particular route for 2 ½ to 3 years as of 1997. Keith had picked up one passenger and was proceeding for his second at 136 Briarwood. His route would take him in an easterly direction through the two above described intersections.

[7] Keith says he first came upon the Romkey vehicle well before the Bonaventure intersection. Keith says Romkey was driving very slow in the

inside lane. Keith overtook Romkey but says when he tried to get back into the inside lane, Romkey was too close to the rear of the bus. Keith described a number of slowing down and speeding up manoeuvres he made in order to get clear of Romkey. In each instance, Keith says Romkey matched the bus's speed thus preventing Keith from getting back into the inside lane.

[8] This situation continued as the vehicles passed through the Bonaventure intersection. The problem for Keith was that he was no longer in a passing lane but in the left turning lane for Hines Road. In addition, Keith noticed a large truck proceeding westerly toward the Hines Road intersection. Keith was now travelling at 75 - 80 km per hour, or, as he testified "as fast as the bus would go." He says he was going too fast to stop (he thought there might be black ice) or turn left. Keith says his only option was to move to the right as they proceeded through the Hines Road intersection. Keith claims that he believed the car was now far enough behind to enable him to make the lane change safely.

[9] Romkey says he did not notice the bus until it was beside him at Hines Road. He was proceeding at approximately 60 km per hour when the bus made an abrupt right turn in front of him. Romkey had no choice but to turn to the right to avoid contact with the rear of the bus. This manoeuvre caused

Romkey's right front tire to go up on the curb and the car came to a dead stop. Romkey immediately noticed a sensation of pins and needles in his back.

[10] I am satisfied that Keith was negligent when he cut off Romkey's vehicle. Keith's negligence caused Romkey's vehicle to make contact with the curb. I am satisfied that Keith was travelling at an excessive rate of speed and operating the bus in a imprudent manner. I reject Keith's evidence that Romkey was slowing down and speeding up in an effort to prevent Keith from regaining the inside lane. I am satisfied that Romkey was operating his vehicle in a lawful manner in the proper lane and within the speed limit.

[11] Keith was not a credible witness. His testimony (and the statement he gave to the RCMP on January 30, 1997) is the self-serving reconstruction of a witness who knew he had erred but would not admit it. Keith knew that once he went through the Bonaventure intersection he was going to be in a left turning lane. He had plenty of time to slow down rather than literally race for the finish line. In the circumstances, Keith's decision to accelerate was reckless.

[12] Keith's January 30, 1997 RCMP statement is telling. He originally wrote: "... I continued to ***accelerate*** hoping to complete my pass." (Emphasis mine)

He later crossed out the word “accelerate” and wrote in “maintain my speed”. I am satisfied the original version more accurately reflects what occurred. Keith’s demeanour on the stand demonstrated impatience and anger. I believe those were his governing emotions on the morning in question. I am sure that, in Keith’s mind, Romkey should have slowed down to let him in. Romkey was under no legal obligation to do so. Keith’s actions alone created a very perilous situation. He is solely responsible for what occurred. There was no contributory negligence on Romkey’s part.

[13] But what exactly did occur is the critical issue. I have already mentioned Romkey’s claim that his right front tire went up on the curb. He claims the vehicle came to a dead stop in some snow. Romkey testified that he then had to rock the car back and forth four or five times before he could pursue the bus. In cross-examination, this evidence was contrasted with what Romkey had previously stated.

[14] In a statement he gave to the RCMP on March 1, 1997, Romkey said: “... I hit the curb and bounced off...”. But, Romkey is then asked “What happened then?” He replies: “... once I got straightened away I went after the bus.” This latter sentence was not referenced in cross-examination. It is an important qualification. It implies that Romkey stopped.

[15] On June 25, 1998, Romkey gave a statement to an insurance adjuster. Exhibit 7 is the typed copy of the statement with the handwritten version attached. In the typed copy, Romkey says simply, “I had to pull to the curb.” In the written version however, the sentence is followed by this one: “My two wheels went right up over the curb.” I am satisfied that that sentence was inadvertently omitted from the typed version. It is obviously a significant omission. Unfortunately, Counsel went by the typed version during his cross-examination of Romkey.

[16] As I will outline later, Romkey pursued the bus and subsequently assaulted the driver. He was charged with assault. Romkey testified as follows during his Provincial Court trial:

> “... Got knocked into th curb, ah, probably waited a few seconds ... probably seemed like minutes, probably was more like seconds. You know, asked Susan if she was okay. She was, you know, shaken up and stuff, of course.
>
> 735-Q. If I could stop you there, you indicated you were knocked into the curb. Can you describe how the vehicle (inaudible - too low) ....
>
> A. Sort of slid when he ... when the bus made ...come into my ... well I guess it would’ve been his right came into my left, I had to force over and when I forced over there’s quite an embankment there so the same time I had my brakes applied and I sort of slid into the curb sideways, I guess, would be the ....

736-Q. Did your vehicle stop?

A. Oh, yeah, yeah." (transcript pp. 167-168)

[17] Fellows testified that their car "slammed into the curb" and said she thought the car was "hung up on the curb". She was cross-examined on evidence she gave at the assault trial. There she said that they "... hit the curb a bit and then we just kept followin'..." (transcript page 140). I give little weight to the apparent discrepancy in her evidence. In cross, she maintained that "slammed into the curb" was the more accurate depiction. At the assault trial, her focus (and that of the proceeding) was on the assault and not on the collision with the curb.

[18] A troubling aspect of Romkey's evidence relates to the damage allegedly sustained by the car. Romkey claims that the wheel rim and the right front tire had to be replaced. Romkey's father, the owner of the car, confirmed that he paid $300.00 for a new rim and tire. He said he did not put it through his insurance because he had a $500.00 deductible. Romkey Sr. claims that he never thought to send the bill to the Metro Transit Authority, nor did he keep a receipt. When Romkey gave his statement to police on March 1, 1997, he made no mention of the damage to the vehicle.

[19] I have considered the foregoing and have concluded that the Romkey vehicle was damaged as the Romkeys described. I do not believe that Romkey Sr. would have lied under oath about this issue. He described how he noticed the wheel wobbling when he drove the vehicle later in the morning of January 29, 1997. I find that Romkey Sr. is a truthful witness.

[20] I am satisfied that the Romkey vehicle hit the curb with considerable force. It went from 60 km per hour to a dead stop very suddenly. I believe Darrell Romkey when he says he was thrown forward and then back upon impact with the curb. I believe him when he says that he noticed pins and needles in his back right after the impact. I attach no significance to the fact that Fellows was not injured at all. It is commonplace that, in many motor vehicle accidents, some occupants of a vehicle may be seriously injured or killed while others walk away without a scratch.

[21] I heard a lot of evidence about the pursuit of the bus and the subsequent assault on the bus driver. I do not believe Romkey or Fellows when they insist that the only reason they pursued the bus was to identify the driver. I am satisfied that Romkey was outraged by what had just occurred. I have no doubt but that he intended to assault the bus driver when he finally caught up to him.

[22] Further, I reject Romkey's evidence that he punched Keith only four times. I am satisfied that Romkey punched Keith twice through the open driver's window of the bus. To accomplish that, Romkey had to climb up on the step by the driver's door. He then got the door open and pulled Keith out. Romkey then slammed Keith up against the side of the bus and then knocked him to the ground.

[23] I accept the evidence of the independent witness, Daniel Awalt, that Romkey landed five or six punches on Keith outside the bus. Awalt described Keith as being hunched over while Romkey delivered "very hard" upper-cut type punches to Keith's mid-section. I am satisfied that this fight required considerable exertion on Romkey's part including significant stress on his back.

[24] ***The Medical Evidence***: Romkey says that when he got home, he layed down for a hour or two. He says his back was much worse and that he spent the better part of the day on the couch. On January 31, 1997, two days after the accident, he visited his family doctor, Dr. Ernest Johnson. Dr. Johnson's note reads in part:

> "Pain right lower back for 10 - 11 years. Last 2 days pain radiating down right leg following car accident. Pain radiates

> down to buttock, back of leg to calf, also paresthesias." (Pins and needles)

[25] Dr. Johnson made no surgical recommendations. He told Romkey to stay off work and lose weight. He also prescribed some pain medication. Unfortunately, Romkey's condition continued to deteriorate. He went back to see Dr. Johnson on February 10, 1997. Dr. Johnson referred Romkey to an orthopaedic surgeon, Dr. Amirault. Dr. Amirault diagnosed "a large L5-S1 disc herniation" and recommended surgery. On March 4, 1997, Romkey underwent a discectomy. He did well post-operatively.

[26] Dr. Amirault saw Romkey again on April 21, 1997. At that time, Romkey had considerably less pain in the low back and down the leg. Dr. Amirault's report says "we will send him to physio and then put him on a home program". There was never any followup on the physiotherapy. Dr. Johnson testified that some specialists feel physio is beneficial while others say it can be detrimental. Dr. Johnson said he could not comment on the effect of Romkey not having physio. In the particular circumstances of this case, I am unable to conclude that Romkey's failure to have physio constitutes a failure to mitigate.

[27] Romkey had no further medical consultations until he again saw Dr. Johnson on October 28, 1997. In a medical-legal report dated August 5, 1998, Dr.

Johnson summarized his findings. As the summary is consistent with the evidence I heard, I will quote it in full beginning with the October 28, 1997 visit:

> "I did not see Mr. Romkey gain until October 28, 1997. He indicated to me at that time that he had returned to work in June 1997, however, his job was labour-intensive and that he suffered back pain at the end of the day along with right leg pain. However, by October he found that the pain had become steady. At that time the range of motion of his lumbosacral spine was diminished and available range caused pain in the right leg. I advised him to stay off work, to do home physiotherapy and I ordered Ultradol 300 mgs twice a day (non-steroidal anti-inflammatory drug).
>
> Follow-up appointment was on December 9, 1997, and he indicated to me that his back was still causing a lot of pain with bending and prolonged positioning. In the morning the right leg is stiff and he also indicated he had cramping in the calf at night. I found that the range of motion was improved and I advised him to continue with the same regimen.
>
> I saw Mr. Romkey on January 27, 1998. At that time he indicated to me that his back was worse then ever, especially in the mornings. He indicated that he could not bend or lift without discomfort, the cramp in the right calf was persistent, it became worse if active and awakened him at night. Range of motion of his lumbosacral spine was diminished, this brought on pain in his low back and right leg. The right ankle reflex was diminished, he had a positive Lasegue's on the right with straight leg raising to 45^{o}. I advised him to carry on his same routine and continue with his Ultradol. I also advised him to continue off work and told him that he would not be capable of pursuing labour-intensive type of employment. It was my opinion that he seek out some form of sedentary type of work.

I did a final examination on Darrell Romkey on July 22, 1998. At that time he complained of right back pain after prolonged sitting (½ hour) and if he lifts over 30 to 40 lbs. He also stated that his back is stiff and sore in the morning on arising and takes approximately ½ hour to limber up. This even occurs after having purchased a new hard mattress. Standing, especially on concrete floors, for over ½ hour causes right low back pain. One of his major complaints at this time is cramps in the right calf. This awakens him on the average of three out of seven nights a week at which time he has to get up massage his calf and walk around. He also experiences pain in the lateral aspect of the right hip after sitting for a period of time. This requires him to get up and move about for relief. He also indicated he gets paresthesia (sensation of pins and needles) on the sole of the right foot and big toe. This also comes on after prolonged sitting of approximately ½ hour. On examination he stood with a straight spine with a flattened lumbar lordosis. He had a full range of motion of his lumbosacral spine with pain in the right low back at the full range. The right ankle reflex was depressed and there was weakness of the right dorsi flexor and evertor of the ankle. Straight leg raising on the left was 90^{o} with a negative Lasegue's and on the right was 45^{o} with a positive Lasegue's. He did not return to his regular type of employment after his visit to my office on October 28, 1997. He has since started doing small engine repairs where he is working for himself. He avoids situations that cause him to suffer pain in his back and leg and this enables him to get by without taking any drugs for pain.

In conclusion I would like to state that Mr. Romkey has had pain in his low back in an intermittent basis over the last 10 to 11 years. This usually came on after incidents of lifting or other stressing activity to his back. ***It is my opinion that as a result of the severe jarring to his back that took place at the time of his automobile accident he suffered a herniation of the L5-S1 disc on the right. This herniation necessitated surgical removal of the disc on March 4, 1997. As a result of the above sequence of events Darrell Romkey is no longer***

> ***capable of carrying out labour-intensive type work that he was accustomed to prior to his accident.*** It is now over one year since his surgical treatment and he still has weakness of the right leg and suffers from daily pain even while doing the sedentary type of activity in which he is presently involved. Any attempts to function beyond this level brings on pain and requires him to stop. I feel that the problems that he has at this time are permanent and I would assess him a permanent medical impairment rating of 18%." (Emphasis mine)

[28] Subsequently, on August 15, 2000, Dr. Johnson updated his findings. He indicated that he had seen Romkey again on October 29, 1998, December 30, 1998, March 29, 1999, June 8, 1999 and August 26, 1999. The last mentioned visit was the last time Dr. Johnson saw Romkey prior to Romkey's involvement in a second car accident on April 14, 2000. (I will deal with the second accident later.) Dr. Johnson made the following conclusion:

> "...On all of those visits there was very little difference regarding his complaints and the findings on examination. On July 22, 1998 I indicated that this man had reached a plateau in his convalescence and I did not feel that he would improve any and I assessed his permanent medical disability at 18%. Based on the findings of the examination of August 26, 1999 my opinion is identical. I do not feel that this man is to improve any beyond that particular status and I would still maintain his permanent medical impairment rating at 18% and further maintain that the restrictions in activity which applied at that time are still present to this day."

[29] I accept Dr. Johnson's uncontradicted opinion that the car accident of January 29, 1997 caused Romkey's herniation of the L5-S1 disc on the right. I am satisfied that that injury is consistent with Romkey's vehicle having hit the curb at 60 kmh and coming to a dead stop.

[30] Further, I am satisfied that the disc hernation was not caused nor aggravated by the altercation with the bus driver immediately following the collision.

[31] In his evidence, Dr. Johnson carefully explained the mechanism of a disc herniation. With the aid of an anatomically correct model, he demonstrated how the individual vertebrae are separated by a ligament. The latter has the appearance and texture of a rubber seal around the perimeter of the separation between the vertebrae. Inside the separation and contained by the ligament is a semi-gelatinous substance which in fact constitutes the disc. The disc acts like a cushion between the bony vertebrae. A herniation is caused by a tear in the ligament. Once the ligament is torn, the semi-gelatinous disc is able to exude through the opening. This causes pressure on the surrounding nerves and thus causes pain.

[32] The Defendant's position is that the fight with the bus driver either caused or aggravated the injury. Dr. Johnson testified, however, that even without the fight, Romkey's condition would have ultimately been the same. He

explained how the weight of the body would inevitably force the semi-gelatinous disc through the tear in the ligament. At most, the fight would have speeded the herniation process along. The Defendant called no medical witnesses. As I have noted, Dr. Johnson's opinion stands uncontradicted. I have no doubt but that the herniation began when the car hit the curb and not during the fight.

[33] I am conscious of the fact that Dr. Johnson at times had the demeanour of an advocate for his patient. This was the first time he had been qualified to give expert opinion evidence on this topic. Despite that circumstance, I am satisfied that Dr. Johnson was an extremely knowledgeable witness. His *curriculum vitae* (Exhibit 16) demonstrates that he has immense practical experience dating back to 1961. Of particular note, he worked in occupational medicine between 1982 and 1995. He was also employed during that time as a medical advisor to the Workers Compensation Board. I attach great weight to his evidence. I was very impressed by his explanations and his ability to communicate his evidence in an easily understandable manner. I am not the least concerned about the accuracy of his evidence.

[34] In ***The Law of Evidence In Canada*** (2nd Ed) Sopinka and Lederman state the following at p. 623:

> "... an expert is allowed to state his or her opinion and conclusions. The expert's usefulness in this respect is circumscribed by the limits of his or her own knowledge. Before a court will receive the testimony on matters of substance, it must be demonstrated that the witness possesses special knowledge and experience going beyond the trier of fact. The test of expertise so far as the law of evidence is concerned is skill in the field in which the witness's opinion is sought. The admissibility of such evidence does not depend upon the means by which that skill was acquired. As long as the court is satisfied that the witness is sufficiently experienced in the subject-matter at issue, the court will not be concerned whether his or her skill was derived from specific studies or practical training, although that may affect the weight to be given to the evidence."

[35] There is no doubt that Dr. Johnson is "sufficiently experienced" to testify as he did.

[36] I further accept Dr. Johnson's opinion that Romkey's symptoms following January 29, 1997, had nothing to do with any of Romkey's previous back problems. I have reviewed the earlier medical history in detail and am confident in this conclusion. I note, for example, that on March 27, 1992, an orthopedic surgeon, Dr. Canham diagnosed mechanical back pain secondary to a work related injury several years before. There was no recommendation for surgical intervention. Significantly, the medical records are silent regarding low back problems between February 1993 and January 1997.

[37] What distinguishes this case from many others heard by this Court is the presence of an objective finding (the herniation) consistent with the Plaintiff's subjective complaints. This herniation was demonstrably new in January 1997. While I have some concerns about Romkey's credibility, I have no doubt that he suffered a very debilitating injury on January 29, 1997, when his vehicle struck the curb.

[38] I have also considered the evidence of Constable Daniel Bretzer of the RCMP. Constable Bretzer took Romkey's statement on March 1, 1997. He noticed Romkey wincing in pain and asked Romkey whether the pain related to the January 29 accident. He quotes Romkey as answering "no", that the pain related to "another matter for which he was having corrective surgery the following week'. I examined Constable Bretzer's notebook. It does not contain the complete answer I just quoted. Constable Bretzer was recalling the comment strictly by memory six years after the fact. He is an impressive witness making an honest effort to be accurate. However, the comment is not logical in the context of the evidence I have heard. I give it no weight.

[39] ***The April 2000 Accident:*** The complicating factor in this case is the second accident in April 2000. In a comprehensive medical legal report dated

March 29, 2001, Dr. Johnson detailed the effects of the second accident. At page 5, he concluded as follows:

> "As a result of his second accident Mr. Romkey suffered a second herniated disc at the right L5-S1 level. Over the course of nearly one year, his symptomatology has waxed and waned and from my observations this has been a result of the amount of activity undertaken in his daily routine. The amount of symptomatology is directly proportional to his level of activity. It has taken a period of 10 months before he has been able to return to an 8 hour day of sedentary to light activity. It would appear that the sedentary activity aggravates his symptoms to a slight degree whereby the light activity brings on more pronounced symptoms which are all the same as when initially examined shortly after his accident however to a lesser degree (quality the same, quantity diminished). I would like to point out that from my observations this man has a very high pain threshold and has a dislike for taking medication. It is further my opinion that his high pain threshold and his determination to work are both very significant factors as to why this man is able to put an 8 hour day with restriction in his activities. I feel that he has a permanent partial disability which is directly related to both of his motor vehicle accidents. I have previously addressed that particular disability as being 18% from the first accident and I would add a further 12% from his second accident giving him a total of permanent medical impairment rating of 30%."

[40] I accept Dr. Johnson's conclusion. I am uncomfortable with assigning specific percentages to the respective disabilities. I am satisfied however that Romkey's 1997 injury and resultant disability was much more severe than the 2000 injury and disability.

[41] ***General Damages:*** Romkey's injury from the 1997 accident had plateaued prior to the April 2000 accident. As of April 2000, Romkey already had a permanent partial disability. The injury with its associated pain and physical restriction had and continues to have a significant negative impact on Romkey's day to day life.

[42] Romkey has had to significantly reduce his recreational activities. Prior to 1997, he was an avid hunter and sports fisher. Since that time, he has had to dramatically reduce those activities. He has also had to curtail strenuous activity with his children such as tobogganing and swimming. He used to enjoy snowmobiling; since 1997 he has done very little. When he does venture into one of these activities, he pays the price in pain for days afterward.

[43] Romkey's spouse described him as a happy outgoing person prior to 1997. Since then, he has been frequently irritable and less willing to participate in dancing or even going out to a movie.

[44] In addition, Romkey's 1997 injury has increased his risk of further and premature deterioration. Dr. Johnson illustrated this proposition by referring to X-rays taken before and after 1997. An X-ray of his lumbar spine and S.I.

joints on February 7, 1992, was normal. By April 18, 2000, there was significant degenerative disc disease noted at the lumbrosacral level.

[45] This is not a ***Smith v. Stubbert*** situation as this was not a soft-tissue injury. It is, however, useful to compare the ***Smith v. Stubbert*** range when assessing other persistently troubling but not totalling disabling injuries. With inflation, that range is now approximately $25,000.00 to $50,000.00. During his post-trial submissions, Romkey's Counsel submitted that an award of $50,000.00 for non-pecuniary damages would be reasonable. I agree. Mr. Romkey's injury and sequelae are as serious as those at the top of the ***Smith*** and ***Stubbert*** range. I therefore assess general damages at $50,000.00.

[46] ***Prejudgement Interest:*** This matter has gone on too long. It is now almost seven years since the accident. Present Counsel came on well after the one year limitation had expired. Still the delay was not the Defendant's fault and he should not have to pay. I will allow interest at 2.5 percent for five years.

[47] ***Past Loss of Income:*** The state of the evidence on this aspect of the Plaintiff's claim is unsatisfactory. There are no T-4 slips or statements of

earnings from Romkey's employers. I have no evidence that Romkey was working at the time of the 1997 accident. He claims that he did not start his small engine repair business until 1998 when it became a registered proprietorship. Yet it is clear that that business was being conducted for gain long before 1997. There is no record of that income.

[48] Romkey's evidence and tax returns do show an average annual income of about $17,000.00 between 1993 - 1995 inclusive. During that time he worked as a truck driver, a lobster fisher, and a part-time snowplow operator. I have trouble with his evidence that the boat he fished on was not available in 1996 but was available from 1997 onward. Surely, if that were true, there was other evidence he could have called to support his claim. Likewise, it should have been easy for him to call evidence regarding his allegedly lost opportunities to drive a truck or a snowplow.

[49] The burden of proof is on Romkey to prove that he lost income between 1997 and the present. He has failed to provide that proof. I am therefore making no award for past loss of income.

[50] ***Diminution of Future Income Capacity:*** Some of the same deficiencies exist here as in the claim for past loss. Still, the evidence is clear that due in

part to the 1997 injury, Romkey is restricted to sedentary occupations. I accept that the type of truck driving he had done was not sedentary. He described how it was necessary to climb up on the vehicles in order to cover the particular cargoes. The trucking firm he worked for hauled garbage in portable containers. The process of connecting and disconnecting the container to the transport is physically demanding. As Dr. Johnson noted, the suspension on large trucks is firm and can aggravate a sore back. Even Romkey's small engine repair business has a physical dimension to it. Romkey will therefore be less efficient in that business then he would otherwise have been.

[51] As I have noted, the tax returns provided in conjunction with Romkey's oral account, demonstrate that prior to 1997, he could make a modest living in non-sedentary occupations. In addition, he was also able to qualify for employment insurance benefits. His ability to qualify for such benefits has now to some extent been compromised. I agree with Hood, J's reasoning in ***Roemer v. Griffin*** [1999] N.S.J. No. 467 where she adopted Grant, J's reasoning in ***Gerow v. Reid*** (1988), 88 N.S.R. (2d) 34 (S.C.) at page 41:

> "The wrongdoers have deprived him of his ability to earn income which income generated U.I. benefits. He has lost the income and also the U.I. benefits. I consider the loss of

> eligibility for U.I. payments to be a real loss for which he should be compensated."

[52] I am satisfied that Romkey's income earning potential has been reduced in part by the 1997 accident. Romkey is still a young man at thirty-four years of age. I would assess his diminution of future income capacity attributable to the 1997 accident at $60,000.00.

[53] ***The Limitation Defence:*** By virtue of Section 205(1) of the ***Halifax Regional Municipality Act***, an action must be brought within twelve months of the event. This action commenced on January 15, 1999, almost two years after the accident.

[54] I am satisfied, however, that the Defendant suffered no substantial prejudice as a result of the late commencement of this action. There is no evidence that witnesses were unavailable due to the passage of time. Nor is there any evidence that physical or documentary evidence was lost.

[55] The fundamental question is the relative degrees of prejudice to the Plaintiff and the Defendant. [See ***Anderson v. Cooperative Fire & Casualty Company*** (1983) 58 N.S.R. (2d) 163 (N.S.S.C.); also ***Brown v. Marwieh***, (1993) S.H. No. 82373 (N.S.S.C.)] Here the Defendant would suffer little if any prejudice if I disallow the limitation defence. The Plaintiff, on the other

hand, would suffer significant prejudice because his action would be dismissed.

[56] I am dismissing the limitation defence.

[57] ***Costs:*** Counsel for the Plaintiff may make a brief written submission on costs by January 9, 2004. Defendant's Counsel then has seven days to respond. The Plaintiff can then make a short (two pages maximum) reply the week following.

J.