IN THE SUPREME COURT OF NOVA SCOTIA
Citation: MacAulay v. Smith, 2006 NSSC19

Date: 20060130
Docket: S.P. No. 06656
Registry: Pictou

Between:

Eva Joan MacAulay

-and-

Robert Wayne Smith and The Town of Trenton, a Municipality Incorporated pursuant to the laws of the Province of Nova Scotia

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Decision

Judge: The Honourable Justice Robert W. Wright

Heard: January 3 and 4, 2006 in Pictou, Nova Scotia

Written Decision: January 30, 2006

Counsel: Counsel for the Plaintiff - Jamie MacGillivray
Counsel for the Defendants - Timothy G. Daley

Wright J.

INTRODUCTION

[1] This personal injury action arises out of a collision which occurred on December 31, 2000 between an automobile being driven by the plaintiff Eva MacAulay and a grader being driven by the defendant Robert Smith while engaged in the course of his employment with the Town of Trenton in a snow clearing operation.

[2] As a result of the accident, the plaintiff sustained an injury to her neck and shoulder areas for which she now seeks compensation under two heads of damages, namely, non-pecuniary loss and loss of housekeeping capacity. Both liability and damages are in issue.

FACTS

[3] At the time of the accident, the plaintiff was accompanied by her daughter Gillian who was then 14 years old. Both gave a generally consistent account of how the accident happened, albeit with a few minor discrepancies in some of the details.

[4] The day began with Gillian MacAulay asking her mother at approximately 9:30 a.m. to drive her to a youth group meeting at a nearby church. After some new fallen snow was brushed off the car they were then using, a 1989 Dodge Omni, they proceeded down Seventh Street which ends in a T-intersection with Duke Street.

[5] As they were proceeding down Seventh Street, they saw in the distance ahead of them the grader being operated by Mr. Smith, plowing the street in the same direction. When the grader reached Duke Street, it turned to the right and proceeded a short distance down from the corner before pulling in at a slight angle to the right to deposit the snow that was intended to be cleared. In doing so, the grader briefly came to a full stop in that position.

[6] At that moment, the MacAulay vehicle pulled up to a full stop at the stop sign on Seventh Street at the Duke Street intersection. They too turned right onto Duke Street en route to the church. Gillian MacAulay testified that as they began to pull away from the stop sign making a right hand turn, the grader was still moving off to the right ahead of them before coming to a stop. Eva MacAulay, when pressed on cross-examination, acknowledged that the grader was already stopped when she began her right-hand turn onto Duke Street. For reasons that will become apparent later in this decision, I do not view that discrepancy as being of much significance, notwithstanding its emphasis by defence counsel.

[7] In any event, Eva MacAulay had barely completed the turn onto Duke Street before coming to a full stop herself, waiting to see what the grader ahead was going to do. The evidence of Gillian MacAulay was that her mother had traveled perhaps 10 feet or so from the corner before coming to a stop. She further estimated that the distance at that point between the front of their car and the rear of grader was in the range of 20-25 feet (which she qualified by acknowledging that she is not good at estimating distances). The evidence of Eva MacAulay was that the distance between the front of her car and the rear of the grader while both

vehicles were stopped was between two and three car lengths. She also placed the stopped grader approximately four car lengths down the right- hand side of Duke Street measured from the front of her car while at the stop sign on Seventh Street.

[8] From this stopped position, Eva MacAulay then decided to inch out slightly to her left so as to be able to take a clear view down Duke Street past the grader. She saw another vehicle approaching which then passed from the opposite direction uneventfully. It was at that moment that she suddenly realized that the grader had begun backing up towards her. Her reaction was to honk the horn and put the gear in reverse, only to have her wheels spin on the slippery road surface. She was therefore unable to get out of the way before the back of the grader collided with, and locked onto, the front of her car. Her car was then pushed backwards and a bit sideways to the left into the area of the Duke and Seventh Street intersection before the driver of the grader realized what was happening and came to a stop. She said that the impact between the two vehicles was a good jolt, sufficient to cause enough front end damage to the car that it had to be written off. Gillian MacAulay, who estimated the reverse speed of the grader at 15-20 kph, described the impact as pretty hard and one that made a sort of whipping motion back and forth as the car was pushed backwards.

[9] The only other witness to testify at this trial was the defendant Robert Smith. Mr. Smith has been employed by the Town of Trenton as a heavy equipment operator for the past 20 years, during which time he has regularly operated a grader for both road improvement and snow plowing purposes.

[10] Mr. Smith gave a detailed description of the grader and the equipment attached to it which were well illustrated in police photographs of the accident scene taken immediately thereafter (by which time the grader had been parked along the right side of Duke Street). These police photographs were entered into evidence by agreement of counsel. Mr. Smith gave evidence that he had been operating this particular grader regularly over the past five or six years and was therefore very familiar with it. He estimated its length at approximately 30 feet and its weight as somewhere in the range of 18 tons. It is not necessary for purposes of this decision to recount the various features of this grader and its equipment (which appear from the photos to be typical for such a machine) other than to highlight those features which pertain to the operator's lines of vision.

[11] The cab of the grader is located just forward of the rear engine compartment. The driver's seat, according to Mr. Smith's estimate, is approximately six feet off the ground from which the driver can see every angle, since the construction of the cab is glass all around. This grader was also equipped with two mirrors located inside the cab. One is a six inch wide - twenty inch long truck mirror installed just above his head. The other is a six inch round convex mirror attached slightly to the right of the driver's seat at eye level. The latter, according to Mr. Smith, gives the driver a view straight back from the grader and would pick up a car positioned closely behind the grader if it were square on. Mr. Smith also testified that when he is backing the grader, looking over his right shoulder, there is still a blind spot running at an angle from the left rear side of the vehicle. Nonetheless, he testified that while operating the grader, he is looking for traffic at all times both by turning his head and using his mirrors. As he put it, "I drive all four sides of my machine".

[12] Mr. Smith also described his routine practice when backing the grader. In describing the visual checks he always makes, he stated that he first checks his mirrors, then looks over his left shoulder, and then looks over his right shoulder while backing the machine. He testified that the grader's maximum speed in reverse when in low gear (as he says it was at the time of this accident) is maybe 2 kph. He further testified that the grader engages an automatic electronic beeper when put in reverse and also has backup lights which he has to switch on manually.

[13] After providing this general information, Mr. Smith described the occurrence of the accident. After coming to a stop at the stop sign on Seventh Street, he then turned right onto Duke Street intending to get rid of the snow that he was then clearing. He referred to the police photographs which illustrate, from the snow clearing pattern, the most forward point the grader had reached before coming to a stop in depositing the snow off to the right side of Duke Street. It was Mr. Smith's estimate that the distance between the rear end of the grader and the corner of the intersection behind him was then only about 20 feet. He testified that he then made the usual visual checks recited above before he began to back up. His intention was to back up beyond the same intersection and then return to plowing the other side of Seventh Street.

[14] Mr. Smith testified that when he made his usual visual checks, he saw no traffic behind him on Duke Street or at the Seventh Street stop sign and, while looking over his right shoulder, began to back up. He says that he is certain that he switched on the back up lights and that he could hear the reverse beeper operating even though he was then wearing earplugs which are standard issue by his employer. He then saw another vehicle coming up Duke Street towards him which he had first noticed several hundred feet away when he was stopped. As he began reversing towards the intersection, he saw the oncoming vehicle go by and then heard a click noise which he attributed to the blade of the grader hitting a crest on the street. He continued backing up until he suddenly saw the plaintiff's vehicle at an angle directly behind him to the left. He then immediately stopped the grader by which time both vehicles were back into the intersection. He said that he neither heard the sound of a horn behind him, nor felt the impact of the collision. He then immediately got out of the grader and walked over to the plaintiff's vehicle to see if the occupants were all right. He said he asked the driver if she had seen his back up lights or heard the beeper which she answered in the affirmative. The police were then called to the accident scene after which Mr. Smith continued to the end of his regular shift.

[15] After hearing the evidence of these three witnesses and observing them on the stand, I am satisfied that each of them was making a sincere effort to accurately recount how the accident happened. Some of the estimates given of time, speed or distance factors are not overly reliable but that is not unexpected of lay persons, especially where they are trying to recollect events from five years ago. In particular, while I accept that the grader was backing up at a low speed, I do not

accept Mr. Smith's estimate of 2 kph, considering the extent of the front end damage to the plaintiff's vehicle evidenced by one of the police photographs. Neither do I accept Mr. Smith's estimate that the distance between the rear end of the grader when stopped and the corner of the intersection was about 20 feet. That would mean that the distance then separating the two stopped vehicles on Duke Street would be left at approximately 10 feet.

[16] Instead, I rely on the series of police photographs of the scene which collectively illustrate that the distance between the rear end of the grader and the front end of the plaintiff's vehicle while they were both briefly stopped was more likely in the range of three car lengths and perhaps a bit more. As benchmarks, I use the most forward position of the grader illustrated by the snow clearing pattern and the position of a police car which was parked afterwards in a location roughly coincidental with that of the plaintiff's car when it was struck. I make this finding because it is relevant when focusing on Mr. Smith's duty to keep a proper lookout in the operation of his machine as will be addressed later in this decision.

[17] Apart from the variances in some of the estimates given by each of the witnesses, overall their testimony as to how this accident came about is generally consistent with one another.

ISSUES

[18] The issues to be decided in this case can be stated as follows:

a. Was the defendant Smith negligent in the operation of the grader and was there any contributory negligence on the part of the plaintiff?

b. What personal injuries were caused by the collision?

c. What is an appropriate award for general damages?

d. What award, if any, is appropriate for loss of housekeeping capacity?

FINDINGS OF LIABILITY

[19] The statutory duty imposed on a driver operating in reverse is set out in s.120 of the *Motor Vehicle Act*, R.S.N.S. (1989) c. 293. Subparagraph (1) reads as follows:

> The driver of a vehicle shall not back the vehicle unless such movement can be made in safety.

[20] At the core of this general duty is the specific duty which the law imposes upon a driver backing up a vehicle to keep a proper lookout while doing so. In the submission of counsel for the plaintiff, it was simply the failure of the defendant Smith to keep a proper lookout when backing the grader that was the sole cause of the accident.

[21] Defence counsel, on the other hand, contends that Mr. Smith did everything that is reasonably required of a snow plow operator, including the series of visual checks that he normally makes. He argues that the standard of care to be observed is one of reasonableness and not one of perfection. He further argues that it was the plaintiff who made an error in judgment in moving her vehicle in behind and slightly to the left rear of the grader at an unsafe distance, knowing that heavy equipment often backs up when plowing snow. In his submission, a reasonable and prudent driver would have waited back at the stop sign on Seventh Street before going any further, to see what the snow plow operator was next going to do. The conclusion the court is asked to draw is that turning the corner onto Duke

Street as the plaintiff did, and waiting there behind the grader to see what it was going to do, at the very least constitutes contributory negligence.

[22] The duty cast upon a driver backing up a vehicle was considered in *Williams v. Delaney* (1990) 94 N.S.R. (2d) 91 (a truck-pedestrian accident) where Justice Grant commented (at para. 36):

> The burden upon the defendant is to exercise reasonable care and skill in the operation of his vehicle. While backing he is required to exercise extra caution or at least is under a statutory duty under [s.120(1)]. He is, however, not a guarantor and perfection is not required.

[23] As recited earlier, Mr. Smith testified that when backing up on Duke Street just before the collision, he followed his usual practice of first checking his mirrors, then looking over his left shoulder, and then looking over his right shoulder while backing the grader. He also described the blind spot running at an angle from the left rear side of the grader while he is looking over his right shoulder. It may well be that when he first looked over his left shoulder before backing up, the plaintiff's vehicle was not yet there in his line of vision. Nonetheless, I am satisfied on the evidence that the plaintiff's vehicle was positioned approximately three car lengths behind the grader once Mr. Smith began to back up. It was at that moment that the oncoming vehicle passed uneventfully to his left.

[24] In cross-examination, Mr. Smith acknowledged having made a prior

statement to an insurance adjuster in February, 2002 that he was keeping an eye on that vehicle while backing up. I find that Mr. Smith was thus distracted while backing up the grader which lead to his collision with the plaintiff's vehicle, which by that time was plainly there to be seen behind him. As was stated in the oft quoted case of *Swartz v. Wills* [1935] S.C.R. 628 (at p. 634):

> Where there is nothing to obstruct the vision and there is a duty to look, it is negligence not to see what is clearly visible.

[25] I find therefore that Mr. Smith was negligent in the operation of the grader in failing in his duty to keep a proper lookout for traffic approaching from behind him. Even if there was a blind spot as he described, it was nonetheless his duty to continue to check that blind spot while backing, which he easily could have done.

[26] Having found Mr. Smith negligent in the operation of the grader, the only question that remains is whether his negligence was the sole cause of the collision.

[27] The test for contributory negligence was recently affirmed by the Supreme Court of Canada in *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.* [1997] 3 S.C.R. 1210. In that case, the court adopted the test summarized by Lord Denning in *Jones v. Livox Quarries Ltd.* [1952] 2 Q.B. 608 (C.A.) which is found at p. 615:

> Although contributory negligence does not depend on a duty of care, it does depend on foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless.

[28] In the present case, the mere fact that the plaintiff turned right onto Duke Street and immediately came to a stop approximately three car lengths behind the

grader, waiting to see what it was going to do, does not give rise to foreseeability of harm to herself and her daughter. True, she could have waited back at the stop sign on Seventh Street to see what the grader was going to do but in my view, it was not negligent for her to turn the corner and stop there as she did. I find that the sole cause of the accident was the failure of Mr. Smith to keep a proper lookout while backing the grader towards the intersection.

DAMAGES

[29] The plaintiff Eva MacAulay is presently 53 years of age and works as an instructor and personal care giver at Summer Street Industries, a workshop for mentally challenged adults. She has not lost any income as a result of her injuries although she has had to leave her workplace early on a few occasions because of pain and discomfort and perhaps other stressors in her life as well. In any event, no claim is advanced for loss of past or future earnings.

[30] What complicates the assessment of non-pecuniary damages in this case is the fact that the plaintiff was suffering from a pre-existing condition, namely, severe osteoarthritis in her cervical and lumbar spine in keeping with chronic degenerative disc disease. The medical evidence of that disease dates back as far as 1992 when some degenerative changes in the cervical spine were noted in her treatment for a minor car accident.

[31] By agreement of counsel, all of the plaintiff's medical records and expert reports were entered in evidence without any medical witnesses being called to testify. Leading the way are three expert reports from the plaintiff's family

physician, Dr. Stephen Lee, and one from a specialist, Dr. E.G. Nurse. Both physicians are in complete agreement with one another in their diagnosis and prognosis of the plaintiff's condition.

[32] A review of the relevant medical records begins in December of 1999 (1 year prior to the accident) when Ms. MacAulay was examined by Dr. Lee for symptoms of pain in the cervical and lumbar spine. She was then referred to physiotherapy beginning in January, 2000 at which time she described an onset of neck pain which had begun several months ago for no apparent reason. At that time, she presented with a dull ache which progressed to a sharp stab localized to the base of the neck, radiating into the top of the left shoulder and aggravated by certain activities. The impression recorded by the physiotherapist, Cynthia Dickie, was that the plaintiff had hypomobile facet joints in the cervical spine secondary to possible osteoarthritic changes resulting in a secondary nerve root irritation. The treatment then prescribed consisted of moist heat, manual therapy, ultrasound, acupuncture and an exercise program designed for cervical flexion (including strengthening exercises for the postural muscles).

[33] In her testimony at trial, the plaintiff confirmed the accuracy of the symptoms recorded by her physiotherapist and the treatment she undertook. She said that she attended physiotherapy on four or five occasions over the next month or two and that the treatment helped. She said that her neck and back were good at that point; that she was still a little sore but not enough to stop her from doing anything. The medical records do not disclose any further pain related complaints or treatment, nor the taking of any prescription drugs, until the occurrence of the

accident on December 31, 2000.

[34] It is to be noted in his medical report of June 10, 2003 however, that Dr. Lee suspected that given the pre-existing severe osteoarthritis of the cervical spine, the plaintiff would have had ongoing problems with her neck irrespective of the motor vehicle accident. This opinion was concurred with by Dr. Nurse.

[35] To be compared with that original baseline condition is the plaintiff's post-accident symptoms and current condition.

[36] The medical records disclose that within a couple of hours of the occurrence of the accident, the plaintiff began to develop soreness in her neck and went to the emergency room at the local hospital. She was then complaining of pain in the left shoulder and the attending physician diagnosed her as having a spasm of her trapezius, more to the left than the right. She was prescribed appropriate medication and advised to see Dr. Lee.

[37] Her first visit with Dr. Lee was on January 16, 2001. He records in his medical report of February 7, 2002 that the plaintiff then complained of a sore right shoulder and right side of her neck. There was also tenderness along the right paracervical soft tissues leading to Dr. Lee's diagnosis of a cervical strain. He prescribed a painkiller and ultimately, physio and massage therapy.

[38] Dr. Lee saw the plaintiff on three more occasions over the next year as she experienced continuous soreness since the accident. She is recorded as

complaining of soreness especially on the right side of the neck and right shoulder. Dr. Lee continued to prescribe pain medication and physiotherapy. He also expressed the opinion in his February 7, 2002 report that the changes on her x-ray were in keeping with chronic degenerative disc disease unlikely caused by the accident but undoubtedly exacerbated by the accident. His expectation, given the underlying degenerative disc disease, was that she would likely never have complete relief of her symptoms.

[39] In a subsequent report dated June 10, 2003, Dr. Lee summarizes three further medical examinations relating to the plaintiff's neck pain which took place during the first half of 2002. He noted that the plaintiff was tender along the left trapezius and left scapula while noting that after the motor vehicle accident, her complaints were in relation to the right side of her neck. Dr. Lee concluded this report with the following diagnosis:

> As stated in my initial letter to you dated February 7, 2002 Ms. MacAulay has had problems with her neck prior to the accident, and had been referred to physiotherapy in December 2000 (sic) due to neck pain. She has changes of severe osteoarthritis on her x-ray in keeping with chronic degenerative disc disease unlikely caused by the accident but undoubtedly exacerbated by the accident. This is of course very difficult to prove. She has also had other non specific musculoskeletal complaints since the accident which cloud the issue. Her current diagnosis would be moderate to severe osteoarthritis of the cervical spine perhaps exacerbated by the soft tissue injury sustained in her motor vehicle accident of December 31, 2000. Given the state of her neck I suspect that she would have on-going problems with her neck irrespective of the motor vehicle accident.

[40] In August of 2003, the plaintiff was referred by her legal counsel to a specialist, Dr. E.G. Nurse, for a medical evaluation. After reciting the plaintiff's

medical history consistently with that of Dr. Lee, Dr. Nurse summarized his medical opinion as follows:

> The x-rays which were reviewed today were done December 21, 2001 and these show significant degenerative disc disease in her lower cervical spine. This type of degenerative disc disease is not related to the motor vehicle accident of December 2000, but is longstanding. The accident clearly represents an aggravation and exacerbation, however, of this condition.
>
> It can be reasonably concluded that Joan MacAulay sustained soft tissue injuries as a result of the motor vehicle accident of December 31, 2000 and these took the form of a Whiplash Associated Disorder Type II injury. She was appropriately evaluated and treated by Dr. Lee and continues under Dr. Lee's care. Unfortunately, she still remains symptomatic, which is only in part related to the motor vehicle accident and in part related to the preexisting issues which we have described in some detail...
>
> As far as her neck is concerned, I believe that she has suffered an aggravation and exacerbation of preexisting disease. It is unlikely that she will be asymptomatic in the future.

[41] The medical records and reports entered in evidence do not extend beyond August of 2003. Evidence of the plaintiff's current symptoms and condition is therefore presented only by the plaintiff's own testimony. She stated at trial that after the accident, she kept getting sorer as time went on and that now she is in constant pain. She described the pain as starting three-quarters of the way up her back on the left and going up to the mid-point of the back of her head. She also said that certain turns of the neck cause her headaches. She further stated that the pain is always in the same location and it is always there.

[42] The plaintiff also demonstrated some confusion in her evidence as to whether she had ever experienced pain after the accident on the right side of her

neck and right shoulder. She thought that the pain had always been localized on her left but the medical reports of Dr. Lee and Dr. Nurse clearly document otherwise. When asked about this inconsistency in re-direct examination, the plaintiff replied “its just pain”. By way of ongoing treatment, the plaintiff continues to take pain medication on a daily basis and continues her massage therapy on a monthly basis.

[43] I conclude from my review of the medical evidence that this case falls within the so-called “crumbling skull” category of cases, the characterization of which was recently affirmed by the Supreme Court of Canada in *Athey v. Leonati* [1996] 3 S.C.R. 458. The court in that case thoroughly canvassed the general principles of causation in tort law which must be applied here. For purposes of this decision, the following passage is particularly apt (at p.473):

> The so-called “crumbling skull” rule simply recognizes that the pre-existing condition was inherent in the plaintiff’s “original position”. The defendant need not put the plaintiff in a position <u>better</u> than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage: Cooper-Stephenson, *supra*, at pp.779-780 and John Munkman, *Damages for Personal Injuries and Death* (9th ed. 1993), at pp. 39-40. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant’s negligence, then this can be taken into account in reducing the overall award: *Graham v. Rourke*, *supra; Malec v. J.C. Hutton Proprietary Ltd.*, *supra*; Cooper-Stephenson, *supra*, at pp. 851-852. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

[44] Although this principle of tort compensation is easily understood, it is often difficult to apply where medical evidence often cannot be definitive. Essentially,

the task of the court is to assess what the plaintiff's medical condition would have been but for the accident and what it will be because of the accident. It is only the additional damage for which the defendant is liable, something not easily quantified in this case.

[45] Both medical experts agree that the plaintiff sustained a whiplash type injury in this accident that exacerbated her pre-existing condition of severe osteoarthritis of the cervical spine. This soft tissue injury manifested itself in two combined respects. First, it caused pain and stiffness in the right shoulder and the right side of the plaintiff's neck which appears to have resolved within two years after the accident with the help of time and treatment. These are symptoms (on the right side) of which there was no evidence prior to the accident. Worse, however, in the long term is the aggravation of her pre-existing ostearthritic condition of the cervical spine which has produced continuous symptoms of pain on the left side of her neck and left shoulder. This is the same area where she had experienced some degree of pain and discomfort in the year prior to the accident. Although he made no attempt to quantify it, Dr. Lee stated in his June 10, 2003 report that given the state of her neck, he suspected that the plaintiff would have ongoing problems with her neck irrespective of the accident.

[46] When asked in her direct testimony how her post-accident injuries compared with her pre-existing condition, the plaintiff said that they are different. She testified that before the accident, her pain was more in her lower back but that now it is farther up in the area of the cervical spine. She also said that the pain gradually became constant and that the level of pain is worse now than it was

before the accident. As recited earlier, she said that prior to the accident, her neck and back were still a little sore but not enough to stop her from doing anything.

[47] Although the plaintiff has perhaps down played the severity of her pre-existing condition, and demonstrated some confusion over the localization of her pain symptoms following the accident, overall I found her to be a credible witness in describing her ongoing medical condition and treatment.

[48] Although it is difficult to quantify, I am satisfied on the evidence and review of the principles restated in *Athey*, that the negligence of the defendant Smith "materially contributed" to the occurrence of the plaintiff's injury. There is little doubt from the medical reports, however, that she likely would have experienced ongoing problems with her neck irrespective of the accident because of her pre-existing condition. The additional damage she suffered from the accident lies in the aggravation of that pre-existing condition and the acceleration of more severe pain symptoms. She also sustained a soft tissue strain on the right side of her neck and shoulder which has since resolved. For that she is to be compensated by an award of non-pecuniary damages.

[49] Plaintiff's counsel in his submissions to the court suggested a general damages figure of $42,000. The court was referred to damages awards made in a number of other cases involving pre-existing conditions, including *MacLean v. Irving* [2003] N.S.J. No. 178, *Berry v. Poteri* [1997] N.S.J. No. 247 and *Lamont v. Moxon* [2000] N.S.J. No. 325. These and other cases produced general damages awards within the range of $25,000-$40,000 but the fact situations presented are

dissimilar enough that I do not find any of these cases particularly helpful. I have also reviewed the case of *Greenfield v. Rhyno* [1994] N.S.J. No. 131 which is somewhat more helpful although the court in that case found that most of the plaintiff's present complaints were linked to his pre-existing deteriorating health. In that case, Justice Saunders made a non-pecuniary damages award of $21,000.

[50] To lend further perspective to an appropriate damages award, I also refer to the well-known case of *Smith v. Stubbert* [1992] N.S.J. No. 532. The guidance to be taken from the Nova Scotia Court of Appeal in that case was that injuries considered to be persistently troubling, but not totally disabling, should attract a damages award in the range of $18,000-$40,000 (by 1992 figures). Although unable to be precise in the absence of actuarial evidence, I would estimate that range in today's figures to be approximately $25,000-$53,000.

[51] Hypothetically, if the facts of this case were that the entirety of the plaintiff's current symptoms of pain and discomfort were attributable to the accident, the damages award would likely fall around the mid-point of the *Smith v. Stubbert* range in today's dollars. However, they are not attributable to the accident in their entirety which must be taken into account in reducing the overall award. All things considered, I conclude that an appropriate award of non-pecuniary damages in this case is $28,000.

[52] As noted earlier, the other head of damages claimed is for loss of valuable services which, in the submission of plaintiff's counsel, is deserving of

compensation of an additional $5,000.

[53] The plaintiff gave evidence in support of this claim that prior to the accident, she was able to do all of the housework in the family home, including interior painting which she enjoyed doing. Her evidence was that now she has to either get someone to carry the laundry basket or push it downstairs herself, picking up the spillage. She says that she no longer can do any heavy lifting or interior painting. She further said that she has had to give up ceramics as a hobby. Overall, she testified that she can do pretty much everything else in the way of housework but that she has to pace herself by taking a break and then returning to the task.

[54] While I accept this evidence on its face, the question remains whether or not the plaintiff would have experienced the same sort of limitations at present irrespective of the accident. No medical opinions have been offered in this regard and in short, there simply has not been a sufficient evidentiary foundation presented to establish a claim for loss of valuable services. I therefore decline to make such an award in this case.

CONCLUSION

[55] The plaintiff shall therefore have judgment for damages of $28,000 against the defendant Robert Smith and, by virtue of vicarious liability, the Town of Trenton as his employer. The plaintiff is also entitled to pre-judgment interest at the rate of 2½ % per annum which I will allow from the date of the accident.

[56] The plaintiff shall also be entitled to her costs of the action and if counsel are unable to agree on an appropriate costs figure, written submissions ought to be

submitted to my attention within 30 days.

J.