SUPREME COURT OF NOVA SCOTIA
Citation: *Tibbetts v. Murphy,* 2015 NSSC 280

Date: 20151007
Docket: Pic No. 390520
Registry: Pictou

Between:

Shirley Tibbetts

Plaintiff

v.

Reginald Greg Murphy

Defendant

v.

Joseph George Joyce

Third Party

Revised Decision:	The text of the original decision has been corrected according to the attached erratum dated July 7, 2015.
Judge:	The Honourable Justice A. David MacAdam
Heard:	May 1, 4, 5, 6, 7, 8, 11 and 12, 2015, in Pictou, Nova Scotia
Final Written Submissions:	July 7, 2015
Decision:	October 7, 2015
Counsel:	Jamie MacGillivray and Trevor Wadden, for the plaintiff Christopher W. Madill and Tipper McEwan, for the defendant Tara A. Miller and Chad G. Horton, for the third party

By the Court:

Introduction

[1] This proceeding arises out of a collision that occurred on July 19, 2011. The plaintiff, Shirley Tibbetts, and her fiancé (now husband), Joseph Joyce, were travelling on motorcycles on the Livingstone Cove Wharf Road. Reginald Greg Murphy was driving his truck in the opposite direction on the same road. Tibbetts and Murphy collided. The front of the Murphy truck hit the left side of the Tibbetts motorcycle. Tibbetts, the plaintiff, subsequently commenced this proceeding in negligence against Murphy, the defendant, who added Joyce as a third party.

[2] In order to establish her claim in negligence, the plaintiff must prove each element of negligence on a balance of probabilities, including the existence of a duty of care, a breach of the applicable standard of care, causation, and reasonable foreseeability.

Preliminary matter

[3] As a preliminary matter, I wish to set out written reasons for an evidentiary determination I made at trial. During the trial, counsel for the plaintiff conducted an examination of the third party, Joyce, who is the spouse of the plaintiff. The third party then sought to be cross-examined by his own counsel, relying on Rule 54.06, which is titled "[c]alling adverse party for cross-examination." It provides:

> (1) In addition to cross-examination in accordance with the rules of evidence about a hostile witness, a party may call and cross-examine a party who is adverse in interest or a person who is, when the person is called, an officer, director, or employee of a party who is adverse in interest.
>
> (2) The party who is called as a witness, or whose officer, director, or employee is called as a witness, by an adverse party may cross-examine the witness on subjects touched upon during the cross-examination by the adverse party.
>
> (3) A witness called by an adverse party, and cross-examined, may be directly examined on new subjects at the conclusion of the first cross-examinations or on recall.

[4] The defendant objected, arguing that a party cannot lead their own witness, or a friendly witness. Cross-examination, by its nature, is intended to challenge the witness, and only the party challenging the witness should be able to ask leading questions. While there are circumstances where a party may lead its own witness – such as the adverse witness procedure under s. 55 of the *Evidence Act*, R.S.N.S.

1989, c. 154 – cross-examining a friendly *party* is a different matter. The defendant cited *Founders Square v. Nova Scotia (Attorney General)* (1999), 175 N.S.R. (2d) 391 (S.C.), a decision made under the former Rule 31.03(3), which stated, in part:

> A party may call an adverse party … and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, but may be cross-examined by the adverse party only upon the subject matter of the examination in-chief.

[5] Moir J said:

> [6] … The rule has in mind the predicament of a party who needs to produce evidence from an opposite party. That does not describe the purpose of the rule: ordinarily, one can call an adverse party in civil proceedings. Nor is the purpose to permit cross-examination where the adverse party turns out also to be an adverse witness: that could be done without this rule. As I read the rule, it achieves two purposes. Firstly, it limits the opportunity for such witnesses to be cross-examined on their own behalf ... Secondly, the rule presumes the opposite party to be an adverse witness when called by others... In this respect, it seems to me that the purpose is to treat as adverse some persons loyal to the other party and within the control of the other party…

[6] The defendant argued that when Joyce was called by the plaintiff, he was not an adverse party. On the contrary, he wanted the plaintiff to win the case. The defendant took the position that whether a witness is adverse is not determined by the pleadings. In this case the third-party witness supported the plaintiff's position. There was no need for plaintiff's counsel to ask him leading questions in order to elicit his evidence. Accordingly, the defendant argued that Rule 54.06 did not allow Joyce's own counsel to conduct a cross-examination.

[7] The defendant went on to argue that what plaintiff's counsel conducted was not in substance a cross-examination. Accordingly, it would not be fair to permit the third party's own counsel to lead him through his evidence in any event. The Rule does not speak to what happens when the examination conducted is, in substance, a direct examination. I agree that what was done by plaintiff's counsel was substantially a direct examination, not a cross-examination. The distinction between direct and cross-examination is rooted, among other things, in the use of leading questions to challenge the witness on cross-examination. I find, however, that the phrase "cross-examination" in Rule 54.06 includes direct examination, so that the plaintiff was not barred from cross-examining. That being said, the Rule limits the subsequent questioning to what was touched on in the cross-examination, as per Rule 54.06(2).

[8] Defence counsel also argued that it was open to the third party to undertake to be called for direct examination, removing the need for the plaintiff to call him. I am not convinced that this is sufficient to ensure fairness to the third party, who is not required to make this determination at this stage of the trial.

[9] The third party argued that the issue was whether he and the plaintiff were adverse parties. He referred to *Domco Industries Ltd. v. Mannington Mills Inc.* (1982), 65 C.P.R. (2d) 189, 1982 CarswellNat 652 (Fed. Ct. (T.D.)), where the court interpreted the term "adverse party" under the Rules of the Federal Court. The court said, at paras. 4-5:

> … In one form or another, it is written in explicit language into the rules of practice of most civil jurisdictions, and certainly in the provincial jurisdictions in Canada… The judicial interpretation of this adversity of interest has consistently required the existence of some issue to be tried or some conflict between the parties, which the litigation is expected to resolve.
>
> … In such a determination, obviously, pleadings are of paramount importance and a perusal of the statement of claim and the statement of defence indicates that the contention of the defendant … is well founded. There is nothing in the statement of claim to indicate any reason for the inclusion of this defendant, other than the requirements of the statute...

[10] The third party also referred to an earlier decision in this proceeding, where Moir J. dealt with a motion by the third party for summary judgment on evidence on the third-party claim. In finding that there was a genuine issue of fact requiring trial, Moir J said, in a decision reported at 2014 NSSC 360, at para. 7:

> The evidence will be that all of this happened in rapid succession. The perceptions of the three witnesses will have to be evaluated to determine who invaded whose space and why. That evaluation may be difficult because the perceptions were tightly compressed in time, the parameters and centre of a gravel road are less certain, and the experiences are coloured by shock. There is the possibility of a finding that accepts Mr. Murphy's perception of the position of the Joyce motorcycle and Ms. Tibbetts' perception of the position of the Murphy truck. Conflicting evidence would necessarily have to be reconciled. In that event, a finding that the evasion caused Mr. Murphy to overcompensate when returning to the centre is possible, even though Mr. Murphy's perception is opposite.

[11] In light of these comments, the third party submitted, he must be adverse in in interest, given that he denied liability for the very damage claimed by the plaintiff against the defendant and for which the defendant claimed reimbursement against the third party. Therefore, he argues, he should be able to lead evidence that will help him advance his position. Otherwise, the plaintiff and defendant

would be at an advantage, at the expense of the third party. I note, however, that there is nothing unusual about multiple parties being able to cross-examine a witness, nor does it violate any rules, nor does it provide counsel the right to cross-examine its own witness.

[12] The defendant argued that the only conflict was between him and the third party. I agree. It was clear that the pleadings of the third party and the plaintiff contain no allegations against one another. Further, I am not convinced that the comments in the summary judgment decision are sufficient to create adversity at trial. Any potential adversity would have to arise from potential practical outcomes respecting liability and damages in the litigation.

[13] The third party's argument did not account for the ability to conduct further direct examination pursuant to Rule 54.06(3). It also assumed that the plaintiff and defendant would be permitted to revisit the same ground in their second examinations. As the defendant pointed out, duplicative question can be controlled by the court through such mechanisms as the common law power to control the process, as well as Rule 51.13(1), which requires a presiding judge to "give directions necessary to curtail an examination that is abusive or clearly duplicative."

[14] I concluded that Rule 54.06 was not engaged. The Rule only applies where a party calls a witness and proposes to cross-examine them. The plaintiff had the right at common law to call the third party as a witness. They were not in adversarial positions, however. Further, what the plaintiff did was not a cross-examination. As such, the third party's ability to advance his evidence as he sees fit was not affected by his examination by plaintiff's counsel.

[15] I now move on to the issues of liability and damages.

The collision

[16] On July 19, 2011, Tibbetts and Joyce set out to travel from their home in Durham, Pictou County, to Antigonish. Both were inexperienced motorcyclists. Tibbetts had only recently received a license, while Joyce was driving on a beginner's license. What experience they had was mainly on paved roads. They took a scenic route through northern Antigonish County, avoiding the heavier traffic on the Trans-Canada Highway. Travelling on Highway 333, they stopped and turned down the Livingstone Cove Wharf Road ("the "Wharf Road"), a gravel road running from Highway 333 to the Livingstone Cove Wharf. They stopped at the wharf, then headed back towards Highway 333. Joyce was in the lead and

Tibbetts followed close behind him. The Wharf Road has no marked centreline. There was no evidence of the width of the road, or of the distance between certain identifiable features referred to by witnesses or observed by the court while taking a view at the request of, and in the presence of, all the parties.

[17] While Tibbetts and Joyce were on the Wharf Road, the defendant, Murphy, an employee of the Department of Natural Resources, was heading to the Wharf in the course of his work. He had driven the Wharf Road before. He estimated he was coming down the road at between ten and twenty km/h.

[18] Tibbetts testified that she was nervous on the Wharf Road, and kept her speed reasonably low. She said she was particularly conscious of the need for safety on the gravel road, leading her to focus her attention both on Joyce ahead of her and on the roadway itself. She said she travelled in a groove, close to the right-hand side of the roadway. Murphy suggested that the "groove" was actually nothing more than tire marks. In any event, Tibbetts was following a mark or groove along the right side of the road, heading back towards Highway 333. To her right was a narrow grassy area leading to an embankment over the Northumberland Strait, with no railing; the proximity of the embankment caused her further concern. The grassy area became wider leading up to the point where the collision occurred.

[19] The collision occurred in the vicinity of a bend in the road. Joyce went around the turn first, and met Murphy's truck. Although there was disagreement about whether Joyce encroached on Murphy's side of the road, it is clear that they were close enough that they each found it necessary to veer to the right. Joyce turned in the direction of some trees. Tibbetts, following him, saw him veer to the right, but did not see Murphy's truck. Murphy veered right, towards a shallow or level ditch. He drove over the lip of a driveway, across the driveway entrance, then back onto the roadway. Murphy testified that he recovered into his own lane after the near-miss with Joyce.

[20] Murphy said the collision with Tibbetts occurred almost as soon as he re-entered the roadway. He said he never saw the Tibbetts motorcycle until the instant before the collision. The evidence of both the plaintiff and the defendant was that neither saw the other until immediately before the collision. Neither of them explained this.

[21] It was agreed that the roadway was in much worse condition at the time of the view than at the time of the collision. Tibbetts stated on direct examination that

she did not see potholes, but appeared to agree on cross-examination that there had been potholes in the road at the time of the accident.

[22] The bend where the collision occurred was described by counsel at various times as "partially blind." It was apparent, however, from taking a view, that, even accounting for the difference in tree and bush cover between the time of the accident and the time of the view, there was a considerable distance over which each party could have been seen by the other before the collision. Despite the description of the turn as "partially blind", it was clear during the view that from the position of the collision to a mailbox located on the plaintiff's side, and beyond, there was a clear view along the road. The parties having invited the court to view the scene, I can conclude that in the vicinity of the collision there was no obstruction that would prevent the plaintiff and defendant from seeing one another at some point while they converged on the curve, if they were looking. At the instant of the near miss, Tibbetts would have been further down the road, towards the wharf; however, it would have been only slightly after the near-miss that she would have seen Joyce heading for the trees. There has been no suggestion that any of the three vehicles were speeding.

[23] As Murphy pulled back onto the road after the near-miss with Joyce, Tibbetts was approaching. She testified that her focus, after passing along the embankment, was on the road immediately in front of her. With her focus on the embankment, however, and on Joyce ahead of her, she was clearly not focused on watching for other vehicles on the road. Similarly, Murphy's evidence was that he did not see the Tibbetts motorcycle until the instant of the collision, though she would have been visible on the roadway ahead of him. His view may have been blocked in part by trees and brush, but I am satisfied that the turn was not completely blind. He did not suggest that his focus on the roadway was disturbed by the near-miss with Joyce. In short, he gave no explanation for not seeing Tibbetts. Murphy testified that he never crossed the centreline of the gravel road, and that Tibbetts was therefore on his side of the road.

[24] Tibbetts testified that Murphy's truck hit her motorcycle while she was on her own side of the road. She described herself being thrown into the air and coming down on her right side, with her head on the motorcycle's saddlebag.

[25] The driveway Murphy had crossed after the near-miss with Joyce went to a cottage then owned by Bridget McDonnell and her husband, who arrived on the scene shortly after the collision. They were driving down the Wharf Road, apparently ahead of Murphy, towards their driveway. Mr. McDonnell, who was driving, turned in to the driveway (still in front of Murphy) and stopped at a rope

gate, which had to be removed before they could continue up the driveway. At that point, Ms. McDonnell said, she heard a crash. She left the car and went around the corner, where she saw the aftermath of the collision. She testified that Murphy's truck was leaving the scene when she arrived. This conflicted with her discovery evidence that the truck was parked when she first saw it. She also stated that she saw the tracks of Murphy's truck crossing the centre of the road; she admitted, however, that the track could have been made by another vehicle, as she had not actually seen the collision.

[26] Ms. MacDonnell testified that on hearing the crash, she first spoke to her husband, then went from their vehicle to the road, a distance of some one hundred feet, where she saw Murphy's truck backing up. Her statement to the RCMP, given two hours after the accident, did not refer to Murphy's truck backing up, nor did it refer to the tracks that she later claimed indicated where Murphy had crossed the centre of the road.

[27] Murphy testified that after the collision he stopped immediately. He denied that he backed up. He said he went directly to where Tibbetts had fallen to check on her condition. Her motorcycle was close to the centreline. Ms. McDonnell then arrived, followed by Joyce, and then Jared Crawford, a fisheries officer who had been travelling on the Wharf Road in the same direction as Murphy. There being no cell phone coverage, Murphy said, he walked up the driveway with Mr. McDonnell to phone in a report of the accident. He then returned and pulled his truck forward and to the right. He said this was the first time he had moved it following the collision. He said he looked at the grassy area on the right of the roadway, and could see where his tires had trampled the grass down. He also said he saw skidmarks in his lane, beyond the driveway immediately before the point of impact. He said the skidmarks were caused by him braking just before the collision.

[28] Ms. MacDonnell testified that she found Tibbetts lying with her head on the motorcycle saddlebag, with her feet pointing towards – and possibly touching, though this was unclear – the grass on the side of the road.

[29] Murphy testified that when he returned to the scene, Tibbetts was lying on the ground, supported by her motorcycle, with her feet stretched towards the embankment overlooking the water. He said her feet were at least six feet from the grassy area between the roadway and the embankment. He said a vehicle could have driven between her feet and the water-side of the road. He walked through this space himself. He also testified that the location of the Tibbetts motorcycle as

shown in the photograph entered into evidence was where it was located after the accident. In other words, it was not moved before the picture was taken.

[30] Joyce testified that when he went back to the scene of the collision he saw gas coming out of the tank of Tibbetts's motorcycle. Tibbetts also recalled smelling gas. Joyce said the motorcycle was moved towards the centre of the road, away from where the gas was leaking. This was done to allow the paramedics to put Tibbetts on a stretcher for transport to hospital.

[31] The other witness who was present at the scene was Mr. Crawford, who testified that as he approached the corner he saw Joyce's motorcycle in the oncoming lane. He saw Joyce come to a stop, then saw another vehicle ahead (Murphy's truck), and stopped his own vehicle. He went over to the scene and noted that the Tibbetts motorcycle was in the centre of the road, six to eight feet ahead of the truck. He said the motorcycle was closer to the wharf than the truck; it is unclear whether he meant that because the truck was on the inside lane while the bike was on the outside lane the bike would be closer to the wharf, or whether he meant that from their locations on the road the truck was further away than the motorcycle. If his meaning was the latter, this would be consistent with Ms. McDonnell's evidence that she saw Murphy's truck back up. I draw no conclusion on this point.

[32] Mr. Crawford appeared to place the collision at approximately the centre of the roadway. He testified that it was himself and one of the RCMP officers who moved the Tibbetts motorcycle. He could not say how far they moved it. Nor could he say whether the photographs showing the motorcycle's location showed it where it was when the collision occurred or after it had been moved.

[33] Although there were various witnesses called to give evidence with respect to the collision, it is striking how many witnesses were not called who would appear likely to have relevant evidence on the central issue of where on the road the collision occurred. The court is left to determine how the accident occurred as well as it can, based on the evidence available, without speculating.

[34] The standard to be met is the civil standard. As Rothstein J put it, for the court, in *F.H. v McDougall*, 2008 SCC 53, [2008] S.C.J. No. 54, "in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred" (para. 49). The trial judge must scrutinize the evidence with care, and the evidence "must

always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (paras. 45-46).

[35] Credibility determinations will be important to this analysis. I adopt the approach to fact-finding described by Forgeron J. in *Baker-Warren v. Denault*, 2009 NSSC 59:

> 18 For the benefit of the parties, I will review some of the factors which I have considered when making credibility determinations. It is important to note, however, that credibility assessment is not a science. It is not always possible to "articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events:" *R. v. Gagnon* 2006 SCC 17, para. 20. I further note that "assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization:" *R. v. R.E.M.* 2008 SCC 51, para. 49.
>
> 19 With these caveats in mind, the following are some of the factors which were balanced when the court assessed credibility:
>
> > a) What were the inconsistencies and weaknesses in the witness' evidence, which include internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony, and the documentary evidence, and the testimony of other witnesses: *Re: Novak Estate*, 2008 NSSC 283 (S.C.);
> >
> > b) Did the witness have an interest in the outcome or was he/she personally connected to either party;
> >
> > c) Did the witness have a motive to deceive;
> >
> > d) Did the witness have the ability to observe the factual matters about which he/she testified;
> >
> > e) Did the witness have a sufficient power of recollection to provide the court with an accurate account;
> >
> > f) Is the testimony in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions: *Faryna v. Chorney* [1952] 2 D.L.R. 354;
> >
> > g) Was there an internal consistency and logical flow to the evidence;
> >
> > h) Was the evidence provided in a candid and straight forward manner, or was the witness evasive, strategic, hesitant, or biased; and
> >
> > i) Where appropriate, was the witness capable of making an admission against interest, or was the witness self-serving?
>
> 20 I have placed little weight on the demeanor of the witnesses because demeanor is often not a good indicator of credibility: *R v. Norman*, (1993) 16 O.R. (3d) 295 (C.A.) at para. 55. In addition, I have also adopted the following rule, succinctly paraphrased by Warner J. in *Re: Novak Estate, supra*, at para 37:

> There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety. On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence. (See *R. v. D.R.*, [1996] 2 S.C.R. 291 at 93 and *R. v. J.H.*, [2005] O.J. No. 39, supra).
>
> 21 Ultimately, I have considered the totality of the evidence in making credibility determinations. I have thoroughly reviewed the *viva voce* and documentary evidence in conjunction with the submissions of counsel, and the applicable legislation and case law.

[36] Credibility is very much in issue. The defendant points to numerous inconsistencies in Tibbetts's evidence, both with reference to her discovery evidence and with reference to other sources. In particular, the defendant refers to certain contradictions in her evidence as to whether she believed her own discovery evidence about the location of the impact and where the motorcycle and her body came to rest. Tibbetts testified at trial that her discovery evidence was wrong on these points. The defendant says these contradictions indicate either that Tibbetts did not take her oath seriously, or that she believed her own recollection to be unreliable and was thus prepared to shape her evidence in accordance with other evidence if it helped her position. The defendant also suggests that the plaintiff's credibility should be impacted by the unlikelihood that she was rolled over on the ground, enabling her to see the gas stain.

[37] The oral evidence is supplemented by documentary evidence, which is similarly of limited assistance. A report prepared by an RCMP officer who attended at the scene, Corporal A. Hamilton, was admitted into evidence by consent. However, neither police officer who came to the scene was called as a witness, nor was either of the two ambulance personnel who transported the plaintiff. Thus there was no direct evidence from any "first-responder" personnel as to what they observed when they arrived on the scene.

[38] The defendant has cited the police report in support of the conclusion that he did not cross the centreline. Corporal Hamilton stated as follows in the report:

> Although there is "no centre line" it did appear as though the DNR vehicle was as far to the right as he could go without going into the ditch. His right wheels had gone into the long grass next to the ditch and he went up and over the lip of the driveway to civic #130. Beyond that there was a very short skid mark "2 meters" and what appeared to be an impact area which still appeared as though it were right of center.

[39] The defendant also cites reports by a Constable White, who apparently was present at the scene with Cpl. Hamilton. In the first report, dated July 21, 2011, Cst. White stated:

> Member attend with CPL HAMILTON and once on scene the ambulance was already working on teh [*sic*] female.
>
> The motorcycle had not been moved as the female injured party was laying around the bike at the time.
>
> Visually there was a open fracture to her left leg and it was being mobilized by EHS.
>
> CST WHITE quickly secured the scene and spoke with a witness that recalled events leading up to the collision. There were no other witness's.
>
> Alcohol was not a factor nor was speed.
>
> EHS stabilized and transported to St MARTHAS hospital with … in ambulance.
>
> CST White photoed scene and vehicles for damage and had a tow company remove both and store until picked up.
>
> Member noted skid marks on the dirt road that appperaed to be all on the proper side of the road.
>
> Approx 3 meters in length.
>
> Member after gathered information at time and independent statement believes all facts not to this point to be true. [sic]
>
> Note: a utterance from the injured female was "he was just there"

[40] In a subsequent general report, dated August 2, 2011, Cst. White stated:

> *Dispatched to a report of a MVA livingston cove, arrived on scene and noted a motor bike and truck accident and a female motor bike driver with an open fracture to her leg.
>
> *EHS transported her to hospital.
>
> *Members on scene photographed area and spoke with an independent witness and truck driver at time.
>
> *all statements are on file.
>
> Roadway is gravel and in good condition with some loose sections and was on a corner in the roadway. From all evidence gathered it appears that no one would be visibly in the wrong as center line is difficult if not impossible to determine. There were injuries but speeds were not in excess and from all reports on file it appears that it was a build up of circumstances which may have lead to this accident.
>
> 1/gravel roadway on a corner

> 2/ sunny time of day
>
> 3/motorbike on gravel and inexperienced driver
>
> 4/truck avoiding lead bike causing it to venture off roadway a bit
>
> 5/it occurred on a bend which is relatively blind in nature.
>
> Member does not feel charges are warranted and as a result all parties to be notified of same.

[41] There was a suggestion by Mr. Crawford that one of the RCMP officers helped to move the motorcycle. Tibbetts is not present in the photo of the motorcycle lying on the roadway, nor is the ambulance. The evidence suggests that when the ambulance was on the scene, it would have been in the area visible in the photograph. The most reasonable conclusion is that the ambulance had left before the photo was taken, and therefore, if the motorcycle was moved to accommodate EHS activities, this would have been done before the photograph was taken.

[42] The defendant suggests that the diagram in Cst. White's report does not show the Murphy vehicle on the wrong side of the road in relation to the Tibbetts motorcycle. However, the diagram is no more than a rough sketch. In the absence of direct evidence from Cst. White, no reliable conclusion about the precise location of the accident can be drawn from the sketch.

[43] The August 2, 2011, report by Cst. White refers to the accident occurring on a bend which he described as "relatively blind in nature." Nevertheless I remain satisfied that both vehicles were within view of one another before the collision, at least briefly, and that each driver could have seen the other had they been looking ahead on the road. This conclusion is based on my own observation while taking a view with the parties.

[44] The plaintiff suggests that the court should conclude from the photograph of the motorcycle on the road that the accident occurred in the Tibbetts lane and that the marks visible in the photographs were drag marks made by the motorcycle being moved before the picture was taken. In my view, to come to such a conclusion would be speculation, not a reasonable inference from the evidence. Apart from Joyce and Tibbetts, no other witness thought the marks resulted from dragging the motorcycle. While this may be the case, it would be a speculative conclusion, not a common-sense inference.

[45] The defendant argues that Joyce was not a credible witness. Among the factors that the defendant relies on in attacking Joyce's credibility are Joyce's denial of his poor memory, and eventual impeachment on the point. The defendant

also cites various inconsistencies. Joyce's trial evidence was inconsistent with his discovery evidence that he was watching Tibbetts behind him in his mirror as they went along the road, rather than watching the road. The defendant also points to various inconsistencies in Joyce's various statements of where on the road Murphy's truck was positioned as it came around the turn, as well as inconsistencies in his description of where his own motorcycle was on the roadway. The defendant goes on to identify numerous discrepancies between points of Joyce's trial evidence and various other accounts he gave in discovery or other statements. The defendant maintains that these inconsistencies arise from Joyce's poor memory and his desire to help his wife's claim.

[46] The plaintiff maintains that discrepancies between Joyce's trial evidence, discovery evidence, and his statement were no more than semantics. The defendant says the inconsistencies go beyond semantics. The defendant also argues that Joyce's recollection is fundamentally faulty, and that he had a motive to fabricate, in order to advance his wife's case. The defendant also argues that Ms. MacDonnell was not a credible witness. They point to, among other things, the inconsistencies in her evidence discussed above.

[47] The plaintiff argues that Murphy's repeated and consistent account of the collision – that he had recovered into his own lane by the time of impact – demonstrates that "he developed a point of view and the more he repeated this to himself the more convinced he became of it." In effect, the plaintiff argues that the consistency in his evidence undermines Murphy's credibility.

[48] On the question of whether Murphy backed up his truck after the collision – which he denied – the plaintiff submits that "common experience" suggests that in the collision the motorcycle would have fallen "immediately in front of the truck", and that it would have been a "reasonable and immediate reaction" for the driver to stop and back the truck away from the motorcycle and the injured person on the ground. The plaintiff suggests that in the heat of the moment Murphy simply forgot that he backed up his truck.

[49] The defendant's position is that he was the only credible party witness. Unlike that of Joyce and Tibbetts, he argues, there are no discrepancies or gaps in his recollection of the accident. He says he was not impeached on any significant point. Furthermore, he submits, his evidence was consistent with that of independent witnesses such as Mr. Crawford, who said he saw Murphy's truck stopped in the inbound lane.

[50] The defendant also submits that Mr. Crawford was a credible witness. Mr. Crawford arrived on the scene shortly after the accident, first passing Joyce, who was recovering from the near-miss, then finding Murphy's truck stopped in the inbound lane, directly ahead of him. He saw the Tibbetts motorcycle in front of the truck, to the left, in the centre of the road. Murphy was with Tibbetts.

Discussion

[51] The defendant says the plaintiff has not established that he was at fault for the collision. The defendant's theory, based on the evidence, is that Tibbetts, an inexperienced and admittedly nervous motorcycle driver who was trying to avoid potholes on a gravel road, was driving close to the inbound lane, taking her further from the potholes and the embankment, both of which she wanted to avoid. Murphy, meanwhile, was approaching within his own lane, inbound.

[52] The defendant says the plaintiff has not proven that the motorcycle was dragged on the road. He says it has not been proven that the discoloration on the road that is visible in photographs is gasoline. He points out that the damaged side of the gas tank was pointing upwards, so that a leak would require the gas to have escaped against the flow of gravity in enough volume to stain the road. Further, the defendant says the alleged drag marks on the road have not been proven to be from the dragging of the motorcycle, and says they could equally have resulted from the scuffing of the ground by the paramedics. The defendant also submits that a gas spill in the outbound lane does not prove that this was the location of the collision, in view of evidence that Tibbetts and the motorcycle continued moving after the impact. However, my understanding of the evidence was that the motorcycle was not moving, but rather that it was still engaged and Joyce, apparently concerned about the smell of gas, turned off the ignition.

[53] The defendant goes on to argue that even if he did cross the centre of the road, this does not prove negligence, given that he was recovering from the near-miss with Joyce. If his recovery manoeuvres were reasonable, he says, there would be no negligence. Furthermore, if he was driving negligently at that point, this was the result of the near-miss allegedly caused by Joyce's negligence. In that instance, he says, Joyce should bear full liability, subject to contributory negligence. He submits that Tibbetts should be assessed as fifty percent contributorily negligent, given that she was not watching the road.

[54] Having regard to all the evidence – including the observation by Cst. White that "from all evidence gathered it appears that no one would be visibly in the wrong as center line is difficult if not impossible to determine" – I conclude on a

balance of probabilities that the collision occurred at or near the centre of the roadway. I also conclude that the parties failed to see each other. This was primarily because the plaintiff was not looking forward on the road, but was focused on the road surface itself, likely looking for potholes. Further, she was in a slightly better position to see Murphy's truck than Murphy was to see her motorcycle, given the size of the truck. Additionally, having seen Joyce turn towards the woods, Tibbetts did not look to see what caused him to turn, but remained focused on the road surface.

[55] Murphy's evidence was that he had recovered from the near-miss with Joyce. He said he had fully recovered into his lane of travel and was in the position he would have been in but for that encounter. He did not attribute the accident to the near-miss. He gave no explanation for not seeing Tibbetts's motorcycle. I have no basis to make any finding that would not be speculation, other than to find fault for Murphy's failure to see the second motorcycle, driven by Tibbetts, until immediately before the collision.

[56] I have concluded that the plaintiff was primarily responsible for the collision, but the defendant was not without fault. I apportion liability two-thirds to the plaintiff and one-third to the defendant. The evidence does not support a finding of any liability on the part of the third party.

DAMAGES

[57] The plaintiff was 51 years old at the time of the collision. She had a varied work history. At the time, she was working as a security guard at North Eastern Investigators, at its Convergys location. She had started this job in May 2011. Her duties included watching surveillance monitors and physically checking generators and servers, but the evidence established that her duties were primarily desk-based and essentially sedentary. She was working between 32 and 45 hours per week, at a wage of $9.65 per hour.

[58] After the accident the plaintiff was taken by ambulance to St. Martha's Hospital in Antigonish, then by helicopter to the QE II Hospital in Halifax. Her injuries included a dislocated and fractured left hip (the femoral head), a fractured left tibia, and a fractured left fibula. She spent eleven days in hospital, undergoing multiple surgeries.

[59] On discharge the plaintiff was completely immobile. Her evidence was that she was severely limited in function for several months, being unable to shower for five months and requiring her husband's assistance to perform basic functions such

as bathing and using the washroom. The plaintiff testified that she gradually regained some of her mobility, but remained dependent on a walker and cane.

[60] The plaintiff returned to work at North Eastern Investigators in February 2012, but was put off again by her physician after three days.

[61] The plaintiff had difficulty sleeping after the accident, due to pain in her left leg, hip and back. She testified that she also experienced nightmares, which declined in frequency after she obtained psychological assistance. She said she still has a nightmare about once a month.

[62] The plaintiff testified that she took hydromorphone and Tylenol #3 for pain.

[63] The plaintiff said her injuries have been life-altering. In particular, she said her left leg, hip and lower back injuries continue to affect her quality of life. She said she previously enjoyed dancing, and that she and her husband would go to weekly dances before the accident; afterward, she said, she was initially unable to attend dances due to her injuries and lack of mobility, and once she was mobile enough to attend again, her ability to dance was still restricted. She also testified that before the accident she sewed a great deal. Although she eventually resumed sewing after the accident, her left leg pain, and limited tolerance for sitting, made it a challenge to sit for more than an hour at a time. Her ability to do other craft activities is similarly limited, she said. Her limited sitting tolerance makes it necessary to frequently change positions or stand up. When she is required to sit for long periods, she uses Tylenol and other muscle relaxants. In addition, she testified that regular swelling in her left leg and foot makes it difficult to find footwear that fits. While the plaintiff testified that she has made progress in managing her pain, her ability to do so depends on the particular activity, and her pain increases through the day, especially on days when she is particularly active.

[64] The plaintiff's evidence was that before the accident there were no limitations on her ability to do housework. Afterwards, Joyce did all the cleaning and housekeeping for a period of months, until her mobility returned. She testified that she remains limited in what she can do, however. Her tolerance for standing is only a few minutes, and she has difficulty bending and squatting.

[65] The medical evidence showed that the plaintiff had a previous history of back problems – including disc herniation and muscle strains – and she agreed on cross-examination that she had lower back problems before the collision, specifically in the centre of the back and down her spine. She testified that immediately after the collision she began to experience pain on the left side of the

lower back. There was no indication in the medical records, however, that she complained of back pain to EHS or to medical, police or insurance personnel in the weeks after the collision. The first reference to back pain in the post-collision records appears in a letter by Dr. Chad Coles, her primary physician during treatment and recovery, dated October 31, 2012, some 14 months after the collision. The back pain was a primary concern after that, and in February 2013 she was referred to a back specialist, Dr. William Oxner. As well, in completing her application for CPP Disability benefits on February 11, 2013, she listed back pain as one of the illnesses that prevented her from working.

[66] Dr. Oxner assessed the plaintiff in June 2013. About half of Dr. Oxner's practice involves assessment and treatment of back pain. Dr. Oxner concluded that her back pain was mechanical and recommended exercise and physical therapy. He considered her back pain to be an aggravation of naturally occurring degenerative disc disease, and indicated that it could be expected to come and go over time. He did not place any medical restrictions on the plaintiff, and he took the view that since there was no underlying organic cause of her pain, she should be able to rehabilitate her back so as to be capable of working again. He did indicate that her hip injury could lead to restrictions on heavy lifting and carrying.

[67] The plaintiff was also assessed by Dr. Edvin Koshi, who conducted a medical examination in October 2014. Dr. Koshi was qualified as an expert in physical medicine and rehabilitation (physiatry), capable of giving evidence on the diagnosis, treatment, and rehabilitation of musculoskeletal injuries and chronic pain. He reported that the plaintiff was reporting pain in the hip, left ankle, in and below the left knee, and the left lower back. He concluded that only the pain below the knee and possibly the ankle were related to her injuries from the collision. He believed that the mechanical lower back pain would have been present regardless of the collision. His opinion was that the plaintiff could not engage in prolonged standing and heavy lifting, but he did believe that she was capable of sedentary employment.

[68] The defendant argues, relying on the medical reports, that the plaintiff is capable of sedentary employment. The plaintiff maintains that neither Dr. Oxner nor Dr. Koshi took account of her subjective pain reporting. She says she is not employable at anything more demanding than "trivial and inconsequential" work, and her belief is that this situation will not improve. Rather, she anticipates that it will continue to retirement age, in view of the degenerative conditions and pain levels she experiences four years after the accident.

[69] The plaintiff's position is essentially that ongoing pain renders her unemployable. The defendant, however, asserts that she is motivated by a desire to "live the life of a retiree." It is clear that the plaintiff's evidence that her back pain started immediately after the accident is inconsistent with the medical records. In addition, on her CPP disability application, the plaintiff omitted to mention her previous back pain, as well as other aspects of her medical history.

[70] The defendant submits that the plaintiff exaggerated the physical demands of her last job, particularly by exaggerating the amount of heavy lifting it entailed. The plaintiff agreed at trial that it was primarily a desk job, with a limited amount of walking around involved. She said on cross-examination that any heavy lifting that was required could be done by someone else.

[71] The defendant argues that the plaintiff was capable of returning to her essentially sedentary work as a security guard on April 25, 2012, based on the date of Dr. Coles's opinion that she was capable of sedentary activities at that time. That being said, she underwent surgery on August 9, 2012. Dr. Coles gave the opinion that she was capable of returning to her former job, or a previous job in technical support at Convergys.

[72] The defendant's position is that the plaintiff was unable to work from July 19, 2011, until April 25, 2012, and again from August 9 to December 20, 2012. These two periods would total 59 weeks. In pre-trial submissions the plaintiff calculated a net weekly past loss in relation to her job at North Eastern at $307.00. Over 59 weeks, this amounts to a net claimed loss of $18,113.00. I accept this as a measure of the plaintiff's past lost wages. The plaintiff also received Section B benefits for loss of income in the amount of $17, 413.09. When combined with CPP disability benefits of $470 per month, the defendant says, this leaves the plaintiff with no net past loss of income. I will deal further with this submission below.

[73] The plaintiff submits that her wage loss should be calculated on the basis of an average of five years of her pre-accident earnings, while accounting for any residual ability to earn income with a contingency reduction of between 25 and 33 percent of the award for lost future income. In the alternative, if the court concludes that she is still employable and that her earnings history is varied, she requests an award based on lost earning capacity.

[74] Given its position that the plaintiff is capable of working in her pre-accident occupation, the defendant argues that there is no future income loss. Further, in the absence of evidence that the plaintiff would have gone on to work in "heavier"

occupations but for the accident, the defendant says there should be no award for loss of earning capacity. Alternatively, the defendant suggests a low number, in the area of $30,000, for lost earning capacity.

[75] I agree that the impact on the plaintiff is properly treated as lost earning capacity. I conclude that while she is capable of returning to work of a similar nature to what she was doing before the accident – that is to say, essentially sedentary – she has been deprived of the ability to do heavier work. I would value her damages for loss of earning capacity at $40,000.

[76] The plaintiff takes the position that CPP disability benefits, which she began receiving in the amount of $469.80 per month on March 1, 2012, are not deductible from her claim for loss of income. She cites *Hollett v. Yeager*, 2014 NSSC 207, where Coady J. found that that CPP disability benefits were not deductible from a claim for past loss of income. Justice Coady reviewed prior caselaw on the issue, including *McKeough v. Miller*, 2009 NSSC 394, where Scaravelli J. followed *Meloche v. McKenzie* (2005), 27 C.C.L.I. (4th) 134 (Ont. Sup. Ct. J.), in concluding that CPP disability benefits were deductible from an award for past income loss, and that amounts received after trial are also deductible and are subject to a trust in favour of the defendant, pursuant to s. 113A of the *Insurance Act*, R.S.N.S. 1989, c. 231, which provides:

> Effect of income-continuation benefit plan
>
> 113A In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, the damages to which a plaintiff is entitled for income loss and loss of earning capacity shall be reduced by all payments in respect of the incident that the plaintiff has received or that were available before the trial of the action for income loss or loss of earning capacity under the laws of any jurisdiction or under an income-continuation benefit plan if, under the law or the plan, the provider of the benefit retains no right of subrogation.

[77] Coady J. said, in *Hollett*:

> 74 Mr. Hollett argues that *McKeough* … should not be followed because *Meloche v. McKenzie* (2005), 27 CCLI (4th) 134, the decision upon which Scaravelli J. relied, was subsequently overturned by the Ontario Court of Appeal in *Demers v. B.R. Davidson Mining and Development Ltd.*, 2012 ONCA 384. In the *Demers* case the Court of Appeal held that CPP disability benefits were not deductible for two reasons. Those reasons are summarized by the Court at paras. 29 and 30:
>
> > 29 Nonetheless, I would answer no to the question whether CPP disability benefits should be deducted from payments for loss of earning capacity for

> either of two reasons. The first reason rests on the principle that clear [and] unambiguous legislative language is required to change common law rights. The addition to the term "loss of earning capacity" in the Bill 59 regime does not clearly and unambiguously change the non-deductibility of CPP benefits at common law.
>
> 30 The second reason I would answer no is that CPP disability benefits are not paid "in respect of the incident"; they are paid in respect of Ms. Demers' disability. Thus, on the wording of s. 267.8(1)2 no deduction is required.
>
> These reasons were not available to Scaravelli J. when he decided *McKeough*...
>
> 75 I am of the respectful view that *McKeough* … was wrongly decided in light of the Ontario Court of Appeal decision. I feel bound by *Demers* and as a result I do not deduct CPP benefits from the $120,000 award for lost past earnings.

[78] The defendant takes the position that the plaintiff sought and received CPP disability benefits "in respect of the incident", in that they were received "solely because of the injuries that she allegedly sustained in the Accident." (The defendant refers to the plaintiff's trial evidence in support, but I give this no weight on a point of statutory interpretation.)

[79] The defendant argues that *Hollett* should not be followed, and that this court is not bound to follow the Ontario precedent. The defendant says neither of the reasons given in *Demers* for finding the benefits non-deductible are persuasive in Nova Scotia. First, the defendant argues, the Ontario decision relied on the Ontario common law interpretation of the meanings of "loss of income" and "loss of earning capacity", which do not necessarily govern in Nova Scotia. The defendant says, "[w]ithin a province, the common law is what the Court of Appeal says it is. The courts of Ontario cannot decide what the law is in Nova Scotia in a manner that binds the Nova Scotia courts." The defendant goes on to argue that unlike Ontario law, Nova Scotia law recognizes loss of income and loss of earning capacity as separate heads of damages: see, e.g., *Abbott v. Sharpe*, 2007 NSCA 6, at para. 156. The defendant submits that CPP benefits are on account of loss of earning capacity, and are therefore deductible under s. 113A.

[80] The defendant also submits that the second basis given in *Demers* – that CPP disability benefits were not paid "in respect of the incident" but rather "in respect of the disability" – is also not persuasive in Nova Scotia. First, the defendant says, whether the CPP benefits were paid in respect of a motor vehicle accident is a question of fact for the trial judge. In the defendant's view, "if the evidence establishes that the disability was caused in fact by the accident, then the CPP payments are made in respect of the accident." The defendant says it would be

absurd for a plaintiff to receive CPP disability benefits in respect of the incident (as determined by CPP) while representing to the court that the CPP benefits are received in respect of the disability.

[81] Alternatively, the defendant says the court in *Demers* interpreted the phrase "in respect of" in accordance with *Sarvanis v. Canada*, 2002 SCC 28, where the Supreme Court of Canada interpreted those words as found, in a different context, in s. 9 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, which provides:

> 9. No proceedings lie against the Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund or out of any funds administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made.

[82] According to the defendant, the language of the federal statute is narrower than that in s. 113A of the Nova Scotia *Insurance Act*:

> … The federal act refers to payments "in respect of the death, injury, damage or loss in respect of which the claim is made." This language specifically ties the payments 1) to a claim for payment from the Crown, and 2) to the death, injury, damage or loss in respect of which the claim is made. The repeated word "claim" links the payments back to the original injury. The claim is made against a single pool of funds: the federal Crown's money.
>
> Section 113A is broader. It refers to "an action for bodily injury or death arising … from the use or operation of an automobile". The damages in this action are reduced "by all payments in respect of the incident". Where the federal statute repeats the word "claim" the *Act* uses the word "action" to describe the suit for damages, the word "incident" to describe the cause of the loss, and the words "all payments" to describe the various payments available for loss of income, loss of earning capacity, or payments under an income continuation benefit plan. The Nova Scotia *Act* contemplates one incident, an action for damages, and the deduction of multiple payments from sources outside the action. The federal statute considered in *Demers* considers one "claim", made against specific pools of money, for one specific incident. [Emphasis in original.]

[83] As such, the defendant says the court should follow the reasoning in *McKeough* and hold that CPP disability benefits are deductible from lost income or lost earning capacity claims. In his post-trial submission, the defendant points out, in addition, that the Court of Appeal recently held that it was an error for a trial judge to follow a decision of the New Brunswick Court of Appeal in respect of the deductibility of CPP benefits in relation to the S.E.F. 44 endorsement: *Portage LaPrairie Mutual Insurance Co. v. Sabean*, 2015 NSCA 53. I do not read the Court

of Appeal's meaning to be anything more than that it would be an error to treat a decision from another jurisdiction as binding.

[84] I conclude that the CPP Disability payments were received "in respect of the incident", as contemplated by s. 113A of the *Insurance Act*.

[85] I am satisfied that the CPP Disability payments are on account of lost earning capacity. Nothing on the CPP Disability questionnaire filled out by the plaintiff touches on lost future income *per se*, and the calculation provisions of the *Canada Pension Plan*, R.S.C. 1985, c. C-8, indicate that the quantum is based partly on a fixed amount and partly on the applicant's earnings history: see, e.g., s. 56. The plaintiff's injuries are inseparable from the incident, that being the collision. In respect to payments received before April 25, 2012, as well as payments between August 9 and December 20, 2012, s. 113A is applicable and the CPP Disability payments are deductible from damages for loss of income.

[86] For the periods when the plaintiff was unable to work, CPP payments, as well as Section B payments, are to be deducted from the damages received for loss of income. In view of the fact that the Section B loss of income payments and the CPP payments exceed the past loss of income there is no sustainable claim for past loss of income. For the period after the plaintiff became able to return to work, future CPP disability payments, to the extent received by the plaintiff, are deductible from damages awarded for lost earning capacity. The plaintiff is required to remit the amount of any future disability benefit when received until the defendant is fully compensated for the amount of loss of earning capacity damages received by the plaintiff.

[87] The plaintiff has also advanced a claim for loss of housekeeping and valuable services, asserting that she is now limited in her ability to do household tasks, particularly due to limitations in her ability to stand for an extended time, as well as limitations on movements such as bending. The defendant denies that the evidence establishes any significant ongoing limitation, but agrees that there is a valid claim for loss of valuable services from the period immediately after the accident when the plaintiff was immobilized by her injuries. I am also satisfied that there has been a continuing impact on the plaintiff's ability to perform housekeeping and household tasks, similar to that which limits her ability to perform heavier work duties. I would award $10,000 under this head of damages.

[88] The plaintiff seeks an award of damages for costs of future care in the amount of $15,000. Among other things, she refers (in pre-trial submissions) to potential future costs arising from hip replacement surgery, various expenses for

equipment to help her in household tasks, and various medications and assistive devices. The defendant says these expenses were not made out on the evidence, and, in any event, they are primarily related to her back pain, which was not established as being caused by the accident. No claim was advanced by the plaintiff in post-trial submission for cost of future care. There is insufficient evidence to found this claim.

[89] As to general damages, I am satisfied that the plaintiff underwent significant pain and suffering in the aftermath of the collision. I am also satisfied that she continues to experience a degree of ongoing pain and discomfort which, while not disabling, is "persistently troubling" in the manner contemplated by *Smith v. Stubbert* (1992), 117 N.S.R. (2d) 118 (C.A.). I would place her damages near the lower end (approximately $27,000 in present day funds). I fix her general damages at $30,000.

[90] The defendant further argues that the plaintiff has failed to mitigate her damages, in that she has declined "all medically available treatment" and has not followed Dr. Oxner's advice. Specifically, Dr. Oxner recommended exercise for her back pain, and placed no limitations on her. The plaintiff, however, took the view that her movements should be restricted by her pain, leading her not to exercise regularly, as later reported by Dr. Koshi. In addition, the plaintiff's evidence was that she declines prescription pain medication, using only over-the-counter products. Accordingly, the defendant submits, she has not taken all reasonable steps to treat or control her pain. The defendant calls for a reduction of the plaintiff's damages by twenty percent to reflect the alleged failure to mitigate. In a reply brief filed after defendant's post-trial submissions, the plaintiff argued that her subjective pain was not considered by Dr. Oxner, with the implication that she is a better judge. Additionally, the plaintiff says she avoids heavier-duty medication because of its side-effects (such as its impact on cognition). She argues that she should not be penalized for this. (The defendant objected to certain content of this brief, and this is one of the few aspects of it to which I have referred.) I am satisfied on the basis of the evidence that there has been a failure to mitigate. I would reduce the plaintiff's general damages by ten per cent on this account.

[91] I note that the defendant and the third party objected to the reply brief. I agree that a good deal of the brief amounted to re-arguing issues that could or should have been addressed previously, and I have not considered the majority of it. That being said, I am not persuaded that Civil Procedure Rule 51.05(1)(f) is necessarily limited to new points of law, as the defendant and third party argue (without authority).

Conclusion

[92] As noted above, I apportion liability two-thirds to the plaintiff and one-third to the defendant. The damage award must be adjusted accordingly.

MacAdam, J.

SUPREME COURT OF NOVA SCOTIA
Citation: *Tibbetts v. Murphy*, 2015 NSSC 280

Date: 20151007
Docket: Pic No.. 390520
Registry: Pictou

Between:

Shirley Tibbetts

Plaintiff

v.

Reginald Greg Murphy

Defendant

v.

Joseph George Joyce

Third Party

Judge:	The Honourable Justice A. David MacAdam
Heard:	May 1, 4, 5, 6, 7, 8, 11 and 12, 2015, in Pictou, Nova Scotia
Final Written Submissions:	July 7, 2015
Decision:	October 7, 2015
Erratum Date:	January 6, 2016

Counsel:	Jamie MacGillivray and Trevor Wadden, for the plaintiff Christopher W. Madill and Tipper McEwan, for the defendant Tara A. Miller and Chad G. Horton, for the third party

By the Court:

ERRATUM

[93] In *Tibbetts v. Murphy*, 2015 NSSC 280, paragraphs 72 and 86 are replaced with the following:

> [72] The defendant's position is that the plaintiff was unable to work from July 19, 2011, until April 25, 2012, and again from August 9 to December 20, 2012. These two periods would total 59 weeks. In pre-trial submissions the plaintiff calculated a net weekly past loss in relation to her job at North Eastern at $307.00. Over 59 weeks, this amounts to a net claimed loss of $18,113.00. I accept this as a measure of the plaintiff's past lost wages. The plaintiff also received Section B benefits for loss of income in the amount of $17, 413.09. When combined with CPP disability benefits of $470 per month, the defendant says, this leaves the plaintiff with no net past loss of income. I will deal further with this submission below.
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> [86] For the periods when the plaintiff was unable to work, CPP payments, as well as Section B payments, are to be deducted from the damages received for loss of income. In view of the fact that the Section B loss of income payments and the CPP payments exceed the past loss of income there is no sustainable claim for past loss of income. For the period after the plaintiff became able to return to work, future CPP disability payments, to the extent received by the plaintiff, are deductible from damages awarded for lost earning capacity. The plaintiff is required to remit the amount of any future disability benefit when received until the defendant is fully compensated for the amount of loss of earning capacity damages received by the plaintiff.

Murphy, J.