SUPREME COURT OF NOVA SCOTIA
Citation: Farrell v. Casavant, 2009 NSSC 233

Date: 20090731
Docket: Hfx No. 244203
Registry: Halifax

Between:

Bernard Farrell

Plaintiff

v.

Richard Casavant and Mary Casavant

Defendants

Judge:	Deborah K. Smith, Associate Chief Justice
Heard:	January 5th, 6th, 7th, 8th,13th, 2009 & February 18th, 2009 in Halifax, Nova Scotia
Written Decision:	July 31st, 2009
Counsel:	Kevin A. MacDonald, Esq. Solicitor for the Plaintiff Michael E. Dunphy, Q.C. and Ashley Dunn, A.C. Solicitors for the Defendants

By the Court:

[1] This is an action for damages as a result of a motor vehicle accident that occurred near the Hantsport exit of the Trans-Canada Highway on the morning of January 9th, 2004. At the time in question, the Plaintiff was travelling in an easterly direction in a Ford Taurus automobile when he was struck, on his side of the highway, by a vehicle being driven by the Defendant, Richard Casavant (hereinafter referred to as "the Defendant".) At the time of the collision, the Defendant was driving a 2001 Chevrolet Silverado pickup truck which he and his wife had purchased in November of 2003. The Plaintiff suggests that the Defendant was driving in a negligent manner at the time of the collision and that this negligence caused the Plaintiff to suffer personal injury and damages. The Defendant denies that he was negligent in the operation of his motor vehicle and has pleaded the defence of inevitable accident.

LIABILITY

FACTS

[2] The Plaintiff, who is presently 60 years of age, had worked the night shift the evening prior to the collision. He left work between 9:30 and 9:45 a.m. on January 9th, 2004 to drive home.

[3] The Plaintiff drove east from New Minas towards his home in Ellershouse. He was travelling on Highway 101 which, at the time of the collision, was a two lane paved highway with a posted speed limit of 100 kilometres per hour. The Plaintiff testified that he was travelling approximately 70 - 80 kilometres per hour on the highway that morning because it had snowed the previous night and he did not know what to expect on the road.

[4] The Plaintiff entered Highway 101 at Exit 12. He said that visibility was good. He cannot recall the temperature that morning but testified that it was cold.

[5] The Plaintiff drove for approximately 20 kilometres after entering Highway 101. He cannot recall seeing any evidence of sand or salt being placed on the highway that day.

[6] There was some uncertainty in the Plaintiff's evidence about the road conditions on the day of the accident. On discovery (taken on November 28th, 2006) the Plaintiff agreed with the suggestion that the road conditions were basically bare pavement with some snow on the side of the road. In addition, he described the roads as "probably" being clear. At trial, however, the Plaintiff testified that the roads had bare spots with snow patches.

[7] In addition, at discovery the Plaintiff testified that he did not think that it had snowed for approximately 24 hours prior to the collision. At trial, however, the Plaintiff testified that it had snowed the night before the accident. On cross examination, the Plaintiff acknowledged that he could not recall whether or not it had snowed in the 24 hours prior to the collision.

[8] In any event, the Plaintiff confirmed that he had no difficulty navigating the roads prior to the accident occurring and had no difficulty with traction prior to the collision.

[9] The accident occurred between 10:00 and 10:30 a.m. on what is known as the Halfway River Overpass. There is a highway exit (Exit # 8) under this overpass and, as the name suggests, there is also a river. Technically, the area where the accident occurred is both an overpass and a bridge. For the purpose of this decision, I will refer to it as either an overpass or a bridge - recognizing that it is both.

[10] The Plaintiff first saw the Defendant's vehicle as the Plaintiff approached the overpass in question. According to the Plaintiff, the Defendant's vehicle was "fishtailing" when the Plaintiff first observed it. The Plaintiff saw that the Defendant's vehicle was over the centre line and pulled his vehicle over to the right as far as he could in an attempt to avoid the collision. Despite this action, the Defendant's vehicle collided with the Plaintiff's vehicle in the Plaintiff's lane of travel. The impact between the two vehicles was significant.

[11] On the day of the collision the Defendant (who is presently 61 years of age) was travelling from his home just outside of Chester, Nova Scotia to visit a friend who lives in Hantsport, Nova Scotia.

[12] The Defendant testified that it was extremely cold on the day of the accident (minus 20 degrees or more) and was overcast but clear. The Defendant had no concerns about the weather as he embarked upon his journey that day.

[13] The Defendant began his travels on Highway 14 which is a secondary road. He testified that he travelled on Highway 14 for approximately 35 to 40 minutes prior to arriving in Windsor, Nova Scotia. He said that the roads had been plowed days before and that other than the odd strip of blown snow across the road – Highway 14 was clear. The Defendant did not encounter any slippery sections on Highway 14 as he drove along that day.

[14] The Defendant stopped in Windsor for a hot chocolate and then entered Highway 101 at Exit 5A. He was travelling west. He drove for approximately 10 kilometres on Highway 101 prior to the accident occurring. He said that the pavement was dry and clear as he travelled along the highway and that he did not encounter any slippery conditions on Highway 101 before the accident occurred.

[15] The Defendant testified that he normally travels below the speed limit and that he was travelling along Highway 101 that day at a speed of 85 kilometres per hour. He says that he knows that his speed was 85 kilometres per hour as approximately five miles after turning onto the highway he passed an R.C.M.P. car travelling in the opposite direction and he checked his speed at that time. He believes that he was travelling approximately 80 kilometres per hour as he approached the overpass in question.

[16] The Defendant testified that there was no change in the appearance of the road surface as he approached the overpass where the accident occurred. He said that as he entered the overpass his vehicle was in its proper lane of travel but it then started to slide to the right. He steered to the right and the rear of his vehicle came around to the left. He said that he then steered to the left and the back of his vehicle came "way around" to the right. His vehicle then hit the Plaintiff's vehicle. The Defendant testified that he did not brake prior to the accident. He said that he had been taught to steer into a skid and not to brake if in a skid.

[17] The Defendant acknowledges that he crossed the center line of the highway prior to the collision and confirms that the impact between the two vehicles occurred in the Plaintiff's lane of the highway.

[18] The Defendant testified that his vehicle "fishtailed" as there was ice on the bridge. The Defendant further testified that he did not see any ice on the bridge before his vehicle started to fishtail.

[19] The Defendant acknowledged that as he approached the overpass in question there was a sign which read "BRIDGES FREEZE BEFORE ROAD". He understood this sign to mean that at around zero degrees the bridge would freeze before the road. He testified that despite this sign he did not expect the overpass surface to be any different than the road surface that he had been travelling on that day as it was so cold he assumed that everything would be frozen.

[20] The Defendant got out of his vehicle after the accident and went to speak to the Plaintiff. He was then talking to two gentlemen at the accident scene. As they were talking, another vehicle travelling west came onto the overpass and started to slide. That vehicle regained control and continued on. In addition, one of the two men that the Defendant was talking to slipped on the overpass but did not fall.

[21] The R.C.M.P. attended at the accident scene. At trial, the Defendant acknowledged telling the R.C.M.P. that the accident was his fault although later in his evidence he testified that he didn't remember actually saying this to the R.C.M.P. Rather, he recalled telling the R.C.M.P. that he had slid on ice and slid into the Plaintiff. He says that he has always viewed the collision as an accident.

[22] While the Defendant's comments to the police after the collision are relevant, it is obviously for the Court to determine the issue of liability after hearing all of the evidence and reviewing the applicable case law.

LAW, FINDINGS AND ANALYSIS RE: LIABILTY

[23] The operation of a motor vehicle upon a highway is governed by the ***Motor Vehicle Act***. The Plaintiff has referred the Court to sections 100(1), 101, 110(1), 111(a) and (b) and 113 of the said ***Act*** which provide:

> **Duty to drive carefully**
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> **100** **(1)** Every person driving or operating a motor vehicle on a highway or any place ordinarily accessible to the public shall drive or operate the same in a careful and prudent manner having regard to all the circumstances.

.....

Careful and prudent speed

101 A person operating or driving a vehicle on a highway shall operate or drive the same at a careful and prudent rate of speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of all other conditions at the time existing, and a person shall not operate or drive a vehicle upon a highway at such a speed or in such a manner as to endanger the life, limb or property of any person. R.S., c. 293, s. 101.

Duty to drive on right

110 **(1)** Upon all highways of sufficient width, except upon one-way streets, the operator or driver of a vehicle shall operate or drive the same upon the right half of the highway and shall drive a slow-moving vehicle as closely as possible to the right-hand edge or curb of such highway, unless it is impracticable to travel on such side of the highway except when overtaking and passing another vehicle subject to the rules applicable in overtaking and passing set forth in Section 115.

.....

Rules for laned traffic

111 Whenever a street or highway has been divided into clearly marked lanes for traffic, drivers of vehicles shall obey the following regulations:

(a) a vehicle shall normally be driven in the lane nearest the right-hand edge or curb of the highway when such lane is available for travel except when overtaking another vehicle or in preparation for a left turn or as permitted in clause (d);

(b) a vehicle shall be driven as nearly as is practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that the movement can be made with safety;

.....

Passing in opposite directions

113 Subject to clause (b) of subsection (1) of Section 118, drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one half of the main travelled portion of the roadway as nearly as possible. R.S., c. 293, s. 113.

[24] It has long been recognized in Canada that the driver of a motor vehicle meeting another motor vehicle on a highway has a duty (whether by statute or at common law) to allow the other vehicle one-half of the road free and clear. If this duty is breached it will give rise to a *prima facie* case of negligence on the part of the offending driver casting upon him what has been referred to as "the onus of explanation" (***Gauthier Co. v. Canada***, [1945] S.C.R. 143 at pp. 149-150).

[25] If a vehicle is on the wrong side of the road due to a skid, the driver of the vehicle must do more than establish the skid to displace the *prima facie* case of negligence. The skidding of a vehicle upon a highway is considered to be a "neutral fact" equally consistent with negligence or no negligence (***Gauthier Co. v. Canada***, *supra*, at p. 152 and ***Laurie v. Raglan Building Co.***, [1942] 1 K.B. 152 (C.A.) at p. 154.)

[26] Macdonald, J.A. dealt with this issue in ***Grant v. Lutes*** (1976), 17 N.S.R. (2d) 614 (C.A.) where he stated at ¶ 31:

> .....it is not sufficient to dispel a *prima facie* case of negligence in a case like the present one merely to show that the cause of the accident was due to the vehicle skidding. A defendant driver in such a case must establish that the skid which caused the accident occurred without his negligence. To put it another way, he must show a way in which the skid may have occurred without negligence.

[27] In **Gauthier Co. v. Canada**, *supra*, Kellock, J. dealt with the onus of proof in circumstances where the defendant provides an explanation for the accident which is equally consistent with negligence or no negligence. Kellock, J. stated at p. 150:

> .....it will be convenient to consider the nature of the onus resting upon the respondent at the conclusion of the appellant's case. I refer first to the judgment of Duff C.J., in *United Motors v. Hutson* [[1937] S.C.R. 294, at 296 et seq.] After referring to the judgment of Erle C.J. in *Scott v. London & St. Katherine Docks Co.* [(1865) 3 H. & C. 596, at 601], his Lordship proceeded:
>
> > Broadly speaking, in such cases, where the defendant produces an explanation equally consistent with negligence and with no negligence, the burden of establishing negligence still remains with the plaintiff.

[28] Whether a skid on a highway results in a finding of negligence depends on the circumstances of the case. In ***Browne v. De Luxe Car Services***, [1941] 1 K.B. 549 it is stated at p. 553:

> .....The degree of care which is called for from a driver depends upon the circumstances of the case. A driver who is proceeding along a piece of road which he knows to be slippery has imposed upon him the burden of driving with an extra degree of care. Certain manoeuvres upon such a road would no doubt be dangerous, and any prudent driver would know that they were dangerous. A sudden alteration of direction, a sudden application of brakes, driving in such a way that one or other of those two manoeuvres may suddenly become necessary – all those are things which the prudent driver must avoid; but if a driver upon a road, which he knows to be slippery, is driving with that measure of care which, in ordinary circumstances, would be perfectly safe upon such a road, he is not to be found guilty of negligence because, for some reason or another, an accident takes place owing to a skid.

[29] ***Browne v. De Luxe Car Services***, *supra*, was referred to by Macdonald, J.A. in ***Grant v. Lutes***, *supra*, who stated at ¶ 59:

> .....in motor vehicle accident cases, if the driver can establish that he was driving with the ordinary care, caution and skill which a driver is required to exercise under the conditions as they existed at the time of the accident he is not to be found guilty of negligence because for some reason or other, an accident takes place owing to a skid. In other words, if he proves that he met the foregoing standard of care he has established or shown 'a way in which the accident may have occurred without negligence.'

[30] As indicated in ***Browne v. De Luxe Car Services***, *supra*, the degree of care that is called for from a driver depends on the circumstances of the case. Notice of slippery road conditions puts a duty on a driver to drive carefully according to those conditions. Failure to do so will result in a finding of liability as occurred in ***Wilson v. MacInnis*** (1992), 111 N.S.R. (2d) 78 (N.S.S.C.) where the Court found that the Defendant was driving too fast and following too closely for the conditions that he knew existed. See also ***Stewart v. Nickerson*** (1986), 73 N.S.R. (2d) 175 (N.S.S.C.)

[31] That is not to suggest that a driver who is on notice of poor road conditions is unable to rebut the presumption of negligence in situations where his vehicle slides off its regular travelled lane of a highway. If the driver can establish that he was driving with the ordinary care, caution and skill which would be expected under those

conditions, he can rebut the presumption of negligence as occurred in ***Gunn v. Matheson*** (1983), 57 N.S.R. (2d) 370 (N.S.S.C.).

[32] Notice of poor road conditions can be an important consideration when determining whether a driver was negligent as is shown in ***Grant v. Lutes***, *supra*. In that case, the Nova Scotia Court of Appeal overturned a finding of negligence by a jury in circumstances where the defendant driver, who skidded off the highway and overturned, had no forewarning of the slippery road conditions and was found to be driving in a reasonable manner. See also ***Coakley v. Halifax and Landry*** (1986), 73 N.S.R. (2d) 331 (N.S.S.C.)

[33] I return now to the facts of this case.

[34] I am satisfied from the evidence presented, and I find, that this accident occurred on the morning of January 9th, 2004 in the eastbound lane of Highway 101 on what is known as the Halfway River Overpass (Exit #8) near Hantsport, Nova Scotia. It was overcast at the time of the collision but clear. The temperature at the time was well below zero. While we do not have weather records for the specific area of the collision, Environment Canada weather records for Kentville, Nova Scotia (which is relative to the area of the accident) show a high on the day of the collision of -12.3 and a low of -16.3.

[35] It had snowed at some point in the days prior to the collision. While the Plaintiff recalls the wind blowing some snow onto the highway as he travelled from Exit 12 towards Exit 8, I find that the portion of Highway 101 travelled by the parties on the day of the collision had been cleared by plows and, for the most part, was clear in the travelled portion of each lane with some snow on the shoulders of the road and some snow and/or salt on the center line. I further find that neither party had any difficulty with slipperiness or traction prior to the collision occurring.

[36] Prior to the accident both parties were travelling below the posted speed limit of 100 kilometres per hour prior. I find that the Plaintiff was travelling between 70 - 80 kilometres per hour while travelling on Highway 101 that day and that the Defendant was travelling between 80 - 85 kilometres per hour while on the highway.

[37] I am satisfied, on a balance of probabilities, and I find that the accident occurred when the Defendants' vehicle hit a patch of ice and slid into the Plaintiff's lane of travel. The Defendant breached his statutory and common law duty to allow the

Plaintiff one half of the road free and clear. This gives rise to *prima facie* case of negligence against the Defendant casting upon him the "onus of explanation" (***Gauthier Co., v. Canada***, *supra*, at p. 150.)

[38] As indicated previously, the skidding of a vehicle upon a highway is a neutral fact which is equally consistent with negligence or no negligence. The burden is on the Defendant to establish that the skid which caused the accident occurred without his negligence, or, to put it another way, he must show a way in which the skid may have occurred without negligence (***Grant v. Lutes***, *supra*, at ¶ 31.)

[39] I have carefully reviewed all of the evidence at trial. The Defendant has satisfied me that the skid which caused this accident occurred without his negligence.

[40] As indicated above, on the day of the accident the weather was clear and visibility was good. The Defendant was driving a vehicle that was mechanically sound and was equipped with all terrain radial tires that had good tread. As was his practice, the Defendant was driving along Highway 101 under the posted speed limit. The Defendant had driven a significant distance prior to the collision and during that time had no indication that the highway was slippery or that there was any difficulty with traction. As the Defendant drove over the Halfway River Overpass he hit a patch of ice which caused his vehicle to skid. I find that the Defendant did not see this patch of ice before his vehicle started to slide and that there was no change in the appearance of the road surface prior to the collision occurring. I am satisfied, and I find, that the Defendant had no forewarning of this slippery condition. I am further satisfied, and I find, that the Defendant was not driving at an excessive speed for the conditions that existed that day. The Defendant, in my view, was driving with the degree of care and caution that a reasonably competent driver would exercise under similar circumstances. He has therefore met the standard of care that is required of him.

[41] While it would be easy, with the benefit of hindsight, to simply conclude that the Defendant must have been travelling too fast for the conditions in light of the fact that he lost control of his vehicle – the law, in my view, requires a greater analysis than this.

[42] As indicated, a skid is a neutral fact equally consistent with negligence or no negligence. One must look objectively at the circumstances that existed at the time of the accident and ask whether the Defendant was driving with the ordinary care, caution and skill which a driver is expected to exercise in those circumstances (see

Grant v. Lutes, *supra* at ¶59.) If not – then he will not be able to rebut the presumption of negligence. If so – then the presumption is rebutted and the Defendant will not be found liable for the collision.

[43] When one considers the circumstances of this accident including the weather, the road conditions, the fact that neither the Plaintiff nor the Defendant had any difficulty with slipperiness at any time prior to the collision that day, I am satisfied that the Defendant, who was travelling 15 - 20 kilometres below the speed limit, was driving with the ordinary care, caution and skill which a reasonably competent driver would exercise in similar circumstances.

[44] The Plaintiff has referred to the fact that other vehicles went over the overpass after the accident without getting into a collision. One of these vehicles started to slide but did manage to regain control. The Plaintiff's solicitor suggests that the fact that these vehicles got over the bridge without losing control supports the suggestion that the Defendant was travelling too fast for the road conditions.

[45] With respect, I do not accept this argument. By the time these other vehicles went over the bridge the accident had already occurred. The drivers of these latter vehicles would have been approaching an accident scene. While we do not have evidence of the exact speed that each of these vehicles was travelling, it is likely that these vehicles would have slowed considerably as they approached the area of the collision. Unlike those vehicles that came by after the accident – the Defendant did not have notice of a problem ahead on the bridge. In light of the road conditions that he had experienced since leaving home earlier that day, it was not unreasonable for him to have been travelling at a speed of 80 - 85 kilometres per hour on the highway that day.

[46] The Plaintiff further submits that the Defendant did not take the proper corrective action once his vehicle started to slide. In particular, the Plaintiff submits that if the Defendant had not taken any corrective action once the skid began – the Defendant's vehicle would not have come into contact with the Plaintiff's vehicle. Further, he submits that the Defendant should have geared down and used his engine to brake. Finally, he submits that the Defendant over-reacted or over-corrected once he started to slide and that this over-correction contributed to the collision. I am not satisfied that the evidence supports these conclusions.

[47] Once the Defendant came upon the icy surface, he was faced with an unexpected and dangerous situation. He steered into the skid once his vehicle started to slide and, as he had been taught, did not apply his brakes. One has to recognize the urgency of the situation that the Defendant found himself in once he came upon the patch of ice and then measure his actions with that urgency in mind. Faced with the situation the Defendant found himself in, I am satisfied that his actions, once he hit the ice, were reasonable and that he met the standard of care required of him in the circumstances that he faced that day.

[48] Further, during the trial a great deal of attention was paid to the fact that prior to entering the area where the accident occurred the Defendant passed a sign which read "BRIDGES FREEZE BEFORE ROAD". The Plaintiff submits that this sign was a warning to the Defendant of possible ice on the bridge ahead and that this sign, along with a number of other factors (including the fact that this was a bridge – not just an overpass), should have caused the Defendant to reduce his speed before entering upon the bridge that day.

[49] While I agree that this sign provided a warning to drivers that bridges freeze before the roads, I do not accept the suggestion that this sign, along with the circumstances that existed that day, should have caused the Defendant to reduce his speed prior to entering upon the bridge.

[50] I have found that the temperature on the day of the accident was well below zero. The Defendant testified that it was so cold that day that he assumed that everything would be frozen. This was a reasonable assumption in light of the temperature that day.

[51] Further, the evidence established that the Defendant had passed over a number of overpasses and bridges that day while travelling from home to the area of the accident, a number of which had signs indicating that bridges freeze before the road. The Defendant had no difficulty with ice or slipperiness on any of those overpasses/bridges. Looking at all of the circumstances, and taking into account what would be expected of a reasonable and prudent driver in light of those circumstances, I am not satisfied that it was incumbent upon the Defendant to reduce his speed as he approached the overpass in question even though there was a sign on the road which read "BRIDGES FREEZE BEFORE ROAD".

[52] I am satisfied that the Defendant's driving before and upon encountering the icy patch was reasonable and that this accident occurred without negligence on his part. In my view, this was an unfortunate accident for which no one is legally liable.

[53] In light of this conclusion, I do not find it necessary to consider the defence of inevitable accident (see the comments of Allen M. Linden & Bruce Feldthusen in ***Canadian Tort Law***, 8th ed. (N.p.: LexisNexis & Butterworths, 2006) at pp. 281-283.) I will, however, briefly review the cases relied upon by the Plaintiff in relation to liability.

[54] The Plaintiff has referred the Court to ***Broughm - O'Keefe v. Taylor*** (1991), 102 N.S.R. (2d) 68 (N.S.S.C. T.D.). That case involved a vehicle that was sprayed with slush as a result of a third party passing it upon the highway. The slush effectively blinded the driver of the defendant vehicle which then slid or skid onto the plaintiff's side of the highway causing a collision. Nathanson, J. found that the defendant was an excessively cautious driver who, when unable to see through his windshield, unwittingly turned his steering wheel so that his vehicle moved to the left. Further, the Court found that the defendant touched his brakes causing his vehicle to skid. The Court in that case concluded that having regard to the circumstances, the defendant driver did not exercise ordinary care, caution and skill and did not drive his vehicle in a careful and reasonable manner. As indicated above, in the case at Bar, I am satisfied that the Defendant was driving with the ordinary care, caution and skill which a reasonably competent driver would exercise in the circumstances that existed on the day of the collision.

[55] Further, the Plaintiff has referred the Court to the case of ***Whey v. Halifax (Regional Municipality)*** 2005 NSSC 348. That case involved a passenger travelling on a bus who suffered damages as a result of falling from her seat when the bus went over a curb. That case, in my view, has very little similarity to the case at Bar and is of little assistance on the facts of this case.

[56] The Plaintiff has also referred to the case of ***Wilson v. MacInnis***, *supra*. That case involved a defendant that rear-ended another vehicle which was on an icy bridge. There was a large yellow sign at the approaches to the bridge which read "CAUTION BRIDGE DECK FREEZES BEFORE ROADWAY". The sign had an amber light which flashed when the temperature was such that freezing was possible. On the night of the accident the light was in flashing mode. The Court concluded that at the time of the collision the bridge deck was covered by black ice and conditions were

extremely slippery. The Court found that the hazardous conditions had occurred suddenly. Nevertheless, the Court concluded that in the circumstances of that case the defendant was liable for the collision.

[57] In my view, ***Wilson v. MacInnis***, *supra*, is distinguishable from the case at Bar. In that case, the Court found that the defendant was aware of the slippery road conditions approximately 2,200 feet from where the accident occurred. Roscoe, J. (as she then was) stated at ¶ 26:

> .....I find that he was driving too fast and following too closely ***for the conditions he knew existed at that time***.....The defendant had approximately 2,200 feet after determining that the bridge deck was icy in which to reduce his speed even further. His vehicle ws [was] travelling uphill at that time, and he could see ahead of him that cars were slowing down and that there was an accident in the on-coming lanes. The plaintiff, the driver of the truck in front of Mr. MacInnis in the passing lane and many other drivers managed to keep their cars under control when faced with the icy conditions. I find that a careful and prudent driver, in the defendant's position, under those conditions, ***with the knowledge of the conditions that he had***, could have avoided the accident by the exercise of reasonable care and skill.....
>
> [Emphasis added]

[58] In the case at Bar, I am satisfied that the Defendant did not know of the conditions that existed on the bridge until his vehicle actually started to slide and that, in the circumstances of this collision, he is not responsible for the accident.

[59] The Plaintiff has also referred to the case of ***Stewart v. Nickerson***, *supra*. That case involved a driver who lost control of her vehicle during a turn and skid into the plaintiff's vehicle. The Court found the defendant liable for the collision. It is important to note that in ***Stewart v. Nickerson***, *supra*, the evidence established that the road was covered with snow and was quite slippery at the time of the collision. The Court found that under the conditions that existed that day the defendant "may well have" been travelling at an excessive speed. In addition, the Court concluded that when the defendant's vehicle started to skid she applied her brakes which was "probably the most hazardous thing she could have done under the circumstances then existing."

[60] In my view, ***Stewart v. Nickerson***, *supra*, is also distinguishable from the case at Bar. In the case before me the evidence is clear that up until the time of the accident the road conditions were not slippery. I have concluded that the Defendant

was not travelling too fast for the conditions that existed that day. Further, I am satisfied that the Defendant met the standard of care required of him once his vehicle hit the icy patch and started to slide.

[61] Counsel for the Defendant has referred the Court to a number of western Canadian cases dealing, *inter alia*, with slippery road conditions. In my view, the law in Nova Scotia in this area is well established and it is unnecessary for me to comment upon these western Canadian decisions.

[62] There is one additional matter that I wish to deal with. That is the argument that in Nova Scotia, in the winter, it is not unusual to come upon a patch of ice on the highway and, therefore, it cannot be suggested that the Defendant did not have warning of this possible condition.

[63] I accept the suggestion that it is not unusual to come upon a patch of ice on the highway during a Nova Scotia winter. We live in a climate that requires drivers to take care and be cautious during the winter months. I do not accept, however, that the fact that icy patches are not unusual – results in the conclusion that every driver who loses control on an icy patch during a Nova Scotia winter had warning of or notice of the icy condition. When considering a skid on ice the court must look at the circumstances that existed on the day of the collision to determine whether the individual in question was driving with the ordinary care, caution and skill which one would be expected to exercise in the circumstances. The court must consider a variety of factors including, *inter alia*, the road conditions, the weather and visibility. In my view, the fact that it is not unusual to find an icy patch on a highway during a Nova Scotia winter does not mean that all drivers automatically have notice of any icy conditions that may exist. It is for the court to determine, on the facts of each case, whether the conditions were such that a driver should have been aware of the slippery conditions and adjusted their driving accordingly.

[64] As indicated above, the Defendant has satisfied me that at the time of this collision he was driving with the ordinary care, caution and skill which a driver would be expected to exercise under the conditions that existed that day. Accordingly, the action against both Defendants will be dismissed. As is the practice in this Court, however, I will go on to provisionally assess damages.

DAMAGES

FACTS

[65] The impact between the Plaintiff's vehicle and the Defendant's vehicle at the time of the collision was significant. The Plaintiff testified that he was removed from his car with the "jaws of life" and was then taken by ambulance to the Hants Community Hospital in Windsor, Nova Scotia. According to the Plaintiff's medical records, he was assessed and treated at the hospital and was discharged home at 2:30 p.m. on the day of the accident.

[66] There is a dispute as to the actual injuries that the Plaintiff suffered as a result of this collision. At trial, the Plaintiff testified that upon leaving the hospital he understood that he had suffered a broken right wrist, broken "bones" in his right [sic] hand, two broken ribs, broken blood vessels in his nose and it "looked like there was some spinal injuries".

[67] A cast was placed on the Plaintiff's right arm/wrist and a splint was placed on his left hand/wrist. The Plaintiff testified that as a result of both hands being immobilized after the accident his wife had to look after his personal care needs including feeding him and helping him in the bathroom.

[68] The Plaintiff testified that the splint remained on his left hand/wrist for approximately three weeks and thereafter he still had the cast on his right arm/wrist. The Plaintiff is right-handed and testified that he still had difficulty with some of his personal care needs after the splint was removed because his right hand and wrist remained immobilized. The Plaintiff estimated that his wife had to continue to help him with some of his personal care needs for approximately a month to a month and a half after the collision. The Plaintiff's wife recalled that this assistance was required for approximately 2-3 weeks.

[69] The Plaintiff's cast was removed from his right wrist on February 17th, 2004 (approximately 5 ½ weeks after the accident.) According to the documentation filed with the Court, the Plaintiff underwent 17 physiotherapy treatments for his wrist between February 24th and April 22nd, 2004. In addition, the Plaintiff testified at trial that over the last year he "probably" went for a further half a dozen physiotherapy treatments without benefit.

[70] The records that have been filed with the Court also indicate that in the fall of 2004 the Plaintiff received 18 chiropractic treatments for his back.

[71] The Plaintiff is an assistant manager at the Walmart store in New Minas, Nova Scotia. At the time of the accident his job involved supervising a night crew of 15-20 people. The Plaintiff directed the restocking of shelves, the building of displays, etc. In addition, he had to do some lifting and, from time to time, had to use a ladder.

[72] As a result of the accident, the Plaintiff was off work from January 9th, 2004 until May 24th, 2004 (approximately 4 ½ months.) He returned to work on May 25th, 2004 working half days for two weeks and was then back to full time work after that. When the Plaintiff first returned to work his duties were modified to accommodate his injuries. After a few weeks his duties returned to normal. The Plaintiff has not missed any time from work as a result of the injuries sustained in the accident since returning to work full time in June of 2004.

[73] The Plaintiff's major ongoing complaints since the accident relate to his right wrist and back. He says that his right wrist "pains constantly" and his back has pain most days all day – depending on what he is doing. He says that some days the pain is light and other days it is severe.

[74] The Plaintiff says that his right wrist has not improved at all since the time of the accident and "if anything" it has gotten worse. He says that there are days when his right hand aches so badly that he would like to take a hatchet and cut it off. The Plaintiff testified that as a result of this pain he is "grouchier" than he was before the accident and his tolerance (mood wise) is not as good as it used to be.

[75] The Plaintiff testified that as a result of the injuries sustained in this accident he has lost flexibility in his right wrist and back. He complains of difficulty with gripping (he says that this problem is getting worse with time) and as a result – he will sometimes drop objects such as a two litre bottle of soda pop or a jar of pickles. He also has difficulty with lifting. The Plaintiff further testified that as a result of the injuries to his back and right wrist he has difficulty climbing ladders and sometimes has to ask other employees at work to give him a hand with what he is doing. Further, he complains of numbness in his right leg (which he said he did not have before the accident) and chest pain.

[76] In the year or so prior to the trial the Plaintiff's family doctor prescribed a brace for the Plaintiff's right wrist. The Plaintiff testified that the brace does not help him

in any way and, in fact, it impairs his ability to lift and grip items. The Plaintiff was wearing this brace at the time of trial.

[77] The Plaintiff and his wife live on a property which is approximately half an acre in size. The property is all lawn except for the area that the house sits on. The Plaintiff testified that prior to the accident he did most of the yard work on the property. In addition, he helped with the dishes, did "some" cooking as well as the "odd" wash.

[78] The Plaintiff says that since the accident his wife does more of the heavy work around the home (such as the lifting and piling of their fire wood) and also does more of the housework. The Plaintiff acknowledged that he is capable of doing chores around his property and in his home but says that it takes him a longer period of time to do things and that he has to stop and rest. For example, he still mows the lawn with a ride on mower but says that he does it with great difficulty. The Plaintiff testified that his tolerance for doing things is getting worse as time goes on.

[79] The Plaintiff testified that his wife works only part of the year and that sometimes he and his wife work at the same time and sometimes they have different work schedules. He confirmed that when his wife is not working she has always done most of the housework.

[80] The Plaintiff testified that he was "pretty active" in the years leading up to this accident. He said that he played hockey when he was younger, used to bowl once a week, played "a bit of" darts for a "little while", hunted and fished, used to like to swim and was a weekend golfer. He said that in the year prior to the collision he golfed maybe a half a dozen times over the season. (In an unsigned statement entered into evidence at the time of trial, the Plaintiff indicated that in the season prior to the accident he played 15-20 rounds of golf.)

[81] The Plaintiff testified that he is no longer able to bowl, no longer plays darts, cannot play horseshoes or other similar activities at family reunions and cannot physically interact with his grandchildren as much as he used to. In addition, he says that since the accident he does not socialize as much with friends and that his relationship with his wife has been negatively affected.

[82] On cross examination, the Plaintiff acknowledged that he had not played hockey for approximately four years prior to the accident, had not hunted for three to

four years prior to the collision, had not fished for a year or two prior to the accident and had only played darts a few times per year in the year or two prior to the collision.

[83] During the course of the trial reference was made to the fact that the Plaintiff has taken few medications for pain since the accident and has not required a great deal of medical attention for the injuries that he sustained in this collision. Mr. Dunphy took the Plaintiff's family doctor through his clinical records relating to the Plaintiff and noted, for example, that between May 12th, 2004 and November 20th, 2006 (a period of over two years) there were no recorded complaints concerning the Plaintiff's right wrist.

[84] The Plaintiff's solicitor has submitted that the Plaintiff is stoic and that is why he has taken so few medications since the accident and has received limited medical treatment for his injuries.

[85] One must be careful not to penalize an individual who is stoic and as a result, does not run to the medicine cabinet or to the doctor every time they feel some discomfort or pain. On the other hand, the fact that the Plaintiff is able to handle his injuries without much by the way of medication and medical care does say something about the effect of the injury. Even the most stoic individual eventually has to resort to medical help if the situation gets too burdensome. It is notable that in the case at Bar, the Plaintiff saw his family doctor regularly (almost monthly) for the first six months after the accident as well as in the three months leading up to the trial. During the remainder of the time his visits were more sporadic.

[86] The Plaintiff's daughter, Heather Ann Lee, testified at trial. She said that in her view her father is the same man today as he was prior to the accident except that he is not able to do as much as he used to. For example, she testified that he is not able to participate in horseshoes and other such activities during family reunions and has difficulty holding and playing with his grandson (Ms. Lee's son). This witness testified that the Plaintiff requires help with work around the house (such as with the wood). She says that her father still does "things" but it takes him "a little bit longer" to do them. According to this witness she has not noticed any change in her father's mood since the accident. She has noticed that her parents do not go out as much as they used to but testified that her parents have not told her the reason for this.

[87] The Plaintiff's sister-in-law, Sandra Naugler, also testified on behalf of the Plaintiff. She gave evidence about the types of activities that the Plaintiff used to

participate in before the accident (bowling, games and activities at family reunions, playing with his grandson, etc.). She said that prior to the accident the Plaintiff was not restricted in any way concerning the physical activities that he could do. She described the Plaintiff as being "fun" to be around prior to the collision.

[88] Ms. Naugler testified that in her view the Plaintiff has not returned to the way he was before the accident. She says that the Plaintiff is not as fun as he used to be and that he has not returned to activities such as bowling and darts since the collision. She says that at family reunions the Plaintiff no longer participates in the games and activities that are being played. This witness felt that over time the Plaintiff's restrictions were getting worse. It was unclear from this witness' evidence how much time she has spent with the Plaintiff in the years following the collision.

[89] Testimony was also given on behalf of the Plaintiff by his boss at Walmart, Maxwell Noseworthy. Mr. Noseworthy gave evidence concerning the Plaintiff's job demands and duties as an overnight assistant manager. He testified that prior to the accident the Plaintiff had no issues performing any of the tasks given to him at work. Since the accident he notices that the Plaintiff rarely climbs a ladder and says that occasionally it has appeared to him that the Plaintiff is working in pain. Mr. Noseworthy confirmed that the Plaintiff has a good work ethic. He could not remember a day that the Plaintiff has missed from work other than the time that the Plaintiff was off of work immediately following the collision.

[90] Mr. Noseworthy testified that in the few months leading up to the trial he had received some complaints from customers concerning the Plaintiff's tone and lack of patience. He was unable to say what was causing the Plaintiff to be short tempered. He said that "mood" is very important at Walmart but testified that it would take "a lot" to have customer service complaints affect the Plaintiff's job.

[91] Mr. Noseworthy testified that normally the Plaintiff does not wear his wrist brace at work and agreed that the vast majority of the time that he has seen the Plaintiff at work the Plaintiff does not have his wrist brace on. This contradicted discovery evidence given by the Plaintiff on December 19th, 2008 in which the Plaintiff said that he wears his brace at work 98% of the time.

[92] Mr. Noseworthy testified quite candidly that the Plaintiff was an "average" assistant manager before the accident and has been an "average" assistant manager since the accident.

[93] Testimony was also given by the Plaintiff's wife, Margo Farrell. Ms. Farrell confirmed the assistance that she provided to her husband in the weeks following the collision.

[94] Ms. Farrell testified that prior to the accident the Plaintiff was easy going and seemed to enjoy life. She says that since the accident he is not as outgoing as he was and he tends to be moody. She said she does not know why this is.

[95] Ms. Farrell testified that prior to the accident there were no physical restrictions on what the Plaintiff could do. She said that since the accident the Plaintiff complains of problems with lifting as well as griping things with his right hand and says that there are things that he can no longer do such as open a bottle of preserves or pickles. She says that her husband is always complaining about his back hurting and that his legs are sore.

[96] Ms. Farrell said that in her view her husband has not fully recovered from the injuries that he sustained in this accident. She says that he is not able to interact with his grandchildren as much as he used to (for example, he does not lift the grandchildren over his head) but acknowledges that he still enjoys the grandchildren a great deal. She said that the Plaintiff does not like to socialize as much as he used to and testified that he does not participate in family reunion activities such as horseshoes and swimming like he used to.

[97] Ms. Farrell acknowledged that since the accident her husband has bowled on occasion as a spare or for fun on a Saturday night but said that sometime during the second string she would notice that the Plaintiff was having discomfort.

[98] This witness testified that the Plaintiff tends to toss and turn a great deal during the night and, as a result, she often sleeps in another bedroom. Ms. Farrell testified that this, as well as the Plaintiff's back problems, have affected how often she and her husband have "intimate relations".

[99] Ms. Farrell testified that since the accident she has observed the Plaintiff to be in pain almost on a daily basis. She said that the Plaintiff tries to do what he used to do before the accident. Some things he is able to do and some things he is not able to do as well. In Ms. Farrell's view, the Plaintiff's overall condition is getting worse over time.

[100] Dr. William K. Beveridge testified on behalf of the Plaintiff. He is an orthopaedic surgeon with training and experience in assessing and treating personal injuries and was qualified to give expert opinion evidence in those areas. Dr. Beveridge saw the Plaintiff at the request of the Plaintiff's family doctor (Dr. Mark Kazimirski) approximately 1 ½ weeks after the motor vehicle accident. In addition, he saw the Plaintiff on four other occasions over the next seven months.

[101] Dr. Beveridge prepared a medical/legal report on behalf of the Plaintiff dated December 7th, 2004. At page one of that report Dr. Beveridge states:

> The diagnostic conclusions in his case are that of right wrist fracture, left hand chip fracture, possible rib fracture, possible thoracic spine injury, and contusion of the right ankle. These were a direct result of the motor vehicle accident he was involved in on January 9th, 2004.....

[102] While Dr. Beveridge referred in this report to a possible rib fracture – he testified at trial that due to the fact that the Plaintiff did not appear to be too uncomfortable and due to the fact that one of the x-ray reports called into question whether the Plaintiff had actually suffered a rib fracture, Dr. Beveridge did not feel that there was a rib fracture.

[103] Further, while Dr. Beveridge referred in his report to a possible thoracic spine injury – at trial he testified that he did not feel that the Plaintiff had suffered a thoracic spine injury as the Plaintiff was too comfortable and was not complaining of pain in his mid-back.

[104] Dr. Beveridge confirmed that the Plaintiff was sent to him primarily for treatment of his right wrist fracture. He testified that the Plaintiff's right wrist injury healed well although objectively, the Plaintiff had a decrease in the range of motion of his wrist. Dr. Beveridge felt that there would be "a permanent medical impairment of stiffness of his wrist". In his medical/legal report of December 7th, 2004 Dr. Beveridge states:

> .....There was an obvious deformity of his wrist with the radius being slightly shorter than the ulna as a result of the fracture to the radius.
>
> The prognosis for the future would include continued stiffness of his wrist. This will be permanent and may contribute to ongoing disability with respect to the use of his

> wrist. It is possible that he will develop osteoarthritic changes in the wrist. This will take ten or more years to develop. Further surgical intervention could be considered if this occurs.

[105] Dr. Beveridge has not seen the Plaintiff since August of 2004 and did not comment on the Plaintiff's condition since that time.

[106] The Plaintiff's family doctor, Dr. Mark Kazimirski, also testified at trial. Dr. Kazimirski is a general physician with training and experience in assessing and treating personal injuries and was qualified to give expert opinion evidence in relation thereto.

[107] Dr. Kazimirski provided two medical/legal reports which were filed with the Court. The first report is dated August 5th, 2004. In that report Dr. Kazimirski states at p. 4:

> Mr. Farrell is a fifty-five year old male who was involved in a head on collision. He was taken to hospital by ambulance were [sic] he was found to have a major fracture of the right wrist, rib injuries, back injury, and a chip fracture of the left hand. Over time he developed ecchymosis [bruising, inflamation or swelling] in this [his] right medial ankle. He had some swelling of the right leg. Bernard was miserable for quite some time.
>
> He has been reviewed in my office since the accident at least once a month. Although I have noticed significant improvement in him over time; he has some permanent injuries that can not be repaired.
>
> His right wrist will continue to remain deformed. He will always have discomfort in this area and there are certain movements that he will never make comfortable. Bernard will constantly struggle with lifting and grasping. His back will remain an aggravation to him as well. Due to the strain that was placed on Bernard's back he may have discomfort with any prolonged activity; whether it be sitting, standing, bending, walking, etc.
>
> Mr. Farrell used physiotherapy to the best of his ability but it was felt that there was nothing more they could do to improve his situation. He continues to have good days and bad days.

[108] Dr. Kazimirski's second report is dated May 2nd, 2008. In that report he states at pp. 4-5:

> I have followed Mr. Farrell on a regular basis since his accident. I have noticed some improvements in him over time, however I feel he has some permanent injuries that unfortunately can not be repaired.
>
> His right wrist will remain deformed. He continues to have severe discomfort in this area and will for the rest of his life. He continues to have trouble with lifting, grasping and gripping and this will not improve. He is [his] back will be a constant aggravation to him. He has difficult[y] with any prolong[ed] activity and I can see this being a problem for him for the rest of his life.
>
> Unfortunately, I do not feel there will be any further improvements with his wrist or his lower back. The persisting pain levels are something he will have to deal with for the rest of his life. He continues to use Tylenol #3 and Celebrax that provide some pain relief.
>
> He will most likely not be able to participate in his previous activities such as hockey or golf as this will add a great deal of strain on his wrist and lower back.
>
> Mr. Farrell will remain disabled to a certain degree because he will never be able to function throughout her [his] regular routines as he did previously. As a result of this motor vehicle accident he is very vulnerable to injury and recurrences of pain to her [his] neck, back and wrist.
>
> Until the motor vehicle accident Mr. Farrell never reported any previous problems with his lower back or wrist.
>
> I will continue to follow Mr. Farrell on a regular basis. Mr. Farrell will be able to see his chiropractor as needed. He will most likely have [to] be on pain medication or anti-inflammatories for the rest of his life.

[109] During the trial reference was made to one of Dr. Kazimirski's clinical notes in which he referred to the Plaintiff's right wrist injury being a major arthritic problem. At trial, Dr. Kazimirski said that he is not saying that the Plaintiff has arthritis in his right wrist, rather, it is possible that the Plaintiff has developed arthritis in his right wrist as a result of this accident.

[110] In May of 2008, the Plaintiff was seen by a neurologist, Dr. Alexander MacDougall at the request of Dr. Kazimirski. According to the medical records filed with the Court, Dr. MacDougall felt that the Plaintiff's problems with his right wrist were do to musculoskeletal factors (as opposed to neurological factors) and he suggested an Orthopaedic consultation. Dr. Kazimirski subsequently referred the Plaintiff for Orthopaedic consultations in relation to both his right wrist and his back. These consultations had not taken place by the time of trial.

LAW, FINDINGS AND ANALYSIS RE: DAMAGES

[111] I must begin my analysis by determining the specific injuries that the Plaintiff received as a result of this collision. As indicated previously, there is a dispute over this question and I will therefore review each of the injuries alleged to have occurred.

[112] In Dr. Kazimirski's initial report dated August 5th, 2004 he listed the Plaintiff's injuries and possible injuries at p. 1 as follows:

> .....Bernard had a [sic] undisplaced fracture of the right seventh and eighth rib, a possible minimal subsegmental atelectasis in the left lower lung, minimal anterior wedging of T9 vertebral body, fracture of the base of the metacarpals on the left hand, fracture of the ulnar styloid process on the right, and a fracture of the distal radius with posterior angulation.

[113] I will deal first with whether the Plaintiff suffered fractures to his right seventh and eighth ribs as a result of this collision.

[114] X-rays were taken of the Plaintiff's ribs on the day of the accident. The radiological report prepared that day states:

> .....There is an undisplaced fracture of the right seventh rib in about the axillary line and there is slight irregularity of the medial cortex of the anterior end of the right eighth rib in about the anterior axillary line, suggesting an undisplaced fracture there as well. There is a faint transverse band of increased density suggesting possible minimal subsegmental atelectasis laterally in the left lower lung. The lungs otherwise appear clear.

[115] A further x-ray of the Plaintiff's right ribs was taken on January 15th, 2004 (six days after the collision). The radiological report of those x-rays reads:

> The fracture of the right 7th rib in about the axillary line noted on the January 9, 2004 examination is not definitely seen on this examination. It appeared real on the previous examination and I suspect that a fracture is present but in excellent position. Is there localized pain or tenderness there? There is very minimal deformity of the extreme anterior end of the right 10th rib. No fracture line is seen. This could be recent or old.....

[116] In Dr. Beveridge's consultation note dated January 20th, 2004 he states at p. 1: "There is a question of some rib fractures." In his medical/legal report dated December 7th, 2004 he refers at p. 1 to a "possible rib fracture".

[117] Dr. Kazimirski (the Plaintiff's family physician) testified that in his opinion, the Plaintiff fractured his right seventh and eighth ribs as a result of this collision.

[118] Dr. Beveridge (an Orthopedic surgeon called by the Plaintiff) concluded that because the Plaintiff wasn't that uncomfortable and because the x-ray report indicated a "question" of an undisplaced fracture, he did not feel that there was a fracture.

[119] The burden is on the Plaintiff to establish, on a balance of probabilities, the injuries that he sustained as a result of this collision. Dr. Beveridge (the Plaintiff's orthopaedic surgeon) concluded that the Plaintiff did not suffer a rib fracture as a result of this accident. I accept his opinion in this regard and I find that the Plaintiff did not suffer rib fractures as a result of this collision.

[120] The Plaintiff had his seat belt on at the time of the accident. On the Nurses' Admission Assessment Form prepared at the hospital on the day of the collision is a note which reads: "Abrasion, contusion noted over Rt. chest." Dr. Kazimirski's clinical notes refer to chest pain and the Plaintiff's ribs being sore. The Plaintiff has satisfied me that he injured his right chest area (as compared to fracturing his ribs) at the time of the collision which, I find, went on to heal uneventfully.

[121] Dr. Kazimirski's clinical notes indicate that in recent years the Plaintiff has been complaining of chest heaviness and pain. In his clinical records (under the date November 20th, 2007) Dr. Kazimirski opined that this chest pain is "probably" related to the motor vehicle accident. In his medical/legal report of May 2nd, 2008 he indicates at pp. 3-4 that the chest pain which has occurred since the motor vehicle accident "may" be caused from the stresses that the Plaintiff has endured from the accident. I have carefully reviewed the evidence that Dr. Kazimirski gave on this issue at the time of trial. The Plaintiff has not satisfied me that any chest pain that he is presently suffering is caused as a result of this accident.

[122] In Dr. Kazimirski's medical/legal report of August 5th, 2004 he refers to the Plaintiff having a "possible minimal subsegmental atelectasis in the left lower lung." Dr. Kazimirski explained at trial that this is a collapse of a small section of the lung. On cross examination, he confirmed that it is possible that this condition was caused by the accident but it is also possible that the atelectasis "may have been there anyway." When it was pointed out to him by Mr. Dunphy that the Plaintiff's "rib injury" was on the right side and the atelectasis was in the left lower lung, Dr. Kazimirski confirmed that it is unlikely that the two are related.

[123] I find that the possible minimal subsegmental atelectasis shown on the x-ray of the Plaintiff's left lower lung was not caused by this collision.

[124] In Dr. Kazimirski's initial medical/legal report he also referred to the Plaintiff having "minimal anterior wedging of [the] T9 vertebral body".

[125] At trial, Dr. Kazimirski gave what could be considered conflicting evidence on whether the Plaintiff actually fractured his thoracic spine as a result of this collision. At one point, Dr. Kazimirski referred to a "possible" fracture of the Plaintiff's 9th thoracic vertebrae. At a later point he testified that in his opinion the Plaintiff "had a compression fracture of T9".

[126] The evidence adduced at trial does not satisfy me that the Plaintiff suffered a fractured thoracic spine as a result of this accident. The radiological reports that Dr. Kazimirski and Dr. Beveridge saw after the collision are equivocal on this issue. The first report dated January 9th, 2004 (the date of the accident) reads:

> **THORACIC SPINE**
>
> .....There appears to be very minimal anterior wedging of T9 vertebral body. This <u>could</u> be recent. Is there pain or tenderness in this area?.....
>
> [Emphasis added]

[127] A further radiological report dated January 15th, 2004 reads:

> **THORACIC SPINE**
>
> There are no films prior to January 9, 2004 available for comparison. There is minimal anterior wedging of what appears to be T9 vertebral body. This wedging is unchanged since January 9 2004. <u>It could be recent or old</u>. Is there pain in this area?.....
>
> [Emphasis added]

[128] Dr. Kazimirski agreed on cross examination that it is unclear from the x-rays whether there was a fracture to the Plaintiff's spine.

[129] In the clinical records from Dr. Kazimirski's first examination of the Plaintiff following the collision (on January 15th, 2004) there is reference to, *inter alia*, the Plaintiff's tailbone being very sore and to the Plaintiff generally being sore all over but there is no indication of specific pain in either the Plaintiff's lumbar area or

thoracic area. Similarly, in the clinical records of the Plaintiff's visits with Dr. Kazimirski in the two months immediately following the collision, there does not appear to be any specific reference to any subjective complaints of pain in the Plaintiff's thoracic spine nor is there any documentation of any objective evaluation of the Plaintiff's thoracic spine.

[130] On January 20th, 2004 Dr. Beveridge dictated a consultation note which was copied to Dr. Kazimirski in which Dr. Beveridge stated at p. 1: "I do not think that the thoracic spine compression is true. There is a decreased anterior body height, but I do not think the history or the physical findings today are in keeping with this." This note is in keeping with Dr. Beveridge's testimony at trial in which he stated that while he did not do a detailed examination of the Plaintiff's thoracic spine he did not feel that the Plaintiff had suffered a thoracic spine "injury" as the Plaintiff was too comfortable and was not complaining of pain in his mid-back. In Dr. Beveridge's view, the radiological report showed some wedging of the intervertebrae which was within normal limits (he explained that some people have anterior wedging of the thoracic spine without trauma).

[131] I find from the evidence presented that the Plaintiff did not fracture his thoracic spine as a result of this accident.

[132] That takes me to the question of whether the Plaintiff suffered some other type of injury to his back as a result of this collision. The evidence establishes that the Plaintiff presently suffers from low back pain. The issue is whether he suffers from this pain as a result of the accident (as is suggested on behalf of the Plaintiff) or due to unrelated causes (as is suggested on behalf of the Defendants).

[133] The Plaintiff relies on Dr. Kazimirski's medical records and opinion in support of the suggestion that his present back problems were caused by this accident. In Dr. Kazimirski's second medical/legal report dated May 2nd, 2008 he states at p. 4 "Mr. Farrell is a 59-year-old gentleman who suffers from ongoing injuries to his wrist and lumbar spine as a result of a motor vehicle accident that occurred on January 9th, 2004". At trial, Dr. Kazimirski was more general about the location of the injury and said that in his opinion, the Plaintiff had a lower back injury which resulted in significant discomfort in his entire lower back.

[134] The Defendants take the position that the Plaintiff has not proved that his back problems were caused by this accident. They note that in 1994 (approximately 10 years prior to the accident) the Plaintiff complained to a Doctor Lacuesta of pain in the back of this thigh going down one of his legs. In a report to Dr. Kazimirski dated

September 1st, 1994, Dr. Lacuesta states "I explained to him that he has some weakness on his back and possibly has an early disc cyst. As you know he has a pot belly and has a very poor abdominal muscle tone."

[135] The Defendants also note that in September of 2000 (a number of years prior to the accident) the Plaintiff complained of some low back pain with radiating symptomology into his right leg when he was receiving physiotherapy for an ankle sprain. Later that same year, he also complained to a Doctor Kirkpatrick in Sydney, Nova Scotia, of some burning pain and numbness in his right leg.

[136] They further note that x-rays of the Plaintiff's lumbar spine taken on the day of the collision showed that the Plaintiff had degenerative changes in his back. Dr. Beveridge confirmed that these degenerative changes were not caused by the accident.

[137] Mr. Dunphy, on behalf of the Defendants, reviewed Dr. Kazimirski's clinical records relating to the Plaintiff in detail and submitted that the first time that there was any reference to pain in the Plaintiff's lumbar spine was in a clinical note dated March 24th, 2004 (approximately 2 ½ months after the accident) which was approximately a week after the Plaintiff had returned to the Hants Community Hospital as a result of a fall that he had apparently taken on March 17th, 2004.

[138] In addition, the Defendants referred to the fact that Dr. Beveridge had testified that there was no indication of any orthopaedic injury to the Plaintiff's low back.

[139] The Defendants submitted that there was no *reliable* medical evidence that the Plaintiff's low back pain was caused by this collision.

[140] Finally, counsel for the Defendants referred to the Plaintiff's physical stature. The Plaintiff is rotund. Accordingly to his medical records, the Plaintiff is 5 feet 10 ½ inches tall. At trial, the Plaintiff testified that he weighed between 280 and 285 pounds. The Plaintiff carries a great deal of his weight on his stomach. The Defendants submit that the Plaintiff's back problems are likely caused by his weight and the pre-existing degenerative changes in his spine.

[141] I have carefully reviewed and considered all of the evidence relating to this issue. I am satisfied, on a balance of probabilities, that the Plaintiff injured his lower back in this collision and that he continues to suffer pain in his lower back as a result of this accident.

[142] A review of the medical documentation filed with the Court shows numerous references to the Plaintiff's back, pain in his back, etc. around the time of the accident. For example:

- The Ambulance Call Sheet from the day of the accident (Exhibit # 1 p. 39) appears to read "Pain both arms, wrists back & shoulder". X-rays were taken of the Plaintiff's back at the hospital that day.

  [Emphasis added]

- Dr. Kazimirski's clinical notes for January 15th, 2004 (the first time the Plaintiff saw his family doctor after the accident) include "generally sore all over. tailbone very sore. (R) leg sore." While Dr. Kazimirski appears to have written "no lumbar" in his chart notes for that day, I am satisfied that shortly after the accident the Plaintiff was complaining of his tailbone area in the lower back being sore.

- Dr. Kazimirski's clinical notes for a visit on February 9th, 2004 include "(R) leg swelling & periodic numbness since accident." Later in those same notes, Dr. Kazimirski wrote down a question to himself about whether the Plaintiff had fractured his sacrum (tailbone). As a result, Dr. Kazimirski arranged for a further x-ray to be done of the Plaintiff's sacrum and coccyx (Exhibit #3 – p. 56). No fracture was seen.

- Dr. Kazimirski's clinical records for March 24th, 2004 (approximately 2 ½ months after the accident) include "coccyx & lower back spasms – (R) leg tingles. ? have physio start working on back." At trial, Dr. Kazimirski testified that the reference to "lower back spasms" in his clinical notes referred to the lower thoracic and lumbar spine. He acknowledged that this is the first mention in his clinical notes of the lumbar spine and also confirmed that the lumbar spine is located immediately above the sacrum.

[143] I am satisfied from the Plaintiff's medical records that he was complaining of pain in his lower back shortly after the accident. I appreciate that the original complaints originated in the coccyx/sacrum area and that his present complaints appear to include the lumbar area. As indicated previously, the lumbar spine is located directly above the coccyx and sacrum. Dr. Kazimirski explained that the pain spread from the area of the sacrum to the lumbar spine. I accept his evidence in this regard.

[144] I appreciate that there were occasions prior to the accident when the Plaintiff suffered from low back pain and pain in his right leg and that there were occasions after the accident when the Plaintiff did not complain to Dr. Kazimirski specifically

about pain in his low back. Nevertheless, looking at the evidence as a whole, including Dr. Kazimirski's clinical records, I am satisfied that the Plaintiff injured his lower back in this collision and that he continues to suffer from low back pain as a result.

[145] I accept that the Plaintiff's girth and pre-existing degenerative changes likely exacerbate the discomfort that he feels in his back. The Defendants, however, take the Plaintiff as they find him.

[146] The Defendants have submitted to the Court that Dr. Kazimirski is an advocate for the Plaintiff and that, as a result, his evidence must be treated with caution. They therefore question the reliability of his evidence on this and other issues.

[147] I agree with the suggestion that Dr. Kazimirski is an advocate for the Plaintiff. I found that during the course of his testimony and in his medical/legal reports that he was not as objective as one would expect from a medical expert. I will provide an example.

[148] In Dr. Kazimirski's initial medical/legal report dated August 5th, 2004 he states at p. 3:

> Previous to this accident Mr. Farrell worked as an assistant manager at the Walmart store in New Minas, NS. **He was in excellent physical shape**; he played hockey, golfed, bowled, and enjoyed doing yard work.

[149] As indicated previously, the Plaintiff is rotund and carries a great deal of his weight on his stomach. Dr. Kazimirski gave evidence as to why he used this choice of words in his report but I must say that it is difficult to understand why this physician would state that the Plaintiff was in excellent physical shape prior to the accident in light of the fact that the Plaintiff was very much overweight. I found it interesting to compare the Plaintiff's description of himself prior to the accident ("pretty active" and "pretty healthy") and his wife's description of the Plaintiff prior to the accident (his general health "seemed to be okay") with Dr. Kazimirski's description in his medical/legal report ("in excellent physical shape".)

[150] As a result of my conclusion that Dr. Kazimirski is an advocate for the Plaintiff, I am not able to put as much weight in his testimony as I otherwise would have. Nevertheless, I am satisfied that the references in his clinical records to the Plaintiff's complaints about back pain can be relied upon and that these references support the finding that the Plaintiff injured his lower back in this collision.

[151] As indicated above, Mr. Dunphy, on behalf of the Defendants, pointed out that the first mention in Dr. Kazimirski's records to the lumbar area of the spine was on March 24th, 2004 which was one week after the Plaintiff apparently fell and re-attended at the Hants Community Hospital. A review of the hospital record for that visit indicates that the diagnosis that day was of a wrist sprain. I am unable to find any reference in the hospital record to back pain or a back injury. I am not prepared to conclude that the Plaintiff injured his back as a result of that fall.

[152] While there does not appear to be specific mention in Dr. Kazimirski's clinical notes about the lumbar spine immediately after the accident, there was clearly reference to the Plaintiff's tailbone and sacrum area being sore – so much so that on February 10th, 2004 an x-ray was done of the Plaintiff's sacrum and coccyx to see if there was a fracture. This suggests that the Plaintiff was having difficulty with his low back soon after the collision.

[153] There is one additional matter relating to this issue that I must comment upon. At the time of trial, Dr. Beveridge testified that there was nothing in the Plaintiff's presentation that indicated to him that the Plaintiff had suffered an injury to his lumbar spine. It was not made clear to the Court whether Dr. Beveridge was referring to a bony injury (a fracture) or whether he was referring to *any* type of injury. As indicated previously, Dr. Beveridge is an orthopaedic surgeon who specializes in fractures and bony injuries. I conclude that when Dr. Beveridge testified that there was nothing in the Plaintiff's presentation that indicated that he suffered an injury to the lumbar spine – he was talking about a bony injury.

[154] Further, it is of significance that in Dr. Beveridge's consultation report dated January 20th, 2004 and in his medical/legal report dated December 7th, 2004 there does not appear to be any reference to the Plaintiff complaining of low back pain. The Plaintiff saw Dr. Beveridge five times in 2004. While I accept that Dr. Beveridge's primary focus was the Plaintiff's right wrist facture, it is, in my view, unusual that the Plaintiff does not appear to have mentioned a problem with his back to Dr. Beveridge. Having said that, it is also clear that during 2004 (and thereafter) the Plaintiff was complaining to Dr. Kazimirski of low back pain and, in fact, in the fall of 2004 (shortly after the Plaintiff saw Dr. Beveridge for the last time) the Plaintiff received 18 chiropractic treatments for his low back.

[155] I have concluded that the fact that the Plaintiff does not appear to have mentioned his back problems to Dr. Beveridge goes to the severity (or lack thereof) of his back symptoms at that time but does not lead one to the conclusion that a low back injury did not occur.

[156] As indicated above, I am satisfied that the Plaintiff injured his lower back in this collision and that he continues to suffer low back pain as a result of the collision.

[157] In addition to the above, I am satisfied that as a result of this accident the Plaintiff incurred a small chip fracture to his left hand and a contusion to his right ankle, both of which healed uneventfully.

[158] Further, the Plaintiff fractured his right wrist in this collision. This right wrist fracture resulted in an obvious deformity of his wrist as a result of the radius being slightly shorter than the ulna.

[159] In conclusion, I find that the Plaintiff suffered the following as a result of this accident:

(a) an injury to his right chest area that went on to heal uneventfully;

(b) an injury to his lower back which continues to cause pain/discomfort;

(c) a small chip fracture to his left hand that went on to heal uneventfully;

(d) a contusion to his right ankle that went on to heal uneventfully;

(e) a fracture to his right wrist which has resulted in an obvious deformity of that wrist and which continues to cause pain/discomfort.

[160] That takes me to the assessment of damages.

[161] On November 1st, 2003 the ***Automobile Insurance Reform Act*** came into force in Nova Scotia. This ***Act*** amended the ***Insurance Act***, R.S.N.S. 1989, c.231 and, in particular, repealed sections 112 and 113 of the said ***Act*** and substituted therefore, *inter alia*, section 113B, the relevant portions of which are as follows:

113B (1) In this Section,

> (a) "minor injury" means a personal injury that
>
> (i) does not result in a permanent serious disfigurement,
>
> (ii) does not result in a permanent serious impairment of an important bodily function caused by a continuing injury which is physical in nature, and
>
> (iii) resolves within twelve months following the accident;
>
> (b) "serious impairment" means an impairment that causes substantial interference with a person's ability to perform their usual daily activities or their regular employment
>
> .....
>
> (4) Notwithstanding any enactment or any rule of law, but subject to subsection (6), the owner, operator or occupants of an automobile, any person present at the incident and any person who is or may be vicariously liable with respect to any of them, are only liable in an action in the Province for damages for any award for pain and suffering or any other non-monetary loss from bodily injury or death arising directly or indirectly from the use or operation of the automobile for a minor injury to the amount prescribed in the regulations.
>
> .....
>
> (8) Where no motion is made under subsection (6), the judge shall determine for the purpose of this Section whether, as a result of the use or operation of the automobile, the injured person has suffered a minor injury.

[162] The ***Automobile Insurance Tort Recovery Limitation Regulations*** expand greatly on the legislation itself and provide, *inter alia*:

> **Definitions for purposes of Section 113B of *Insurance Act***
>
> **2 (1)** For the purposes of Section 113B of the *Insurance Act* and these regulations,

.....

(c) "non-monetary loss" means any loss for which compensation would be payable, but for the *Insurance Act*, that is not an award for

(i) lost past or future income,

(ii) diminution or loss of earning capacity, and

(iii) past or future expenses incurred or that may be incurred

as a result of an incident, and for greater certainty excludes valuable services such as housekeeping services;

.....

(e) "regular employment" means the essential elements of the activities required by the person's pre-accident employment;

(f) "resolves" means

(i) does not cause or ceases to cause a serious impairment of an important bodily function which results from a continuing injury of a physical nature to produce substantial interference with the person's ability to perform their usual daily activities or their regular employment, or

(ii) causes a serious impairment which results from a continuing injury of a physical nature to produce substantial interference with a person's ability to perform their usual daily activities or their regular employment where the person has not sought and complied with all reasonable treatment recommendations of a medical practitioner trained and experienced in the assessment and treatment of the personal injury.

(g) "substantial interference" means, with respect to a person's ability to perform their regular employment, that the person is unable to perform, after reasonable accommodation by the person or the person's employer for the personal injury and reasonable efforts by the injured person to adjust to the accommodation, the

essential elements of the activities required by the person's pre-accident employment;

(h) "usual daily activities" means the essential elements of the activities that are necessary for the person's provision of their own care and are important to people who are similarly situated considering, among other things, the injured person's age.

.....

Total amount recoverable for non-monetary losses

3. For the purpose of subsection 113B (4) of the *Insurance Act*, the total amount recoverable as damages for non-monetary losses of a plaintiff for all minor injuries suffered by the plaintiff as a result of an incident must not exceed $2,500.

.....

Onus to prove injury not minor injury

5. On a determination of whether an injury is a minor injury under subsection 113B (6) or (8) of the Act, the onus is on the injured party to prove, based upon the evidence of one or more medical practitioners trained and experienced in the assessment and treatment of the personal injury, that the injury is not a minor injury.

[163] As a result of this legislation, an individual who suffers a minor injury (as defined by the ***Act*** and the ***Regulations***) in a motor vehicle accident is limited to an award of general damages for pain and suffering or any other non-monetary loss of $2,500.00. This "cap" is for *all* minor injuries suffered by the Plaintiff (s. 3 of the ***Regulations***.)

[164] There are currently a number of cases before this Court that challenge the constitutionality of this legislation (see for example: ***Hartling v. Nova Scotia (Attorney General)***, 2009 NSSC 2, which is presently under appeal.) The validity of this legislation has not been raised as an issue in this proceeding and I will therefore assume, for the purpose of this decision, that the legislation is valid.

[165] The Plaintiff submits that he has not suffered a minor injury as a result of this collision and, therefore, his general damages are not limited to $2,500.00. The

Defendants submit that the Plaintiff's injuries are minor (as defined by the legislation) and that the total amount recoverable by the Plaintiff in general damages is therefore limited to $2,500.00. The burden is on the Plaintiff to prove, based upon the evidence of one or more medical practitioners trained and experienced in the assessment and treatment of the personal injury, that the injuries that he suffered in this accident are not minor (s. 5 of the ***Regulations.***)

[166] Mr. MacDonald, on behalf of the Plaintiff, has referred me to the case of ***Brak v. Walsh***, 2008 ONCA 221 in support of his position. Mr. Dunphy, on behalf of the Defendants, has referred me to ***Meyer v. Bright et al***. (1993), 110 D.L.R. (4th) 354 (Ont. C.A.) (leave to appeal to the Supreme Court of Canada dismissed); ***Tallis v. Davis***, [1995] O.J. No. 3578 (Ont. Court of Justice (General Division)); ***Jobin v. Pereault***, [1996] O.J. No. 694 (Ont. Court of Justice (General Division)); ***Hall v. Darnbrough***, [1996] O.J. No. 4707 (Ont. Court of Justice (General Division)); ***Rossignol v. Rubidge*** (2007), 317 N.B.R. (2d) 105 (Q.B.); ***Fraser v. Haines***, 2007 NBQB 285 and 2008 NBCA 59 and ***Beaulieu v. Gyuraszi***, 2008 NSSC 187. I have reviewed and considered all of these cases in arriving at my decision.

[167] In order to determine whether the Plaintiff suffered a minor injury as defined by the legislation, I must decide the following:

(1) Did the Plaintiff suffer a "personal injury"?

(2) If so, did the personal injury result in a permanent serious disfigurement?

(3) Did the personal injury result in a permanent serious impairment of an important bodily function caused by a continuing injury which is physical in nature?

(4) Did the personal injury resolve within twelve months following the accident?

[168] I will deal with each of these issues separately.

(1) Did the Plaintiff suffer a "personal injury"?

[169] The term "personal injury" is defined in s. 2(1)(d) of the ***Regulations*** by what it is *not*. This section provides:

(2)(1)(d) "personal injury" does not include

(i) a coma resulting in a continuing serious impairment of an important bodily function,

(ii) chronic pain that

(A) is diagnosed and established as chronic pain by a medical specialist appropriately trained in the diagnosis and management of pain disorders,

(B) is a direct result of a physical injury sustained in the motor vehicle accident with respect to which the claim is brought,

(C) results in a continuous serious-impairment of an important bodily function, and

(D) is moderately severe or severe pain, as classified in the American Medical Association *Guides to the Evaluation of Permanent Impairment*, 5th edition,

(iii) a burn resulting in serious disfigurement,

(iv) an amputation of a major limb;

[170] Neither counsel have suggested to the Court that the Plaintiff's injuries fall within s. 2(1)(d) of the ***Regulations***. I am satisfied and I find that the Plaintiff suffered a personal injury as a result of this accident.

(2) <u>If so, did the personal injury result in a permanent serious disfigurement</u>?

[171] In order to answer this question I must decide the following:

(a) Whether the Plaintiff suffered a disfigurement;

(b) If so, whether the disfigurement is serious;

(c) If so, whether the serious disfigurement is permanent.

[172] The Court is provided with guidance on these questions from a number of cases that have dealt with the issue of what constitutes a "permanent serious disfigurement". A number of Canadian provinces have enacted legislation that places a "cap" on general damages for pain and suffering in motor vehicle accident cases or a general immunity in relation thereto. One must be careful when analyzing these cases as the language and terms used in such legislation tends to vary by province. However, there are often similar terms used such as "permanent serious disfigurement".

[173] In the leading Ontario Court of Appeal judgement in ***Meyer v. Bright et al.***, *supra*, the Court decided three appeals together. The Ontario legislation under consideration by the Court was different than the Nova Scotia legislation before me in that the Ontario legislation granted a general immunity to defendants for loss or damage arising out of a motor vehicle accident occurring after June 21st, 1990 unless the plaintiff fell within one or more statutory exceptions to the general immunity. (The Nova Scotia legislation that I am considering places a "cap" on non-pecuniary general damages of $2,500.00 for minor personal injuries as defined by the legislation.) Nevertheless, both pieces of legislation refer to "permanent serious disfigurement" a term which was not defined in the Ontario legislation being considered by the court in ***Meyer***, *supra*, and is not defined in the legislation before me.

[174] In ***Meyer v. Bright et al.***, *supra*, the Ontario Court of Appeal concluded that in order for an injury to constitute a "disfigurement" it must have the effect of marring or detracting from the appearance of an individual as a person. The word "appearance" was said to connote "that which meets the view of someone other than the injured person" (p. 367). The court noted the importance of recognizing that each person is different and stated at p. 367 "…….Whether a particular injury mars the appearance of the injured person will depend almost entirely upon the circumstances of that person's life. The question, it seems to us, cannot be answered by reference to generalities but by reference only to the particulars of the injured person's life."

[175] The logic behind this is obvious. A scar on the shoulder of a 55 year old man who never goes out without his shirt on may have very little effect on the injured person or his life. The same scar may have a significant effect on a 22 year old swim suit model. Each case must be decided on its own facts.

[176] The Court in ***Meyer***, *supra*, went on to consider what constitutes a "serious" disfigurement and stated at p. 367:

> .....Because the word 'disfigurement' is qualified by the word 'serious' in the legislation, it is clear that it is not all disfigurements which will permit a claim for damages. It is only when the disfigurement is a serious one that a claim for damages may be advanced.
>
> Obviously the court will take into account the extent of the disfigurement, its location and the effect that it has on the injured person and on that person's life. Beyond that there is little that can be said except that each case will be determined upon its own facts. The legislation has left it to the courts to decide on a case-by-case basis whether a disfigurement is serious to the particular injured person. Regrettably we are unable to give the trial courts any guidance as to how they should make these very difficult judgements.

[177] In the ***Meyer*** case, *supra*, one of the parties (Ms. Dalgliesh - a 74 year old widow) had been left with a 15-inch scar down the center of her abdomen. The Ontario Court of Appeal concluded that the scar marred or detracted from her appearance as a person but went on to say at p. 374:

> .....The scar is on a part of Mrs. Dalgliesh's body which she did not permit other persons to see before the accident. She had, and has, no plans to remarry or to become involved in a relationship where in circumstances of intimacy another person might see her scar. Her disfigurement has not caused her to change her style of clothing nor has it caused her to change her life-style so that others are prevented from seeing it. It causes her no embarrassment.
>
> In the general part of these reasons we held that in determining whether disfigurement is serious the court will take into account the effect that it has upon the life of the injured person. This scar has had little, if any effect, upon the life of Mrs. Dalgliesh. It is in a place where it would not normally be seen by others and in a part of her body which she had no intention of exposing to the view of any other person.
>
> We are of the view that while Mrs. Dalgliesh has sustained a permanent disfigurement, it cannot be said to be a serious one, having regard to the circumstances of her life.....

[178] A contrary result occurred in the case of ***Jobin v. Pereault***, *supra*. In that case, the plaintiff, who was 63 years old at the time of the collision, incurred a fracture to her right hand/wrist, broken ribs, an injury to her left breast and a sore head and right shoulder as a result of a motor vehicle accident. She was hospitalized for three weeks following the collision and took physiotherapy treatments three times per week for one and a half years. At ¶ 8 of the decision Bolan, J. stated:

> As a result of the injuries sustained in the accident, her lifestyle has changed considerably, primarily because of her inability to use her right arm. She no longer is able to prepare the daily meals and this has been taken over by her husband. Her daughter comes in to do the heavy housework. She no longer attends the Golden Age Club to play cards or shuffleboard because of her inability to use her right hand. She can't do gardening or ice fishing. She is embarrassed about the shape of her right hand and tries to keep it hidden from others.

[179] Later in the decision the Court stated at ¶ 23:

> The seriousness of the disfigurement will depend on its extent, its location, and the effect it has on the plaintiff and on her life. I view the injury to be extensive and [it] totally incapacitates her ability to use her right hand. The effect of the disfigurement has seriously affected the plaintiff. The disfigurement is significant to this particular individual. It is located in such a place that it is readily noticeable. It has significantly compromised her abilities to enjoy the amenities of life such as homecare, cooking, knitting and socializing.

[180] The court concluded, *inter alia*, that the plaintiff in that case had suffered a permanent serious disfigurement.

[181] In ***Tallis v. Davis***, *supra*, a 45-year old plaintiff who worked as a cleaner and a taxi cab operator suffered multiple injuries as a result of a motor vehicle accident including injuries to the third and fourth fingers of his left hand (the plaintiff was right-handed.) The left hand middle finger sustained a closed rupture of the extensor tendon. With the left hand flat on a surface, the middle knuckle of the third finger remained raised and there was some deformity of the same knuckle on the fourth finger. The plaintiff had sworn an affidavit in which he said that his fingers were permanently injured and that they caused him to have severe problems in gripping objects, lifting and in his job as a taxi driver. He went on to say that his ability to perform his "usual daily activities" suffered severely. He described having difficulty gripping the steering wheel while driving, parking his vehicle and carrying passengers' luggage. At home, he described having difficulty in cutting the grass, washing the car and other household chores and suggested that when the weather changed these tasks were "impossible". He further stated that he could no longer fish or lift weights. All parties agreed that the injury constituted a deformity that was permanent. Wilkins, J. concluded that having regard to the age, occupation, education and type of life activities referred to in the materials placed before him – the disfigurement was not serious.

[182] In my view, when dealing with the question of whether a Plaintiff suffered a disfigurement the Court should be focused on the appearance of the individual as compared to the function of the individual. Bodily functions are dealt with in other sections of the legislation.

[183] In the case at Bar, the Plaintiff's right wrist is deformed. This is confirmed in Dr. Beveridge's medical/legal report of December 7th, 2004 in which he states "There was an obvious deformity of his wrist with the radius being slightly shorter than the ulna as a result of the fracture to the radius."

[184] When one looks at the Plaintiff's right wrist it is bent. I am satisfied from the evidence presented, and I find, that the Plaintiff has suffered a disfigurement as a result of this motor vehicle accident.

[185] That takes me to the question of whether the disfigurement is serious.

[186] Dr. Beveridge refers to the Plaintiff having an "obvious" deformity of the wrist with the radius being "slightly" shorter than the ulna as a result of the fracture.

[187] The Plaintiff is presently 60 years of age. He works as an assistant manager at Walmart. He is married and has a loving and supportive family. On discovery, the Plaintiff confirmed that the look of his wrist does not bother him and that despite the condition of his wrist he wears short sleeved shirts and shirts with the sleeves rolled up.

[188] In my view, the disfigurement to the Plaintiff's wrist has not had a serious effect on his life. While it is visible to others, the look of the wrist does not bother the Plaintiff and he does not attempt to hide it. Having regard to the extent of the disfigurement, its location, the age, occupation and other circumstances of the Plaintiff as well the effect that the disfigurement has had upon him, I find that this disfigurement is not serious.

[189] While it is not necessary for me to go on and determine whether this disfigurement is permanent, I will do so. In Dr. Kazimirski's medical/legal report dated August 5th, 2004 he states at p. 4 "His right wrist will continue to remain deformed." I am satisfied from the evidence presented that the Plaintiff's disfigurement is permanent.

[190] I therefore conclude that while the Plaintiff suffered a permanent disfigurement as a result of this accident, he did not suffer a permanent serious disfigurement.

(3) Did the personal injury result in a permanent serious impairment of an important bodily function caused by a continuing injury which is physical in nature?

[191] The Ontario Court of Appeal in ***Meyer v. Bright et al***., *supra*, also considered the meaning of the term "permanent serious impairment of an important bodily function caused by a continuing injury which is physical in nature." The court in that case stated at p. 360:

> .....Because the word 'serious' qualifies 'impairment' and the word 'important' qualifies 'bodily function', it is only necessary to consider those words when a particular injured person has sustained a permanent impairment of a bodily function caused by continuing injury which is physical in nature. It is only if the injured person has such an impairment that it is necessary to decide whether the bodily function which is impaired is an important one. And it is only if the impairment is of an important bodily function that it is necessary to determine whether the impairment is a serious one.
>
> We conclude therefore that the appropriate approach in these cases is to answer sequentially the following questions:
>
> 1. Has the injured person sustained permanent impairment of a bodily function caused by continuing injury which is physical in nature?
>
> 2. If the answer to question No. 1 is yes, is the bodily function, which is permanently impaired, an important one?
>
> 3. If the answer to question No. 2 is yes, is the impairment of the important bodily function serious?

[192] Despite the differences in the Ontario and Nova Scotia legislation, I am satisfied that this is an appropriate approach for me to take in the case at Bar.

[193] I find that the Plaintiff has sustained a permanent impairment of a bodily function caused by continuing injury which is physical in nature.

[194] A review of the case law that I have been referred to shows that courts in other provinces have taken a broad view of the words "bodily function". For example, swimming (which I would consider to be an activity rather than a bodily function) has been found to be a bodily function (see for example: ***Meyer v. Bright et al.*** (1992), 38 M.V.R. (2d) 138 (Ont. Court of Justice (General Division)) at ¶ 58.)

[195] The drafters of the legislation before me did not refer to impairment in function, but rather, referred to impairment in *bodily* function. In my view, an impairment in bodily function involves an impairment in the function of the body itself. As a result of that impairment certain activities (such as walking, swimming and the like) may be limited, but the impairment is to a part of the body itself.

[196] I find that the Plaintiff in the case at Bar has sustained a permanent impairment in the function of his right wrist and his back as a result of this collision. I further find that these permanent impairments are caused by continuing injuries which are physical in nature. As a result of these impairments in bodily function there is interference with the Plaintiff's ability to grip, lift (including lifting his grandchildren), climb, maintain his home and participate in physical activities (such as throwing horseshoes.)

[197] During summation counsel for the Defendants submitted that the Plaintiff had failed to prove that his lack of ability to grip was caused by this accident. I do not accept this argument. I am satisfied and I find that the Plaintiff's difficulty with grip was caused as a result of this collision.

[198] The next issue that I must deal with is the question of whether these bodily functions, which are permanently impaired, are important. When dealing with the issue of importance the Ontario Court of Appeal in ***Meyer v. Bright et al.***, *supra*, warned against resorting to so-called objective or subjective tests and also declined to attempt to define the word "important". The court stated at pp. 362-363:

> It is clear that the legislature did not intend that every bodily function would meet the test, otherwise the word 'important' in s. 266 becomes superfluous. Some bodily functions, however seriously impaired, will not satisfy the legislation. There are bodily functions which obviously are important to everyone. The application of the legislation to them will cause no problems. But there are some bodily functions which are important to some people but not to others. In our view, the legislation was aimed at bodily functions that play a major role in the health and general well-being of the injured plaintiff. The use of the word 'important' is intended to

> differentiate between those bodily functions which are important to the injured person and those which are not. It is only those bodily functions which are important to the particular injured person which can amount to important bodily functions within the meaning of that expression in s. 266(1)(*b*). Such an interpretation, in our opinion, is consistent with the obvious intention of the legislature to reduce substantially the number of personal injury claims coming before the courts as a result of motor vehicle accidents.
>
> Because of the infinite variety of the human condition and of human activities, it is impossible for the court to lay down any general guidelines to the application of 'important bodily function' to all injured persons. Each case will essentially be one of fact. What must be considered is the injured person as a whole and the effect which the bodily function involved has upon that person's way of life in the broadest sense of that expression. If the bodily function is important to the particular injured person, then the bodily function in question is an important one within the meaning of that expression contained in s. 266(1)(*b*).

[199] I am satisfied and I find that the bodily functions that I have found to be permanently impaired are important to the Plaintiff.

[200] That takes me to the question of whether the permanent impairment of these important bodily functions is serious. In ***Meyer v. Bright et al.***, *supra*, the Court of Appeal dealt with the meaning of the words "serious impairment" (these words were not defined in the Ontario legislation.) The court noted that the words "important" and "serious" qualified the words "bodily function" and "permanent impairment" respectively and did not relate to the word "injury". At p. 365 the Court of Appeal stated:

> It is simply not possible to provide an absolute formula which will guide the court in all cases in determining what is 'serious'. This issue will have to be resolved on a case-to-case basis. However, generally speaking, a serious impairment is one which causes substantial interference with the ability of the injured person to perform his or her usual daily activities or to continue his or her regular employment.

[201] The Nova Scotia legislature appears to have adopted this definition in s. 113B (1)(b) of the ***Insurance Act*** which states:

> "serious impairment" means an impairment that causes substantial interference with a person's ability to perform their usual daily activities or their regular employment.

[202] Our Nova Scotia ***Regulations*** go further, however, and also define the terms "regular employment", "substantial interference" (as it relates to regular employment) and "usual daily activities". These terms are defined as follows:

> **2(1)** (e) "regular employment" means the essential elements of the activities required by the person's pre-accident employment;
>
> (g) "substantial interference" means, with respect to a person's ability to perform their regular employment, that the person is unable to perform, after reasonable accommodation by the person or the person's employer for the personal injury and reasonable efforts by the injured person to adjust to the accommodation, the essential elements of the activities required by the person's pre-accident employment;
>
> (h) "usual daily activities" means, the essential elements of the activities that are necessary for the person's provision of their own care and are important to people who are similarly situated considering, among other things, the injured person's age.

[203] As is seen from the above, the term "substantial interference" is defined only as it relates to a person's ability to perform their regular employment. The term is not defined in relation to a person's ability to perform their usual daily activities.

[204] It is important to note that the focus of this legislation is on *disfigurement* and *impairment* rather than the nature of the injury itself. An injury that most people would consider serious will be deemed to be minor if the person involved does not suffer a permanent serious disfigurement, a permanent serious impairment of an important bodily function caused by a continuing injury which is physical in nature or if their injuries resolve (as defined by the ***Regulations***) within twelve months following the accident. So, for example, a person who breaks their back but has a good recovery within twelve months and as a result, does not suffer from a permanent serious impairment of an important bodily function, will be said to have a minor injury and will be limited to general damages in the amount of $2,500.00.

[205] Conversely, an injury that most people would consider to be minor will be exempt from the $2,500.00 "cap" if the person who suffered the injury can bring themselves within one of the exceptions set out in s.113B of the ***Insurance Act***. So, for example, a harpist who breaks one of her fingers that does not heal properly will be found not to have suffered a minor injury if she can satisfy the Court that she is no longer able to work as a harpist as a result of the injury.

[206] In ***Fraser v. Haines***, *supra*, the New Brunswick Court of Appeal was dealing with New Brunswick's "cap" legislation which is similar to the legislation before me. At ¶ 29 of that decision the court stated:

> The New Brunswick legislation requires *serious* impairment, which, in turn, requires a *substantial* interference. 'Any' interference is not sufficient; 'substantial' interference is required. In addition, it is critical to note that the injury itself is not what the qualification 'serious' applies to; 'serious' refers to the impairment, which brings into play the *effect* of the injury. An injury may be serious, yet that does not mean that there has been a serious impairment, and so a serious injury may still be caught by the non-pecuniary general damages **cap**.

[207] In ***Meyer v. Bright***, *supra*, the Ontario Court of Appeal stated at p. 372:

> .....When the legislature qualified 'permanent impairment' by the word 'serious' it obviously intended that injured persons must endure some permanent impairment without being able to sue. It is only if that impairment is serious impairment to that injured person that the right to sue continues to exist.

[208] I have carefully reviewed all of the evidence at trial. I have concluded that while the Plaintiff sustained a permanent impairment to important bodily functions caused by continuing injuries which are physical in nature, the impairment is not serious as defined by the legislation. In particular, I am not satisfied that the impairment causes a *substantial* interference with the Plaintiff's ability to perform his usual daily activities or his regular employment as defined by the legislation.

[209] As indicated above, in the ***Regulations*** before me, the term "usual daily activities" is defined to mean the *essential* elements of the activities that are necessary for the person's provision of their *own care* and are important to people who are similarly situated considering, among other things, the injured person's age. No indication is given as to what activities are necessary for the person's provision of their own care. In my view, it would be inappropriate to attempt to provide an exhaustive list of those activities. However, they would include dressing oneself, cooking, feeding oneself, cleaning (of both oneself and one's home), mobility and any other activity that is necessary for living on one's own.

[210] While I am satisfied that the Plaintiff continues to have pain and discomfort in his right wrist and back and I am further satisfied that as a result of this accident he has permanent impairment of important bodily functions which results in interference

with his ability to grip, lift, climb, maintain his home and participate in physical activities, I am not satisfied that as a result of these injuries there has been *substantial* interference with his ability to perform his usual daily activities (as defined by our ***Regulations***.)

[211] Further, I am not satisfied that all of the Plaintiff's present problems are caused solely by these injuries. The Plaintiff is 60 years of age. The medical evidence establishes that in recent years his general health has declined for reasons unrelated to the accident. This is reflected in Dr. Kazimirski's clinical record of November 6th, 2008 in which he states:

> His general health is concerning in that he is overweight has mild systolic hypertension his lipids are elevated and he does have a metabolic syndrome will start on Crestor 20 mg will further delineate his blood pressure problems with time. Note there is a fair amount of stress with regard to some family health issues.

[212] In addition, Dr. Kazimirski testified at trial that the Plaintiff has a "touch of diabetes starting". I am satisfied that these unrelated health problems contribute to some of the Plaintiff's complaints.

[213] Further, the Plaintiff has not satisfied me that he is unable to perform the essential elements of the activities required by his pre-accident employment. As indicated previously, prior to this accident the Plaintiff was an assistant manager at Walmart and he continues with that employment today.

[214] The Plaintiff has not missed any time from work as a result of this collision since returning to work full time in June 2004.

[215] While the Plaintiff's duties at work were modified to accommodate his injuries when he first returned to work - after a few weeks his duties returned to normal.

[216] At trial, the Plaintiff confirmed that he works approximately 45 hours per week. He usually works 8 hours per day 5 days per week but he sometimes works 9 or 10 hours per day. In addition, he drives one hour per day (total) to and from home and work each day that he works. The Plaintiff stands or walks 90% of the time while he is at work. The Plaintiff confirmed that since the accident he has consistently received excellent reviews on his performance appraisals. While he has difficulty climbing ladders at work or lifting objects that are over 40 pounds, I am satisfied that he is able to perform the essential elements of the activities that are required by his employment.

[217] During summation counsel for the Plaintiff referred me to the Ontario Court of Appeal decision in ***Brak v. Walsh***, *supra*. In that case the Court stated at ¶ 6-7:

> [6] The question of whether an injury is serious was addressed by this court in *May v. Casola*, [1998] O.J. No. 2475 (Ont. C.A.). Carthy J.A. said 'In our view a person who can carry on daily activities, but is subject to permanent symptoms including, sleep disorder, severe neck pain, headaches, dizziness and nausea which, as found by the trial judge, had a significant effect on her enjoyment of life must be considered as constituting serious impairment. The trial judge's standard was too high and we consider that an error in principle.'
>
> [7] So here, as well, the trial judge's focus was too narrow in determining whether the appellant's injury was serious. The requirement that the impairment be 'serious' may be satisfied even although plaintiffs, through determination, resume the activities of employment and the responsibilities of household but continue to experience pain. In such case it must also be considered whether the continuing pain seriously affects their enjoyment of life, their ability to socialize with others, have intimate relations, enjoy their children, and engage in recreational pursuits.

[218] The Ontario Court of Appeal in that case remitted the matter back for a new trial.

[219] As indicated previously, one must be careful when analyzing cases from other provinces due to the differences in the wording of the legislation in question. The Ontario ***Insurance Act*** and ***Regulations*** in effect at the time of that decision are different than the Nova Scotia ***Insurance Act*** and ***Regulations*** that I am considering. My analysis and conclusions must be based on the Nova Scotia legislation.

[220] That is not to suggest, however, that I have not taken into account how the Plaintiff's pain arising from the accident interferes with his ability to perform his usual daily activities or his regular employment. After considering the evidence as a whole, I am not satisfied that there has been substantial interference with his ability to perform his usual daily activities or his regular employment and, as a result, I am not satisfied that his impairments are serious as defined by the legislation.

(4) <u>Did the personal injury resolve within twelve months following the accident</u>?

[221] As indicated above, the ***Regulations*** define resolve to mean:

2(1)(f) "resolves" means

> (i) does not cause or ceases to cause a serious impairment of an important bodily function which results from a continuing injury of a physical nature to produce substantial interference with the person's ability to perform their usual daily activities or their regular employment, or
>
> (ii) causes a serious impairment which results from a continuing injury of a physical nature to produce substantial interference with a person's ability to perform their usual daily activities or their regular employment where the person has not sought and complied with all reasonable treatment recommendations of a medical practitioner trained and experienced in the assessment and treatment of the personal injury.

[222] I find that for the first few months following the collision the Plaintiff did have a serious impairment of an important bodily function (the function of his right wrist) which resulted from a continuing injury of a physical nature and which produced substantial interference with his ability to perform his usual daily activities and his regular employment (as defined by the ***Regulations***.) However, I am also satisfied and I find that by June of 2004, when the Plaintiff returned to work full time, that this serious impairment ceased. Accordingly, I find that the personal injury resolved (as defined by the ***Regulations***) within twelve months following the accident.

[223] In light of my findings, I conclude that the Plaintiff has suffered minor injuries as a result of this collision and that his non-pecuniary general damages are therefore limited to $2,500.00. I provisionally assess his general damages in this amount.

[224] Had the Plaintiff not been subject to the legislated definition of "minor injury" and to the "cap", I would not have considered his injuries to be minor and I would have awarded him a greater sum for general damages.

[225] As indicated previously, the amendments to the ***Insurance Act*** apply to "non-monetary loss" and not to a claim for lost past or future income, a claim for diminution or loss of earning capacity, the cost of past or future expenses that may be incurred as a result of an accident as well as loss of valuable services such as housekeeping services (s. 2(1)(c) of the ***Regulations***.) I will therefore provisionally assess any claims that the Plaintiff has made under these additional heads of damage.

[226] At the conclusion of the trial counsel for the Plaintiff confirmed that his client is not advancing a past loss of income claim. He is, however, claiming for diminished earning capacity. The Plaintiff's solicitor suggests that the Plaintiff's condition is getting worse and that the Plaintiff (who is presently 60 years of age) may have to stop work before his intended retirement age of sixty-five.

[227] As noted above, the Plaintiff has not missed any time from his employment since returning to work full time in June of 2004. While I accept that the Plaintiff's overall medical condition is getting poorer as he gets older, the Plaintiff has not satisfied me, on a balance of probabilities, that he has suffered a diminished earning capacity as a result of this accident.

[228] The Plaintiff has also advanced a subrogated claim on behalf of The Maritime Life Assurance Company in the amount of $1,179.48. This claim relates to expenses that were incurred for the Plaintiff's physiotherapy and chiropractic treatments as well as Tylenol #3. The Defendants agree to this figure. I provisionally assess damages for the Maritime Life subrogated claim in the amount of $1,179.48.

[229] The Plaintiff is also advancing a *quantum meruit* claim on behalf of his wife for the assistance that she gave him immediately after the accident. In the pre-trial brief filed on behalf of the Plaintiff it is stated "..... Mr. Farrell's wife had to look after him for the first 13 weeks after the accident. This included dressing him, feeding him, assisting him with his personal care needs etc. The significant amount of time that she expended in our view entitles her to damages in the range of $5,000.00 - $7,000.00."

[230] The Defendants do not dispute that in the circumstances of this case a *quantum meruit* claim is warranted. In the pre-trial brief filed on behalf of the Defendants it was submitted that an award for this claim should be in the range of $2,000.00. After hearing the evidence at trial it was submitted that any such award should not exceed $1,000.00.

[231] According to Ms. Farrell's recollection, she assisted her husband with all of his needs (including his personal care needs) for approximately 2-3 weeks following the collision. Thereafter, her assistance was still required but on a less significant basis. I provisionally assess damages for this claim in the amount of $2,200.00.

[232] In addition, the Plaintiff has advanced a claim for loss of valuable services in relation to yard and house work. Mr. MacDonald, on behalf of the Plaintiff, acknowledges that the Plaintiff does activities around the home but says that the Plaintiff's ability to do these activities is impaired and will likely be more impaired in the future. He acknowledges that as the Plaintiff gets older his ability to do many of these activities may have been impaired in any event. He submits that based on the evidence before me the Plaintiff should be awarded between $10,000.00 and $15,000.00 for loss of valuable services.

[233] Mr. Dunphy, on behalf of the Defendants, notes that the Plaintiff does yard work, house work as well as maintenance of the home, albeit with some discomfort. He suggests that if the Plaintiff requires help with these activities in the future the amount of help required should be minimal. The Defendants take the position that if anything is awarded for loss of valuable services the amount should not exceed $1,500.00.

[234] In ***Leddicote v. Nova Scotia (Attorney General)***, 2002 NSCA 47, Saunders J.A. dealt with the issue of loss of valuable service claims and stated at ¶ 50:

> ..... Thus, in order to sustain a claim for lost housekeeping services one must offer evidence capable of persuading the trier of fact that the claimant has suffered a direct economic loss, in that his or her ability or capacity to perform pre-accident duties and functions around the home has been impaired. Only upon proper proof that this capital asset, that is the person's physical capacity to perform such functions, has been diminished will damages be awarded to compensate for such impairment .....

[235] While, in relation to non-monetary losses, I have found that the Plaintiff has not suffered a *serious* impairment of an important bodily function (as defined by the legislation), I am satisfied that the Plaintiff's ability to perform pre-accident duties and functions around the home has been impaired as a result of this accident and will continue to be impaired in the future. In my view, the Plaintiff would have had some limitations in this regard in any event due to his other health conditions [see ¶ 209 and 210] and age. Taking all matters into consideration, I provisionally assess damages for loss of valuable services in the amount of $5,000.00.

[236] Finally, counsel for the Defendants has submitted that the Plaintiff's damages should be reduced due to an alleged failure to mitigate. In particular, Mr. Dunphy notes that the Plaintiff has failed to lose weight despite the fact that Dr. Kazimirski has recommended that he do so in order to improve, *inter alia*, his back problems. In

response, the Plaintiff suggests that he has attempted to lose weight but that the injuries that he has sustained in the accident prevent him from exercising to the extent required to lose weight.

[237] The Plaintiff is under a duty to act reasonably to mitigate his damages. The onus of proving a failure to mitigate rests with the Defendants.

[238] The Plaintiff in this action was 55 years old and significantly overweight at the time of the collision. For years prior to the accident, the Plaintiff attempted to lose weight without any real success. While the Plaintiff has an obligation to act reasonably to mitigate his damages, in my view, the recommended treatment must be realistically achievable before the Plaintiff will be penalized for failing to follow it. In other words, there must be a reasonable expectation that the Plaintiff will be able to comply with the treatment recommendation. As indicated above, for years prior to this accident the Plaintiff tried to lose weight without any real success. In my view, it was not realistic to expect the Plaintiff to lose any significant amount of weight after the collision. The Defendants have not satisfied me that it is appropriate to reduce the Plaintiff's damages for a failure to mitigate.

CONCLUSION

[239] An Order will issue dismissing the Plaintiff's action.

[240] I reserve the right to deal with the matter of costs. If counsel are unable to reach an agreement in this regard, I will receive written submissions on this issue.

Deborah K. Smith
Associate Chief Justice