SUPREME COURT OF NOVA SCOTIA
Citation: McKeough v. Miller, 2009 NSSC 394

Date: (20091217)
Docket: Pic. No. 261422
Registry: Pictou

Between:

Francis Bernard McKeough

Plaintiff

v.

Doreen Miller

Defendant

v.

Daniel Bowie

Third Party

Judge:	The Honourable Justice N.M. Scaravelli
Heard:	October 23, 26, 27, 28, 29, 2009 in Pictou, Nova Scotia
Counsel:	**Ray O'Blenis, Esq.,** for the plaintiff **Christa M. Brothers**, and **Karen N. Bennett-Clayton** for the defendant **Clarence Beckett, Q.C.** and **Ellen R. Sampson** for the Third Party

By the Court:

[1] This is an action for recovery of damages for personal injuries sustained by the plaintiff as a result of a motor vehicle accident that occurred on February 26th, 2004 on highway # 4, commonly known as the Linwood Harbour Road, located in Antigonish County, NS.

The Accident

[2] The accident scene involved six motor vehicles and occurred in what has been described as whiteout conditions. The plaintiff, Mr. McKeough brought action against the defendant, Ms. Miller, alleging negligence in the operation of her motor vehicle causing injuries to the plaintiff. The defendant denies liability and claims *inter alia*, contributory negligence on the part of the plaintiff. The defendant also brought third party proceedings against Mr. Bowie alleging negligence on his part.

[3] Earlier that morning, the third party, Mr. Daniel Bowie, drove his 1991 blue Chevrolet Sprint motor vehicle (Bowie vehicle) to the post office. The roads were bare and the sun was out when he left his home. Returning from the post office, travelling in a westerly direction on highway # 4, he noted that the wind had picked

up. Mr. Bowie said he was travelling at a speed of about 70 kilometers per hour in the 80 kilometer zone when he approached the Linwood Harbour area and could see snow blowing from the harbour across the road. Initially, he could see through the blowing snow and noted it was clear beyond. Mr. Bowie was familiar with this area and its propensity for drifting snow. His vehicle was equipped with four studded snow tires. Mr. Bowie said he slowed to 20 kilometers and entered the area of blowing snow. Shortly after entering, his vehicle became stuck in a 12 to 13 inch snow drift on the right-hand side of the road in the lane he was travelling. He was unable to extricate his vehicle from the snowdrift.

[4] Mr. Bowie put on his four-way flashers and got out of the vehicle to go for help. At that time, he said the weather was getting worse. He could not see the road behind him to the east but could see ahead. Specifically, he could see the driveway of a home owned by Mr. Pettipas and walked in a westerly direction to the Pettipas home located on the left-hand or opposite side of the road. While at the Pettipas home, Mr. Bowie made three phone calls. First, to the Department of Highways. They had two plows in the area and were going to block each end of the road in that area. He then called Monastery Auto to tow his vehicle. The third call was to 911.

[5] Mr. Bowie said he looked out the Pettipas window and saw a vehicle to the west of his vehicle into a snowbank. When he came out of the house to investigate, he could see that it was clear further to the west, but a complete whiteout to the east. As he walked towards his vehicle, he observed another vehicle to the east of his vehicle as well as a shadow of another vehicle further to the east. Mr. Bowie then ran back to the Pettipas home and called 911. He remained there until the RCMP and plows arrived. At that time he noted the rear of his vehicle had been smashed.

[6] Mr. Bowie acknowledged he was concerned that other vehicles might strike his disabled vehicle when he left for help. He did not walk back in an easterly direction, through the whiteout to flag cars approaching from the west as he feared he could have been struck by oncoming traffic.

[7] Mr. Jonathon Breen was 18 years old on February 2004 and resided in Frankville, Havre Boucher. He travelled highway #4 frequently and was also familiar with the propensity for blowing snow out of the north across from Linwood Harbour. On this date he was driving his father's 1995 Ford Sedan (Breen vehicle) westbound in the right lane of highway #4. He said the roads were clear as they had been plowed. He was travelling at a speed of 80 to 90 kilometers per hour when he crested the hill

near Linwood Harbour and saw what he described as a whiteout. He said that he started to brake as he entered the whiteout, but struck a blue vehicle (Bowie vehicle) almost instantly. His vehicle spun around the vehicle he struck and ended to the east of the Bowie vehicle still in the right lane. Mr. Breen noted the vehicle he struck was unoccupied. He and his passengers then crossed to the left side of the road and walked east to a friend's house close by.

[8] Ms. Flora Coady was also travelling west of highway#4 in her 1998 Hyundai vehicle (Coady vehicle) with her two grandchildren when she encountered the whiteout. There was no visibility as she entered the whiteout. She managed to stop her vehicle as it moved to the edge of the snowbank on the right-hand side of the road. She said that she instructed her grandson, seated in the front passenger seat, and granddaughter in the backseat to take off their seatbelts and climb onto the snowbank on the right-hand side of the road. After her granddaughter removed her seatbelt, but before she could exit, their vehicle was struck from behind tragically resulting in the death of the granddaughter.

Ms. Coady recalls her vehicle being hit a second time which moved her vehicle forward ending next to a blue vehicle (Bowie vehicle).

[9] Mr. Dan Cunningham was the front seat passenger in a 1990 Acura motor vehicle being operated by Mr. Deyoung at the time (Deyoung vehicle). Earlier that morning, they had travelled east on highway #4 to Port Hawkesbury. On the return trip, as they approached the Linwood Harbour area, he saw the whiteout and what he described as blinding snow with zero visibility. He estimates the vehicle was travelling between 40 to 50 kilometers when they entered the whiteout and struck what he thought was a snowbank. It was not until he exited the vehicle that Mr. Cunningham was able to determine that they had struck another vehicle (Coady vehicle). Mr. Deyoung left the scene to get help while Mr. Cunningham called 911 on his cell phone. He walked to the Coady vehicle, where he saw Ms. Coady, her grandson and granddaughter who he believed to be unconscious at the time. Mr. Cunningham believed the Deyoung vehicle was bumped or nudged two or three times after their accident. Due to conditions, he could not see any other vehicles. The wind was strong causing a lot of noise. He did hear a person behind him yelling for him to get back in the car. He was unable to see this person.

[10] The plaintiff, Mr. McKeough was the driver of the next vehicle into the whiteout. He lived in and was familiar with the area around Linwood Harbour Road. He was aware that whiteout conditions occurred in this area where Linwood Harbour

extended toward the road. Indeed, as a former driver for the Department of Transportation, he operated a plow through this whiteout area on previous occasions.

[11] Mr. McKeough was driving his 1989 Crown Victoria station-wagon (McKeough vehicle) in a westerly direction from his mother's home to his own home only a few minutes away. As he crested the hill, he could see drifting snow blowing across the highway coming off the ice from Linwood Harbour. He stopped his vehicle to assess the situation. In order to get to his home, he would have to pass through this area and make a right-hand turn at the bottom of the hill. He believed the plow must have gone through this area as he had observed the plow from his mother's house earlier that morning, travelling in a westerly direction on the highway. He said his headlights were on as he engaged his four-way flashers and drove into the whiteout at a speed of approximately 10 kilometers per hour. About 60 feet into the whiteout, visibility worsened but he could still see some 40 feet ahead of him. Mr. McKeough saw two vehicles in front of him at 45 degree angles blocking the road. The front vehicle (Coady vehicle) was into the snowbank and the other vehicle (Deyoung vehicle) was into the back of the Coady vehicle.

[12] Mr. McKeough moved to the right and stopped his vehicle about eight or 10 feet away. He saw a man standing outside a vehicle talking on a cell-phone. Mr. McKeough then backed up his vehicle about two car lengths and turned off the engine. He said by this time there was no visibility. He was unable to see any other vehicles in the area. Mr. McKeough walked to the Coady vehicle and observed the situation. He said he retrieved a winter jacket from his vehicle and told the man with the cell-phone to place it over the girl who was unconscious in the back of the Coady vehicle. His evidence is that he also told this man to get out of the way, to go to the other side of the road where it would be safer. Mr. McKeough acknowledged he had safety training as a traffic person and he knew that remaining in the right-hand lane was a dangerous situation.

[13] Mr. McKeough said he returned to his vehicle and retrieved a fluorescent rain jacket. His intention was to walk back to the clear area and stop any oncoming traffic. He proceeded to walk back in an easterly direction close to the edge of the road in the lane of oncoming traffic while putting on his jacket. He did not have his jacket completely on when he saw a red vehicle (Miller vehicle) approaching him almost 10 feet away. He said he had no opportunity to react and the vehicle struck him below the knees. He was thrown in the air striking the vehicle's passenger side windshield

and breaking the aerial on that side. As Mr. McKeough landed in the snowbank on his side of the road, the Miller vehicle proceeded to strike the rear-end of his vehicle. Mr. McKeough stated the Miller vehicle was travelling on its proper side of the road. He was unable to estimate the speed of the oncoming vehicle. He sustained serious injuries to his legs.

[14] The defendant, Ms. Miller (now Ms. O'Reagan) resided in Havre Boucher at the time of the accident. She also was very familiar with the Linwood Harbour Road and its propensity for bad weather near Linwood Harbour. On February 26th, she was travelling west on highway #4 heading to New Glasgow to visit her son. She was driving her red 1997 Chrysler equipped with winter studded tires. Her automatic running lights were turned on. Ms. Miller was not concerned about the roads as the sky was clear and she was aware the road had been plowed. She was also aware that the school bus was running that day.

[15] Ms. Miller stated she had been travelling at a speed of approximately 70 kilometers per hour. As she crested the hill, she saw the whiteout. Her evidence is that she expected to see whiteout conditions in that area, but not that big. She later described it as a cotton ball, the worse she had seen in that area. Ms. Miller said she

decided to go through the whiteout as she was an experienced driver and had driven through whiteouts before. She initially stated she slowed to 40 to 50 kilometers per hour and as soon as she got to the whiteout she saw a man walking towards her with hands extended. As he was in her lane of traffic and directly in front of her, she had no opportunity to avoid striking him. After hitting the plaintiff, she said her vehicle then came to an abrupt stop. She later said she had a sense that she had struck a vehicle. She got out of her vehicle and ran to the left-hand side of the road. She said she could hear hollering further down the road and hollering next to her vehicle which turned out to be Mr. McKeough crawling on his arms and elbows.

[16] On cross-examination, Ms. Miller adopted her discovery examination evidence that she drove into the whiteout at a speed of 50 to 60 kilometers per hour. She said the whiteout did not scare her at all. That she assumed she could go through it in a few seconds. She said she was prepared to take a chance that nothing was in there.

Liability

[17] The ***Motor Vehicle Act***, R.S.N.S., 1989, c. 293 places a duty on both a driver of a motor vehicle and a pedestrian to exercise due care. Relevant sections are as follows:

> **Duty to Drive Carefully**
>
> 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.
>
> **Onus of proof of liability**
>
> 248(1) Where any injury, loss or damage is incurred or sustained by any person by reason of the presence of a motor vehicle upon a highway, the onus of proof
>
> (a) that such injury, loss or damage did not entirely or solely arise through the negligence or improper conduct of the owner of the motor vehicle, or of the servant or agent of such owner acting in the course of his employment and within the scope of his authority as such servant or agent;

> (b) that such injury, loss or damage did not entirely or solely arise through the negligence or improper conduct of the operator of the motor vehicle,
>
> shall be upon the owner or operator of the motor vehicle.

The Defendant

[18] Based on the evidence I make the following findings.

- The plaintiff was a pedestrian at the time of the accident and, therefore, the defendant has the onus of establishing the injuries sustained by the plaintiff were not solely caused by the defendant's negligence.

- The defendant frequently travelled and was very familiar with the Linwood Road. She was aware of the propensity for blowing snow across the highway at the Linwood Harbour area and, on the day of the accident that the highway would be clear on the other side of the whiteout. By the time the defendant reached the whiteout area there was zero visibility. She effectively made a decision to punch through the whiteout.

- The defendant was travelling at a speed of 50 to 60 kilometers per hour when she reached the entrance of the whiteout and struck the plaintiff. She actually saw the plaintiff emerging from the whiteout walking towards her with his hands in the air. She travelled towards the whiteout with total disregard for her own safety and the safety of other potential motorists on the highway. A reasonable person would foresee the consequences of entering an area of zero visibility at that rate of speed. Conditions had deteriorated rapidly from the time Mr. Bowie encountered the blowing snow to the time the defendant approached. Knowing that the road would be clear on the other side and having made the decision to proceed required the utmost caution, the least of which would be the ability to stop her vehicle if necessary. Had she maintained a proper lookout and approached the whiteout in a slow and cautious manner, as the circumstances demanded, she may well have been able to avoid striking the plaintiff.

- I find the defendant was negligent in that she breached the duty of care required of a reasonable and careful person in the circumstances resulting in injuries to the plaintiff.

Contributory Negligence

[19] At issue is whether there is contributory negligence on the part of the plaintiff. I am satisfied that, although the defendant exhibited a high degree of negligence in her actions, the injuries suffered by the plaintiff did not solely arise from the negligence of the defendant and that this is an appropriate case to apportion liability.

[20] The plaintiff acknowledged he was in a dangerous situation when he came upon the other vehicles in the whiteout area. He was aware of the serious risk of remaining in the lane of oncoming traffic. The plaintiff's evidence is that he directed an individual standing in his lane to move to the opposite side of the road. Unfortunately, the plaintiff did not follow his own advice. Although his intention was to warn approaching vehicles, he created a foreseeable risk to himself by walking on the roadway towards oncoming traffic in whiteout conditions. He was unable to walk on the shoulder of the roadway facing traffic as it was occupied by snowbanks.

Nevertheless, he could have walked to the opposite side of the roadway out of and away from the direction of oncoming traffic.

[21] Under the circumstances, I find the defendant was materially responsible for the accident. I apportion 80 percent liability to the defendant and 20 percent liability to the plaintiff.

Third Party

[22] The defendant alleges negligence on the part of the third party as a result of his decision to enter the whiteout. That his disabled vehicle caused a hazard setting into motion a chain of events that led to the plaintiff's injuries.

[23] The third party argues that he acted reasonably in entering the area of blowing snow with diminished visibility and by leaving the disabled vehicle under the circumstances to seek assistance. Further, the third party argues there is no causal connection between the third party's action and the injuries suffered by the plaintiff.

[24] I am not satisfied on the evidence before me that the third party was negligent in his actions at the time. Conditions as he approached the Linwood Harbour area enabled him initially to see through the blowing snow and to the clear road ahead. It was not unreasonable for him to attempt to proceed through this area at a cautious rate of speed. Moreover, as conditions were worsening after his vehicle became disabled, it was not unreasonable for Mr. Bowie to engage his four-way flashers and seek assistance by walking to the opposite side of the road, away from oncoming traffic, in the only direction he had visibility which was towards the Pettipas driveway.

[25] Even if there were negligence on the part of Mr. Bowie, I am not satisfied on the evidence that his actions caused or contributed to the injuries suffered by the plaintiff. In order for the third party, Mr. Bowie to be liable in damages it is necessary for the evidence to establish that Mr. Bowie's conduct caused or contributed to the plaintiff's injuries. In ***Resurface Corps v. Hanke*** [2007], S.C.J. No. 7, the Supreme Court of Canada re-affirmed the "but for" test as the primary test for causation in negligent cases. Therefore, in order to attribute liability to the third party the evidence must establish that "but for" Mr. Bowie's conduct, the plaintiff would not have been injured.

[26] In the present case, Ms. Coady entered the whiteout in a cautious manner and at a reduced rate of speed. She was able to stop her vehicle without incident. Shortly thereafter, her vehicle was struck from behind by the Deyoung vehicle. This was followed by the plaintiff entering the area in a cautious manner at a reduced rate of speed. He was able to stop his vehicle without difficulty upon seeing two vehicles (Deyoung vehicle and the Coady vehicle) blocking the road. Ultimately, the plaintiff walked on the travelled roadway towards oncoming traffic when he was struck by the defendant. There is no evidence that any of the above individuals were even aware of the existence of the third party Bowie vehicle. It was only the Breen vehicle that came in contact with the Bowie vehicle and ended up further to the west of the Bowie vehicle. It was the stationary Coady vehicle, not the Bowie vehicle, that set in motion the chain of events that led to the plaintiff's injuries. Mr. Bowie's actions were not connected to these events.

General Damages

[27] The plaintiff, now 60 years of age, was 55 years old at the time of the accident. He currently resides with his wife. Their three grown children are on their own.

[28] Following the accident, the plaintiff was transported by ambulance to the St. Martha's Hospital, Antigonish and transferred from there to the QEII in Halifax. He suffered serious injuries to both of his legs. On February 27th, 2004, Dr. David Johnston performed an operation on the plaintiff's right leg. The left leg was too swollen at the knee to risk surgery at the time. That leg was placed in a stove-pipe cast until March 5th, 2004, when Dr. Gerald Reardon performed surgery on the plaintiff's left leg.

[29] The plaintiff said he was in the hospital for 21 days. He was transferred home by ambulance with both legs in casts. He said that he could not move or turnover on his own and was told not to weight-bear for a period of two months. His wife, a trained personal care worker, took a two month leave of absence from her job as a library technician with the school board. Her school year ended in June 2004 for the summer break. The V.O.N. attended every second day for the first month to clean the plaintiff's wounds and to provide some physiotherapy. The plaintiff was initially prescribed Dilaudid for pain. He ceased using this drug and switched to Tylenol Extra Strength, which he continues to take in the mornings and evenings.

[30] After the plaintiff was able to weight-bear on one leg, he began to use a wheelchair. He progressed to a walker for a couple of months. Next, he used two canes to move around progressing to one cane which he still uses. He attended a physiotherapy clinic in Antigonish for approximately 70 sessions. His wife drove him to the sessions until September 2004, when he was able to drive himself.

[31] At the time of the accident, the plaintiff was employed seasonally with Antigonish County Diesel driving a tandem gravel truck. He would normally haul asphalt or shoulder gravel. His average work day was 12 hours. He would have to climb on parts of the truck to hook and unhook cords securing the automatic tarp. At the end of the day, he would climb into the box of the truck and clean out debris with a shovel.

[32] Prior to the accident, the plaintiff was active outdoors. He participated in hunting, boating, fishing, gardening and swimming.

[33] The plaintiff said he currently sleeps at night on his side with a pillow between his legs. He has to “limber up” his legs each morning before getting out of bed. Usually, after breakfast, he will take a 30 minute walk on a level gravel road near his

home. He then reads the paper followed by some light work around the house. He now operates a sit-down lawnmower and tends to a raised garden bed in the summer. He said he needs to rest every day in bed after lunch, otherwise he will be sore in the evening. He said his right foot is turned out and does not land properly. Neither does his left foot due to lack of knee flexion. He has problems standing for any length of time. His right ankle will begin to hurt and his left knee will become sore. He also experiences problems sitting for any length of time. He has to get up or keep changing positions. He stated that he requires breaks if driving any distance in a motor vehicle. He cannot squat or kneel. He no longer is able to hunt in the woods. He is able to do some fishing in his 16 foot boat with assistance. He continues to enjoy swimming. The plaintiff has not worked since the accident. He applied for and currently receives Canada Pension permanent disability benefits.

Medical Evidence

[34] Medical reports authored by a number of specialists who examined the plaintiff as well as the plaintiff's family physician were admitted into evidence by consent of the parties. Only Dr. Booth, family physician, testified at trial.

[35] Dr. Gerald Reardon, Orthopaedic Surgeon, prepared a report dated June 23rd, 2005 which states in part:

> "...He had multiple musculoskeletal injuries including a comminuted fracture of his left tibial plateau and proximal tibia and fibula and, as well, a fracture of the right tibial shaft.
>
> The right tibial shaft fracture, which was comminuted, was treated with an intramedullary nail by Dr. David Johnston, an orthopaedic surgeon at the QEII Health Sciences Centre . . .
>
> Because of marked swelling in his left knee and proximal leg area, definitive surgery for the (left) tibial plateau fracture was delayed until March 5, 2004.
>
> This was a very severe injury involving the entire proximal tibia. A major open reduction procedure approaching the knee joint from both the medial and lateral sides was performed. Multiple screw and plat fixation was required to fix the fracture...
>
> ...He was last examined on January 12, 2005. At that time examination revealed that his wounds were well-healed. His walking ability was impaired because of discomfort. Examination revealed permanent stiffness in his knee. . .
>
> It is obvious that Mr. McKeough has sustained severe injuries to both of his lower limbs. . .
>
> His left lower limb injury is more severe than that on the right side. The joint surface of the left knee joint has been severely disrupted. Mr. McKeough has been left with significant discomfort and a significant loss in the range of motion in his knee which is permanent.

> As a result of his accident, he will have permanent symptoms in his left knee. He definitely will develop post-traumatic osteoarthritis and at some point in the future he will require a knee replacement. This will require complete removal of all the hardware in order to expose the knee and proximal tibia properly for the knee replacement operation.

[36] Dr. Thomas Loane, specialist in physical medicine and rehabilitation, performed an independent medical examination on the plaintiff on February 2005. His report of February 16, 2005 provides in part:

> CURRENT FUNCTIONAL RESTRICTIONS: Mr. McKeough will continue to have restrictions for prolonged standing, climbing, long distance walking, crouching, kneeling or heavy lifting involving the legs. The left knee is likely to be the primary restrictor as the right lower leg should continue to heal and improve over the next year. The left knee, however, will not likely improve further and may deteriorate.
>
> He is unlikely to be able to return to physically demanding work. Unfortunately the truck driving work requires climbing up and down the cab of his truck, securing tarps and performing routine or emergency maintenance on the vehicle. He is not currently capable of doing this and the prognosis for returning to truck driving is tenuous.
>
> With respect to heavy equipment operation, his sitting tolerance currently precludes working as a heavy equipment operator. As with truck driving, there are on site duties required, unrelated to the actual operation of the equipment. Although he would be capable of operating the equipment, the climbing up and down into the cabs, the prolonged sitting and the need to perform routine or emergency maintenance would be beyond his capacity at the present time. **. . .**
>
> Mr. McKeough enjoyed outdoors activities including hunting and fishing. He will have difficulty walking in the woods or on rough or uneven ground for extended periods of time and it is unlikely that he will get back to most hunting activities. He should be able to return to some fishing activities in future.

> PROGNOSIS: The prognosis, therefore, is for no further improvement in the left knee and he has likely reached maximal medical recovery. There is a risk of further deterioration and the need for further joint replacement surgery on the left. On the right, the prognosis is for improvement over the next year. It is unclear how much pain relief he will get but as the fracture remodels and heals, the discomfort should improve.

[37] Further independent medical examination to the plaintiff conducted by Dr. William Stanish, Orthopaedic Surgeon, in April 2006:

> The following are my findings.
>
> Mr. McKeough walks with a single-handed cane and limps.
>
> He finds difficulty in sitting and certainly getting on the examining table.
>
> On his stance, one can appreciate the scarring about the right leg, as well as scarring about the left leg with a residual muscle hernia.
>
> There was no evidence of any redness or drainage from either leg.
>
> One could observe on the right side that there is a distinct external tibial torsion, compared to the left side.
>
> Direction examination of the right leg reveals a normal range of motion of the hip, knee and ankle. There is no evidence of any neurological or vascular impairment. His wounds are well healed. He does have an external rotation deformity of approximately 15 degrees, compared to his left side.
>
> Examination of the left leg reveals a knee flexion to approximately 90 degrees, 5 degrees short of full extension.
>
> There is evidence of a muscle hernia on the front part of the leg.
>
> Direct examination of the left knee reveals a stable knee, with the limitation of motion as mentioned. The metallic hardware is palpable on the medial and lateral aspects of the tibia.

There is minimal leg length discrepancy on evaluation, with the right leg being ½ cm. longer than the left.

X-rays on computer had revealed evidence of a segmental shaft fracture of the right tibia and fibula.

There was a very severe complex comminuted fracture of the left proximal tibia.

OPINION

Mr. Francis McKeough was involved in a very severe car/pedestrian accident on February 26, 2004.

He incurred a segmental fracture of the right tibia, and a comminuted complex fracture of the left proximal tibia.

He is left with residual complaints which include discomfort about both lower extremities.

The magnitude of the trauma accounts for his residual complaints.

The past treatment interventions were essential and appropriate.

Mr. McKeough is suffering with residual disability as a consequence of post-traumatic osteoarthritis involving the left knee, as well as a residual deformity of his right lower extremity.

Considering the magnitude of the injury to the bones, as well as soft tissues, Mr. McKeough is left with significant limitations and restrictions.

It is virtually impossible for this gentleman to return to his job, working in and around heavy equipment.

Mr. McKeough would be suitable for a sedentary type of job.

Prolonged walking and standing will not be well tolerated.

Intermittent squatting or bending will likewise trigger discomfort almost certainly.

At this point Mr. McKeough does not require any further investigations.

It is quite likely that in the future he will develop post-traumatic osteoarthritis involving his knee that may require a total knee replacement.

> I found Mr. McKeough most cooperative and I do believe that he has reached maximum medical recovery at the present time.
>
> His findings are solely related to the car/pedestrian accident of February 26, 2004.
>
> On meeting him and judging from the records, I feel that he has been a most stoic gentleman attempting to live around his residual impairments.

[38] Dr. Reardon performed further surgery on the plaintiff on March 10th, 2009, removing screws from his right leg that had been inserted by Dr. Johnston. His report dated May 4, 2009 states in part:

> "...In follow-up I examined Mr. McKeough a number of times including November 27, 2008. At that time he was doing reasonably well. He still walked with a cane and had a limp. He had some mild discomfort from post-traumatic osteoarthritis on the left. His main issue was on the right. The locking screws from the intramedullary nail that had been inserted by Dr. Johnston were very prominent. There was one proximal screw and two distal screws. Mr. McKeough indicated that he would like to have those removed.
>
> Examination of his x-rays at that time revealed that the fractures were well healed. The screws were quite prominent. We therefore elected to remove the three bothersome screws.
>
> . . .
>
> It is important to understand that the intramedullary rod is still in place on the right. The plate and screws that I had originally inserted on the left are still in position."

[39] As indicated, Dr. William Booth, family physician, testified at trial. Following an assessment of the plaintiff on August 31st, 2009, Dr. Booth provided a summary report dated September 8th, 2009 which states in part:

> "Ongoing chronic pain issues, primary both knees. He walks an antalgic gait. He walks regularly with a cane. There is a bit of a limp with his gait. He walks with his right foot everted. Examination of his knees revealed decrease ranged of motion especially on the left. There also may be a small effusion on the left. I expect he is developing significant osteoarthritis in his knees of a post-traumatic nature as a result of his injuries in 2004. New x-rays ordered..
>
> . . .
>
> It is my feeling that Mr. McKeough is not going to obtain any further recovery than what he has now. In fact over time I suspect that his level of discomfort will likely increase as the degree of post-traumatic osteoarthritis primarily in his knees increases.

[40] At trial, Dr. Booth said the plaintiff had been a patient of his since 1986. His previous medical history included intermittent treatment for alcohol abuse, lower back pain and flat feet. He prescribed antibuse for treatment of the alcohol problem, anti-inflammatory medication for the back, and orthotics for flat feet.

[41] In terms of his report, Dr. Booth explained that antalgic gait meant that he observed the plaintiff walking in discomfort. He acknowledged that flat feet may

cause a foot to turn outwards as may be the case where the plaintiff's left foot was turned out a fraction. However, Dr. Booth believes the degree to which his right foot is everted is related to the injury as are his other current limitations.

[42] In ***Malcolm Melanson v. Blake Robbins*** (2009) NSCC No. 31, I discussed general damages as follows:

> [16] In assessing non-pecuniary damages the Court is required to take a functional approach to compensation, which requires the calculation of an amount of damages needed to provide reasonable comfort to the plaintiff in the time following the injury. In *Sharpe v. Abbot* 2007 NSCA 6:
>
> > [118] The Supreme Court has directed that courts take a functional approach to assessing damages for non-pecuniary loss in personal injury cases.
> >
> > [120] ...that assessing damages for non-catastrophic injuries cannot simply be a matter of comparing the seriousness of the plaintiff's injuries with those of the Plaintiffs in the trilogy and scaling the award back from the maximum. As was said in *Corkum v. Sawatsky* (1993), 118 N.S.R. (2d) 137 (T.D.) at pages 154-5, (varied slightly on appeal, but not on this point [1993] N.S.J. No. 490 (QL), 44 A.C.W.S. (3d) 1089 (C.A.)), an assessment of non-pecuniary damages must take account of all of the circumstances in light of the goal of the award of providing some measure of solace for the pain, suffering and loss of enjoyment of life suffered by the plaintiff
>
> [17] In making this obviously difficult assessment the Court will invariably identify the nature and extent of the injuries in order to determine the relevant cases to be considered in establishing a range. The Court will then review those cases and determine an award that, in the Court's opinion, addresses the unique circumstances of the plaintiff.

[43] In the present case, I find the plaintiff suffered serious injuries to his legs resulting in permanent partial disability which has had an impact on his enjoyment of life. The plaintiff underwent separate operations on both of his legs. Dr. Reardon subsequently removed three bothersome and protruding screws from the plaintiff's right leg by way of day surgery. The plaintiff was initially confined to his bed upon returning home with both legs in a cast. His progression led him to a wheelchair, walker, two canes, and eventually one cane which he currently uses. He is unable to return to his employment as a heavy duty truck driver. His capabilities around the home are reduced to light housework and light yard work. He currently walks with a cane and a limp. This is caused in part by an external rotation deformity in his right foot caused by the accident. He continues to have restrictions for prolonged standing, climbing, walking on uneven terrain, long distance driving, crouching, kneeling and heavy lifting. He no longer hunts, but continues to fish from a boat with assistance and enjoys swimming.

[44] I find it is probable that his left knee will continue to deteriorate from post-traumatic osteoarthritis requiring eventual knee replacement surgery and subsequent rehabilitation.

[45] In determining quantum of general damages I have considered authorities provided by counsel including ***Mills v. Bougeois Estate*** (1995), Carswell 375 (N.S.F.C.); ***Baker v. O'Hanley*** (2001), 191 N.S.R. (2d) 179; ***Bomar v. Crane*** (1997), 162 N.S.R. (2d) 39; ***Melanson v. Robbins*** *(supra).*

[46] In ***Melanson*** *(supra)* I awarded the sum of $65,000.00 general damages to a plaintiff who suffered a permanent partial disability from a mid-shaft fracture on his left leg. This resulted in an external rotation deformity and a left leg discrepancy causing a short-leg gait. The plaintiff in that case had reached a plateau of functional recovery and was able to tolerate the physical demands of a farming operation.

[47] In the present case, I find the plaintiff's injuries to be more severe with more physical limitations than ***Melanson***. As well, the plaintiff's left knee will continue to deteriorate resulting in further discomfort requiring knee replacement surgery. Under the circumstances, I award general damages in the amount of $85,000.00. Pre-judgment interest has been agreed at 2.5 percent.

Past and Future Loss of Income

[48] The plaintiff is currently 60 years of age. Prior to the accident, he was seasonally employed by Antigonish County Diesel as a tandem-gravel truck driver. He worked approximately 60 hours per week for 26 weeks between May and December. He would generally draw EI benefits in the off-season. The evidence is that the plaintiff was a dependable and hardworking employee. He worked long hours and was able to perform the physical duties required of the job. He currently receives Canada Pension Disability benefits to age 65. For purpose of calculations, I find the plaintiff would have continued to work in his previous capacity until the age of 65.

[49] Based on the above information, Ms. Gmeiner, Actuary, prepared calculations of past loss of income from date of accident to date of trial. The plaintiff earned $13.00 per hour in 2003. Ms. Gmeiner reasonably calculated the loss assuming the hourly wage rate would have kept pace with inflation as measured by the consumer price index resulting in a gradual increase to $14.42 per hour by 2009. For the 2004 year, Ms. Gmeiner assumed additional income of $4,730.00 based on a six week Union job. There was no evidence before me to support this calculation and, therefore should be deleted. The plaintiff's net employment related income was calculated for the years 2004 through to date of trial. From these amounts income reported by the plaintiff was deducted.

[50] The plaintiff began receiving CPP disability benefits in late 2004. The issue at trial is whether these benefits should be deducted from the claim for loss of income. Ms. Gmeiner calculated past loss of income scenarios based on both the deduction and non-deduction of CPP disability benefits.

[51] Prior to the amendments of the ***Insurance Act***, the general common law position was that CPP benefits were non-deductable from an award for loss of income. ***Fraser v. Hunt Estate***, (2000) NSCA 63. As a result of the 2003 amendments, the Nova Scotia ***Insurance Act*** provides, at section 113A:

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

[52] The reduction under s. 113A, then, has the following elements: (1) payments in respect of the incident, (2) that the plaintiff has received or that were available before trial, (3) that are for income loss or loss of earning capacity (4) under the laws

of any jurisdiction or under an income-continuation benefit plan (5) if the provider of the benefit has no right of subrogation.

[53] The ***Insurance Act*** goes on to state, at Section 113B:

> **Limitation on liability**
>
> 113B
>
> ...
>
> (2) Notwithstanding any enactment or any rule of law, but subject to subsection (6), [minor injury] 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 not liable in an action in the Province for the following damages for income loss and loss of earning capacity from bodily injury or death arising directly or indirectly from the use or operation of the automobile. [added]
>
> (a) damages for income loss suffered before the trial of the action in excess of the net income loss, as determined by regulation, suffered during that period;
>
> (b) damages for loss of earning capacity suffered after the incident and before the trial of the action in excess of the net loss of earning capacity, as determined by regulation, suffered during that period.

[54] The ***Automobile Insurance Tort Recovery Limitation Regulations*** define "net loss of earning capacity" and "net income loss," for the purposes of s. 113B of the Act, at s. 2(1)(a) and (b):

> **(a)** "net loss of earning capacity" means total loss of earning capacity or loss of future income less that portion of probable future income that would be paid by a plaintiff in
>
> (I) income and payroll taxes,

(ii) employment insurance or similar costs,

(iii) union or professional dues, and

(iv) pension contribution, including Canada Pension Plan contributions;

(b) "net income loss" means total income lost less that part of total income that would have been paid by a plaintiff in

(I) income and payroll taxes,

(ii) employment insurance or similar costs,

(iii) union or professional dues, and

(iv) pension contributions, including Canada Pension Plan contributions...

[55] Section 113B and the regulations are principally concerned with the calculation of damages for past income loss, loss or earning capacity and lost future income, in view of the deductions required to provide quantum for "net loss of earning capacity" and "net income loss." Both forms of loss are net of CPP contributions.

[56] The present Ontario legislative scheme, resembles (in substance) s. 113A of the Nova Scotia Act. Subsection 267.8(1) of the Ontario ***Insurance Act*** provides, in part:

> In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, the damages to which a plaintiff is entitled for income loss and loss of earning capacity shall be reduced by the following amounts
>
> ...

> 2. All payments in respect of the incident that the plaintiff has received or that were available before the trial of the action for income loss or loss of earning capacity under the laws of any jurisdiction or under an income continuation benefit plan...

[57] The essential elements set out in s. 267.8(1)(2) are substantively identical to those in section 113A of the Nova Scotia ***Insurance Act***. The only exception is the specific requirement in the Nova Scotia Act that the provider of the benefit have no right of subrogation. However, s. 267.8(17) of the Ontario Act provides that a person who has made a payment under ss. (1) "is not subrogated to a right of recovery of the insured against another person in respect of that payment." In the context of the treatment of CPP disability benefits, there is no apparent substantive difference between the two provisions.

[58] The Ontario ***Insurance Act*** also provides, at s. 267.8(9) and (10), for any "payments in respect of the incident that the plaintiff receives after the trial of the action for income loss or loss of earning capacity under the laws of any jurisdiction or under an income continuation benefit plan "to be held in trust by the plaintiff, to be paid to the persons whom damages were recovered. There is no such provision in the Nova Scotia legislation.

[59] In ***Meloche v. McKenzie*** (2005), 27 C.C.L.I. (4th) 134, 2005 CarswellOnt 2150 (Ont. S.C.J.), Patterson J. considered the effect of s. 267.8(1) on the treatment of CPP disability benefits. The issue was (inter alia) whether CPP disability benefits were deductible from a damage award for personal injuries pursuant to s. 267.8(1) of the ***Insurance Act***. Patterson, J. stated at paragraph 11:

> "the intention of [section] 267.8 was an overt attempt by the Legislature to eliminate double recovery in tort awards arising out of claims for damages on account of injuries sustained in motor vehicles accidents." [added]

[60] Patterson J. referred to the "private insurance exception" to the rule against double recovery, by which the benefits derived from private policies of insurance, which the plaintiff funded prior to the accident are not deductible as double recovery under a tort award. Patterson, J. took the view that the amendments to the Act that gave rise to s. 267.8 expanded the scope of s. 267(1) by adding the words "on account of loss of earning capacity," with the intent to clearly eliminate the private insurance exception.

> [19] Since the original intent was to prevent double recovery by having the collateral benefits deducted from the tort award, the interpretation of these sections in my opinion, should be broad, inclusive and encompassing with respect to identifying those benefits which are the subject of deduction in tort law from an award for past loss and the subject of a trust for future receipt. A separate issue involves Canada Pension Plan provided by the government of Canada which is a comprehensive

> program for old age pension, supplementary benefits. CPP provides six types of benefits: Retirement pensions, disability pensions, death benefits, survivor's pensions, disabled contributor child's benefits, orphan benefits. A contributor is entitled to a benefit from Canada Pension Plan on the basis that they have made employee contributions to it. The benefit varies according to the class of benefit received, length of time a contributor has made contributions and the total amount of those contributions. Section 44 of the Canada Pension Plan provides benefits to disabled persons and their dependent children. To qualify, a person must be under the age of 65, must have contributed for a minimum qualified amount for a minimum qualified period and that he or she must be disabled within the meaning of the act.. To qualify for disability, the disability must be severe and prolonged, making the person incapable regularly of pursuing any substantial gainful occupation and the disability is prolonged in that the disability is likely to be long continued and of indefinite duration or is likely to result in death. The third requirement is that the contributor is unable to work and unlikely to be able to work a long indefinite period because of his or her disability, see Canada Pension Plan, Section 42(2)(a).
>
> The disability CPP benefits are discontinued on the earliest of the person ceasing to be disabled or commence to receive CPP retirement pension or under the provisions of a provincial pension plan or reaches the age of 65. Therefore, the criteria for Canada Pension is that the person is unable to work and likely unable to work for a long, indefinite period of time. ....

[61] Further at paragraph 27.

> [27] In my opinion, when Bill 59 was passed, it was the intent of the Legislature to include CPP Disability benefits among the class of benefits deductible from a tort award against a protected defendant. It dealt with both the issues of income loss and loss of earning capacity. There is no doubt the CPP Disability pensions are not properly characterized as payment for income loss, but there can be no dispute that their payment is tied to a recipient's inability to engage in the act of gainful employment. In other words, as a result of a loss of earning capacity.

[62] The result of ***Meloche*** is that, in Ontario, CPP disability benefits received by a plaintiff would be deductible from an award for past income loss. Amounts received

after trial are also deductible and are subject to a trust in favour of the defendant, pursuant to s. 267.8(9). Section 113A of the Nova Scotia ***Insurance Act*** includes the same categories: "income loss and loss of earning capacity." I conclude that CPP disability benefits are deductible from an award for past and future income loss under the Nova Scotia legislation.

[63] As a result, Ms. Gmeiner's calculations for past loss of income to date of trial would be based on the scenario that assumes CPP disability benefits are deducted as set out in Schedule 1 of her report. As indicated, an amount must be deducted from this sum to reflect inappropriate inclusion "extra income in 2004". I fix the amount for loss of income from employment at $29,000.00 including interest to date of trial.

[64] The Gmeiner report calculated loss of future income on the basis that the plaintiff was unemployable. Unfortunately, the calculations did not include a scenario that deducted CPP disability benefits.

[65] The plaintiff has not worked since the accident. He received employment insurance sick benefits, short-term disability payments and weekly indemnity payments from his Section B insurer.

[66] On August 15th, 2009, physiotherapist Tom Stanley performed an IME functional capacity evaluation of the plaintiff. His report was introduced at trial. Mr. Stanley determined the plaintiff would be unfit to return to his previous work as a heavy-duty truck driver. Given the plaintiff's limitation for standing, walking, squatting, crouching, etc., Mr. Stanley concluded that light work including sedentary work with a high predominance of sitting would be possible with the best option for work that involves sitting with the ability to get up and move around as needed to relieve pain. Mr. Stanley recommended a transferable skills analysis (TSA). The TSA report was prepared by Sibley and Associates. It concluded that the plaintiff had the ability to work in the position of parking and control officer and parking lot attendant. The report noted the employment prospects for these occupations is "limited" in the plaintiff's geographical area.

[67] I find the plaintiff does not possess any meaningful residual earning capacity given his current functional limitations and the fact that his age does not make retraining a viable option. As indicated, his prognosis calls for further knee deterioration and surgery. To qualify for CPP disability benefits, the plaintiff was

determined to have a severe and prolonged disability rendering him unable to pursue gainful employment.

[68] Using Ms. Gmeiner's multiplier of 3.885, I calculate the present value of loss of future earning capacity to age 65 based on the plaintiff's average net income of $16,000.00 per year amounting to $62,160.000. From this amount should be deducted future CPP disability benefits based on the indexing provisions of the CPP.

Section B Benefits

[69] The plaintiff settled his Section B claim with his insurer in 2006 for a lump sum of $75,000.00. The plaintiff was unable to provide evidence of the breakdown between medical benefits and the benefits attributable to income which would be deductible from the loss of income claim. Section B allocates the sum of $25,000.00 for medical related benefits. The plaintiff underwent a significant amount of rehabilitation. Undoubtedly, he will have future medical costs relative to future surgery. The parties have left it to the Court to effect a division. Without the benefit of firm evidence, I apportion the sum of $50,000.00 attributable to future weekly benefits.

Other Income

[70] In addition to employment income, the plaintiff claimed an amount for past and future loss of income for cutting and selling pulp on his father's land. Figures produced in the Gmeiner report averaged $3,000.00 per year for the years 1999, 2000, and 2002. The evidence regarding this claim is deficient and unreliable. The plaintiff did not claim this income on his income tax returns. There was no pulp income in 2003, the year before the accident. Invoices produced to substantiate the plaintiff's income were made out to third parties. Moreover, there was no evidence regarding expenses incurred in cutting the pulp. Any calculations under these circumstances would be speculative.

Loss of valuable services

[71] In ***Leddicote v. Nova Scotia (Attorney General)*** (2002), N.S.J. No. 160, Justice Saunders stated the following with respect to loss of valuable services.

> [50] The question becomes to what extent, if at all, have the injuries impaired the claimant's ability to fulfill home making duties in the future? Thus, in order to

> sustain a claim for loss 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.

[72] The plaintiff was virtually incapacitated during the months following the accident progressing from bedridden, to wheelchair, walker, two canes, and ultimately one cane. Following the plaintiff's release from hospital, his spouse Mrs. McKeough, obtained a two month leave of absence from her work with the school board to provide care. She received compensation from their Section B insurer at a rate of $11.33 per hour for nine hours a day, seven days a week for the period March 22nd, 2004 to May 22nd, 2004. She was able to be home during days following completion of the school year in June 24th, 2004. The plaintiff is currently able to perform light duties around the house and outdoors. He is unable to perform heavy household duties. He is unable to climb ladders, walk on uneven surfaces or complete chores that are outside his level of reach. He is able to perform small carpentry jobs around the house and is able to scrape snow from the steps of his house. The plaintiff is no longer able to shovel snow from his driveway, however, his driveway is shared with a neighbour who uses the plaintiff's tractor to clear both driveways. He is no longer able to cut his own firewood. He relies on his son and neighbours to cut and split

cords of wood. He is able to pile the wood. The plaintiff stated that while he is no longer able to use a push-mower for his lawn he is able to care for it with a ride-on mower. Dr. Booth testified that because the plaintiff's osteoarthritis is post-traumatic, it will progress faster than regular osteoarthritis and his level of discomfort will increase in the future. I find this will undoubtedly further diminish his physical capacities.

[73] Ms. Gmeiner's report quantified the present value of loss of valuable services. She assumed the plaintiff could no longer perform heavier household duties. She used a present value multiplier of 10.2024 to age 75 which includes both mortality and disability contingencies. Ms. Gmeiner made use of Statistics Canada studies to calculate the current value of replacement costs of household work to equate to $13.76 per hour for an average of 201 hours per year spent by Canadian men on heavier household tasks. Her report notes she used a conservative hourly rate given that the average rate for "carpenters" in the Antigonish area is $21.26 per hour. The average rate for "automotive and mechanical repairers" is $18.50 per hour. The plaintiff was able to perform carpentry and his own vehicle mechanical maintenance prior to the accident. I find the calculations in the report to be reasonable and award the sum of $28,220.00 which includes provision for income tax gross-up.

Past Care Costs

[74] At trial and for the first time, the plaintiff during closing submission put forth a claim for past care costs provided by the plaintiff's spouse. This claim for *quantum meruit* did not form part of the pleadings, nor was an amendment to the pleadings requested. The defendant and third party objected to consideration of this claim by the Court. In the circumstances, I would not consider the claim put forward at this stage of the trial. In any event, there was insufficient evidence at trial to establish the claim.

[75] In the result, the plaintiff shall have judgment against the defendant for 80 percent of non-pecuniary and pecuniary losses as determined herein. The defendant's action against the third party is dismissed. Costs to the parties follow the result.

[76] I reserve jurisdiction to hear the parties on costs/calculations in the event they are unable to agree.

J.