SUPREME COURT OF NOVA SCOTIA
Citation: Hill v. Cobequid Housing Authority, 2010 NSSC 294

Date: 20100726
Docket: Tru No. 259625
Registry: Truro

Between:

James Hill, of RR#1, Noel, in the County of Hants,
Province of Nova Scotia

Plaintiff

v.

Cobequid Housing Authority and
Nova Scotia Housing Development Corporation

Defendant

Judge: The Honourable Justice A. David MacAdam

Heard: May 17 and 18, 2010, in Truro, Nova Scotia

Counsel: Kerri Ann Robson, Ll.B., for the plaintiff
Darlene Willcott, Ll.B. and Ryan Brothers, Articled Clerk, for the defendant

By the Court:

Background

[1] In late February or early March, 2004, James Hill entered the covered parking lot of the Johnson Manor, a residential apartment building occupied by senior citizens and owned by the defendants. His mother was one of the residents of the manor and he was visiting her and bringing her some water. He said it was both raining and snowing as he proceeded to drive into the parking lot, although he could not identify where, within the confines of the covered parking area, he parked on the occasion. He says he often uses the disability spaces, but he could not recall whether he had on this occasion. He said the parking lot was covered with ice and therefore slippery and he had to be more careful than usual.

[2] He said he wears a prosthetic on his left leg but it does not cause him any problems in walking. He also was wearing boots with steel studs. He proceeded towards the back entrance of the Johnson Manor, possibly carrying some of the jugs of water he had brought for his mother. His memory is then unclear as to whether he delivered the water to his mother or he first interacted with a lady who was at the door waiting for a taxi to attend a doctor's appointment. He said that he offered to drive her to her doctor's appointment in his 2002 Ford Ranger motor vehicle and that he accompanied her to the passenger side of his vehicle. When she had entered, he walked back around the back of the vehicle and then slipped and fell on his back, hurting his left shoulder and left hip. He got up and drove the lady to the doctor. He said he was wet and sore, black and blue. He said he could hardly move for a couple of days. It seemed to get worse and worse over the following month. The back was okay after a few days but his shoulder never got better.

[3] Apparently in early March 2004 he visited his doctor, Dr. Stewart, and eventually was referred to an orthopaedic specialist, Dr. John David Amirault of the Queen Elizabeth II Health Science Centre in Halifax, Nova Scotia. Dr. Amirault scheduled an operation on his left shoulder. However, on the morning of the scheduled operation, following discussions involving Mr. Hill, Dr. Amirault and others, it was decided because he was experiencing more pain in his right shoulder than his left shoulder that the operation would be on his right shoulder. Apparently some time earlier Mr. Hill had injured his right shoulder in a

fall and it was, at the time of the scheduled operation, causing more pain than the left shoulder. The operation was successful and eventually he was scheduled for, and underwent, an operation on his left shoulder, which, however, was not as successful.

[4] Ruth MacArthur was the lady that Mr. Hill agreed to drive on the morning of his accident. She was a resident of Johnson Manor and had, the previous evening, called a local taxi to be picked up in the morning and driven to her doctor's appointment. The taxi company phoned her in the morning to advise that the taxi was unable to enter the parking lot because of snow clearing taking place on the streets in the vicinity of Johnson Manor and that if she could make her way to a nearby taxi stand they would be willing to drive her from there to her appointment. She decided that she would walk to the taxi stand and was at the exit of Johnson Manor when she met Mr. Hill who offered to drive her. She said they walked out the back door towards his truck, which was located in the second row of spaces for parking, and facing the back door of the Manor. She walked, by herself, towards the passenger's side and when she reached the door she looked behind to see where Mr. Hill was and could not see him. She then walked back towards the front of the vehicle, where she saw him getting up. She asked him if he was alright and he said he was. He got in the driver's side and drove her to the taxi stand where he dropped her off and she took a taxi to her appointment.

[5] While Mr. Hill testified that the whole parking lot was covered with ice, with no sand or salt anywhere, Ms. MacArthur testified that it was clear except for a small patch of black ice and that there was salt and sand in the parking lot. She suggested that the one spot of black ice on which Mr. Hill had slipped had apparently been missed in the salting and sanding.

[6] Also testifying on behalf of the defendants was Brenda Richards, Property Manager for Cobequid Housing Authority and the individual responsible for a number of buildings, including the Johnson Manor. She testified that she has a staff of ten of which five are maintenance staff, with one supervisor and four other staff persons.

[7] Her responsibilities include looking after the various buildings for which she is responsible. In addition to these staff persons, during the winter period a contract is let for snow removal and a person is hired to do snow shovelling of the

walkways and entrances. In the summer other contracts are let in respect to lawn care, painting and electrical, when required.

[8] The heavy snow removal is contracted out, on tender, and in 2004 the successful tenderer was Terra Excavating. At the beginning of each season, she said, she would meet with the successful tenderer and review details of the work and what was expected. In the event of a snow storm the parking lot would be plowed early in the morning, even before she arrived at work at 8:30 in the morning. If the storm continued throughout the day, the parking lot would periodically be checked, salted and sanded, if required. As part of the tender contract, Terra Excavating were required to not only plow the snow from the parking area, but also to salt and sand.

[9] She also indicated if there was a snowfall and if they were not on the scene as promptly as she would like, she would call them. She said, however, that they were pretty prompt and rarely did she have to call them.

[10] Ms. Richards also said that when she arrives, she, on occasion, checks the parking lot, walkways and entrances. She said, when required, she has on occasion spread sand and salt as well. When the maintenance persons arrive on the scene in the morning to pick up their work vehicles, she has seen them spreading salt and sand, at times, as well.

[11] She said she has been happy with the work of Terra Excavating and with Pat Spears, the individual who has been hired for some seven to ten years to shovel the walkways and entrances on the properties for which she is responsible.

[12] On cross-examination she said Terra Excavating had won the tender not only for 2004 but also for 2005 and 2006. For each of the buildings, they are responsible for both the driveway and the parking lots. She did agree with counsel, however, that if there are cars parked in the parking lot they would not be able to plow the entire parking lot. She said on occasion they have asked people to move vehicles, but they rarely do so.

[13] Also testifying for the defendants was Bill Maynard who performs maintenance and grounds work for Cobequid Housing Authority, including in respect to Johnson Manor. Terra Excavating were responsible for plowing and spreading salt and sand and for which they used a broadcast spreader. They would

come whenever there was snow or freezing rain. Usually they were there first thing in the morning following an overnight snowfall. He would arrive in the morning at Johnson Manor, to pick up his work truck and to check on any job orders for the day. He would walk around the exterior of the building and check the walkways and entrance ways, as well as the parking lot itself. Where he saw a need, he would apply salt and sand. He said he would do this every morning when there was an overnight snowfall. He confirmed that he was not assigned responsibility for the parking lot, adding, however, that when he arrived at work if something had to be done he would deal with it. He said he did not have the equipment to plow the parking lot, if there was a snow fall during the day and on those occasions Terra Excavating would be required to come and plow the parking lot. He said that they have been a good contractor and have had the contract for several years.

[14] He also indicated that when there is freezing rain or snow, maintenance staff, as well, are told to check the building and the parking lot. If there is ice or snow down, they are told it is to be removed. He also indicated that if snow is observed between parked vehicles, he has removed it and placed sand and gravel himself. This would be in areas where Terra's equipment were unable to remove the snow.

[15] On cross-examination he indicated that when he arrives at work, sometime between 8:00 and 8:30 in the morning, Terra Excavating would have completed its plowing. When he arrived he would look around, pick up his work orders for the day and attend at the other buildings for which he was responsible. He repeated that Terra was expected to return to the property if there was a snowfall during the day.

The Law

[16] At issue is s. 4 of the *Occupiers' Liability Act*, 1996, c.27 which provides:

> 4 (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that each person entering on the premises and the property brought on the premises by that person are reasonably safe while on the premises.
>
> (2) The duty created by subsection (1) applies in respect of

(a) the condition of the premises;

(b) activities on the premises; and

(c) the conduct of third parties on the premises.

(3) Without restricting the generality of subsection (1), in determining whether the duty of care created by subsection (1) has been discharged, consideration shall be given to

(a) the knowledge that the occupier has or ought to have of the likelihood of persons or property being on the premises;

(b) the circumstances of the entry into the premises;

(c) the age of the person entering the premises;

(d) the ability of the person entering the premises to appreciate the danger;

(e) the effort made by the occupier to give warning of the danger concerned or to discourage persons from incurring the risk; and

(f) whether the risk is one against which, in all the circumstances of the case, the occupier may reasonably be expected to offer some protection.

(4) Nothing in this Section relieves an occupier of premises of any duty to exercise, in a particular case, a higher standard of care that, in such case, is required of the occupier by virtue of any law imposing special standards of care on particular classes of premises. 1996, c. 27, s. 4.

[17] Until the emergence of s. 4 of the *Occupiers' Liability Act*, the duty of care owed by occupiers of property to their lawful visitors was founded in the often quoted statement of Willes, J. in **Indermaur v. Dames** (1866), L.R. 1 C.P. 274 (Eng.C.P.) at p. 288:

> ...With respect to such a visitor, at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of

> neglect, the question whether such reasonable care has been taken by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact.

[18] In **Smith v. Atlantic Shopping Centres Ltd.**, 2006 NSSC 133, the defendant, notwithstanding the advent of s. 4 of the *Occupiers' Liability Act*, submitted that notwithstanding codification of the law, that liability on a defendant continued to rest on a finding there had been an "unusual danger." In outlining plaintiff's counsel's submissions that there is no longer a requirement that there be an "unusual danger" for liability to be imposed on an occupier, at para. 29, the court said:

> It is argued that support for that position is found in a number of cases including ***Corbin v. Halifax (Regional Municipality)*** [2003] N.S.J. No. 819, where Wright, J. of this Court, made no reference to the common law concept of "unusual danger". I have also been referred to two cases from the Newfoundland Court of Appeal. In ***Murphy v. St. John's (City)*** [2001] N.J. No. 119 and ***Gallant v. Roman Catholic Episcopal Corp. for Labrador/Diocese of Labrador City-Schefferville*** [2001] N.J. No. 118, the Court held that trial decisions based on the "unusual danger" principle were overturned and the general rule of negligence law requiring reasonable care to visitors should apply.

[19] After referencing comments from the then Minister of Justice, the Honourable Jay Abbass, in the Nova Scotia House of Assembly during the debate on the passage of the *Occupiers' Liability Act*, Justice MacLellan concluded that the new *Act* was specifically intended to codify the law and the concept of "unusual danger" was no longer applicable.

[20] In his reasons Justice MacLellan did note that in **Ryan v. Holiday Inn**, [2000] N.S.J. No. 394, Justice Tidman suggested the law had not changed as a result of the passage of the *Occupiers' Liability Act*. Clear, however, is that Justice Tidman had found that there was an "unusual danger", and therefore the case was not decided on that issue. He also observed that it predated the two decisions by the Newfoundland Court of Appeal which had held otherwise. Also, he acknowledged, the Newfoundland Court of Appeal decisions were not based on an actual provincial statute, but rather were dealing with the issue of occupier liability based on a perceived need for a new development in the law.

[21] In the present instance the defendants, neither in their written or oral submissions, suggested that the plaintiff, in order to be successful, was required to establish that there was an "unusual danger." At para. 50 in **Smith v. Atlantic Shopping Centres Ltd**., *supra*, Justice MacLellan referenced the principles outlined by Justice Cameron in **Gallant v. Roman Catholic Episcopal Corp. for Labrador/Diocese of Labrador City-Schefferville**, [2001] N.J. No. 118, at para. 27.

> As already noted, in the common law jurisdictions in Canada a generally consistent approach to occupiers' liability has emerged, one which is compatible with **Stacey**. The following is not an attempt to create an exhaustive list but a collection of principles which emerge from the cases under the current, generally accepted view of occupiers' liability and which are relevant to the law in this province, post Stacey:
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> 1. There is a positive obligation upon occupiers to ensure that those who come onto their properties are reasonably safe (see: **Stacey**; **DeMeyer v. National Trust Co.** (1995), 104 Man. R. (2d) 170 (Q.B.); **Preston v. Canadian Legion, Kingsway Branch No. 175** (1981), 123 D.L.R. (3d) 645 (Alta.C.A.));
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> 2. The onus is upon the plaintiff to prove on a balance of probabilities that the defendant failed to meet the standard of reasonable care - the fact of the injury in and of itself does not create a presumption of negligence - the plaintiff must point to some act or failure to act on the part of the defendant which resulted in her injury (see: **Kayser v. Park Royal Shopping Centre Ltd.** (1995), 16 B.C.L.R. (3d) 330 (C.A.); **Empire Ltd. v. Sheppard**, 2001 NFCA 10);
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> 3. When faced with a prima facie case of negligence, the occupier can generally discharge the evidential burden by establishing he has a regular regime of inspection, maintenance and monitoring sufficient to achieve a reasonable balance between what is practical in the circumstances and what is commensurate with reasonably perceived potential risk to those lawfully on the property. An occupier's conduct in this regard is to be judged not by the result of his efforts (i.e. whether or not the plaintiff was injured) but by the efforts themselves (see: Empire Stores);
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> 4. The occupier is not a guarantor or insurer of the safety of the persons coming on his premises. (See: **Empire Stores; Qually v.**

> **Pace Homes Ltd. and Westfair Foods Ltd.** (1993), 84 Man.R. (2d) 262 (Q.B.) and also, **Stevenson v. City of Winnipeg Housing Co.** (1988), 55 Man. R. (2d) 137 (Q.B.) in which the court found that there was no duty to completely clear sidewalks of snow in a Winnipeg winter, and that frozen patches were inevitable, notwithstanding that the occupier took reasonable care to make the property reasonably safe.)

[22] In **Waldick v. Malcolm**, [1991] S.C.J. No. 55, the plaintiff was injured as the result of slipping and falling in the driveway of a farm occupied by the defendants. Although the court was primarily concerned with whether the defendant had a valid defence under s. 4(1) of the Ontario *Occupiers' Liability Act*, which preserved the defence of *volenti* while replacing the common law occupiers' liability in that province, Justice Iacobucci commented on the *Act*. At para. 45 he observed:

> The goals of the Act are to promote, and indeed, require where circumstances warrant, positive action on the part of occupiers to make their premises reasonably safe.

[23] Section 3(1) of the Ontario legislation parallels s. 4(1) of the Nova Scotia *Occupiers' Liability Act*. Justice Cameron at para. 26 in **Gallant v. Roman Catholic Episcopal Corp**, *supra*, made the following observations:

> Iacobucci J. approved of certain factors which had been considered by the lower courts in deciding if reasonable care had been taken: weather, time of year, the size of the parking area, the cost of preventive measures, the quality of the footwear worn by the plaintiff, the length of the pathway and whether the premises were rural or urban. He said of the duty, at p. 124:
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> > That duty is to take reasonable care in the circumstances to make the premises safe. That duty does not change but the factors which are relevant to an assessment of what constitutes reasonable care will necessarily be very specific to each fact situation - thus the proviso "such care as in all circumstances of the case is reasonable"

[24] To similar effect, Justice Saunders of the Nova Scotia Court of Appeal in **Miller v. Royal Bank**, 2008 N.S.C.A. 118, at para. 11, observed that the trial judge had "correctly described the requisite duty", under the *Occupiers' Liability Act*, as being an obligation

> "...to take such care as in all the circumstances of the case is reasonable to see that each person entering on the premises and the property brought on the premises by that person are reasonably safe while on the premises." The standard is one of reasonableness, rather than 'unusual danger',...

[25] It would appear, therefore, that at issue is whether the defendants took reasonable care, in the circumstances, to make their premises safe.

[26] In her written submission, counsel for the plaintiff suggests that the defendants failed to meet a "standard of reasonable care taking into account the use of the premises as a seniors home and the age of the residents of the home." Her submission continues:

> ...Mr. Hill fell in a covered parking area at Johnson's Manor. It is submitted that the defendant did not have a regular regime of inspection, maintenance and monitoring to achieve a reasonable balance between what is practical in the circumstances and what is commensurate with reasonably perceived potential risk to the person who live in and visit the senior complex.

[27] On the other hand, defendants' counsel, after noting that consideration must be given to the general winter conditions that are experienced in Nova Scotia, and that in February 2004, prior to Mr. Hill's accident in the parking lot of the Johnson Manor, there was an unusual winter storm commonly referenced as "White Juan." On the day in question there were stormy conditions, or 'after effects', from "White Juan", such that the taxi that Ms. MacArthur had hired was unable to reach the Johnson Manor to pick her up. In her written submission counsel states:

> 40. The Defendants submit that an unfortunate incident occurred that led to the Plaintiff suffering an injury, however, the Defendants took steps to ensure the safety of its residents and visitors. The Defendants had a snow clearing system in place. They had contracted with an independent company to plow, sand and to salt the parking lot. The Defendants also have staff whose duties are to check the parking lots, the entrance ways, the fire exits to ensure they are free of snow and ice. Ruth MacArthur in her statement confirms that the Defendants maintain the property in a reasonable manner. She stated she had lived at the Johnson Building for 10 years and they are very prompt in cleaning the sidewalks or walkways.
>
> 41. In addition, the Defendants state the Plaintiff did not take care for his safety on the day in question. The Plaintiff testified at his discovery that he

> noticed when he got out of his vehicle after arriving at the Johnson Building that the parking lot where he parked was wet and that there was ice underneath the water. In noticing the condition, he stated he walked slowly. When he returned to his vehicle to take Ruth MacArthur to her doctor's appointment, he took no precautions despite seeing the ice a second time.
>
> 42 In conclusion, the Defendants did what was reasonable bearing in mind the stormy weather conditions on the day in question. They did what was reasonable bearing in mind they were dealing with the aftermath of White Juan. They did what was reasonable bearing in mind the incident occurred in February in Nova Scotia which is known to have inclement weather, thus ice and snow is expected. To expect the Defendants to remove all traces of snow and ice in a parking lot in February in Nova Scotia would be too high of standard for an occupier. The standard is not one of perfection, but of reasonableness. The Defendants state they did what was reasonable on the day in question, and the fact that the Plaintiff fell is not evidence that they didn't do what was reasonable to ensure his safety...

[28] Counsel for the plaintiff, in her oral submission, references the evidence that it would be rare that the parking lot would be empty of cars at the time it was being plowed in the early morning. As such, she suggests, there would be ice and snow between the cars that had not been removed, presumably suggesting this would be the snow and ice on which Mr. Hill fell. She suggests that there were no employees specifically assigned to the parking lot. The evidence, however, is that in fact it was contracted to Terra Excavating and indeed a number of employees made a policy of checking the parking lot, when there had been a storm and on their arrival. The evidence of Ms. MacArthur is that the parking lot was clear, except for a small patch of black ice which was beneath the water and difficult to see. Although, as observed, it is no longer necessary to establish that there was an "unusual danger" for the plaintiff to succeed, nevertheless, the evidence suggests that the regime adopted by the defendants was reasonable in the circumstances, absent only the fact that Mr. Hill did fall.

[29] Like in **Smith v. Atlantic Shopping Centres Ltd.** the plaintiff in this instance did not immediately report his fall to the defendant. Rather, he left in his vehicle and only advised of the fall after visiting a Dr. Stewart on March 3, 2004. In his notes Dr. Stewart noted that this was six days after the apparent incident. Consequently, as in **Smith**, *supra*, there was no opportunity for staff of the Johnson Manor to inspect the site and determine what the conditions were at the location where Mr. Hill fell.

[30] Nevertheless, it is clear Mr. Hill did fall, and in view of the evidence of Ms. MacArthur I am satisfied it was likely on a small patch of black ice that was difficult to see. I am further satisfied that notwithstanding Mr. Hill's evidence that the parking lot was covered by ice, that such was not the case and prefer the evidence of Ms. MacArthur that this was an isolated patch of black ice, rather than ice that covered the entire parking lot. Ms. MacArthur testified that she herself had no difficulty in walking to the passenger door of the truck. Consequently, it appears that this was an isolated patch of black ice that had either been missed in the salting or sanding, or had occurred since the morning snow plowing. Although there was no direct evidence of snow plowing on the morning of the accident, there was similarly no evidence that the regime set in place by the defendants had not been observed, following the snowstorm that had occurred over the preceding night. I am unable to conclude that because there was a patch of black ice that this meant the parking lot had not been plowed or sanded and salted as was the usual policy, under the terms of the contract with Terra Excavating.

[31] In **Gallant v. Roman Catholic Episcopal Corp. for Labrador/Diocese of Labrador City-Schefferville**, *supra*, Justice Cameron after referencing the fourth principle, that an occupier is not a guarantor or insurer of the safety of the persons coming on their premises, and citing **Stevenson v. City of Winnipeg Housing Co.,** *supra*, that there is no duty to completely clear sidewalks of snow in a Winnipeg storm, at para. 28 added:

> Another example of the application of the last stated principle can be found in **Thuvenson v. Robert H. Ash & Associates**, [1997] B.C.J. No. 1177 (S.C.). Thuvenson had slipped on frost-covered steps located outside an apartment building. The defendant had a regular practice of clearing the steps early each morning. The defendant had cleared the steps on the morning of Thuvenson's fall, but had not had time to return to do them again. Frost had accumulated in the interim. The court, denying the claim of Thuvenson, found that the plaintiff had failed to prove that the stairs were frost-covered because of the defendant's failure to take reasonable steps to ensure that they were reasonably safe.

[32] It is unnecessary to decide whether Mr. Hill, as suggested by counsel for the defendants, failed to take reasonable care for his own safety. I am satisfied that the regime put in place by the defendants was reasonable in the circumstances. In this

regard I again reference **Gallant v. Roman Catholic Episcopal Corp. for Labrador/Diocese of Labrador City-Schefferville**, *supra*, at para. 30.

> In summary, it can be said that the experience in other jurisdictions where the general law of negligence has been applied to occupiers' liability has not been to place an onerous burden upon the occupier. Generally the courts examine the procedures used by the occupier to ensure reasonable safety for the visitor. What is reasonable is determined in the context of the circumstances of each case. This is illustrated by two cases in this province which have applied **Stacey**. In **Snook v. Rose** a home owner was held to be not liable to a person injured in a fall on his property in the circumstances described in paragraph 29, above. However, in **Saunders v. Sobey Leased Properties ltd.** (2000), 193 Nfld. & P.E.I.R. 146, affirmed [2001] N.J. No. 40, the defendant operator of a supermarket was held liable to a customer who tripped in a mat and fell. In **Saunders**, the supermarket had a system for checking the area where the mat was located but on the night in question the system was not implemented and the problem was not addressed.

[33] Absent evidence that the regime put in place by the defendants was not implemented on the morning in question, I am satisfied that the plaintiff has not established a breach of s. 4(1) of the *Occupiers' Liability Act* on the part of the defendants. The proceeding is therefore dismissed.

Damages

[34] Notwithstanding my finding that the plaintiff is unsuccessful, I will nevertheless provisionally determine the plaintiff's claim for damages.

[35] Essentially, the injuries resulting from the fall at Johnson Manor were to the plaintiff's left shoulder and left hip, with bruising on both locations. The hip resolved itself in relatively short order, but the shoulder became more painful as time passed. Mr. Hill first visited Dr. Graham Stewart on March 3, 2004, approximately a week or less after the accident. In his report of December 22, 2004 Dr. Stewart refers to the accident as having occurred on February 26, 2004 and that six days later he attended with pain and restricted movement, being unable to elevate his left shoulder either in forward flexion or abduction. Dr. Stewart further noted that the left hip, while bruised, could flex and rotate.

[36] His report to Dr. Amirault, the Orthopaedic surgeon who performed surgery on Mr. Hill, refers to the amputation of his left lower limb for bone cancer in 1982,

as well as other injuries and medical treatments he had received over the years. In 1970 he was involved in a motor vehicle accident which left him permanently disabled. Dr. Stewart also referred to his osteoarthritis and reviewed the various treatments he had received from the time of his first visit until the preparation of his report to Dr. Amirault.

[37] Predating the incident, as noted earlier, Mr. Hill was involved in an accident in which he injured his right shoulder. Dr. Stewart testified that he was fairly adept at getting around, and although his gait was not totally normal, he made accommodation. He did add, however, that he did not recover well, if he overbalanced or started to slip or fall. He treated him fairly conservatively but by October, 2004, in his report to then counsel for Mr. Hill, he noted that

> there was no significant improvement, and he was describing diffuse aches, often at nighttime. As well as the limited range of shoulder movement, though that had improved a little to approximately 90 degrees of both forward flexion and abduction.

Dr. Stewart testified this was approximately six months after the accident and his shoulder was not returning to its previous condition. He therefore contemplated referring him to an orthopaedic specialist.

[38] In addition to his left should problems, he also had pain in both wrists. Dr. Stewart's referral letter to Dr. Amirault, as noted earlier, is dated December 22, 2004 and outlined the background of Mr. Hill's complaints, the circumstances and his history.

[39] Dr. Amirault testified that on the morning of the surgery, following a discussion between himself, other staff persons and Mr. Hill, it was decided that because he was experiencing more pain in his right shoulder, the operation would be changed to that shoulder. The Operating Report, dated May 26, 2005 described the procedure followed in repairing the right rotator cup. Dr. Amirault's ambulatory care consultation report, following a visit by Mr. Hill on June 17, 2005, stated that he was doing well following the procedure with no pain.

> ...He is a little aggressive with his shoulder. I am a little concerned by this approach but he seems to be the type of guy you cannot keep down. We are going to ask him to press on with his exercises at home and we will review him in 2 months.

[40] Mr. Hill apparently attended on Dr. Amirault on August 26, 2005 as a follow up to his right rotator cuff repair. Dr. Amirault's report indicates that he was doing well, but then references the problem on the left shoulder and Mr. Hill indicating he would like to have something done. He was then booked for surgery for repair of his left rotator cuff. The operation took place April 11, 2006, some two years following the accident. Mr. Hill visited Dr. Amirault on April 24, 2006 for a post operative assessment of his left rotator cuff repair. Dr. Amirault recommended that he start some range of motion exercises and noted that he had declined physiotherapy and had agreed to exercise the shoulder on his own. Mr. Hill was next seen on June 5, 2006 and again on July 10, 2006. The report following the July 10th visit reads:

> This man was seen in followup of a rotator cuff repair on the left. At the time of the repair, he had an irreparable repair. He has also detached his deltoid. He only has 90 degrees of abduction and about 80 degrees of forward flexion. He has no pain, however, I would like to avoid any further surgery with this man. We are therefore going to start him on a physio program to strengthen what muscles remain in the shoulder.

[41] In a report, following a visit on October 2, 2006, it was noted that he had no tenderness over his left shoulder, but

> ...had quite limited range of motion, i.e. forward flexion 70-80 degrees, abduction 80 degrees, external rotation 20 degrees, internal rotation 60 degrees, and flexion 30 degrees. He had full range of motion in his elbow, wrist and hand...

[42] A further follow-up visit occurred on December 4, 2006, and it was again noted that he lacked a full range of motion, "especially lifting up the arm into the air." The report stated that physical examination revealed a range of motion with flexion to 100 degrees and abduction to 100 degrees. The report also indicated that he had almost a full abduction, internal rotation and external rotation. There was slight tenderness over the left rotator cuff. In the assessment the resident noted that Mr. Hill was advised that this was a long-term rehab process and that he should be able to improve the function of his left shoulder in the future.

[43] Dr. Amirault testified that the rotator cuff tear on the right shoulder, although severe, was not as massive as on the left shoulder. He did agree with defence counsel that the severity of the tear on the left shoulder could have

increased during the interval between the incident and the repair of the left rotator cuff in April 2006. He described, in the repair of the left rotator cuff, that the repair was not complete in that they were not able to attach all of the muscles.

[44] On cross examination he agreed that if an injury, such as occurred with Mr. Hill, was left untreated for a year it could worsen. He agreed with defence counsel that he recommends physiotherapy after any rotator cuff surgery and that usually where a patient does not follow recommendations the range of motion is poor and the shoulder can become stiff. He commented that if a person does not go to physiotherapy their future is likely not as bright as for someone who does. Although he was not aware whether Mr. Hill attended physiotherapy, it appears from the evidence that he did so on two occasions following the surgery on the left shoulder. Dr. Amirault said the fact he was experiencing no pain was a positive and that there would be, and continue to be, a limited range of motion. He concluded by indicating that the left shoulder should improve, but there would never be full recovery.

[45] Both counsel referenced the decision of Justice Stewart in **Singer v. Power**, 163 N.S.R. (2d) 1. The plaintiff's motor vehicle was struck from behind. He did not note any immediate injury but later experienced stiffening in his neck and shoulder. He was diagnosed with shoulder, elbow and cervical stress. Most of his pain and injuries resolved themselves, however his shoulder difficulty intensified. A bone spur and rotator cuff tear were discovered and he underwent surgery. The rotator cuff injury was determined to have been likely caused by the impact of the accident. He was awarded $38,000.00 for pain and suffering. The court noted that his enjoyment of life and ability to work and perform daily tasks were impaired. Damages were slightly reduced to account for his failure to seek earlier treatment for debilitating depression caused by the accident.

[46] Plaintiff's counsel stated that the award, before the reduction, was $40,000.00 and would be the equivalent in 2010 to $51,300.00. She described the injuries to the plaintiff in **Singer v. Power**, *supra,* as similar to those experienced by Mr. Hill.

[47] Also referenced by counsel for the plaintiff was **Randall v. Ramia**, 2006 NSSC 291, where the plaintiff suffered a moderate injury to his shoulder and back as a result of a motor vehicle accident. The court found he failed to mitigate his damages by not following through with a bone scan, as had been recommended.

He was awarded $18,000.00 for injury which counsel equated to $19,200.00 in 2010. Also cited was **Gaudet v. Keay an Central Amusement Company Limited**, 2002 NSSC 63, where the plaintiff was injured and suffered cervical whiplash-type injury to his neck and the aggravation of a pre-existing shoulder problem. His shoulder remained a problem for over two years and he experienced emotional problems associated with post traumatic stress and depression during this period. He was awarded $30,000.00 for non-pecuniary general damages which counsel equated to $35,000.00 in 2010.

[48] In summary, counsel for the plaintiff suggests that Mr. Hill's injuries more closely approximate the injuries occasioned to Mr. Singer and suggested general damages in the amount of $50,000.00.

[49] On the other hand, after referencing **Singer v. Power**, *supra*, defence counsel suggested damages in the range of $40,000.00 for the "persistently troubling, but not totally disabling injury." Counsel also suggested that the failure to mitigate should result in a reduction. During oral submission following the evidence, counsel suggested that in view of the evidence at trial the award of general damages should be somewhat less.

Mitigation

[50] Defence counsel maintained that there has been a failure, by the plaintiff, to mitigate his damages by his non-attendance at physiotherapy as had been recommended. The report of Physiotherapy Services dated August 15, 2006 noted that he attended for two treatments on July 20, 2006 and August 1, 2006 and then had not kept any further appointments and as a result they would not be re-booking any further appointments. The notes include that, "Pt chose not to rebook any further appointments as he feels his shoulder has plateaued in function."

[51] Counsel observed that in **White v. Slaughter** (1996), 149 N.S.R. (2d) 321, the Nova Scotia Court of Appeal found there had been a failure to mitigate by reason of the refusal to follow the recommendations of the treating physicians. Freeman, J., in rendering the reasons of the court, at para. 88, observed:

> If the plaintiff diligently attempts to mitigate his damages and no improvement results, he will then be entitled to recover damages in full measure for the disabilities that continue from secondary causes related to the initial

> injuries, even in the event of full recovery from the initial injuries. If, however, there is medical evidence that a substantial improvement could have been expected in the plaintiff's condition if he had followed medical advice, and he failed to follow it, then he will be deprived of damages resulting from his own failure. This will be taken into account in the assessment of damages even if there is only a likelihood falling well short of certainty that the recommended treatment will be successful...

[52] Dr. Amirault conceded to defence counsel that it is possible, if Mr. Hill had followed the physiotherapy program that had been recommended, that he may have achieved additional functioning of his left rotator cuff, such that his range of motion would not have been as restricted as it is now. He, however, also stated that he did not believe he would ever have achieved a return to the level of function that he had experienced previously.

[53] Mr. Hill stated that he did not have the resources to attend physiotherapy. He indicated that it was an approximately one-hour drive from his residence to where he could receive such treatments and it was outside his resources. However, he also testified that at least weekly, and sometimes more frequently, he attended in Truro to visit his mother in the Johnson Manor. Although he stated that some of these would be trips that occurred at the last moment, apparently because his work activities would bring him to Truro, it is nevertheless clear that he had the ability to attend in Truro and to attend physiotherapy, if he had so wished. Although he stated he performed the exercises that were recommended to him, at home, it is clear Dr. Amirault was recommending a physiotherapy program rather than simply at-home exercises. In view of his decision not to attend physiotherapy, he was provided with these exercises, which Mr. Hill said he followed and performed at home.

[54] The defence counsel suggested, referencing **Davis v. Shields**, 2010 NSSC 80, where the court reduced damages by 50% for failure to mitigate, that a similar reduction should take place in the present instance. However, in **Davis v. Shields**, *supra*, Justice Haliburton found the plaintiff had rejected any consideration of the psychological counselling, that had been recommended, "out of hand." At para. 90 he observed:

> Here, two experts in rehabilitative medicine gave virtually identical testimony that it is statistically established that individuals suffering whiplash injuries of the type suffered by the plaintiff can be expected to entirely or almost

> entirely recover over a relatively short period of time. Where the symptoms have persisted for a period of time and the patient has developed what they have referred to as the "whiplash syndrome", the rehabilitative period is extended and demands a psychological or psychiatric treatment component in order to be effective.

[55] Dr. Amirault did indicate that he recommends physiotherapy with every rotator cuff surgery, but his expectation with respect to the left shoulder was that it was never going to be 100%. This was because it was a massive tear. At the end of the day he said his recovery was probably about 60% of normal. He acknowledged that usually if a patient does not follow the recommended course of physiotherapy treatment, their range of motion remains poor.

[56] Also raised by counsel for the defendants was the decision by Mr. Hill, in consultation with Dr. Amirault and the others, to proceed with the rotator cuff repair of the right shoulder rather than the left during the initial procedure. However, as has often been said and was referenced by the Nova Scotia Court of Appeal in **White v. Slaughter**, *supra*, the defendants must take the plaintiff as they find him which would include the fact that Mr. Hill, at the time of the accident had already suffered an injury to his right shoulder. Absent is any authority that would require Mr. Hill to proceed with the repair of the left shoulder, when at the time of the initial procedure it was his right shoulder that was causing him more pain. The delay in the procedures, both in respect to the right shoulder, and then later to the left shoulder, were indicated by Dr. Amirault to be the result of the wait-times for surgical procedures now in place in this Province. They were not, as Dr. Amirault testified, the result of any failure on Mr. Hill's part to get medical treatment, and corrective procedures, as early as possible.

[57] The issue of mitigation therefore rests on the submission by the defence that had he followed the recommended course of physiotherapy in respect to his left shoulder, the degree of restriction he now experiences would have been less. Dr. Amirault said this could be a possibility in the circumstances.

[58] Although there would not appear to be the degree of certainty considered by Justice Haliburton in **Davis v. Shields**, *supra*, or evidence of any "substantial improvement" as referenced by Justice Freeman in **White v. Slaughter**, *supra*, I am satisfied that some allowance should be made, to recognize that failure to follow his physician's advice, and the possibility that his degree of impairment

could have been lessened if he had done so, in the absence of satisfactory reasons for not doing so, amounts to a failure to mitigate. In this circumstance the reasons advanced by Mr. Hill were unsatisfactory. He was able to attend in Truro when it suited his purpose. A plaintiff is obligated to take such reasonable steps as may be required to effect recovery from his injuries or to provide a satisfactory explanation for not doing so. Mr. Hill's "out of hand" decision not to do so, does not amount to a satisfactory explanation.

[59] If liability had been found on the part of the defendants, I would have awarded Mr. Hill general damages in the sum of $40.000.00 less a reduction of $5,000.00 on the basis of the failure to mitigate.

[60] Counsel advised that they have agreed on the majority of special damages. If necessary, the one remaining item of special damages, which has not been finalized, they have indicated they would anticipate resolving. In the event Mr. Hill had been successful, the special damages as claimed would therefore have been awarded in addition to the general damages.

[61] Counsel for the plaintiff also advised, in her written submission, that the Department of Health had a subrogated claim in the amount of $5,010.57 pursuant to the *Health Services and Insurance Act*, R.S.N.S. 1989, c. 197, (as amended). Unclear is whether some of that claim relates to the treatment of the right shoulder and therefore whether it is not an appropriate part of a claim for subrogation in this proceeding. If necessary, counsel may address the issue whether or not the subrogated claim should be adjusted.

[62] The plaintiff would also have been entitled to prejudgment interest at the rate of 2.5% per annum on the award of general damages.

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A. David MacAdam