IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Leslie v. S & B Apartment Holding Ltd., 2011 NSSC 48

Date: 20110203
Docket: Tru No. 272838
Registry: Truro

Between:

Alissa Leslie and Harry Bryson

Plaintiffs

v.

S & B Apartment Holding Limited

Defendant

Judge:	The Honourable Justice N. M. Scaravelli
Heard:	September 20, 21, 22, 23, 27, 28, 29, 30, 2010, in Truro, Nova Scotia
Counsel:	Jamie MacGillivray, Esq., and Nicolle Snow, for the plaitniffs Colin Piercey, Esq., and Nathan Sutherland, Esq., for the defendant

By the Court:

[1] This is an action for damages arising out of injuries suffered by the plaintiffs when they escaped a fire by jumping from the top floor of a three-storey apartment building owned by the defendant.

[2] Liability and damages are at issue in this case.

Background

[3] The plaintiffs were occupying apartment No. 302, 265 Young Street, Truro at the time of the fire. The apartment building consisted of 12 units with three floors. The first floor was below ground level and was accessed by entering the building and walking downstairs. Each of the three floors contained four apartment units all accessed by way of a common hallway with two apartments on each side of the common hallway. Self closing doors were located at both ends of the common hallway leading to stairs and stairwells used for entering and exiting the building. The stairwell located on the south side of the building led to the front door. The north stairwell led to the back door of the building. The plaintiff, Ms. Leslie's apartment was located on the top floor at the north-east corner adjacent to the north stairwell.

She was the tenant and resided in the apartment with her two young children and occasionally with her partner at the time, the plaintiff Harry Bryson. Her lease commenced September 1st, 2005, approximately one year before the fire.

[4] The apartment building had a fire alarm panel located on the first floor of the basement hallway. Each floor had a fire alarm bell system located in the centre of the hallway on the wall that was wired into the fire alarm panel. A fire alarm pull-station was also located on the wall next to the bell system. Each hallway contained a smoke or heat detector located on the ceiling. Each stairwell also had a smoke detector located on the ceiling above the stairwell. These were also wired into the fire alarm panel. In addition, each apartment had its own battery-operated smoke detector.

[5] This apartment building was identical in layout to an adjacent apartment building located at 269 Young Street and owned by the defendant at the time. According to the CMHC insurance certificate prepared at the time of acquisition of both properties by the defendant, the attic of the apartments were divided into two sections by a firewall running north and south along the ceiling hallway dividing the eastern portion of the roof from the western portion.

The Fire

[6] On the evening of August 24th, 2006, Ms. Leslie and Mr. Bryson were both in the apartment. Ms. Leslie's older son was staying overnight at his grandmother's home. Her younger son was asleep in his bedroom. Mr. Bryson stated he went to bed that evening around 10 p.m. Ms. Leslie was in the livingroom. He believes she woke him around 1 a.m. and told him there was a fire as the apartment was full of smoke. They walked to the living room window and saw flames and sparks on the overhanging eves of the roof. He also saw smoke coming out of the window at the north stairwell landing below and to his left. He stated it was quiet. There was no sound of fire alarm in the building or sirens outside. He spoke through the window opening to people standing outside. Shawna White, a tenant, told them the exit doorways were on fire and they would have to jump. The smoke in the apartment continued to worsen.

[7] Mr. Bryson stated he told Ms. Leslie they were going to have to jump. He went to the child's bedroom and Ms. Leslie went to her bedroom. Mr. Bryson was able to tie bedding around the child and lower him out of the bedroom window to people below. Mr. Bryson made an effort to go to Ms. Leslie's bedroom but could not see.

He called her name. Hearing no reply he assumed she got out through her bedroom window. He went back to the child's bedroom to await for assistance from the fire department. To avoid being overcome by smoke he placed a stuffed animal over his face to assist his breathing. He repeatedly moved in and out of the window to get fresh air. He still could not hear the sound of the fire department. Mr. Bryson stated that sparks and building fragments were floating around him as he hung from the window. He decided to let go, landing on his feet suffering extensive injuries to his legs. He estimated 10 minutes expired from the time he was awakened to the time he let go from the window. He saw Ms. Leslie lying on the ground when he was on the ground. They were removed to an ambulance and taken to the hospital.

[8] Mr. Bryson stated he is no longer in a relationship with Ms. Leslie. He has been in another relationship for the past two years.

[9] Mr. Bryson stated he was familiar with the apartment building as he previously stayed with his sister who occupied two apartments in the building prior to Ms. Leslie's tenancy. He stated the hallway doors to the stairwells were self-closing. These doors were open most of the time. The self-closing hinge on the north hallway door adjacent to Ms. Leslie's apartment was broken and not repaired at the time of the

fire. The window in the north stairwell was open most of the time causing the door to slam shut with a gust of wind. Mr. Bryson stated there were no fire extinguishers located in the building. There was a smoke detector in Ms. Leslie's apartment hallway ceiling between the living room and bedroom. He had never replaced any batteries in the unit nor did he ever hear the unit beeping at any time.

[10] Ms. Leslie testified she was asleep on the living room sofa when she woke up "gaging and gasping, unable to breath". There was blackness all around her. She walked through the open bedroom door to wake Mr. Bryson. There was a lot of smoke in the bedroom. She believes the bedroom clock showed the time as 1:12 a.m. Ms. Leslie stated they called out for help through the window. Shawna White, a tenant, told them the building was on fire. Ms. Leslie saw smoke and flames coming out of the lower stairwell window on the north side of the building. She stated the over hanging portion of the roof was in flames. Mr. Bryson helped her to a sitting position on the bedroom window and left to go to the child's bedroom. He later shouted that he had the child. Ms. Leslie stated by this time the room was completely black and she was unable to see. She was weak from breathing. She moved from a sitting position hung from the window with her hands before letting go. Ms. Leslie

suffered serious injuries from the fall. She recalls it being very quiet outside with no sign or noise of fire trucks.

[11] Ms. Leslie testified the hallway door had “cranks” at the top of each door. She stated the doors were always open and she believed that maybe the purpose of the crank was to keep the door open. She stated that Mr. Lloyd, the superintendent, never told them to keep the hallway doors closed.

[12] Ms. Leslie stated the smoke detector in her apartment was located between the kitchen and the bedroom. Mr. Lloyd did not tell her whether it was battery operated or wired into the system. She assumed the smoke detector was connected to the main system. She could not recall ever seeing a light on the smoke detector. There were never any beeping noises coming from the smoke detector that would indicate a weak battery.

[13] Under cross-examination she confirmed her discovery evidence that she had no specific recollection of the time of 1:12 a.m. but stated this stuck in her mind from viewing the bedroom clock. She further stated the hallway doors were always open on her floor. When she awoke there was no sound from a smoke detector. While

sitting on her window ledge she recalled seeing the ambulance on Young Street. She believes the ambulance arrived before the fire trucks. She estimates the time lapse from waking to exiting from the window to be five to six minutes. Ms. Leslie acknowledged she did not know where the fire was in relation to her apartment when she woke up. She made the decision to jump because her apartment was full of smoke, the building was on fire and the fire department was not there.

[14] Mrs. Christie, who is the mother of the plaintiff Ms. Leslie, testified she visited her daughter and grandchildren at the apartment on a regular basis, at least once per week. She stated the hallway doorways to the stairs were always open. She did not know how they were held open.

[15] Shawna White was a tenant of apartment 303 located on the north-west side of the upper floor directly across the hallway from the apartment occupied by Ms. Leslie. She testified the third floor hallway doors were always in the open position. They were held open by wooden stops wedged under the doors. She stated she became aware of the fire around 12:30 a.m. when she was awakened by her roommate. They opened the apartment door and noted the hallway was pitch black. They closed the door and went to a window in their apartment and called for help. When they went

back to the apartment door to attempt to leave, the door would not open. Both Ms. White and her roommate escaped by jumping out the apartment window.

[16] On cross-examination Ms. White acknowledged making a previous statement wherein she stated she woke up around 12:30 a.m. and asked two visitors in the apartment to leave. In her statement she indicated the visitors were there close to 1:00 a.m. and to her knowledge there was no fire when they left. She adopted this statement as being accurate. Ms. White stated five to ten minutes could have passed until they tried to open the apartment door the second time. She could not recall previously stating she heard door bells sounding. Although she could not recall making this statement she adopted it as being accurate.

[17] On re-direct examination, Ms. White confirmed her previous statement that there was no indication of any fire alarms sounding.

[18] David Westlake, Deputy Fire Chief, testified the fire was called in at 1:26 a.m. He estimated a fire truck arrived on scene at approximately 1:30 a.m. He stated a call was made to the ambulance service on route, but he was not aware of the time of

arrival. His report indicates that firefighters assisted tenants from the third floor south-west corner apartment using an extension ladder.

[19] Robert Orr, now retired, was Deputy Fire Marshall for the Province of Nova Scotia since 1989. He was contacted by the Truro Fire Chief to investigate the fire. The defendant's insurance company had retained Maritime Fire Investigations, operated by Mr. Greg Clarke, to conduct a fire investigation. It was agreed the two would conduct a joint investigation. Mr. Orr prepared a report based on notes he took at the time. He arrived on the scene around 7:15 a.m. the morning of the fire. The building was essentially a wooden structure with vinyl siding on exterior walls and asphalt roof shingles. He observed the roof was completely burned out. The third floor hallway was blackened. Mr. Orr determined the fire started at the south-west corner of the hallway on the third floor. He stated it was a fast, hot fire that burned through the ceiling hatch, throughout the roof and down the south stairwell towards the front entrance. The south hallway door was in an opened position at the time of the fire which allowed the fire to go downstairs. He referred to hallway doors as "fire doors" which are required to be self-closing. There was heavy burning on the south stairs. The fire also worked its way north along the third floor hallway. He could not recall if the north stairwell door was opened or closed.

[20] In his fire investigation report dated September 5th, 2006, Mr. Orr states he spoke to Mr. Lloyd, the Building Superintendent, at the scene who told him the fire alarm did not operate when pulled by him and had not been working for some time. Also the smoke alarms did not work so the tenants did not have advance warning of the fire. Mr. Orr testified he took notes at the time. He stated the fire alarm and smoke detectors were designed to go off automatically as they were wired into the fire alarm system. The fire alarm system could also be pulled manually at the pull-station in the hallway. He stated no accidental cause of the fire could be found. He suspected some form of accelerant may have been spread on the hallway and south stairs that caused the fire to burn so fast. Although, the cause of the fire remained undetermined following testing, it was suspected that the fire was incendiary in nature.

[21] On cross-examination Mr. Orr explained tenants would not have had any warning as the smoke detectors would not have detected smoke and gone off. Although not expressed in his report, Mr. Orr thought the tenants would have been unable to escape via the hallway as the fire burned hot and fast.

[22] Mark Wentzel, an electrical engineer, investigated and prepared a report at the request of Maritime Investigation Services who were retained by the defendant's insurers. Mr. Wentzel was called to give evidence by the plaintiff. Mr. Wentzel examined the electrical system five days after the fire, having been advised the fire alarm did not sound in the building at the time of the fire. He testified the fire alarm panel system was 25 to 30 years old. Upon examination, there was no fire damage to the fire panel on the lower floor. He noted corrosion in the panel likely caused by water. He could not find an annual inspection log which he expected should have been located at the panel. Mr. Wentzel testified the fuse on the bell circuit was blown and not the fuse on the fire alarm panel as he stated in his written report to Maritime Investigations. This was determined on a subsequent investigation a number of months later. He concluded there was no evidence the system was operating at the time of the fire. There was no electrical arcing that caused the fire. He speculated that the fire may have burned the fuse. He was not conclusive on this point nor was this mentioned in his written report. Mr. Wentzel did acknowledge that the wired-in smoke detectors should go off before the bell circuit could possibly overheat to cause the fuse to blow.

[23] Ken Lloyd, Building Superintendent, testified on behalf of the defendant. He and his family resided in Unit 204 located on the second floor of the building. He described his duties as general maintenance including cleaning, painting, light fixtures and drywall work. In response to Mr. Bryson's assertion that the third floor hallway lights were burnt out and the self-closing arm on the north hallway door was broken, Mr. Lloyd stated this may have been the case, and if so, he believed he "would have" changed the light and repaired the arm. Mr. Lloyd explained that he was always working 12 hour shifts at another job during this period which may have prevented him from performing repairs in a timely manner. Mr. Lloyd stated there was an on-going problem with the third floor hallway doors being kept open as fire code required they be closed. He stated the tenants would use various items to prop the door open and upon discovery he would remove the door stops and close the door.

[24] Mr. Lloyd was asleep at the time of the fire and was awakened by a tenant shouting from outside the building. He looked out his window and saw a glow coming off the adjacent apartment building. He also saw smoke and flames coming from the south entrance doorway. Mr. Lloyd stated there was no fire alarm bell sounding when he woke up. He got his family out through the living room window. He then exited his apartment door to the hallway and encountered what he described

as wall of smoke. He touched his way along the wall and pulled the fire station handle. The alarm did not go off. He then knocked on the door of the other two occupied apartments on his floor alerting the tenants. When he returned to his apartment he saw a glow through the window of the closed south hallway door. He then went to the closed north hallway door and felt a lot of heat. Mr. Lloyd returned to his apartment and climbed out of his apartment window.

[25] Mr. Lloyd testified he had no prior knowledge of the fire alarm system not working. He stated the alarm system had gone off before with false alarms and kids smoking. He estimated the last time the alarms sounded was two or three months prior to the fire. He was not aware if any inspections of the alarm system were ever carried out. He stated he did not recall speaking to Mr. Orr, retired Deputy Fire Marshall, who was investigating the fire.

[26] Under cross-examination, Mr. Lloyd did not dispute Mr. Orr's assertion that he had spoken with Mr. Lloyd. His position was that he did not remember the conversation. When questioned about Mr. Orr's testimony wherein Lloyd told him there were problems with the fire alarm system not working on previous occasions, Mr. Lloyd stated he would not have said that. He stated it was not his role to maintain

the hallway fire alarms. Mr. Lloyd confirmed there were not any fire extinguishers located in the building. He stated the fire alarm system was very sensitive and was previously set-off by cigarette smoke. He did not check the hallway doors on the third floor on the evening of the fire as he was working that evening.

[27] Mr. Lloyd stated he spoke with the plaintiff Mr. Bryson while Bryson was sitting on the apartment window ledge “trying to get fresh air”. He told Bryson to wait for the fire department. Mr. Lloyd acknowledged that other tenants on the third floor as well as himself left the building through apartment windows prior to the arrival of the fire department.

[28] Mr. Salah was manager of the apartment building owed by the defendant. He testified he would travel from Halifax to check on the property twice a month. He did not know much about the fire alarm system and assumed it was working as Mr. Lloyd had previously complained about kids and false alarms “shortly” before the fire. He did not instruct Mr. Lloyd to have the alarm system inspected on a regular basis.

[29] Under cross-examination, he acknowledge the fire alarm system was not maintained or inspected.

[30] Mr. Greg Clarke, President of Maritime Investigation Services, testified on behalf of the defendant. He is a certified fire explosion investigator. He investigates origins and causes of fires. Mr. Clarke took extensive photos of the damaged building following the fire in conjunction with his written report. He also submitted samples for testing for possible accelerant that may have caused the fire. The testing was negative which did not surprise Mr. Clarke as a flammable liquid, if it existed, could have been consumed in the fire. His conclusion is that the cause of the fire remains undetermined.

[31] During Mr. Clarke's testimony he indicated there were possibly three areas of origin of the fire, namely, the south-west third floor hallway, the south stairwell and the south entrance, given the severity of burning in these areas. He was unable to determine if the fire burned up or down the stairs. Regarding the third floor, Mr Clarke stated the fire burned through the ceiling hatch to the roof. The photos revealed the south-west corner of the roof received the heaviest fire damage. He acknowledged the attic firewall would have slowed the progress of the roof fire from the west side of the roof to the east side of the roof.

Liability

[32] The Supreme Court of Canada summarized the elements required to make out a claim for damages and negligence in the case ***Mustapha v. Culligan of Canada Ltd.,*** [2008] S.C.C. 27.

> [3] A successful action in negligence requires the plaintiff demonstrate (1) that the defendant owed him a duty of care; (2) that the defendant's behaviour breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach . . .

[33] The defendant concedes that, as landlord, it owed a duty of care to the plaintiffs. The defendant denies it breached the standard of care. Further, the defendant concedes the plaintiffs suffered damages but denies they were caused by any act or omission by the defendant.

Duty of Care

[34] The common law duty of care arises from the proximity of the relationship between a landlord and the tenants of its multi-unit residential building. In this case,

the defendant owed a duty of care to the plaintiffs to ensure they were reasonably safe from injury while residing in the premises. In my view this would reasonably include the installation and maintenance of an operational fire alarm system.

[35] The defendant was also subject to statutory obligations. The ***Residential Tenancies Act*** sets out statutory conditions that apply to all residential leases including the requirement to keep the premises in a good state of repair and to comply with any statutes regarding safety. The National Fire Code of Canada (adopted by the ***Nova Scotia Fire Safety Act***, S.N.S. 2002, c. 6) required the installation of an operational fire alarm system which must be tested yearly. Also, yearly testing of the smoke alarms was required.

[36] I accept Mr. Bryson's evidence regarding the broken self-closing hatch on the opened north hallway door at the time of the fire. I also accept Mr. Orr's evidence of his conversation with Mr. Lloyd regarding the malfunction of the alarm system. Mr. Lloyd lacked any specific recollection regarding these issues. Further, I accept the evidence of the plaintiffs and the other witnesses who testified the hallway doors on the third floors were continuously left in an open position and that the plaintiffs

were not advised by the defendant nor were they aware that the doors were to be kept in a closed position.

[37] Although there is no evidence the defendant was responsible for the fire, I find the defendant's conduct created an unreasonable risk of harm in the event of a fire. The fire alarm system was not functioning at the time of the fire. There were problems with the fire alarm system not functioning prior to the fire which was known to the defendant's supervisor; the defendant did not maintain, test, or inspect at all, its fire alarm system that was in excess of 25 years old at the time of the fire; the self-closing hallway "fire doors" on the third floor were continually in an open position and the north hallway door adjacent to the plaintiff's apartment, which was open at the time of the fire, had a broken self-closing latch at the time of the fire; the battery operated smoke alarm in the plaintiff's apartment did not function at the time of the fire. The plaintiff, Ms. Leslie, was uninformed and unaware as to whether the smoke detector formed part of the fire alarm system or was self-contained and the responsibility of the tenant.

[38] The defendant's conduct resulted in the failure to provide the benefit of warning of the existence of smoke and/or fire in the apartment building. As a result, the defendant breached the standard of care owed to the plaintiffs.

Causation

[39] Having determined the defendant breached the standard of care, I am required to determine whether the plaintiffs, on a balance of probabilities, established the defendant's acts or omissions caused the injuries and, therefore, the damages suffered by the plaintiffs.

[40] The Supreme Court of Canada has confirmed the "but for" test as the basic test for causation in negligence actions while stating that the "material contribution" test may be applied under certain circumstances. These general principles for causation were reviewed in ***Resurfice Corp. v. Hanke,*** 2007 SCC 7:

> 21. First, the basic test for determining causation remains the "but for" test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory negligence may be apportioned, as permitted by statue.

22. This fundamental rule has never been displaced and remains the primary test for causation in negligence actions. As stated in *Athey v. Leonati,* at para. 14, per Major J., "[t]he general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant". Similarly, as I noted in *Blackwater v. Plint,* at para. 78, "[t]he rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities."

23 The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and the defendant's conduct is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone": *Snell v. Farrell,* at p. 327, per Sopinka J.

24. However, in special circumstances, the law has recognized exceptions to the basic "but for" test, and applied a "material contribution" test. Broadly speaking, the cases in which the "material contribution" test is properly applied involve two requirements.

25. First, it must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test. The impossibility must be due to factors that are outside of the plaintiff's control: for example, current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. In other words, the plaintiff's injury must fall within the ambit of the risk created by the defendant's breach. In those exceptional cases where these two requirements are satisfied, liability may be imposed, even though the "but for" test is not satisfied, because it would offend basic notions of fairness and justice to deny liability by applying a "but for" approach.

26. These two requirements are helpful in defining the situations in which an exception to the "but for" approach ought to be permitted. Without dealing exhaustively with the jurisprudence, a few examples may assist in demonstrating the twin principles just asserted.

> 27. One situation requiring an exception to the "but for" test is the situation where it is impossible to say which of the two tortious sources caused the injury, as where two shots are carelessly fired at the victim, but it is impossible to say which shot injured him: *Cook v. Lewis*, 1951 CanLII 26 (S.C.C.), [1951] S.C.R. 830. Provided that it is established that each of the defendants carelessly or negligently created an unreasonable risk of that type of injury that the plaintiff in fact suffered (i.e. carelessly or negligently fired a shot that could have caused the injury), a material contribution test may be appropriately applied.
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> 28. A second situation requiring an exception to the "but for" test may be where it is impossible to prove what a particular person in the casual chain would have done had the defendant not committed a negligent act or omission, thus breaking the "but for" chain of causation. For example, although there was no need to rely on the "material contribution" test in *Walker Estate v. York Finch General Hospital*, this Court indicated that it could be used where it was impossible to prove that the donor whose tainted blood infected the plaintiff would not have given blood if the defendant had properly warned him against donating blood. Once again, the impossibility of establishing causation and the element of injury-related risk created by the defendant are central.

[41] In order to determine causation using the "but for" test in the present case it would have to be possible for the plaintiffs to prove that, but for the failure of the defendant to maintain a functional smoke and alarm system and/or closed north hallway fire door, the plaintiffs would have had sufficient time to exit their apartment and escape down the adjacent north stairwell or to await rescue by the fire department before being overcome by smoke and jumping from the window. In my view, evidence is not available to establish the progress of the rate of smoke and fire from

the south end to the north end of the third floor hallway over a time line which would be necessary to meet the test. Although the fire was described as a hot and fast fire, there was no available evidence to prove on a balance of probabilities how much time the plaintiffs would have had to escape down the adjacent north stairwell or how much time they would have had to wait for the fire department had the smoke or fire alarm activated.

[42] Based on the evidence, there were three possible locations where the fire may have originated, namely, the southwest corner of the third floor hallway, the south stairwell, and the south entrance. The plaintiffs' apartment was located on the north east corner of the third hallway adjacent to the north stairwell. There is evidence the fire likely occurred between 12:30 and 1 a.m. The plaintiffs were awakened by smoke at 1:12 a.m. By this time Ms. White and her roommate were already outside the apartment building. The fire was called into the fire department of 1:26 a.m. and the first fire truck arrived at approximately 1:30 a.m., a response time of four minutes.

[43] When the plaintiffs were first awakened by smoke and looked out their window the fire had already worked its way up through the third floor attic hatch to the roof and from the west side of the attic fire wall to the east side of the roof eves where

flames were visible to the plaintiffs. At this time the plaintiffs could also see smoke and flame coming out of the open north stairwell window. Smoke preceded the fire on the third floor hallway. Smoke and fire were able to freely flow to the north stairwell as a result of the fire door being open at the time. There is no evidence capable of establishing with sufficient probability, the time of the fire in relation to the time the fire alarm or smoke detector would have sounded, the proximity of the smoke or fire to the plaintiffs' apartment at that time and the amount of time it took the smoke or fire to engulf the north end of the hallway.

[44] Under the circumstances of this case I find it appropriate to apply the "material contribution" test. The fact that the defendant was not responsible for starting the fire does not excuse liability where the defendant's conduct materially contributed to the plaintiffs injuries. In ***Athey v. Leonati*** [1996] S.C.J. No. 102 the Court stated:

> 13. Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury: Snell v. Farrell, [1990] 2 S.C.R. 311; McGhee v. National Coal Board, [1972] 3 All E.R. 1008 (H.L.).
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> 15. The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury: Myers v. Peel County Board of Education; [1981] 2 S.C.R. 21, Bonnington Castings, Ltd. v. Wardlaw, [1956] 1 All E.R. 615 (H.L.); McGhee v. National Coal Board,

supra. A contributing factor is material if it falls outside the de minimis range: Bonnington Castings, Ltd. V. Wardlaw, supra; see also R v. Pinske (1988), 30 B.C.L.R. (2d) 114 (B.C.C.A.), aff'd [1989] 2 S.C.R. 979.

16. In Snell v. Farrell, supra, this Court recently confirmed that the plaintiff must prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision; as Lord Salmon stated in Alphacell Ltd. v. Woodward, [1972] 2 All E.R. 475, at p. 490, and as was quoted by Sopinka J. at p. 328, it is "essentially a practical question of fact which can best be answered by ordinary common sense". Although the burden of proof remains with the plaintiff, in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof.

17. It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. To borrow an example from Professor Fleming (The Law of Torts (8th ed. 1992) at p. 193), a "fire ignited in a wastepaper basket is . . . caused not only by the dropping of a lighted match, but also by the presence of combustible material and oxygen, a failure of the cleaner to empty the basket and so forth". As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.

18. This proposition has long been established in the jurisprudence. Lord Reid stated in McGhee v. National Coal Board, supra, at p. 1010:

> It has always been the law that a pursuer succeeds if he can shew that fault of the defender caused or materially contributed to his injury. There may have been two separate causes but it is enough if one of the causes arose from fault of the defender. The pursuer does not have to prove that this cause would of itself have been enough to cause him injury.

> 19. The law does not excuse a defendant from liability merely because other casual factors for which he is not responsible also helped produce the harm....(Citations omitted).

[45] The wired-in smoke detectors, when in a working condition, were sensitive to smoke. There is evidence that prior false alarms related to smoking cigarettes in these areas. Failure of the smoke detectors or fire alarms to activate allowed time for the smoke and fire to progress before being detected by the plaintiffs. The open north stairwell door allowed the smoke and fire to spread down the stairwell more quickly.

[46] I find the relevant factors relating to the plaintiffs' injuries are sufficiently connected to the defendant's negligence.

Contributory Negligence

[47] The defendant claims the plaintiffs share responsibility for any liability assessed to the defendant. That their contributory negligence arises from the unreasonable actions of the plaintiffs when they discovered the fire. Further that the plaintiffs failed to ensure the battery-operated smoke alarm in their apartment was functional.

[48] Ms. Leslie stated she was aware that smoke detectors in the hallways and stairwells and the fire alarm were wired into the central system. She assumed the smoke detector located in her apartment was also wired in. She did not observe any lights or beeps coming from the smoke detector in her apartment. There was nothing contained her lease regarding the responsibility of maintaining the smoke detector in her apartment. She stated she was not advised by the supervisor that her smoke detector was battery-operated and was her responsibility to maintain. Ms. Leslie was not challenged on this evidence. Mr. Lloyd's evidence was that he would normally change smoke detectors in apartments upon requests and after tenants moved out. I find the plaintiffs acted reasonably in escaping out of the windows where the building was on fire, they were being overcome by heavy smoke in their apartment and there were no fire trucks present at the time to assist in a rescue.

[49] Under the circumstances, I am not satisfied there was any contributory negligence on the part of the plaintiffs.

Damages - Mr. Bryson

[50] The plaintiff Harry Bryson, is 37 years of age. As a result of jumping out of the third floor apartment window and landing on his feet he sustained serious fractures to both ankles and a fracture of the fibula of his left leg. He was transported by ambulance to Colchester Regional Hospital in Truro for assessment and thereafter to Queen Elizabeth II Health Services Centre in Halifax. He underwent surgery the same day for his left fibula fracture. Further surgery was performed on his left ankle on September 11th, 2006 and his right ankle on September 14th, 2006. The surgeries involved insertion of plates, screws, and pins. As well, external metal fixtures were attached to immobilize the limbs. The surgeries were performed by Dr. Coles, Orthopaedic Surgeon. Mr. Bryson was immobilized to the extent of non-weight bearing on his legs. He was discharged from the hospital on September 18, 2006.

[51] Mr. Bryson testified he remained non-weight bearing until December 2006. He mobilized by way of wheelchair. In December he utilized a walker and cane but continued to use the wheelchair for longer distances. He stopped using the wheelchair in the Spring of 2007. During convalescence he stayed with his father in Bible Hill and later with his sister in her apartment. He relied upon them for meals, bathing and toiletry. He continued taking Dilaudid for pain and as well as sleeping pills while

residing with his father. Mr. Bryson attended physiotherapy from January to August 2007. Records indicate a total of 58 sessions.

[52] Mr. Bryson returned to work as a production worker at Peter Kohler Windows, Debert on modified hours beginning July 2007. He resumed full-time hours September 2007. He continues to work on the same production line as before the accident. His duties include lifting windows of various sizes and weight. Employees are required to wear steel toed boots which Mr. Bryson wasn't able to do as they hurt his ankles. His employer allows him to wear sneakers with composite caps over the top. He has worked at other positions withing the plant over the years. He stated his legs are "beat" at the end of the day requiring him to put his feet up for about an hour at the end of a work day.

[53] Mr. Bryson underwent surgery in July 2010 to remove hardware in his left leg that was causing him pain and discomfort. The surgery has lessened the pain in his leg. He still has difficulty with stairs, but less so after the removal of hardware. He is not able to run or engage in sports that require impact on his feet. He has stopped walking as a form of exercise. He is able to do general household duties. He can mow the lawn with a sit-down lawn mower. He is unable to lift heavy objects. Mr.

Bryson stated he experiences pain and discomfort on a daily basis and has arthritis in his ankles. Dr. Coles advised him he is a candidate for a right ankle fusion. He currently takes Ibuprofen and Tylenol Arthritis tablets.

[54] Dr. Coles specializes in treating patients recovering from traumatic injuries. He prepared two updated medical reports and testified at trial. He stated it is possible that a further operation may be carried out in the spring of 2011 to remove hardware in Mr. Bryson's right foot. Although still symptomatic on his left side, Dr. Coles described Mr. Bryson's right ankle as more severely injured than the left. There is wearing of the cartilage layer consistent with arthritis. This will eventually lead to bone-on-bone contact. The pain will progress as this condition worsens. Dr. Coles expects there to eventually be a loss of range of motion and impaired standing and walking. His report of February 2nd, 2010 states in part:

> The prognosis for these injuries is fair. His articular injury was less severe and long-term I do not anticipate he will develop significant ankle arthritis to require further surgical intervention, other than the previously described plans for hardware removal.
>
> The right tibial pilon fracture had far more significant impaction and cartilage injury. This places him at significantly increased risk of developing post traumatic arthritis in the future. There is a high likelihood that he will develop sufficient arthritis in the right ankle and ultimately require ankle fusion or ankle replacement surgery. At this point, now 3 ½ years post injury, he has not shown a rapid progression of joint space narrowing or ankle symptoms. This has likely been in part due to a self imposed

> restriction of his activities secondary to his proximal tibial pain. While there has not been rapid progression of his joint space narrowing, there remain signs of mild lateral joint space narrowing and articular incongruity. It is impossible to predict the time course of his arthritis progression. Given his young age, I do anticipate that this will become an issue for him in the future, likely requiring further surgery, other than the previously described planned hardware removal.
>
> . . .
>
> Hopefully hardware removal will be of some benefit in relieving his proximal tibial pain. Again, he remains at increased risk of developing post traumatic ankle arthritis, particularly in the right ankle. As his symptoms progress, I anticipate he will benefit from a prescription anti-inflammatory medication to manage his pain and stiffness. Ultimately as his symptoms progress I anticipate there is a high probability that he will require further surgery in the form of ankle fusion or replacement. This would obviously hinder his abilities to continue in his current work position and may require him seeking more sedentary type work in the future. He would benefit from a course of physical therapy after such a surgery and might require an off-the-shelf ankle support or brace as well.

[55] At trial Dr. Coles indicated that an ankle fusion would be more likely than ankle replacement surgery. Following the surgery, Mr. Bryson would be subject to approximately 12 weeks of restrictive mobility. Ultimately, he would still have some flexion of the foot, but not the ankle.

[56] In ***Malcolm Melanson v. Blake Robbins*** (2009) NSSC 31, I discussed the issue of general damages as follows:

> 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.
>
> 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.

[57] In the present case I find Mr. Bryson suffered serious injuries to his legs. This has involved considerable pain and discomfort through surgeries, immobilization and the rehabilitation process. Although he has returned to work as a production labourer, his condition especially his right leg will continue to deteriorate as a result of post-traumatic arthritis causing increased pain and discomfort which will limit his physical activities and, therefore impact on his enjoyment of life. He will require prescription

medication for pain and will probably require further surgery in the nature of a right ankle fusion and subsequent rehabilitation.

[58] In determining the range of awards, I have reviewed cases submitted by plaintiffs' counsel including ***Campbell-MacIsaac v. Deveau*** (2003), N.S.J. No. 170; ***Trites v. Steeves*** (2005) N.B.J. No. 275; ***Melanson v. Steen*** (2009) N.B.J. No. 218. Counsel submits an award for general damages in the amount of $120,000.00 would be appropriate.

[59] I have also reviewed cases submitted by defendant's counsel including ***Courtney v. Neville*** (1995), 141 N.S.R. (2d) 241; ***Mills v. Bougeois Estate*** (1995), CanLII 4504 (N.S.S.C.); ***Phillips v. Kendall Estate*** (1994), CanLII 4400 (N.S.S.C); and ***Melanson v. Robbins*** *(supra)*. Relevant cases submitted by the defendant range in general damage awards from $40,000.00 to $65,000.00 in present day values.

[60] I have also considered my decision in ***McKeough v. Miller*** (2009), NSSC No. 394.

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

[62] In ***McKeough*** the plaintiff received serious injuries to his legs resulting a permanent partial disability. He was unable to return to his employment as a heavy duty truck driver. He walked with a cane and permanent limp. This was caused by an external rotation deformity in his right foot caused by the accident. He would ultimately have to undergo a knee replacement on his left knee resulting from post-traumatic arthritis. I awarded the sum of $85,000.00 general damages.

[63] Under the circumstances of this case, I award general damages in the amount of $75,000.00.

Past-Loss Income

[64] The defendant does not dispute Mr. Bryson lost wages for a period following the accident until his return to work at Kohler on a full-time basis. It also acknowledges loss of overtime pay and loss of increase pay level over the period. The plaintiff acknowledges receipt of disability payments in the amount of $10,433.00 from SunLife which has a subrogated claim. Having reviewed evidence of past earnings and calculations by the parties, I find the total loss to be $26,586.00 which leaves an amount of $16,153.00 payable to the plaintiff.

Loss of Future Income and Earning Capacity

[65] The plaintiff claims that his earning capacity as a capital asset has been impaired. In this instance the onus is on the plaintiff to prove there is a real possibility of impairment of earning capacity as opposed to proof on a balance of probabilities. In ***Olson v. General Accident Assurance Co. Of Canada*** (1998), A.J. No. 544 the Court reviewed a number of authorities dealing with loss of earning capacity.

> 51. In determining loss of earning capacity, I find on the basis of the Authorities, the following to be the relevant principles ("Principles"):

In assessing damages for pecuniary losses, the object sought is full compensation. Although it is virtually impossible to evaluate future losses with complete accuracy, the trial judge must attempt to put the injured party in the position that the party would have enjoyed if the Accident had not occurred: Engel; [[1993] S.C.J. No. 4 - citation added]

It is not loss of earnings, but rather the loss of earning capacity of a person, injured by the negligence of another, for which compensation must be made. It is the capacity which existed prior to the Accident that must be valued. In effect, a capital asset has been diminished and the question is - what was its value: Andrews; [[1978] S.C.J. No. 6 - citation added]

The amount or value of the loss of earnings in the future need not be proven on a balance of probabilities. Although mere speculation will not suffice, a "real and substantial possibility" will: Athey [[1996] S.C.J. No. 102 - citation added]

Even though an injured person may, notwithstanding the impairment of his or her earning capacity, continue his or her employment, the injured person is nevertheless entitled to be compensated by the person whose negligence caused such injury, for such loss. The usual method of valuing such loss is the amount of future loss of earnings: Pallos, Palmer, Earnshaw, Graff, Personal Injury Damages in Canada, p. 202;

In assessing damages for loss of future earning capacity the following factors are relevant: Kwei; [[1991] B.C.J. No. 3344 (C.A.) - citation added] namely whether the Plaintiff:

> Has been rendered less capable overall from earning income from all types of employment.
>
> Is less marketable or attractive to potential employers;

> Has lost the ability to take advantage of all job opportunities which might otherwise have been open to him or her;
>
> Is less valuable to him or herself as a person capable of earning income in a competitive labour market;

[66] Mr. Bryson is currently 37 years of age with a Grade 10 education. He worked as an unskilled labourer since leaving high school in 1990 until he was employed with Kholer on a full-time basis in 2003 where he remained employed until the accident in August 2006. Mr. Bryson returned to work full-time as a labourer on the production line with Kholer in September 2007. Given his history, I find he likely would have remained employed as a production worker or labourer. His current job involves standing for long periods of time and lifting windows of various sizes and weight. He takes breaks whenever he can and takes advantage of sitting where possible. He needs to rest his legs at the end of the day and currently takes non-prescription drugs for pain. The pain in his legs will continue to exacerbate as a result of post-traumatic arthritis requiring prescription medication and eventual surgery, likely, an ankle fusion. His recovery will involve a period of immobilization and physical therapy. Mr. Bryson is viewed by his employer as a good employee. Evidence from his employer indicates efforts would be made to accommodate Mr. Bryson in the event he becomes unable to continue his current job as a result of his injuries.

[67] I am satisfied that Mr. Bryson suffers from residual disabilities that will worsen over the years in terms of pain and discomfort. I find that his earning capacity has been impaired and that he is less capable overall from earning income from all types of employment. As an unskilled labourer with minimal education the possibility exists the he will lose the ability to take advantage of all job opportunities which in this field might otherwise be open to him which renders him less marketable.

[68] The fact that Mr. Bryson remains employed by his pre-accident employer does not disentitle him to compensation for the impairment. Nor does the possibility that he continue to be employed indefinitely. It is the loss of capacity for which he is entitled to compensation. The difficulty is in the valuation of the loss. The case law reveals two approaches to assessing damages for prospective pecuniary loss: the mathematical approach and the global approach. The mathematical approach relies upon actuarial evidence and statistics. The global approach attempts to arrive at a just, fair and reasonable figure to compensate for the loss where the evidence does not permit calculation with any mathematical precision.

[69] Loss of earning capacity is reviewed by our Court of Appeal in ***Newman v. LeMarche***, [1994] N.S.J. No. 457.

> 22. We must keep in mind this is not an award for loss of earnings but as distinct therefrom it is compensation for loss of earning capacity. It is awarded as part of the general damages and unlike an award for loss of earnings, it is not something that can be measured precisely. It could be compensation for a loss which may never in fact occur. All that need be established is that the earning capacity be diminished so that there is a chance that at some time in the future the victim will actually suffer pecuniary loss.
>
> 23. As Davison, J. said in Guadet v. Doucet et al 101 N.S.R. (2d) 309 (N.S.S.C.T.D.) at p. 331:
>
> > In my view, there are generally two ways to prove loss of future income. Where the evidence permits, definitive findings can be made by a trial judge based on a comparison of the income that would have been earned had the victim been permitted to continue in his normal employment with the income, if any, the injured party can reasonably expect following his injuries. In these situations, there is usually evidence of employment history before the accident and evidence of the extent of the present limitations on employment. In these situations, actuarial evidence is helpful as a guide to the court.
> >
> > In many cases, the plaintiff will not be able to show, on the balance of probabilities, the extent of his loss and this is particulary (sic) true of young victims who have not had the opportunity to develop an employment history or plans for a future career. Similar difficulties will be encountered where the injuries do not represent a total disability and it is impossible to determine with any arithmetic precision the extent of the loss. In these circumstances, it is my opinion, that the loss should be considered as the loss of an asset - a diminution in capacity to earn income in the future. In seeking damages for future loss, the burden on the plaintiff is not as stringent as that which exist when he attempts to prove losses which occurred in the past. In Mallett v. McMonagle, [1970] A.C. 166, Lord Diplock stated at p. 176:

> The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.

This passage received the approval of the Supreme Court of Canada in Janiak v. Ippolito, **[1985] 1 S.C.R. 146;57 N.R. 241**, and was referred to by our Appeal Division in MacKay v. Rovers, supra, at p. 242.

24. In making an award for loss of future earning capacity the court must, of necessity, involve itself in considerable guesswork. Indeed, in many cases where there is less than total disability and the loss of earning capacity cannot be calculated on the basis of firm figures, the diminution of earning capacity is compensated for by including it as an element of the non-pecuniary award. See Yang et al v. Dangov et al **(1992), 111 N.S.R. (2d) 109** at 126; Armsworthy - Wilson v. Sears Canada Inc. **(1994), 128 N.S.R. (2d) 345** at 355. It is thus a difficult exercise to begin with and from the point of view of an appeal court it is very difficult to say that such an award is inordinately high or inordinately low except in the most obvious cases.

[70] Mr. Bryson currently earns more income from his employment than he did prior to the accident. His earnings can be summarized as follows:

2004	$18,361.00
2005	$16,121.00

2006	$23,450.00 (pro-rated)
2008	$27,315.00
2009	$31,720.00

[71] As stated he continues to remain employed full-time and still takes advantage of overtime work. As his arthritis progresses his discomfort will be managed by prescription drugs. He will likely require an ankle fusion in 10 to 15 years which, averaged, would place him at about 50 years of age. It is at this stage Dr. Coles anticipates he may have to seek a more sedentary type of work. Other than for his injuries, Mr. Bryson is in reasonable good health although he is a smoker.

[72] Recognizing that in cases of this nature valuation of impairment of earning capacity is somewhat speculative, I award the sum of $45,000.00.

Loss of Valuable Services

[73] In ***Leddicote v Nova (A.G.),*** 2002 NSCA 47, the Court 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 lost housekeeping services one must offer evidence capable of persuading the trier of fact that the claimant has suffered a direct economic loss, in that his or her ability or capacity to perform pre-accident duties and functions around the home has been impaired. Only upon proper proof that this capital asset, that is the person's physical capacity to perform such functions, has been diminished will damages be awarded to compensate for such impairment.

[74] Mr. Bryson's mobility was restricted to non-weight bearing and use of a wheelchair for a number of months following the accident. He moved to a walker then a cane before being able to walk without assistance. He relied upon his father and then his sister for food preparation and physical care. At present, he is generally able to perform household duties that do not involve heavy lifting. He stated he is able to climb a ladder and utilize his sit-down lawn mower. It is reasonable to conclude that he would be more restricted in his physical abilities in the future, especially when he undergoes further surgery. He is presently living in a common-law relationship. Recognizing that his capacity to perform pre-accident duties at home will be impaired to a limited extent, I will allow the sum of $15,000.00 for past and future loss of valuable services.

Damages - Ms. Leslie

[75] Ms. Leslie is currently 30 years of age. She also sustained serious injuries as a result of jumping out of her apartment window to escape the fire. She suffered a pelvic ring injury with bilateral fractures to her pelvis, bilateral sacral fractures, a right elbow fracture and a broken rib. She was transported to the Colchester Hospital by ambulance and from there to the Q.E. II in Halifax. Doctor Coles performed surgery that day which included placement of a external fixator. Her elbow was placed in a cast. Her range of movement was non-weight bearing during her stay in the hospital. She was discharged from the hospital in October 2006. Ms. Leslie stated she moved to her sister's home where she resided until December 2006. She used a wheelchair with difficulty despite being unable to use her right arm. She was unable to prepare meals and required assistance for dressing and toiletry. Ms. Leslie moved with her children to a mobile home close to her parents in December 2006. Her mother attended on a daily basis and performed all household duties. Ms. Leslie was able to use a walker and by February 2007 she could look after her own hygiene.

[76] Ms. Leslie began physiotherapy while in the hospital and after discharge. She acknowledged attendance problems which she attributed to transportation and child care issues as well as how she was feeling on a particular day. She joined a gym in 2007

using the treadmill. She also utilized a swim pass for three months in the Spring of 2007.

[77] Ms. Leslie currently describes pain in her tail bone from extensive sitting. Pain in her right elbow with limited extension of her right arm. Pain in her pelvic area from long periods of standing and pain in her right hip. She has discomfort sitting for long periods of time. She walks with a limp. She stated she takes Ibuprofin 600 - two tablets four times a day. She is also prescribed Neproxen. She is able to perform light household duties. Her mother assists with the children who have special needs. Her father handles any heavy lifting. Ms. Leslie described what she termed as a worsening of her depression, accompanied by increased anxiety and panic. She said she still has night terrors and flashbacks regarding fire and smoke. She is obsessive compulsive in her behaviour and is continually locking her doors, repeatedly checking smoke-detectors, and checking on her children during the night. She has sought counselling through group therapy and flashback recovery. Her family physician placed her on permanent disability.

[78] Ms. Leslie acknowledged having problems with panic and anxiety prior to the fire that prevented her from going out in public and having difficulty sleeping. She

turned to food for comfort which led to weight issues. She acknowledged having used illicit drugs. She was receiving counselling from Dr. Fraser, psychiatrist, prior to the fire. She stated that she was feeling much better in the month preceding the fire. She was no longer using drugs and her mother became more involved with her and the children. The children who had been apprehended by Children's Aid Society, were returned to her in June 2006.

[79] Dr. Coles stated the pelvic external frame was removed seven weeks following surgery. The pelvis has healed although she has a trendelenburg gait which causes here to "waddle from side to side". This condition occurs when the abductor muscles are weakened as a result of disuse. This condition could improve with appropriate strength exercising. The right elbow fracture extended into the joint where she has scaring due to soft tissue damage. This permanently limits her ability to fully extend her elbow. This would present difficulties tying her shoe and reaching the back of her head as well as interfering with her abilities to perform certain recreational activities in a normal fashion. Dr. Coles diagnosed her hip pain as bursitis and gave her a cortisone injection. He states in his report:

> 2. Ms. Leslie is now 3-years post injury. I would anticipate her current symptoms and restrictions to be stable. At this point I would not anticipate a significant improvement

> in her elbow range of motion or function. X-rays do show some osteophyte formation and mild joint space narrowing. She may develop some arthritis in the elbow in the future. I think it is unlikely that she will require any surgery for this. I would anticipate her trochanteric bursitis symptoms to improve with an appropriate strengthening program. Her pelvic ring is healed. It does not involve joint structures and, as such, poses no increased risk of arthritis or degenerative changes in the future. She describes seating difficulties secondary to pain in her sacral region. I would not anticipate any change in these symptoms with strengthening. This is likely to be a persistent source of discomfort for her.

[80] Dr. Coles was unable to opine as to whether her symptoms would constitute chronic pain.

[81] Dr. Ronald Fraser is a psychiatrist with the Capital District Health Authority in Halifax. He is also a consulting psychiatrist in the District of Colchester and Pictou Counties. Dr. Fraser's other current positions include Director, Extended Care Borderline Personality Disorder Clinic, McGill University Health Centre, Assistant Professor at Department of Psychiatry Facility of Medicine at both Dalhousie and McGill Universities and an examiner with the Royal College of Physicians and Surgeons of Canada (Psychiatry). Dr. Fraser stated he specializes in personality disorders.

[82] Ms. Leslie was referred to Dr. Fraser in September 2005. Dr. Fraser stated his diagnosis at that time was panic disorder, features of compulsive disorder and aspects of social phobia. His primary diagnosis was borderline personality disorder.

[83] Following the fire, Dr. Fraser diagnosed Posttraumatic Stress disorder (PTSD). His medical legal report dated June, 2009 states:

> Presently, Alissa suffers from Borderline Personality Disorder, Panic Disorder with Agoraphobia, Posttraumatic Stress Disorder and many features of Obsessive Compulsive Disorder. I have requested that copies of my reports for the last year be included. Previously, you had accessed her medical chart and had psychiatric reports up to and including July 17, 2008.
>
> In terms of your inquires, the documentation provided covers some of the issues at least in terms of her ongoing psychopathology. You specifically asked what injuries were caused or materially contributed to by her having to jump from her burning building. Obviously the most direct attributable psychological injury is that she developed Posttraumatic Stress Disorder secondary to this experience. She was predisposed to developing PTSD due to the fact that she had preexisting anxiety disorders (Panic Disorder with Agoraphobia and features of OCD) as well as having a vulnerable personality structure as a result of her Borderline Personality Disorder. Her family physician has recently put her on permanent disability and there seems little evidence to suggest that she will ever fully recover from her physical and psychiatric disability and be able to return to work. Certainly, she lives at a fairly marginal level in that she has very few leisure activities. She has a great deal of difficulty taking care of herself and tends to invest disproportionately in her two sons, both of whom are quite demanding as the eldest has Attention Deficit Hyperactivity Disorder and the youngest suffers from autism. She certainly had difficulties pre-morbidly even prior to the fire but her posttraumatic stress symptoms have worsened her clinical condition. As one would expect adding another co-morbid psychiatric condition certainly does nothing to improve one's clinical presentation.

[84] Dr. Fraser stated PTSD is a unique symptomology which he rarely diagnoses even though he treats a population in high risk of PTSD. He stated Ms. Leslie meets the criteria for PTSD according to the Diagnostic And Statistical Manual of Mental Disorder (DMS) published by the American Psychiatric Association. DMS sets out criteria for scoring Global Assessment Function (GAF). Ms. Leslie's GAF score was 45. The lower the score the more impairment. Conversely a higher score means minimal symptoms.

[85] Dr. Fraser was asked to comment on the expert report filed on behalf of the defendant that questions his diagnosis of PTSD. In Dr. Ruben's report he diagnosed Ms. Leslie as having a complex borderline personality disorder. In response, Dr. Fraser pointed to Dr. Ruben's GAF score of 90 and stated he did not follow the accepted criteria set out in DMS. He stated Dr. Ruben used his own criteria using what is described as global assessment potential. Dr. Fraser stated GAF means actual impairment not potential. He termed Dr. Ruben's report as bizarre. Dr. Fraser never scored a patient over 70. Dr. Fraser referred to the Ruben report as a diagnosis of exclusion concentrating on Ms. Leslie's pre-existing condition. He stated that Dr. Ruben's report engaged in an exercise of challenging Ms. Leslie's credibility as well as his own. Dr. Fraser did not take issue with Dr. Ruben's report that only two percent

of the general population are diagnosed with PTSD. However, Dr. Fraser stated Ms. Leslie does not represent the general population. She had a pre-existing diagnosis of borderline personality disorder. Even though she did not meet the criteria for PTSD before the fire, she was at heightened risk of developing PTSD which occurred following the traumatic event of the fire.

[86] Under cross-examination Dr. Fraser acknowledged he had not seen Ms. Leslie since June 2009. She was not taking medications when he first saw her in 2005. Although her symptoms persisted over the year prior to the fire, prescribed medications helped with her mood and anger issues. She made positive lifestyle changes. As of February 2006 Dr. Fraser felt she was stabilized and on the road to recovery. She was being referred back to her family physician.

[87] Dr. Fraser acknowledged Ms. Leslie's attendance at his scheduling appointments dropped off after the fire. She also failed to attend regularly to other service provider appointments. She missed 11 out of 15 mental health appointments. Dr. Fraser acknowledged the symptoms she described to him in 2009 were the same as her pre-fire history, but stated other symptoms such as paranoia were new. Dr. Fraser acknowledged reporting to Ms. Leslie's family physician in March 2009 that Ms. Leslie

appeared to be psychiatrically stable and that he had no acute concerns. He reported chronic parenting difficulties with her two children - one suffering from autism and the other ADHD. Dr. Fraser stated Ms. Leslie focuses on the issues regarding the children as a distraction from her psychiatric issues that still exists.

[88] Dr. Ruben, psychiatrist, is an assistant professor, Department of Psychiatry at Dalhousie University. He lectures on anxiety and post-traumatic stress disorder. He also accepts referrals for suspected PTSD following traumatic experiences. Although Dr. Ruben did not treat Ms. Leslie, he interviewed her and reviewed her medical history from age 18 until the year 2009. Dr. Ruben prepared an extensive 90 page report. His conclusion is that Ms. Leslie suffers from a complex personality disorder consistent with her history and Dr. Fraser's diagnosis pre-fire. He states:

> The GAF score should be rated, in my opinion, on the basis of an individual patient's long-term, baseline patterns of functioning, rather than on the basis of a numerical scale equally applicable to all patients. The GAF score should also be rated in terms of potential functioning, with regard to clearly established psychiatric diagnoses in a given case, rather than in terms of actual functioning at a given time. Based on these considerations, even though the patient's actual functioning at present is marginal at best, I would rate this patient's current GAF score (past 8 weeks) at approximately 90. It is not obvious to me that this patient's current functional patterns are significantly different from what they have been in the long-term, and it is, on the other hand, clear that this patient could be functioning, in terms of any actually diagnosable psychiatric illness, at a higher level than is actually the case at present.

CONCLUSIONS & PROGNOSIS

1. The major conclusion I would emphasize in this patient's case is that, in keeping with what her treating psychiatrist considers to be her primary diagnosis, and with what I agree is her primary diagnosis, namely a complex Personality Disorder at the more severe end of the Personality Disorder spectrum, this patient's history, stemming back into her childhood, is marked by continuity and consistency, unfortunately, in markedly impaired and dysfunctional coping and behaviours, disruptive interpersonal relationships, and accompanying non-specific emotional and psychological symptoms.

. . .

3. While I would not question that Alissa's experience of the building fire of August 24 - 25, 2006 was markedly distressing, in fact meaningfully traumatic, for her, I would strongly question whether or not this patient ever developed the full syndrome of Post-Traumatic Stress Disorder (PTSD) following this traumatic event, as PTSD does not automatically or inevitably follow trauma. If this patient ever did exhibit the full syndrome of PTDS this is not well documented at all and by the Spring of 2007 indicate that pre-fire sources of distress and impairment came once more to the fore, more or less unchanged.

[89] Dr. Ruben testified that Dr. Fraser's diagnosis of PTSD was not well documented. Even if Ms. Leslie suffered PTSD following the fire, there is no evidence the condition continued after the summer of 2007.

[90] Under cross-examination Dr. Ruben acknowledged that DSM is the required method of determining GAF. However, he stated it was suspect and he was not

conforming to the scale. He stated he has his own opinion as to how to determine GAF. Dr. Ruben disagreed that Ms. Leslie's condition was improving prior to the fire stating there was no evidence in support. His view was that Dr. Fraser's drug prescriptions were making Ms. Leslie worse. He stated Ms. Leslie was the author of her shortcomings to some extent by failing to attend mental health and physiotherapy appointments.

[91] I find that Ms. Leslie's pre-existing psychological condition was exacerbated by the accident and that she subsequently developed PTSD. As treating psychiatrist, I accept Dr. Fraser's evidence that Ms. Leslie's condition was improving prior to the fire. This was a result of prescribed medications and lifestyle changes on her part. In diagnosing PTSD, Dr. Fraser's GAF score was based on DMS criteria adopted by the American Psychiatric Association. In doing so Dr. Fraser identified symptoms that arose post-fire. On the other hand there is no evidence that Dr. Ruben's own method of determining GAF has been tested or accepted in the field of psychiatry.

[92] Having found that Ms. Leslie's psychiatric condition worsened following the fire, the question is to what extent these symptoms affected her functioning as compared to her level of functioning before the fire. As stated in ***Athey v. Leonati***, *(supra)*:

> The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence then this can be taken into account in reducing the overall award [citations omitted]. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

[93] Ms. Leslie had long standing serious mental health issues prior to the fire including behavioural personality disorder, panic disorder with agraphopia and features of compulsive disorder. The evidence is that BPD is a serious mental illness that results in significant impairment of a person's ability to function. Although Ms. Leslie demonstrated signs of improvement prior to the fire, her symptomology remained. Moreover the stresses relating to her two children continue to contribute to her dysfunction.

[94] Ms. Leslie is currently 30 years of age. She has reached a plateau in functional recovery of her physical injuries. She has permanent loss of elbow extension which restricts her abilities to extend for certain tasks such as tying her shoe and reaching behind her head. It also limits certain pre-fire recreational activities such as throwing a ball and riding a bicycle. She continues to experience discomfort in her right elbow.

There are degenerative changes in her elbow following post-accident that may develop into arthritis in the future. Ms. Leslie will continue to experience pain and discomfort in her sacral region consistent with her injuries. Her trendelenburg gait and bursitis should improve with appropriate strength exercises which she has yet to accomplish. Her mental health issues, that worsened following the accident, affect her progress towards recovery.

[95] I have reviewed authorities submitted by the plaintiff, namely, ***Campbell v. Meinen***, [1999] B.C.J. No. 1859; ***Guymer v. Nova Scotia (Registry of Motor Vehicles),*** [1984] NSJ No. 85; ***Jonson v. Milton (Town),*** [2006] O.J. 3232; ***Hill v. Ghaly***, [2000] N.S.J. 215. I have also reviewed the following authorities submitted by the defendants ***Holiday v Frank Larch Manufacturing (1975) Ltd.***, sited as 1986 Carswell 297; ***Langthorn v. Marshall,*** [1998] N.S.J. No. 15; ***Gillis v. MacKeigan*** sited as 2010 Carswell NS 27.

[96] I assess Ms. Leslie's general damages in the amount of $55,000.00.

Loss of Valuable Services

[97] Following her release from hospital in October 2006, Ms. Leslie resided with her sister and relied upon her for care. Ms. Leslie's children moved in with her mother for the period. Ms. Leslie moved to a mobile home close to her mother in December 2006. Her mother attended on a daily basis performing all household duties and carrying for the children. Ms. Leslie eventually progressed from a wheelchair to a walker. By February of 2007 she could manage some light housekeeping and hygiene but was still unable to stand for long periods of time. She was not able to manage laundry or sweeping. Currently she is able to do most household chores although it takes longer. She states she has good days and bad days. Her father helps with any heavier work such as garbage and snow removal. She is able to do some gardening with her parents help. Ms. Leslie believes her ability to carry out home chores is deteriorating. She required assistance from her mother following the cortisone treatment last winter. She still has difficulty with stairs.

[98] Ms. Leslie's mother confirmed taking responsibility for the children following the fire. Following her stay with her sister, Ms. Leslie moved into a mobile home within walking distance of her mother. For the next six months her mother attended daily, performing all household work and caring for the children. Following that period she would assist but not on a daily basis. Approximately one and a half years after

moving there, Ms. Leslie moved to a new location with the children. Her mother stated she continued to help with the children and heavier household work. Her daughter needed assistance washing her hair due to problems with her arms. She moved in with her daughter and children for a few months last winter as her arm and hip were getting worse. She stated her daughter currently is unable to bend down to take a turkey from the oven. She is unable to bend over to pickup because of pain. She notices her daughter has problems standing for long periods. She still goes to her daughter's home a couple of times a week to assist with cleaning and the children. She anticipates this will continue. Prior to the fire, she stated her daughter's apartment was always spotless.

[99] I find Ms. Leslie will continue to require some assistance in performing household duties in the future and that her own ability to perform the duties she is now able to manage has been impaired.

[100] The plaintiff seeks an award of $35,000.00 for past and future loss of valuable services. In the circumstances, I find that amount to be reasonable.

Loss of Future Income and Earning Capacity

[101] Ms. Leslie, now 30 years of age, was unemployed at the time of the accident and was receiving social assistance benefits. She currently remains unemployed and continues receiving social assistance. Her last job with Convergys lasted from January 2005 until May 2005. Although she stated she experienced back pain from sitting on the job, (which resolved) her main reason for leaving related to problems with one of her special needs children. Ms. Leslie stated that having progressed with her personal and mental health issues in 2006, she was hoping to return to work by December 2006 after making arrangements for more appointments for her child and getting him back to school. She acknowledged her child still demands a great deal of her attention. She feels she is now unable to work due to her injuries which prevent her from sitting or standing for long periods of time. She also has limitations with her arm. Ms. Leslie does not appear to be a candidate to further her education as she stated she always had trouble concentrating on school work. As well she has a history of hearing problems. Her previous work history included working as a telemarketer for Electrolux and working at Tim Horton's. None of these jobs were for sustained periods of time.

[102] Regarding her physical injuries Dr. Coles reported that, with an appropriate seat cushion, Ms. Leslie should be able to return to sedentary work such as a Call-Center

where she was previously employed. In 2007, her psychiatrist, Dr. Fraser was encouraging Ms. Leslie to attempt to return to work, although he recognized her multiple psychiatric diagnosis had diminished her ability to cope with her unique family problems as well as work. In 2009, Dr. Fraser reported that her physical disabilities coupled with the psychological injuries sustained in the accident worsened her clinical condition making it unlikely she would be able to recover and return to work. Dr. Ellis, Ms. Leslie's family physician, placed her on permanent disability.

[103] Based on the evidence I find Ms. Leslie has no meaningful residual earning capacity. I find prior to the accident Ms. Leslie was making progress with her mental and personal health issues and would have returned to work in a capacity similar to her previous employment as a telemarketer or work in the service industry. Ms. Leslie's earnings from employment over four years prior to the accident (excluding 2002 when she was pregnant and delivered a child) averaged $4,500.00 per year. Her income on each of those years was supplemented by social assistance which was her only source of income at the time of the accident. Based on the evidence before the Court, calculation of loss of future income by multiplying annual income of $4,500.00 to normal age of retirement at 65 years would total $157,500.00 less pre-existing contingencies as well as consideration of the possibility that Ms. Leslie would not work

to age 65. Under the circumstance, I award the sum of $75,000.00 for loss of future income.

[104] The plaintiffs' award of damages can be summarized as follows:

Mr. Bryson		**Ms. Leslie**	
General Damages	$75,000.00	General Damages	$55,000.00
Past Loss Income (Subrogated claim)	$10,433.00	Loss of Valuable Services	$35,000.00
Past Loss Income	$16,153.00	Loss of Future Income	$75,000.00
Diminished Earning Capacity	$45,000.00		
Loss of Valuable Services	$15,000.00		
Total	**$161,586.00**	**Total**	**$165,000.00**

[105] The plaintiffs shall recover pre-judgment interests and costs. I will accept written submissions in the event the parties are unable to agree.

J.