SUPREME COURT OF NOVA SCOTIA

Citation: *Hollett v. Yeager*, 2014 NSSC 207

Date: 20140617
Docket: Hfx No. 310141
Registry: Halifax

Between:

Ronald Hollett

Plaintiff

v.

William Yeager

Defendant

Judge:	The Honourable Justice Kevin Coady
Heard:	March 10 - 17, 2014 in Halifax, Nova Scotia
Written Decision:	June 17, 2014
Counsel:	Colin Bryson, Q.C., for the Plaintiff Scott Norton, Q.C. and Tipper McEwan, for the Defendant

By the Court:

[1] This action arose out of a motor vehicle accident which occurred on May 17, 2006. Mr. Hollett was driving home from his employment at the Granite Springs Golf Club. He slowed or stopped his vehicle to wait for approaching traffic to clear before turning left into a parking lot. Mr. Hollett's vehicle was struck from behind by a Dodge Ram 2500 truck driven by the Defendant, William Yeager. There is evidence to suggest Mr. Yeager's vehicle was travelling about 70 to 80 kilometres per hour. Mr. Hollett suffered personal injury and his vehicle was a total write-off. He was 34 years old at the time of this accident.

[2] The Defendant admits breaching the standard of care. While he admits that his actions caused this accident, he does not admit the accident caused the injuries Mr. Hollett reports. Causation, mitigation and quantum of damages are the main issues in dispute.

[3] Mr. Hollett claims that he is permanently disabled by the accident and it is unlikely he will ever resume employment. Consequently, he seeks general damages, loss of past and future income, loss of valuable services and special damages. The Defendant argues that Mr. Hollett failed to take an active role in his

recovery. Specifically the Defendant argues that Mr. Hollett failed to diligently pursue therapeutic programs recommended by healthcare professionals. Further, he has unilaterally decided that he cannot be helped and, as a result, has conflicting relations with many of his healthcare professionals. It does appear as if Mr. Hollett views many physicians as persons attempting to disclaim the severity of his condition. The Defendant argues that this reticence is the true cause of his present diagnosis.

[4] It is not disputed that Mr. Hollett suffered physical injury as a result of the 2006 rear-end collision. All medical experts agree the physical injuries were resolved within two years. It is now seven years post-accident and Mr. Hollett continues to experience constant and severe pain. The medical experts agree that Mr. Hollett's present condition is caused by a "pain disorder," often termed "chronic pain." Mr. Hollett argues that this pain is a natural consequence of the accident. The Defendant argues the chronic pain developed as a result of Mr. Hollett's resistance to following medical advice. It other words, if he did what he was told he would not find himself in his present condition. Mr. Hollett does not accept the suggestion that he failed to follow medical treatment. He does acknowledge significant displeasure with his Section "B" insurers and their medical referrals.

[5] It should be noted that Mr. Hollett's condition is not limited to chronic back pain. On July 27, 2009 he reported the following condition to Dr. Edvin Koshi:

> He complained of headaches, noise sensitivity, dizziness, blurred vision, imbalance problems, irritability, poor sleep, fatigue, poor concentration, poor memory and difficulties with word findings which all started within 10 days of the collision with the exception of the blurred vision which started later. Blurred vision is better. Sensitivity to light, imbalance problems, poor concentration, poor memory and difficulties with word findings have not changed since. Irritability, poor sleep and fatigue are worse.

These complaints are of note given the 2006 diagnosis was limited to "cervical, thoracic and lumbar strain".

[6] Dr. Koshi was retained to do an independent medical assessment for Mr. Hollett's Section "B" insurer. In a report dated July 27, 2009, he provided the following diagnosis:

1. Soft tissue injury in cervical, thoracic, lumbar spine and knees;
2. Chronic pain;
3. Pain disorder associated with psychological factors;
4. Deconditioning.

Dr. Koshi followed up on this diagnosis by stating: "It is likely that the injuries that the claimant sustained in the motor vehicle collision in question have healed although he is left with on-going pain."

[7] Dr. Koshi described "pain disorder" in his report as follows:

> According to The Diagnostic and Statistical Manual of Mental Disorders 4th edition text revision (DSM-IV-TR) "*Pain Disorder*" is diagnosed when pain is the predominant focus of the presentation and causes significant distress in all areas of functioning. The diagnosis of "*Pain Disorder Associated with Psychological Factor*" is made when the psychological factors are thought to play the major role in the onset, severity, exacerbation and maintenance of pain.

This definition casts light on the multiplicity of symptoms reported by Mr. Hollett as reproduced above.

[8] Mr. Hollett also reports that since the accident he has experienced severe ringing in his ears, commonly referred to as "tinnitus". Dr. Koshi commented on this condition as follows:

> Within the area of my specialty, I did not find any medical condition such as traumatic brain injury to explain this individual's tinnitus . . . from the information in the chart, it seems that the family physician has obtained hearing tests, etc. and nothing was found. It is likely that tinnitus is best explained by the diagnosis of pain disorder associated with psychological factor.

On the basis of this evidence, I will treat the tinnitus issue as part of the chronic pain diagnosis.

[9] In the wake of the chronic pain diagnosis, Dr. Koshi discussed recovery with Mr. Hollett. The following appears at p. 21 of his 2009 report:

> Education is perhaps the best treatment for this individual. He should be told that it is possible to have pain although the peripheral injury has healed. He should be told that at this stage of recovery, hurt does not mean harm. He should be told that he doesn't seem to have suffered serious injuries and the findings in his MRI are incidental. He should be told that at this stage of recovery there is not much that medical practitioners can do for him unless he takes matters in his own hands and increases his function.
>
> He should be told that it is time for him to learn how to live with pain and move on, otherwise pain is going to take over his life.
>
> I had a frank discussion with him today. I explained to him all the above. I told him that I realized that his pain and suffering is real. I told him that unless he takes matters in his own hands there is not much that medical practitioners can do for him. I told him that it is time for him to identify activities that he likes such as walking, get involved in such activities and increase them on a gradual basis.
>
> It is important that such education be done by all medical practitioners that are working with him. Only then do we have a chance to avoid chronic pain related disability and to get his life back.

Mr. Hollett's prognosis for medical recovery is stated at p. 28 of Dr. Koshi's report:

> Although the injuries that he sustained in the motor vehicle in question have healed, his prognosis for complete resolution of pain complaints is "poor". The painful condition has been present for four years and has been resistant to treatment. It is likely that the claimant will be left with chronic residual pain.

[10] The Plaintiff also called Dr. Harris Crooks, Mr. Hollett's family doctor since 2006. In a report dated November 2, 2008 he confirms the chronic pain diagnosis as follows:

> In my opinion Mr Hollett has suffered cervical sprain, lumbar sprain and probably lumbar disc injuries as a result of the May 17/06 motor vehicle accident. Unfortunately he has gone on to develop a chronic pain syndrome with a requirement for moderate amounts of opiods. He has been unable to increase his activity level apparently due to an increase in pain. It has now been about 30 months since the accident. Poor progress at this time is a bad prognostic sign for the future. I believe Mr Hollett will continue to have disability and although some further improvement is possible, it will be slow.

[11] The Defendant called Dr. Edwin Rosenberg as an expert in the field of General Adult Psychiatry. In a report dated March 10, 2010 he concluded that Mr. Hollett was suffering from "a pain disorder associated with both psychological factors and a general medical condition". He also concluded that he has been a "less than active participant in any of the therapeutic modalities which have been offered to him."

[12] A review of the multiplicity of treatment records from various health care providers does not challenge the conclusion that Mr. Hollett suffers from chronic pain. The critical question is whether he contributed to this outcome by failing to actively support treatment programs recommended to him. The answer to that question will be determinative of the mitigation issue.

[13] Freeman, J.A. in *Slawter v. White,* [1996] N.S.J. No. 122 discussed the components of chronic pain at para. 84:

> It appears from the evidence that for the purpose of determining damages, chronic pain syndrome consists of three elements:
>
> 1. Physical injuries suffered in a tortious accident which do not account for the degree of disability complained of by the plaintiff and, indeed, which may have wholly healed without continuing disabling effect.
>
> 2. Continuing physical discomfort from causes secondary to the original injury, which may include cramping, atrophy, shortening or other stresses in the affected muscles and tendons resulting from inactivity during and following the healing process.
>
> 3. A psychological overlay, in which depression and anxiety may be factors, resulting in exaggerated symptoms and pain or other sensations such as numbness which may be wholly psychosomatic in origin.

In such cases the challenge lies in determining the limits of the Defendant's just duty to compensate in damages.

[14] The issues of chronic pain, and the duty to mitigate, were discussed by Freeman J.A. at para. 88:

> **88** 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.

[15] In chronic pain cases the burden does not shift to the Defendant to prove an absence of mitigation (*Janiak v. Ippolito,* [1985] 1 S.C.R. 146). It is also well accepted that a lack of mitigation will be excused if the Plaintiff at the time of the accident is suffering from a psychological infirmity that deprives him of the capacity to make rational choices. (*Janiak v. Ippolito, supra*). There is nothing in the evidence to suggest Mr. Hollett suffered any such condition. He did experience some past depression and anxiety but there is nothing to suggest that these conditions limited his ability to make treatment choices. This case also supports the proposition that the reasonableness of a refusal to mitigate must be based on an objective and not a subjective standard. In other words, a significant distinction has to be made between persons who, subsequent to an accident, develop an emotional or psychological infirmity and those who bring a pre-existing emotional or psychological infirmity to the accident. A Defendant should only be responsible for the former.

[16] On the totality of the evidence, I am satisfied that presently Mr. Hollett suffers from chronic pain. This conclusion leads to three questions. One, is the condition attributable to the motor vehicle accident? Two, did Mr. Hollett

contribute to that condition by failing to fully engage in recommended treatments? Three, is he permanently disabled and therefore unemployable?

[17] On the first question, I find that Mr. Hollett's chronic pain condition is attributable to the 2006 motor vehicle accident. There is nothing in his medical history to suggest a different external contributor. There was consensus among health providers that it all started with the accident. In other words, if it were not for the accident there would not be any chronic pain.

[18] On the second question, I will review the various pieces of evidence that address this issue.

[19] Dr. Koshi's 2009 report discusses lifestyle as reported by Mr. Hollett. It indicates he does not exercise regularly, smokes 20 cigarettes a day and has no leisure activity or hobbies. These comments were made three years post-accident and Mr. Hollett reported these factors were present since the accident.

[20] Mr. Hollett told Dr. Koshi that he did not think that further tests were needed to clarify the source of his pain and that he feels he should avoid painful movements. He stated that nothing is going to help him and nothing is going to change anything. He further stated the best way to help him is to give him financial compensation for his injuries and to leave him alone.

[21] Dr. Koshi observed Mr. Hollett's stance and commented that he displayed a lot of pain behaviour which at times was exaggerated. He found that Mr. Hollett stood and walked with a very abnormal gait that was without a pattern. Dr. Koshi also concluded that getting Mr. Hollett out of litigation as soon as possible is one of the best treatments for his chronic pain.

[22] Dr. Koshi attributed the following comments to the May 3, 2010 report of Dr. Harris Crooks, Mr. Hollett's family doctor:

> "I would agree that Ron demonstrates exaggerated pain behaviour and has not been fully compliant with physical therapists that have been advised by myself, Dr. Paterson, his pain specialist and by Dr. Koshi". It was thought that Mr. Hollett would benefit from psychological intervention.
>
> Mr. Hollett "is feeling that he doesn't want any more assessments or people telling him what him [sic] to do. Each time he has one of these assessments, he views it as another attempt to disclaim the validity of his injury. I therefore do not think any further intervention is worthwhile until the legal issues are settled".

Dr. Crooks backed away from the first point in his *viva voce* evidence. However, I find his report comments to be more consistent with the totality of the evidence.

[23] Dr. Koshi filed a second report in 2013. It was commissioned by Mr. Hollett's counsel. Essentially he concluded that nothing had changed since the 2009 consultation. Under the heading "Treatment Recommendations" Dr. Koshi stated:

> When I initially saw Mr. Hollett in July 2009, I did not recommend an interdisciplinary rehabilitation program, for the reasons outlined in that report. I recommended only a short course of psychological treatment to address coping mechanisms and a short course of physical therapy, mostly in form of cardiovascular training, to address deconditioning. I emphasized that the best treatment was to educate Mr. Hollett regarding hurt versus harm and advise him to take matters in his own hands.

Mr. Hollett did not follow these recommendations fully. Dr. Koshi offers the following explanations at p. 20 of his 2013 report:

> Regarding psychological treatment, Mr. Hollett went to see a psychologist, but was not interested in such. However, this should not be seen as a sign of non-compliance. As mentioned in my previous report, the best psychological treatment is to educate him regarding hurt versus harm. This is best done by a physician, rather than a psychologist. After reading Dr. Crook's (family physician) reports, it appears that this education was done on a regular basis, and therefore, it is not surprising to me why Mr. Hollett did not want to have the same education done by a psychologist.
>
> Regarding physical therapy, Mr. Hollett attended four or five sessions of physical therapy, which he did not find helpful. Again, this is not surprising. As explained in my previous report, the effectiveness of treatment is affected by an individual's expectation from the treatment. Mr. Hollett presented with distorted beliefs regarding his condition, and therefore, it is not surprising that he perceived physical therapy as not being helpful.

With the greatest respect to Dr. Koshi, I must conclude that his explanations for non-compliance are rooted in support rather than diagnosis. These explanations are not consistent with the evidence as a whole.

[24] Mr. Hollett was asked to complete a "personal health and pain evaluation form" before his second consult with Dr. Koshi. After the question "describe

relevant appointments, tests and treatments after the accident", Mr. Hollett replied "since last saw you bit of physio, IME with Dr. King".

[25] In his oral testimony, Dr. Koshi stated that he felt Mr. Hollett received many wrong diagnoses and consequently he never bought into the "hurt does not mean harm" principle. It was his opinion that the best treatment would be to address his fears about harming himself. Dr. Koshi felt that the best chance of recovery would require educating Mr. Hollett about the hurt not meaning harm principle and getting a concerted effort from Mr. Hollett. In other words, recovery was in his hands.

[26] Mr. Hollett was referred to an anaesthetist in 2007. Dr. Robert Patterson filed a report in which he reviewed the medical history. He attributed the following comments to Mr. Hollett:

> He tells me he has also not had physiotherapy, although he was seen by the physiotherapist but they were unwilling to touch him until further x-rays had been done. He has been to see the chiropractor on one occasion but it did not seem to help.

[27] I do not doubt Mr. Hollett made these comments to Dr. Patterson. The totality of the evidence suggests they are not entirely accurate.

[28] In 2010 Mr. Hollett attended physiotherapy on four occasions between January 18th and February 1st. W.A. Humphries forwarded a report to Dr. Crooks which included the following remarks:

> He has a very unusual gait where he walks by rocking forward and back on his right hip. I have never seen a gait like this.
>
> On two occasions, I was able to treat him with very light traction mobilization, both to his cervical and lumbar spine. He responded to the lumbar maneuvers, but said that the cervical traction caused him pain, and I had to abort the treatment. This is highly unusual, as I am able to do similar treatments on 60 year olds, who are stiff and sore from arthritis in their neck. I mentioned this to the patient; his response was that we don't understand his pain.
>
> On two occasions, I was again able to complete a normal treatment, because he was in pain and reluctant to try.

It appears as if the 7th word in the third paragraph is a typo. The word should be "unable".

[29] Dr. Crooks filed a report on April 18, 2011 in which he stated, "med refills; thinking of moving to the country; very upbeat today; much less pain behaviour." This evidence suggests to me that if Mr. Hollett focused on recovery he would lessen his chronic pain symptoms.

[30] In 2006 Mr. Hollett was referred to Dr. Roger McKelvey, a neurologist. In a report dated December 20, 2006 (7 months post-accident) he reported as follows:

> I have strongly emphasized the importance of engaging in more normal activity outside the home. Currently he is at home pacing the floor or trying to lie down, and not really engaging in any normal activity at all. He is not going to make any progress with this. I emphasized that it is essential for him to start getting out of the house, getting regular activity, and engaging in normal things.

This evidence satisfies me that Mr. Hollett's unwillingness to follow treatment advice was evident very early in his treatment history.

[31] In 2010 Mr. Hollett was referred to psychiatrist Dr. E.M. Rosenberg for an independent medical examination. After reviewing Mr. Hollett's medical history, and meeting with him, he filed a report dated March 10, 2010. The following appears at p. 3:

> Mr. Hollett stated that his present day-time activities involve feeding stray cats in the neighborhood, watching 'some' television, and laying down periodically, occasionally falling asleep. However, Mr. Hollett noted that 'I'm pretty much awake all of the time, but in bed because my back hurts'. Mr. Hollett did not describe any daily routine to take him out of the house. However, he also commented that 'at night, I'm awake'.

The following appears at p. 5:

> However, Mr. Hollett also commented that 'now, I am at the point where I want to be left alone, I don't want to participate in any programs. I'm fine being the way I am. I'm tired of people telling what I can do to be happy. I've already bent myself backwards to do things. I realize that I've reached my maximum recovery'. Mr. Hollett also described how he walks regularly, goes up and down stairs, and generally does not participate in any other physical activity. He also commented that he enjoys reading medical books.

[32] In addition to a diagnosis of "pain disorder," Dr. Rosenberg concluded that Mr. Hollett presented with "features of entitlement, with expectations regarding automatic compliance with wishes, with exaggerated expression of pain behaviour". He also found that he had a "perceived psychosocial stress relating to allegations of maltreatment by insurers."

Dr. Rosenberg further wrote as follows at p. 8 of his 2010 report:

> The documentation reviewed suggests that Mr. Hollett has been less that an active participant in any of the therapeutic modalities which have been offered to him. Certainly, during this interview, it was the impression of the examiner that Mr. Hollett's mind-set was such that he viewed any further therapeutic intervention as being useless, and without value.

Dr. Rosenberg recommended physiotherapy and an ongoing program of exercise. Mr. Hollett has not pursued those programs. He also recommended Mr. Hollett be evaluated by a psychologist with a view to participation in cognitive-behavioural therapy. There has been no such evaluation or therapy.

[33] Mr. Hollett's spouse, Susan Miller, testified on behalf of the Plaintiff. She stated that in 2008 he presented with the following:

- Does not sleep through the night;

- Walks very little in terms of distance;
- Stands and sits for very short periods of time;
- Walks with a noticeable limp;
- Lacks interest in activities they enjoyed before the accident.

She testified they now do nothing as a couple.

[34] Mr. Hollett testified that post-accident 2006, he tried to return to work but the pain severely limited him. He testified that as of 2007 he felt trapped in his house. He stated that he stretched and exercised in his basement. He also attended a local park and fed the feral cats. He stated he has done as much as he can.

[35] Mr. Hollett testified that post-accident 2009, he started yoga but that activity has not lessened his symptoms. He stated that if he tried to push himself he would experience sharp shooting pain.

[36] Mr. Hollett testified about his present situation. He said he cannot sit comfortably and standing leads to a sore back. He says that he can only drive a car for short periods and he must stay "hunched over" while doing so. He was asked to describe a good day and a bad day and gave the following answers:

> A Good Day – I can get out of bed without meds. I get dressed then go to the park to feed the cats. I return home and I will do a few chores if I feel up to them.
>
> A Bad Day – I have to take meds before I can get out of bed. I have trouble doing bowel movements. I am unable to bend over. I try to do yoga. I do not push myself on bad days.

[37] I have concluded that Mr. Hollett must accept some responsibility for his pain disorder. I am satisfied that if he had seriously endorsed programs of physiotherapy, exercise and psychological counselling he would not be in his present predicament. I am not suggesting he would be entirely pain free, but I am confident he would be capable of achieving greater recovery.

[38] Mr. Hollett does not seem to be able to accept the "hurt does not mean harm" principle. He does not accept that some short term pain will result in long term gain. He has convinced himself that he is permanently disabled and that he will never return to any kind of employment. He views all medical caregivers with suspicion and interprets their recommendations as efforts to disclaim his version of events and the severity of his injuries. I am not suggesting that he is a malingerer. I am suggesting that a mindset has developed and all of his decisions are based on

that mindset. I find it ironic that while he fears pain, he allows it to take over his life.

[39] Mr. Hollett suffers on the credibility front. I have no confidence he does the activities he reports. There is no corroboration from Ms. Miller or anyone else. The evidence satisfies me that Mr. Hollett has adopted a sedentary life and the only real modality he supports is narcotic medications. I am satisfied that he only does enough to satisfy those who question his credibility. The only activity in which he is enthusiastically involved is feeding the feral cats. I accept that Mr. Hollett feels that this activity is consistent with his caregivers recommendations respecting an active lifestyle. Clearly Mr. Hollett is caught in a rut.

[40] I find many similarities between Mr. Hollett and the Plaintiff in *White v. Slawter, supra*. Freeman, J.A.'s comments at para. 3 can be applied to this Plaintiff:

> Mr. White failed to co-operate in measures that might reasonably have led to his recovery and his condition has become chronic. Dr. David P. Petrie, an Orthopaedic surgeon who has seen him on numerous occasions, noted in a report dated November 16, 1990, that "he feels frustrated and obviously has taken a very negative position with regard to his subsequent rehabilitation". He exaggerates his symptoms and there is evidence of hypochondriasis. The tragic consequence is that, whether deliberately, inadvertently, or inevitably, a young man may have ruined his life because of injuries from which he could have been expected to make a full recovery. The underlying issue is the degree of responsibility the appellant should be made to bear.

Para. 14 applies equally:

> Stresses in the relationship and financial worries played a major role in Mr. White's emotional state. There can be little doubt that the quality of Mr. White's life worsened significantly following the accident. The damage which had been done to his body and the pain and discomfort he suffered became the dominant elements in his life, to the virtual exclusion of all others. He brooded on his condition and the conclusions to which this led him are at considerable variance from the medical opinions and other evidence.

Mitigation is a serious issue in this trial. I will apply it when I deal with damages.

[41] I will now address the issue of the probability of future employment. Mr. Hollett feels that his pain disorder is permanent and, as such, he is permanently unemployable. Dr. Koshi and Dr. Crooks support this position, while Dr. Rosenberg challenges such a conclusion.

[42] Mr. Hollett was 34 years old at the time of the accident. He returned to his pre-accident employment but by the end of 2006 he was fully unemployed. He testified that his pain was such that he could not do the activities required. He has not been employed for the past seven years. Mr. Hollett has been supporting himself through Section "B" benefits and a CPP disability income.

[43] Mr. Hollett graduated from high school in 1989. He completed a computer course in 1996. He has no other formal education. He grew up around a golf

course and has always pursued a career in golf. After high school he worked at a golf course for several summers as a pro shop manager and instructor. From 1996 to 2000 he worked for a carpet cleaning company. He was employed at a call centre in 2001. In 2003 he started working at the Granite Springs Golf Club, the position he held at the time of the accident. In most of those years his income came from employment, employment insurance benefits and fees for private golf lessons.

[44] The following is a schedule of Mr. Hollett's income for the years 1997 to 2006:

1997 - $21,960

1998 - $13,881

1999 - $14,307

2000 - $10,728

2001 - $19,289

2002 - $15,404

2003 - $9,003

2004 - $12,752

2005 - $12,765

2006 - $10,456

These figures do not include fees for golf lessons as Mr. Hollett did not declare that income.

[45] Mr. Hollett testified that if not for the accident he would be seasonally employed at the golf club and would qualify for benefits in the off season. He testified that as of 2006 his golf lesson business was really "taking off" and he anticipated an ever increasing income from that activity. Mr. Hollett is claiming future income loss of $24,700 per year from golf activities, $3,500 per year from employment insurance or $8,500 to $13,500 per year from carpet cleaning.

[46] Dr. Koshi's 2009 report addresses the prognosis for return to work. The following opinion appears at p. 28:

> In an individual with subjection complaints of pain, no significant objective findings and no medical restriction based on risk, prognosis for return to work depends on tolerance.
>
> Tolerance is the decision by an individual to ensure symptoms such as pain in exchange for the benefits of returning to work. Tolerance depends on the reward available for doing the activity. For example 90% of American football players returned to game after rotator cuff surgery (Pagnani 2002). In contrast, only a small number of WCB patients with same injuries/surgeries return to work. Thus, tolerance is not scientifically measurable or verifiable by medical practitioners. It is simply an individual's decision after he/she had made the cost/benefit analysis (Talmage J.B., AMA 2005).
>
> Considering this claimant's social and psychological factors, the length of time off work and the already established distorted beliefs about pain, disability and his animosity towards some medical practitioners and the insurance system his prognosis for return to work is "poor".

Dr. Koshi maintained the same opinion in his 2013 report.

[47] Dr. Crooks also feels that the prognosis for a return to work must be guarded. He states as follows in his November 2, 2008 report:

> In my opinion Mr. Hollett has suffered cervical sprain, lumbar sprain and probably lumbar disc injuries as a result of the May 17/06 motor vehicle accident. Unfortunately he has gone on to develop a chronic pain syndrome with a requirement for moderate amount of opiods. He has been unable to increase his activity level apparently due to an increase in pain. It has now been about 30 months since the accident. Poor progress at this time is a bad prognostic sign for the future. I believe Mr. Hollett will continue to have disability and although some further improvement is possible, it will be slow.

In his July 2, 2010 report, Dr. Crooks stated, "In my opinion Ron has reached maximum medical improvement. I do not believe he will be gainfully employed in the future."

[48] Dr. Rosenberg filed a report dated March 10, 2010 and states at p. 9:

> Although Mr. Hollett does view himself as being permanently disabled as a result of impairment in functioning due to injuries sustained in the accident of 2006, the medical evidence for this belief is less than compelling. If Mr. Hollett can be persuaded to participate in a therapeutic endeavor such as that suggested above, the results may prove beneficial to both Mr. Hollett, his partner, and any future employer.

Dr. Rosenberg also filed a report dated December 20, 2012 and states at p. 10:

> It must be emphasized that Mr. Hollett should be an active participant in any therapeutic endeavor if such an endeavor is to succeed with the goal of restoring Mr. Hollett's functional ability. And, until proven otherwise by a failure of such a therapeutic program, the prognosis for Mr. Hollett's return to the workplace must be viewed as a distinct possibility, although somewhat guarded. The surveillance

> documentation and videos show that Mr. Hollett is capable of more physical activity than he believes to be possible for himself – the implication being that with active participation in therapeutic endeavors as described above, functional ability is attainable.

[49] Mr. Hollett participated in a functional capacity evaluation which produced a report based on a July 11, 2009 assessment. The author concluded that Mr. Hollett is capable of performing sedentary and light activities on at least a part-time basis.

[50] I do not accept that Mr. Hollett has no employment future. I conclude that when this proceeding is over, he will succeed in removing some of the obstacles to employment. Mr. Hollett does not suffer any physical limitations that would interfere with employment. A return to work is within his reach, including a return to his pre-accident employment. However, it is quite possible he will not push himself that far, settle for lighter employment for a shorter time, and consequently for less income.

[51] I am firmly of the belief that this litigation is a major barrier to recovery and employment. Dr. Koshi in his 2009 report stated at p. 27:

> Finally, getting him out of the litigation system as soon as possible is one of the best treatments for this individual.

Dr. Crooks in his report May 3, 2010, stated as follows as para. 4:

> I do believe that patients who have been injured have little chance of getting back to normal life when litigation or compensation issues have not been resolved . . . I therefore don't think any further intervention is worthwhile until the legal issues are settled.

These opinions were not refuted at trial.

[52] Mr. Hollett's words to Dr. Koshi confirm his singular focus on compensation. The following appears at p. 17 of his 2009 report:

> When asked what he expects is going to help him with the situation that he is in, he said that nothing is going to help him and nothing is going to change anything. He said that the best way to help him is to give him the financial compensation for the injuries that he sustained and to leave him alone.

Once the litigation is resolved, Mr. Hollett will have no reason to view his caregivers as disclaimers. Recovery may then take place.

[53] Mr. Hollett is a relatively young man who comes from an athletic background. He has no limitations beyond chronic pain. He has been constantly told, and is aware, that recovery is possible but depends on his own efforts. I have observed Mr. Hollett over five days. I found his overall demeanor to be extremely exaggerated. I found he was defensive to any suggestion that recovery and employment was possible. I am satisfied that if Mr. Hollett put consistent efforts into a recovery program he will improve. He may not get back to his pre-accident condition and progress may be slow. He will experience recovery that will allow for employment.

[54] I have been provided with an actuarial report dated September 26, 2013 and prepared by Kelly McKeating, Consulting Actuary. I have carefully considered the computations of Plaintiff's counsel as advanced in oral and written submissions. It is my view that this is an appropriate case to apply a diminishment of income approach. A strict mathematical approach is not warranted.

[55] I rely on the comments that appear at para. 57 of *Whitehead v. Misner* (1982), 51 N.S.R. (2d) 111 (N.S.C.A.):

> To determine what damages should be awarded to Mr. Whitehead for loss of future income, we cannot simply go through exercises in mathematics. Although we should take actuarial estimates into account, we must not abdicate to an actuary the judicial duty of arriving at a fair and just result. The determination should be made after considering, on the evidence, the relative probability of possible incomes that Mr. Whitehead might have earned in the future had he not been injured and the relative probability of the possible incomes that he may in fact earn. The determination should weigh and consider the diverse mathematical estimates based on those incomes. In doing so, it should consider the relative probability of the various assumptions inherent in the estimates - such as the assumptions as to retirement, and the universal assumption that the income postulated will in each case continue unchanged until retirement except for the inflationary allowance built into the multipliers. The result must be appraised by judgment to ensure that it is not "inordinately high" or "unusually low": *Lewis v. Todd et al.*, p. 708, quoted above. The determination must on the bottom line make a "judgment call" as to what allowance for loss of future income is just and reasonable in the light of all the evidence.

[56] In *Campbell-MacIsaac v. Deveaux* (2004), 224, N.S.R. (2d) 315 (N.S.C.A.) Justice Saunders commented at paras. 102-102:

> [101] The analysis undertaken by Justice Oland in **Kern v. Steele** [2003] N.S.C.A. 147 beginning at ¶ 56, is most instructive. Her approach, together with the authorities upon which she relies, may be briefly summarized. When assessing contingencies the court is engaged in the exercise of examining possibilities, probabilities and chances against the likelihood that they might prevail in any given factual situation. The evidence upon which such estimations are based must be "cogent evidence and not evidence which is speculative" (**Schrump, et al v. Koot et al** (1977), 82 D.L.R. (3d) 553 (Ont. C.A.)). Evidence which supports a contingency must show a "realistic as opposed to a speculative possibility" (**Graham v. Rourke** (1990), 75 O.R. (2d) 602 (Ont. C.A.)). Justice Oland also endorsed the approach in **Graham**, supra, which was to distinguish general contingencies from special ones. Into the category of general contingencies fall those features of human experience that are likely to be common to all of us, things like the aging process, sickness, or promotions at work; whereas circumstances falling into the category of special contingencies are peculiar to that particular claimant. For example, remarkable talents, education, a unique illness or a poor employment history would be characterized as special contingencies.
>
> [102] As was noted in **Graham**, supra, and endorsed by Oland, J.A., in **Kern**, the impact of general contingencies may not be easily susceptible to formal proof. A trial judge has a discretion whether to adjust an award for future pecuniary loss in order to take into account general contingencies, but any such adjustment ought to be a modest one. Where, however, a party relies upon a specific contingency, whether negative or positive, there must be sufficient proof on the record which would support an allowance for that type of contingency. At all events, as noted by Oland, J.A., the overall approach is that which best achieves fairness between the parties (**Keizer v. Hanna**, [1978] 2 S.C.R. 342, wherein Dickson, J. (as he then was)) held at page 351 that:
>
> > . . . At the end of the day the only question of importance is whether, in all the circumstances, the final award is fair and adequate. Past experience should make one realize that if there is to be an error in the amount of an award it is likely to be one of inadequacy.

I have difficulty with the assumptions and contingencies appearing in the actuarial evidence. Consequently, I must make a judgment call based upon evidence which is not speculative. I must assess the possible income Mr. Hollett might have

earned and possible income he may earn as well as the effect of his health conditions on his income earning ability.

[57] In *Kern v. Steele*, 2003 NSCA 147 Justice Oland cites *Halsbury's Laws of England* as follows at para. 56:

> . . .
> Possibilities, probabilities and chances. Whilst issues of fact relating to liability must be decided on the balance of probability, the law of damages is concerned with evaluating, in terms of money, future possibilities and chances. In assessing damages which depend on the court's 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 happen or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.

[58] In *Gaudet v. Doucet* (1991), 101 N.S.R. (2d) 309 Davison J. commented as follows:

> In many cases, the plaintiff will not be able to show, on the balance of probabilities, the extent of his loss and this is particularly 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.

While Mr. Hollett is not strictly a youth, he had not established a significant employment history at the time of the accident.

[59] Freeman, J.A. tied this approach to chronic pain in *White v. Slawter, supra*. He said at para. 129:

> It is common practice in assessing general damages for lost future income in chronic pain cases to make a global award without attempting to link it directly to an arithmetical calculation of annual income times the number of years until the conventional retirement age of sixty-five.

I am not suggesting that all chronic pain cases should be resolved in this way. I am satisfied that in this case diminished earning capacity best does justice as between the parties.

General Damages:

[60] The Plaintiff argues that general damages should exceed the range of damages in *Smith v. Stubbert,* [1992] N.S.J. 532. He seeks general damages between $106,000 and $112,000. The Defendant argues that the proper range of general damages is the range in *Smith v. Stubbert, supra*. The Defendant submits that the present day value of that range is $27,000 to $54,000.

[61] In *Smith v. Stubbert, supra,* Chipman J. (as he then was) considered the range of general damages for pain and suffering in chronic pain cases at p. 127:

> I have considered a number of recent cases involving damage awards for injuries not unlike those sustained by the respondent. Most are cases dealing with that

> small percentage of people who do not recover from soft tissue injuries of the neck but suffer long-term discomfort which almost invariably brings on emotional problems. Some of the cases dealt with other injuries in addition, and others dealt with injuries of a different nature but having the common feature of long-term chronic pain. No two cases are alike and even similar injuries will impact differently on different people. . . . Each case was decided by a different court at a different time and a precise range of awards cannot, with precision, be laid down. In broad terms the range of nonpecuniary damage awards for such persistently troubling but not totally disabling injury is from $18,000 to $40,000.

I conclude that Mr. Hollett's general damages fall within the *Smith and Stubbert* range. It is my further opinion that the best comparator is *White v. Slawter, supra*, where $40,000 was awarded. Given that this case is over 15 years old, I set general damages at $47,500.

[62] The Defendant seeks a 50% reduction for failure to mitigate. They rely on Justice Haliburton's decision in *Davis v. Shields*, 2010 NSSC 80. I do not accept that Mr. Hollett deserves such a significant reduction as I conclude that the *Davis v. Shields* case is a bit of a one-off. I consider 20% to be the right number. Application of this figure reduces Mr. Hollett's general damages to $38,000.

[63] In *Cowie v. Mullin,* [1992] N.S.J. No. 162, the issue of mitigation arose. Tidman J. commented at p. 11:

> I am satisfied from the evidence that the plaintiff's obesity does, in fact, exacerbate the effects of his injury. I am also satisfied that the plaintiff was advised that it would so do. No acceptable evidence has been offered as to why the plaintiff has not kept his weight down. The plaintiff has an obligation to mitigate the effects of the injury caused by the defendant's negligence. I find that in this respect he has not done so. Under the circumstances here I would reduce

> an award for non-pecuniary damages by 10% for the failure to the plaintiff to mitigate the exacerbating effect of his obesity on his back condition.

[64] Mitigation was also a live issue in *Woods v. Hubley*, [1995] N.S.J. No. 128, where the Court concluded the Plaintiff was likely permanently disabled. Nathanson J. commented at p. 19:

> With respect to mitigation, I hold that the defendants have not, except with respect to one minor point, carried their burden of proving that the plaintiff could have overcome her psychological problems by following the medical advice of her doctors. That minor point concerns her failure between November 27, 1992, and May 11, 1993, to fully co-operate in attending physiotherapy, doing her exercises, and attending the Pain Clinic. While most of this failure can be attributed to her psychological problems, some may also be attributed to a simple lack of co-operation which must be reflected in a reduction of the amount of some of her damages. I set that reduction at 5% of any amount awarded for general damages for pain, suffering and loss of amenities. There is no need to reduce any other amounts awarded in the face of the absence of evidence that the plaintiff's failure to co-operate adversely affected her loss of past earnings, loss of future income or earning capacity, and other future losses.

The 5% reduction was approved on appeal.

[65] In *Grundy v. Boudreau*, 2006 NSSC 223 Tidman J. imposed a 25% mitigation reduction on a $60,000 award of general damages. He set forth specific examples of failing to mitigate at p. 12:

> 65 I have not heard a case where failure to mitigate was so overt and extreme. Such to the point that the Court feels that a deduction from the general damage award should be precisely considered.

66 Even before this accident the plaintiff often failed to follow medical advice from his family doctor. Following the accident, Dr. Ozere referred the plaintiff to Burnside Physiotherapy, physiotherapist Heather MacAuley treated Mr. Grundy. She was conscientious in her treatment and Mr. Grundy seemed to have confidence in Ms. MacAuley, but she acknowledged in her letter of April 16, 2002 to Dr. Ozere (Exhibit 7) that Mr. Grundy did not regularly attend sessions and was a difficult patient.

67 Mr. Grundy then attended Portland Physiotherapy, which he says was a more convenient location for him. His attendance was again sporadic. He then attended Scotia Physio, but for only one treatment. He then sporadically attended Maritime Physiotherapy for massage therapy.

68 Dr. DeCroos, Mr. Grundy's then family doctor, referred him to physiotherapy at the Q.E.II. Although Mr. Grundy was booked for two appointments, he failed to appear on both occasions.

69 Mr. Grundy was provided with a bite plate by his dentist, Dr. J.D. MacNeil, which was recommended later by Dr. Hannigan as a solution to his "TMJ" joint problems, but Mr. Grundy would not follow instructions on its use and eventually stopped wearing it.

70 Mr. Grundy was prescribed splints to wear for his carpal tunnel syndrome but he failed to wear them as prescribed and eventually ceased wearing them altogether.

71 In January 2003, Mr. Grundy was seen by Neurologist, Dr. McKelvey, but failed to follow Dr. McKelvey's advice that he increase his physical activities. Mr. Grundy refused to see Dr. McKelvey again. Dr. DeCroos, because of the pain complaints, referred Mr. Grundy to an anaesthesiologist, Dr. Finlayson, in an attempt to provide relief for complaints of pain. Although an appointment was made for Mr. Grundy, he failed to keep the appointment and never did see Dr. Finlayson.

> 72 Mr. Grundy was referred to several psychologists and psychiatrists including Drs. Hayes, Millner-Clerk, Reuben and Steele. He failed to see those doctors except for one appointment with Dr. Steele and did not return as recommended to Dr. Steele.
>
> 73 Even Dana Marcon, a medical exercise specialist who Mr. Grundy called to give evidence on his behalf, admitted that Mr. Grundy missed appointments for exercise therapy. Ms. Marcon could not recall how many appointments were missed but said Mr. Grundy missed more than one appointment. Ms. Marcon says she billed Mr. Grundy's insurers for all appointments whether or not Mr. Grundy attended. Ms. Marcon records showed she billed for 31 sessions, but only had chart notes for 12 or 13, and Mr. Grundy did not attend for any appointments between December 19, 2001 and August 7, 2002 and between June 2003 and September 25, 2003.
>
> 74 In light of this evidence I have no difficulty in finding that Mr. Grundy failed to exercise reasonable diligence and ordinary care in attempting to minimize the damage caused by the motor vehicle accident. Because of the consistency of that failure I would reduce the general damage award by 25% resulting in a final award of monetary damages of $45,000.00.

Mr. Hollett shares many similarities with Mr. Grundy.

[66] In *Hill v. Cobequid Housing Authority*, 2010 NSSC 294 MacAdam J. applied a 12.5% reduction on general damages of $40,000. The Plaintiff's failure to attend physiotherapy was the reason for this reduction.

[67] I conclude that *Grundy v. Boudreau, supra*, most resembles Mr. Hollett's case when it comes to a lack of mitigation. I am satisfied that the 20% figure is the appropriate reduction for Mr. Hollett's circumstances.

Special Damages:

[68] Mr. Hollett testified he had several items in the trunk of his vehicle at the time of the collision. The list of items include golf equipment, fishing gear, books, CDs and clothing. He testified that these items were ruined as a result of being left in the damaged vehicle and exposed to the elements. Mr. Hollett seeks $7,700 in replacement costs. I find his evidence on these damages to be vague and exaggerated. I do not accept that he is entitled to replacement cost, but I accept there is some loss. I set the special damages at $3,500. I will not apply the mitigation factor to these damages.

Past Lost Earnings:

[69] It has been approximately eight years since this accident. Mr. Hollett's pre-accident income came from his golf club employment, golf lessons and employment insurance. Mr. Hollett's testimony suggests that but for the accident, he would have continued working at Granite Springs. He also testified that he would have continued giving golf lessons. As well, he testified that he might have returned to the carpet business as a fall-back or in conjunction with employment insurance.

[70] I do not accept that a return to the carpet business was ever in the cards for Mr. Hollett. A career in the golf industry was always his goal. I do accept that Mr. Hollett would have continued giving golf lessons and that sideline would have grown somewhat over the years. I accept Mr. Hollett's position that he would have worked 1300 hours a season at Granite Springs Golf Club or at some other club. The Plaintiff's counsel have submitted that the following table reflects Mr. Hollett's anticipated earnings from 2006 to 2013:

Year	Wage Per Hour	Gross Pay	Lessons	Deductions	Net
2006	$9.00	$11,700	$10,000	$3,680	$18,020
2007	$9.50	$12,350	$10,000	$3,869	$18,481
2008	$10.00	$13,000	$11,000	$4,060	$19,940
2009	$10.50	$13,650	$12,000	$4,823	$20,827
2010	$11.00	$14,300	$13,000	$5,300	$22,000
2011	$11.50	$14,950	$14,000	$5,778	$23,172
2012	$12.00	$15,600	$15,000	$6,317	$24,283
2013	$12.50	$16,250	$15,000	$6,544	$24,706
TOTAL:					$171,429

In addition, Mr. Hollett would have received Employment Insurance Benefits in each off-season in the net approximate amount of $3,500 per year for additional

lost past income of $28,000 per annum. Mr. Hollett's lost income to the end of 2013 is set at $200,000 (rounded off). I will add a further $1,000 for employment insurance benefits in 2014, increasing this number to $201,000.

[71] A mitigation deduction of 20% reduces lost past earnings to $160,800. It is agreed that Mr. Hollett received $38,902.64 in Section "B" weekly indemnity benefits to July 2012 and that this amount must be deducted from this head of damages. This reduction reduces lost past earnings to $121,897. A further Employment Insurance Disability Benefit of $2,370 was received in 2006 and must be deducted. I set Mr. Hollett's past loss income award at $120,000 (rounded off).

[72] This brings the Court to the issue of Mr. Hollet's CPP income and whether these payments are to be deducted from his award for lost past income. Mr. Hollett argues that contrary to the only Nova Scotia decision on point, CPP disability benefits should not be deducted. In the alternative he argues that they are deductible under section 113A of the *Insurance Act*, R.S.N.S 1989, c. 23, only to the date of the trial. The Defendant takes the position that CPP benefits are deductible under the section 113A both before and after trial.

[73] In *McKeough v. Miller,* 2009 NSSC 394, Scaravelli J. considered whether CPP disability benefits are deductible from a loss of income claim under section 113A of the *Insurance Act*. Section 113A provides:

> In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, the damages to which a plaintiff is entitled for income loss and loss of earning capacity shall be reduced by all payments in respect of the incident that the plaintiff has received or that were available before the trial of the action for income loss or loss of earning capacity under the laws of any jurisdiction or under an income-continuation benefit plan if, under the law or the plan, the provider of the benefit retains no right of subrogation. 2003 (2nd Sess.), c. 1, s. 12.

Scaravelli J. found that CPP benefits are deductible. He stated at para. 62:

> The result of *Meloche* is that, in Ontario, CPP disability benefits received by a plaintiff would be deductible from an award for past income loss. Amounts received after trial are also deductible and are subject to a trust in favour of the defendant, pursuant to s. 267.8(9). Section 113A of the Nova Scotia Insurance Act includes the same categories: 'income loss and loss of earning capacity.' I conclude that CPP disability benefits are deductible from an award for past and future income loss under the Nova Scotia legislation.

[74] Mr. Hollett argues that *McKeough v. Miller, supra,* should not be followed because *Meloche v. McKenzie* (2005), 27 CCLI (4^{th}) 134, the decision upon which Scaravelli J. relied, was subsequently overturned by the Ontario Court of Appeal in *Demers v. B.R. Davidson Mining and Development Ltd.,* 2012 ONCA 384. In the *Demers* case the Court of Appeal held that CPP disability benefits were not

deductible for two reasons. Those reasons are summarized by the Court at paras. 29 and 30:

> 29 Nonetheless, I would answer no to the question whether CPP disability benefits should be deducted from payments for loss of earning capacity for either of two reasons. The first reason rests on the principle that clear an unambiguous legislative language is required to change common law rights. The addition to the term "loss of earning capacity" in the Bill 59 regime does not clearly and unambiguously change the non-deductibility of CPP benefits at common law.
>
> 30 The second reason I would answer no is that CPP disability benefits are not paid "in respect of the incident"; they are paid in respect of Ms. Demers' disability. Thus, on the wording of s. 267.8(1)2 no deduction is required.

These reasons were not available to Scaravelli J. when he decided *McKeough v. Miller, supra*.

[75] I am of the respectful view that *McKeough v. Miller, supra*, was wrongly decided in light of the Ontario Court of Appeal decision. I feel bound by *Demers* and as a result I do not deduct CPP benefits from the $120,000 award for lost past earnings.

Loss of Earning Capacity:

[76] Setting a damage award for loss of earning capacity involves an element of speculation. I must take into account Mr. Hollett's age, education, personality, as well as his pre-accident work history. After having considered all of these factors and the evidence as a whole, I set Mr. Hollett's diminishment of earning capacity

at $200,000. Once the 20% mitigation is factored in, this award is reduced to $160,000.

[77] The evidence establishes that Mr. Hollett settled his Section "B" claim for income replacement for $85,000 in July 2012. Mr. Hollett argues that this sum is not deductible from his loss of earning capacity award. The Defendant argues that it must be deducted. Additionally, the Defendant argues that the deduction should represent all benefits that were available to the Plaintiff. Mr. Hollett testified that he settled to avoid any interruptions to his benefits. The Section "B" Insurer had terminated those benefits subsequent to the accident and reinstated them after receiving an independent assessment from Dr. David King.

[78] The issue with respect to Section "B" benefits is not whether they should be deducted, but whether the deductions for future Section "B" benefits should be limited to the $85,000 settlement. I am of the view that only the settlement amount should be deducted. Given the history of Mr. Hollett's Section "B" claim, I conclude a settlement was the appropriate option. The relationship between Mr. Hollett and his Section "B" insurer had broken down.

[79] I find authority for this conclusion in *Corkum v. Sawatsky* (1993), 126 N.S.R. (2d) 317 (NSCA), as well as *McKay v. Rovers* (1987), 79 N.S.R. (2d) 237. The following appears in the former at para. 77:

> . . . From a policy perspective, plaintiffs ought to be encouraged to settle claims against their own Section B insurers and not be thwarted by having to obtain the consent of the defendants (presumably, insurers). Whether it was wise for Mr. Corkum to buy out his claim for only $9,000.00 is not the point. If, as it has been said, no fault insurance was promoted by insurance companies to avoid litigation and reduce the cost of insurance to policy holders then, in the absence of clear legislative amendments any such "loss" should be borne by the defendant and not the plaintiff. I see no basis in law or on policy grounds to refuse to shift the loss where, as here, the net result of Mr. Corkum's settlement is to give the defendants a credit of $9,000.00 which they would not otherwise have received.

[80] In *McPhail v. Desrosiers* (1997), 166 N.S.R. (2d) 1981, MacLellan, J. stated at paras.148-150:

> 148 Given the position of the defendants that the plaintiff is not totally disabled, I have difficulty with the argument that she should not have settled for $30,000.00 in September, 1996. Also, in light of my finding herein that she is not totally disabled and has some ability to earn income, I reject the submission of the defendants and find that the settlement arrived at with the Section B Insurance Company was reasonable in her particular circumstances.
>
> 149 In *Dillon v. Kelly, supra*, the Court found that the plaintiff there clearly had a right to the Section B benefits until her date of retirement and in effect had used bad judgment by accepting the low lump sum amount.
>
> 150 In this case, the plaintiff was clearly beyond the 104 week initial period and would have to show that she qualified for the Section B benefits. She was not questioned on cross-examination about why she did so, and I am not prepared to second guess her decision to accept a lump sum amount. (See *Corkum v. Sawatsky, et al,* (1994), 126 N.S.R. (2d) 317.)

I conclude that Mr. Hollett's decision to settle with his Section "B" insurers was reasonable in the circumstances. I therefore deduct $85,000 from Mr. Hollett's claim for lost earning capacity. This reduces the award to $75,000.

[81] On the basis of my reasons on Mr. Hollett's claim for past lost earnings, there will be no reduction for future CPP benefits.

Loss of Valuable Services:

[82] Mr. Hollett seeks $30,000 on this head of damages. The Defendant argues he is only entitled to a small award. Justice Saunders discussed lost valuable services at para. 50 of *Leddicote v. Nova Scotia (Attorney General)*, 2002 NSCA 47:

> The question becomes to what extent, if at all, have the injuries impaired the claimant's ability to fulfill homemaking 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. . . .

It should be noted that this head of damages is not intended to compensate a Plaintiff for duties or chores they did not perform prior to their injury.

[83] Susan Miller testified that post-accident Mr. Hollett was unable to clean dishes, chop and stack wood, clean out the fireplace or snow clearing. She did not provide clear evidence as to how often Mr. Hollett did these activities prior to the accident. She did not provide any documentation as to direct economic loss. She did testify that they had to buy a ride-on lawnmower for $2,000.

[84] Mr. Hollett testified that since the accident, he has been unable to shovel snow and do mowing and lawn care. He stated that he cannot cut and stack wood, paint or clean his garage. He did not provide convincing evidence as to how often he did these tasks before the accident. He did not provide any documentation as to direct economic loss. He did testify to spending $1,900 on a ride-on mower, $500 for insulation and $75 to repair a toilet.

[85] I found the valuable services evidence vague and unconvincing. However, I expect that there is a basis for a modest award. I set Mr. Hollett's damages for loss of valuable services at $5,000. A 20% mitigation reduction sets the final figure at $4,000.

Future Medical Expenses:

[86] Mr. Hollett seeks $105,000 for future medications. His position on this head of damages appears at para. 56 of the Plaintiff's brief:

> Medical Expenses
>
> 56. Mr. Hollett is entitled to compensation for the cost of medical treatment that is not covered by Section B. The Section B indemnity expired on May 16, 2010, four years after the accident. Mr. Hollett's claim for past medical expenses is based upon his drug medication of $425.00 per month, so since May 2010, amounts to $19,550. The actuarial report provides a multiplier of 20.7385 for costs to age 80 including a gross-up. At an annual cost of $5,100.00 this amounts to $105,000.

Mr. Hollett has used narcotic medications as his main defence against pain. With the exception of Dr. Koshi, his caregivers are strongly encouraging him to curb their use. I am satisfied that a time will come when Mr. Hollett will have to limit his heavier medications. The evidence on point is anything but firm. I am setting future medication costs at $35,000. A mitigation reduction of 20% results in damages of $28,000.

[87] The Supreme Court of Canada in *Krangle v. Brisco*, [2002] 1 S.C.R. 205, set forth the principles governing an award of damages for cost of future care at paras. 21 and 22:

> 21 Damages for cost of future care are a matter of prediction. No one knows the future. Yet the rule that damages must be assessed once and for all the time of trial (subject to modification on appeal) requires courts to peer into the future and fix the damages for future care as best they can. In doing so, courts rely on the evidence as to what care is likely to be in the injured person's best interest. Then they calculate the present cost of providing that care and may make an adjustment for the contingency that the future may differ from what the evidence at trial indicates.
>
> 22 The resulting award may be said to reflect the reasonable or normal expectations of what the injured person will require. … The measure is objective, based on the evidence. This method produces a result fair to both the claimant and the defendant. The claimant receives damages for future losses, as best they can be ascertained. The defendant is required to compensate for those losses. To award less than what may reasonably be expected to be required is to give the plaintiff too little and unfairly advantage the defendant. To award more is to give the plaintiff a windfall and require the defendant to pay more than is fair.

The quantum of such damages should be based on what is reasonably necessary on the medical evidence to promote the mental and physical health of Mr. Hollett.

[88] Calculation of an appropriate award for future costs of care is clearly a fact specific exercise. The medical evidence in Mr. Hollett's case does not establish that taking narcotic medication for the rest of his life is in his best interests. The experts appear to share the view that Mr. Hollett would derive some benefit from adding psychological treatment, physiotherapy and exercise to his life. They also agree that these activities could decrease his need for pain medications.

Conclusion:

[89] The following represents Mr. Hollet's damages.

General Damages:	$38,000
Special Damages:	$3,500
Past Lost Earnings:	$120,000
Lost Earning Capacity:	$75,000
Loss of Valuable Services:	$4,000
Future Care:	$28,000
Total Award:	$268,500

Pre-judgment interest is set at 2.06% for a period of four years.

Coady, J.