

SUPREME COURT OF NOVA SCOTIA

Citation: *Davis v Shields*, 2010 NSSC 80

Date: 20100302

Docket: Hfx No 227546

Registry: Halifax

Between:

Tim Davis

Plaintiff

v.

David Shields

Defendant

Judge: The Honourable Justice Charles Haliburton

Heard: November 12, 16, 18 and 19, 2009,
in Halifax, Nova Scotia

Counsel: Barry Mason, counsel for the plaintiff
Darlene Wilcott, counsel for the defendant

By the Court:

Background

[1] The plaintiff Tim Davis suffered a whiplash injury as a result of a rear end motor vehicle accident on August 6, 2002. He was alone in his 1965 Comet Cyclone motor vehicle on the Bedford Highway and stopped for a red light when he observed the defendant's motor vehicle rapidly approaching from the rear. The Comet had never been equipped with a seatbelt.

[2] The plaintiff's testimony described himself as seeing this car approaching from his rear without apparent slowing. He said he gripped the steering wheel, put both his feet on his brake and braced himself.

[3] The impact was of sufficient force to "snap the steering wheel," bend the seat, the ashtray landed in the back seat and the defendant vehicle "went under my gas tank. My car was pushed forward" but there was no impact with a van stopped on the roadway in front of him.

[4] The plaintiff indicated that when he opened the door to get out of his vehicle, the defendant vehicle had "bounced back" about three feet and was "gone right back to the firewall." Davis' car was still drivable, although a bent door indicated some bending of its frame. He later observed paint, apparently from the hood of the defendant vehicle on the bottom of his gas tank confirming his impression that the rear of his vehicle had actually been lifted up by the impact as it was shoved ahead.

[5] Police arrived on the scene as a result of the accident and the parties exchanged information.

[6] The plaintiff testified that he immediately experienced a bad headache which became worse as he drove toward his home in Tantallon. He stopped on his journey to consult his family doctor who prescribed pain killers and rest.

[7] His 1965 model car was written off for insurance purposes and the defendant vehicle apparently suffered \$5,000.00 to \$6,000.00 in damages, which resulted in it being written off as well. Photographs of the plaintiff's vehicle do not reveal much, if any, visible damage however his testimony was that the frame had been buckled four inches. He subsequently repaired it, or had it repaired.

[8] It is now more than seven years after the accident and the plaintiff is obviously seriously disabled. He did not attend Court continuously during this four-day matter but when he did attend, he remained standing. He explained that his least comfortable position was sitting; that standing is more comfortable but he spends much of his time lying down in order to minimize his pain. The principal cause of his ongoing discomfort and/or pain is whiplash.

[9] The medical reports and the doctors who testified seem to be unanimous in saying that he suffers a "whiplash associated disorder type II." I understand that it is implicit in this diagnosis that

the medical experts who have examined and/or treated the plaintiff have been unable to identify an organic cause for the symptoms that he suffers and the disability that has resulted. As a result of this accident, there were no broken bones, there were no disconnected joints but nonetheless the plaintiff suffers a lack of mobility, restricted movements in rotation or bending, diminished strength along with, of course, pain.

[10] At the time of trial, the plaintiff testified that he suffers a continuous headache, which he likened to “a hand reaching up from the base of my skull” and pain in his lower back. He takes medication to help him sleep but he wakes nonetheless, tossing and turning to attempt to gain some comfort. He complains that his muscles go into a spasm and as the day grows longer, the pain gets worse. The more active he is, the more pain he suffers. On a good day he gets around; on a bad day he stays in bed with pain killers. The pain in his neck and shoulder has been somewhat resolved.

[11] The plaintiff is a highly qualified welder. His welding experience includes building trailer frames, boiler repairs (that is retubing boilers) and welding sheet piling. He also had experience working as a carpenter or carpenter’s helper while working in Ontario in the mid-70s. At the time of the accident he was employed by Damar Industries, who had some form of a maintenance contract in relation to military installations in the Halifax area. This work was physically demanding and included using his welding skills, mechanical skills (his hobby was restoring old cars) and carpentry. He says that he loved his work with Damar, with whom he was employed for ten years and had seniority. In 2002, he was earning just over \$40,000 a year.

[12] The plaintiff testified that he had an active lifestyle aside from his employment. Among his free-time activities were fast dancing, down hill skiing, riding his mountain bike, weight training, karate, riding his motorcycle as well as waterskiing in St. Margaret’s Bay. He is a certified scuba diver. He lamented that his scuba-diving equipment, mountain bike and other possessions have not been used since his accident.

[13] While the plaintiff still does a little motor vehicle mechanic work, the turning and twisting required aggravates his condition so he does very little of it. In the same vein, he lives in an old farmhouse that he was in the course of renovating. Only a few days before the accident he took delivery of a steel I-beam to be installed in the house. That beam remains on the ground where it landed because he is unable to do that type of work anymore.

[14] The plaintiff had no earned income in 2003 or 2004. In 2005, however, he did net \$5,315.00, which he indicates was from plowing snow for some of his neighbours. In 2006, his income was approximately \$7,000.00; in 2007, \$6,850.00 and continues to earn approximately that amount of money doing some handyman work and plowing snow. He says he will continue to plow snow as long as his old truck holds out.

[15] The plaintiff is able to perform casual labour, but only because he can take frequent breaks and do the work as he is able.

[16] The plaintiff was quite emphatic in saying that it would be unfair to an employer to hire him for a regular work day when he cannot work on a continuous basis.

[17] Other than the plaintiff, the only other lay witness was his friend Leslie Manuel. He worked with the plaintiff at Damar Industries, where they worked as a team. Damar went out of business at some point after August 2002 and the entire work crew moved to Carbaries Construction, where they continue to do the same work on DND properties.

[18] Mr. Manuel testified that he continues to work at the same job and that his wages have increased from \$17.50 an hour to \$21.00 an hour in the meantime. I calculate that to be an increase of 20%.

[19] Over the past several years, Mr. Manuel has continued his spare time association with the plaintiff. The odd jobs, or handyman jobs, from which the plaintiff earns some money is work done in association with Mr. Manuel. He corroborated the evidence of the plaintiff about the jobs and the type of work that they undertake, the fact that he does the “heavy lifting” while the plaintiff may operate a truck, a small chain saw, or a welding torch. He has, on occasion, chopped and carried wood into the house for the plaintiff. He commented on the complaints of discomfort made by the plaintiff when they work together, with the plaintiff taking frequent breaks to rest or make himself comfortable.

[20] The plaintiff’s case is seriously handicapped by the fact that his treating physicians were not called to give evidence. He consulted Dr. Saunders immediately after the accident and regularly until 2004. He has not sought medical advice since 2004.

[21] The plaintiff saw no medical doctor other than Dr. Saunders until June of 2003, when his insurers referred him for an independent medical assessment by Dr. Burton McCann. It was as a result of that assessment that Dr. Saunders referred him to Dr. Deirdre MacLean at the Nova Scotia Rehab Center for assessment and treatment. Dr. MacLean saw him June 23, 2003, and made a number of recommendations for rehabilitation. She expressed surprise about the fact that he had not pursued appropriate physical therapy treatments to restore his health and strength. She probably had before her the earlier report of Dr. McCann in which he wrote:

Primary treatment recommendation would be a referral to a Psychologist skilled in pain management and issues relating to mood and post injury sequelae.

...

Once Mr. Davis has had his therapy commenced with the Psychologist as recommended above, the most appropriate course of action would be referral to a physiotherapy clinic for a graduated exercise and activation program, possibly culminating in a work conditioning program. This therapy should be in conjunction with the Psychologist skilled in pain management.

[22] In preparing his medical/legal report for trial Dr. Mahar quoted from the “work conditioning report” of January 8, 2004 (Concentra Integrated Services).

[23] Psychological assessment was recommended. *“Mr. Davis did not feel this intervention would be of benefit. This is unfortunate as it appears that stress management is a significant barrier to his success with his program”*

[24] No satisfactory explanation is before the Court as to why Dr. Saunders and Dr. MacLean, his treating physicians, were not called to testify.

Medical Evidence

[25] Dr. D Burton McCann, Dr. Robert K. Mahar and Dr. Rosenberg (a psychiatrist) did testify, all of them having been retained to do assessments and reports in preparation for the trial.

[26] Dr. Robert Mahar was qualified as an “expert in physical medicine who can give opinion evidence on the assessment, diagnosis, treatment and disability arising from neuromusculoskeletal injuries, including chronic pain and the effect of stress, anxiety and depression on such impairments and pain.” Dr. Mahar testified that he sees a thousand patients a year for similar complaints of the condition known as “chronic pain”. His patients sometimes suffer psychological problems, commonly depression and anxiety. He treats his patients by attempting to educate them, prescribing medication and using the services of psychologists and vocational counsellors. He said that 60% of these patients are referred to him by family doctors.

[27] He examined and assessed the plaintiff on October 22, 2008.

[28] Dr. Mahar concluded, based on the records that were produced to him and his interview with the plaintiff, that the plaintiff had been “exposed to significant force.” He was told that with the brakes on, the plaintiff’s vehicle had been moved four feet forward by the collision, the rear end was lifted clear of the road so that the driver was looking down at the ground, the ashtray was propelled into the back seat, the drivers’ seat was twisted and bent and that the defendant’s vehicle was substantially damaged.

[29] He described the mechanism of injury in rear-end collisions. He described some of the forces at work; the car moves, then the person moves, the neck and shoulders move backwards and the spine pushes up into the head. The resulting complaints of the plaintiff of his low back, left leg, left buttock, groin, left shoulder pain and headache are typical. Dr. Mahar’s physical examination of the plaintiff was intended to assess both objective and subjective symptoms, those respectively outside or under the control of the patient. He listed subjective symptoms as pain, tenderness, posture and, to some extent, strength and range of motion. Without enumerating his particular findings, I think it is sufficient to say that he determined the patient’s range of motion and comfort in both flexion and rotation was severely inhibited, in many cases to the extent of 50% from normal. These findings applied to the cervical and lumbar spine, as well as his shoulders. His ultimate

diagnosis was Whiplash Associated Disorder, Grade II of IV. He did not confirm, but did find “suggestion” of a complicated biopsychological chronic pain disorder.

[30] As with the other experts, Dr. Mahar was asked to give his opinion about the prospects that the plaintiff would return to work. His opinion was that even if there were no mental component to his pain syndrome, he would never be able to return to full-time heavy work. In support of his conclusion, he made reference to the statistical information about such prospects after a worker suffering whiplash has been out of the workforce for a certain period of time. He classified the plaintiff’s disability as moderate to severe and opined that his symptoms would stay as they are.

[31] Dr. Mahar has experience with clients who have, with the work of a psychologist, been restored from sedentary work capacity to the capacity to perform heavy work, but his evidence satisfied me that the possibility of that outcome for this patient at the time of his assessment was very limited.

[32] The evidence before the Court is that the plaintiff was not referred for physiotherapy by his family physician. It was not until June, a year later, that Dr. Saunders arranged for him to be seen by Dr. MacLean at the Nova Scotia Rehab. Centre. He did attend a chiropractor on a regular basis after the accident and apparently had massage therapy. Dr. MacLean expressed surprise that he had not been sent for physiotherapy at an earlier date. Davis did not in fact receive any physiotherapy treatment until November 2003, at which time he was referred to the “Bay Centre Physio Work Hardening Program.” By that time, I was told that a person in his position has only a one in four chances (statistically) of returning to work.

[33] The report of Dr. MacLean, as interpreted by Dr. Mahar, advised that there was nothing about his condition that would be damaged by activity, specifically physiotherapy. This was likewise the opinion of Dr. Mahar. He did not opine that the patient was exaggerating his symptoms but he expressed his view that there is probably some degree of “pain amplification.” He likened the pain disorder to fibromyalgia, where medicine has not identified any anatomic cause. Nonetheless, where there is chronic pain for six months or more patients develop a constellation of symptoms signalled by “Disuse, Drugs, Depression, Dramatization and Duration.”

[34] The witness had reviewed the report of Dr. McCann. Under cross-examination he opined that if the plaintiff had followed the full recommendations of Dr. MacLean, even when he first consulted her, that he might have returned to his pre-accident work, although he thought the prospect of doing so after this time lapse as a “simple negative”.

[35] Dr. Burton McCann also testified on behalf of the plaintiff. He was qualified as “an expert in family medicine with a subspeciality in occupational medicine who can give opinion evidence on all matters pertaining to those fields.” It was his Section B insurers who referred him to Dr. McCann. They sought an assessment and recommendations for treatment. It was June 2, 2003.

[36] Based on the information Dr. McCann was given about the accident, he concluded that there was a significant amount of force involved, that it was not a minor incident. He observed that the plaintiff braced for the impending impact, which may have amplified the injury.

[37] At the time of the plaintiff's consultation with Dr. McCann, his main complaint was of low back and shoulder girdle pain. The Doctor said that he was concerned that the plaintiff had experienced a depressive episode and opined that he was not "coping" with his pain, and was demonstrating significant pain behaviour.

[38] Dr. McCann did not communicate his recommendations directly to the plaintiff but did communicate to his client, the insurers, that the plaintiff should terminate the chiropractic treatments and initiate an exercise program. Statistically, he testified, persons with the plaintiff's condition recover with appropriate treatment. Dr. McCann's examination of the plaintiff suggested "pain magnification" and he observed similar restrictions on movements, extension and rotation as did Dr. Mahar.

[39] Dr. McCann expressed some concern about the plaintiff's mental health. The plaintiff had a history of treatment and a drug overdose as an adolescent. He described the plaintiff's present condition as "non-organic" pain, which was failing to improve. He testified that the most important recommendation he was making was that the plaintiff should receive physiotherapy with the assistance of psychological counselling. Dr. McCann expressed the view that the plaintiff was capable of doing sedentary work at the time of his first examination.

[40] In reviewing his follow-up report (pp. 31-2), Dr. McCann said that "time is our enemy" with these patients. Statistically, the chances of returning to full functioning fall as time passes.

[41] It was Dr. McCann's opinion that if his recommendations had been followed, it was "more likely than not" that the plaintiff would have returned to his former work but by December 2003, after Dr. McCann did his follow-up examination he wrote: "Given that we are now almost 20 months post-injury and given the functional level documented in December 2003, one would have to be progressively more pessimistic that Mr. Davis would be able to return to his full-time pre-accident work activity." (Tab 1, p. 32 of the Joint Exhibit Book).

[42] Dr. McCann was cross-examined by defence counsel about the reality of the pain alleged by the plaintiff. I understand his evidence to be that the pain is real but that there is no structural cause and therefore perhaps no real understanding of why the patient is suffering. That is why he recommended a psychological assessment as a first step in treatment. Psychology in pain management is extremely useful in assisting the patient to regain their former functions. Reconnecting to the workplace, he said, is very helpful to a positive outcome.

[43] I return to the issue of the chiropractic treatments and/or massage and medication. Dr. McCann had expressed the opinion that the plaintiff should be "weaned off passive modalities." He testified that the plaintiff had been following this passive form of treatment "over and over again with no improvement." He expressed the opinion that chiropractic treatment after six months would

probably be useless and that “activating folks earlier improves the outlook for recovery.” His recommendations were not implemented. His last word regarding Davis’ prognosis was written to Angela Hamilton, case manager (sec B insurers) is to be found at Page 14, Tab 8 of Defence Exhibits:

The larger question is perhaps what would the likely outcome have been had Mr. Davis accepted the therapy recommendations in the sequence as outlined. While one will never know the answer with certainty, it is the opinion of the undersigned that had these recommendations been actioned, and in the sequence noted, that it is more likely than not that Mr. Davis would have been able to return to his pre-accident work.

[44] Dr. Rosenberg is a psychiatrist. He testified on behalf of the defence. He has seen hundreds of patients with chronic pain syndrome. He did not conclude that the plaintiff suffers “depression.” I gather, in part, because the plaintiff continues to want to work and, according to Dr. Rosenberg, was significantly bothered by his inability to do so.

[45] Dr. Rosenberg agreed that the plaintiff “is experiencing pain,” that its source is emotionally based, and that it causes him to be moderately impaired. He expressed the view that the plaintiff would have benefited from psychotherapy in conjunction with physical therapy and that such treatment is more successful if undertaken sooner, rather than later. It is his opinion that such treatment would have decreased the plaintiff’s pain and raised his potential to function. The plaintiff’s desire to return to work is a positive sign, he said.

[46] Even today, Dr. Rosenberg thought that the plaintiff might improve with such treatment saying, “You never know unless you try.”

Findings of Fact

[47] My review of the evidence persuades me that the relevant facts are as follows:

- i) Liability for the accident (collision) of August 2002 is admitted.
- ii) As a result of the collision, the plaintiff is significantly disabled. He will never return to physical work and he will suffer continuous pain and discomfort.
- iii) The plaintiff lives alone in a home where he was the person who did the gardening and property care as well household maintenance. Renovations to the house were planned and in progress as of August 2002, with the plaintiff intending to provide his own labour. The accident terminated those plans. His grown daughter was living with him in that household in 2002 but has since married and moved away leaving him as the sole housekeeper. His disabilities are such that he can no longer perform all of the housekeeping and handyman services necessary to maintain the household. He will, for the foreseeable future, depend on others for housekeeping services and

property care and any renovations or upgrading to the home. All of which works he previously did himself.

iv) The plaintiff's physical movements are significantly restricted. His ability to extend and rotate his head and body is limited by as much as 50% from normal. His physical capacity is now limited by both pain and loss of strength. These conditions are now unlikely to improve.

v) The plaintiff does continue to have the capacity to perform light sedentary work in a circumstance where there is opportunity for intermittent breaks and a variety of sitting or standing options available to him. (He spoke of his retirement plan, which had been to establish a small automotive/repair business where he could hire and supervise a helper. I suggested to him that a possible job would be as a clerk in the parts and service department of a garage or automotive dealer which would utilize his interest in and knowledge of automobiles).

vi) The evidence of the medical experts is accepted that the plaintiff should have been able to return to full or nearly full functioning after this accident. The experts say that he failed to pursue appropriate treatment when his symptoms failed to resolve, they should have done. Specifically in failing to accept and employ the advice of Drs. McCann and MacLean of June 2003. Relying on the evidence of the medical experts (the report of Dr. MacLean, their evidence about his condition and about the statistics relating to whiplash injuries), I am persuaded that, with appropriate advice and treatment, a rational person would, in all likelihood, recover, perhaps totally, thereby mitigating most of the losses suffered.

The Issues

[48] The plaintiff made a claim for general damages, loss of future earnings, loss of valuable services and the cost of future care. It is the position of the defence that the plaintiff failed to mitigate his damages and that he was contributorily negligent in that he was not wearing a seatbelt at the time of collision.

Damages

[49] In ordering damages payable to the victim of the tortious conduct of another, the object must be to place that victim, in so far as it is possible, in the same position as if the incident had never happened. The payment of money is the only method available for doing so. No sum of money will remove a chronic headache or restore a person's health. Any monetary compensation that incorporates future losses or conditions clearly involves a certain amount of speculation. Compensation for pain and suffering, the loss of amenities and the loss of past income depend on many factors relating to the individual and the parameters established by the courts in various precedents. What compensation will as nearly as possible make the plaintiff whole? His credibility is the springboard for all these conclusions.

[50] Among the cases to which I have been referred, I find *Marinelli v Keigan*, 173 N.S.R. (2d) 56, [1999] N.S.J. 23, to be instructive as a review of many of the principals which I propose to

employ in this instance. Like the present case, this was one where the plaintiff suffered “from chronic pain with origins which are myofascial, a term used in the evidence almost synonymously with fibromyalgia to mean pain having its source not in (the plaintiffs’) skeletal structure but deep in the muscles and surrounding tissues of her neck and shoulder girdle, including the upper back between the shoulder blades. She has pain in her pectoral and rib areas, numbness in some of her fingers, and later developed hip and buttock pain which was diagnosed as part of a fibromyalgia pattern from the original trauma.” (at Paragraph 6).

[51] *Kennedy v MacAdam*, (NBQB) McLellan J., 2000 CarswellNB 54, 2000 NBR (2d) (Supp) #9, is a case that has some similarities to the present. This was a case of a 36-year-old labourer who suffered injuries similar to the plaintiff in a rear end collision. He was awarded \$50,000 in general damages after a trial in the year 2000. Mr. Kennedy was taken to the hospital by ambulance and released a few hours later after x-rays were taken and found to be negative. He began physiotherapy six months later (January 1996). He was able to return to work but obliged to avoid “heavy tasks.” Unlike the plaintiff, he did regularly and consistently follow medical advice including 16-months of physiotherapy sessions. When some additional demands were made at his job, he had to give it up. By the time of trial, he had virtually five years’ treatments by psychologists, physiotherapists and a chronic pain service, with a report from the latter July 19, 1999. Justice McLellan indicated: “I felt Mr. Kennedy was likely to have a long term, probably permanent, disability as a result of his injury.”

[52] In determining damages for whiplash type injuries in Nova Scotia, the cases make it obligatory to consider the finding of the Court of Appeal in *Smith v Stubbart*, 1992 Carswell 250, 117 N.S.R. (2d) 118, where Chipman J.A. discussed what the court felt was appropriate by way of general damages in cases of this nature. The condition of the plaintiff was summarized at Paragraph 22 in these words,

... The medical evidence was that the respondent suffered a whiplash or soft tissue type of injury to his neck with some general bruising of his spine. This was associated with post-trauma headache. ...

[23] [The doctors] pointed to a condition, which while long term, was treatable and far from totally disabling.

[53] This was an appeal from a generous award by a jury which according to Chipman J.A.’s assessment resulted from the juries’ conclusion of complete disability based on the evidence of a psychologist who had been misinformed. At Paragraph 33, the judge observed about “a number of cases.” He indicated,

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. . . . In broad terms, the range of non-pecuniary damage awards for such consistently troubling but not totally disabling injury is from \$18,000 to \$40,000.

[54] Justice Chipman went on by referring to the decision of Dickson J. in *Andrews v Grand and Toy (Alberta Limited) et al*, 1978 S.C.R. 229 at 261,

There is no medium of exchange for happiness. There is no market for expectation for life. The monetary value of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions, but the award must also of necessity be arbitrary or conventional . . .

Justice Chipman reduced the award of \$100,000.00 to the sum of \$40,000.00 in that case.

[55] Bearing in mind the cases I have reviewed, and considering the observations of Chipman J. in *Stubbert*, my conclusion is that the injuries and continuing disability of the plaintiff places him at the higher end of that scale. Making allowances for the impact of inflation, I find the plaintiff entitled to general damages for pain and suffering and loss of amenities in the amount of \$56,000.00.

Loss of Future Earnings

[56] The plaintiff was born June 5, 1956. He was 46 at the time of the accident and is now 53. It took over seven years to get this matter to trial, which I consider an unreasonable delay. I therefore propose to restrict loss of past earnings to four years and consider future earnings as if he were presently 48.

[57] I choose to think in all likelihood he would not continue to engage in the “heavy” work of his then employment until age 65. His hobby was restoring antique cars and he dreamed of opening his own shop where he would hire an apprentice and offer mechanical services to the public. While acknowledging that this is arbitrary and speculative, I propose to use 12 years as the basis to calculate future earnings.

[58] The applicable philosophy was expressed by Major J. in *Athey v Leonati*, [1996] 3 S.C.R. 458, where he said,

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.

[59] Similar or consistent comments on the question of future loss appear in *Leddicote v NS AG*, 203 N.S.R. (2d) 271 (CA), 2002 NSCA 47. At Paragraph 57, the Court refers to the quote of Lord Diplock in *Mallett v McMonagle*, [1970] A.C. 166,

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.

[60] It should be noted that unlike most of the cases to which the Court has been referred, there is before me no actuarial evidence as to what the plaintiff would have earned as future income if he had continued his job to some particular age, or at all. The only real evidence is that of his good friend and workmate, who continues to be employed at the same type of work.

[61] In *Kennedy*, (*supra*) the plaintiff was of the same approximate age, was engaged as a labourer and brought actuarial evidence and was allowed loss of future income calculated to age 60. There is a limiting factor to be taken into account in attempting to evaluate the amount of money required to compensate for future events, Justice Dickson J. is quoted at Paragraph 65 of *Smith v Stubbart*, *supra*, as saying that in such circumstances “the court is faced with the task of determining the present value of a lump sum which, if invested, would provide payments of the appropriate size over a given number of years in the future, extinguishing the fund in the process.”

[62] *White v Slawter*, (1996) 149 N.S.R. (2d) 321, CA 118453, is another case in which the plaintiff suffered a soft tissue injury as a result of a motor vehicle accident, and where the victim worked at heavy labour. In that case, the court had the benefit of evidence from the treating physicians although, like this case, there was no actuarial evidence. The court in the final analysis determined that the trial judge had erred in its finding that the plaintiff would not return to work and restricted the allowance for loss of future earnings to four years and simply multiplied his annual salary by that number.

[63] Where the court find there is a likelihood of return to work at the same or similar job and at the same or similar salary, it seems appropriate to simply multiply the time by that wage. Such is obviously not the case with long term disability nor, I suppose, is it always the case even where there is a short term disability.

[64] There are contingencies that must be taken into account as an aspect of future earnings. This is discussed in *MacPhail v Desrossiers*, 170 N.S.R. (2d) 145(C.A.), 1998 NSJ 353. In this decision,

at Paragraph 65, Hallett, J.A. discussed the type of contingency to be taken into account when considering loss of future earnings. Those contingencies are both positive and negative. In that case, the court had the benefit of actuarial evidence, as well as evidence relating to job opportunities in the plaintiff's profession, which was nursing. Included apparently was evidence about the structure of pensions for the professions and "the average age of retirement" of persons in this "strenuous" profession, being age 59. No such helpful evidence has been produced on this trial. Nonetheless, I believe I am able to identify some contingencies which can be taken into account.

[65] The evidence of Mr. Manuel persuades me that there would have been a job for the plaintiff and that gradual increases in his wage rate would have taken place over time. The plaintiff possessed a number of skills and qualifications, which would have guaranteed him opportunities for employment at well-paying tradesman jobs until he decided to withdraw from full time employment. There is no evidence before me that the plaintiff had thought about retirement, other than his expressed desire to open his own modest garage or body shop at some point in the future when he might have the capital to do so.

[66] He had suffered a previous workplace accident which had kept him from work for a year in the recent past and he had been in two minor motor vehicle accidents since the one we are presently dealing with. It is evident that accidents are a fact of life and that the plaintiff has encountered a number of them.

[67] Many of his hobbies or recreational pursuits were active and physically demanding. I include mountain biking, downhill skiing and scuba diving. Clearly those activities have opportunity for accident, disability or even death.

[68] Likewise, his work around his home, the renovations he had initiated including erecting one or more steel beams, operating whatever machinery was necessary for maintaining a large property and even carrying wood or doing the housekeeping chores bring their own dangers and risks of injuries.

[69] After giving some weight to the effect of the contingencies which have come to mind as relevant, I am treating 2007 as the appropriate starting point for calculating loss of future earnings. Retirement at age 60 would yield Mr. Davis 12 years of anticipated earnings. His loss, after allowing for the earnings from his part time efforts \$33,000 per year, or \$396,000.00. Bearing in mind the negative contingencies I have considered, I think 25% to be an appropriate deduction for such contingencies. I fix the value of loss of future earnings at \$297,000.00.

[70] My assumption of retirement at age 60 derives from two factors, those being the heavy physical nature of his work and his desire at some point to embark on his own mechanics' business where his expertise can be used.

[71] I have allowed nothing for inflation.

[72] The evidence is that he has over the last few years managed to generate some income doing limited handyman work and snow plowing. He seems to average about \$7,000.00 from that source. I have assumed a continuation of his capacity to continue such employment in fixing the value above and ignoring the impact of inflation.

Loss of Valuable Services

[73] The evidence of loss under this heading is certainly not extensive and I have therefore considered whether it would be appropriate to deal with it as a separate head of damages or whether it would be better served as an aspect of the loss of amenities and lumped in with general damages. I find *Carter v Anderson*, 168 NSR (2d) 297, 1998 N.S.J. 183, persuades me that it should, in this case, notwithstanding slender evidence, be treated as a separate head of damages. At Paragraph 26, *Carter v Anderson*, *supra*, in delivering the decision of the court, Roscoe J.A. had this to say,

In my opinion, the modern advancement of this area of the law of damages, which is premised on the concept of direct economic loss of the plaintiff whose ability or capacity to perform homemaking or housekeeping tasks has been impaired, should be acknowledged and accepted in Nova Scotia. Future loss of capacity, where proved, should be compensated separately whether or not replacement help has been paid in the past. The award for lost capacity should not simply be part of the non-pecuniary damages as "an element of loss of amenities". Housekeeping capacity is ordinarily not an amenity. Its loss is not an intangible loss comparable to the appellant's loss of ability to dance, to skate, or to ride horses. . . . Managing one's home and keeping it clean and organized is important and necessary for the health and safety of the family. The partial or total loss of that ability has economic value which should be recognized. In another case, it may be more appropriate to compensate most of the loss with a non-pecuniary award for a loss of amenity, if for example, the plaintiff proved that he derives personal gratification from doing housework. . . .

[74] In the present case there is no evidence that the plaintiff has paid others to perform his household tasks. In this case, I interpret household tasks to include those minor services around his house and property which may have provided some enjoyment to him but which were nonetheless necessary to the health, well-being and safety of the occupants of the property. Since the accident, he has found it necessary to visit his mother for laundry and meals. He has called on his friends to carry wood and possibly other chores. He has abandoned the normal, everyday upkeep and maintenance on his house and its surrounding property, which has been permitted to become a virtual jungle, as the evidence discloses. He struggles to perform normal household chores, as in sweeping his floor and washing his dishes.

[75] I deem it appropriate to order an allowance under this heading, which would contemplate five hours a week at \$10.00 an hour, \$2,600.00 a year, until his retirement. A number of contingencies may be considered which would impact this time frame including an improvement of his condition, attracting another person to share his accommodation or the possibility that he will

move to a residence where care is provided, whether public or private. On the other hand, it is possible that his need for the such services could extend well beyond his normal retirement age. There is no perfect way to predict the future.

[76] I deem \$26,000.00 a reasonable allowance under this head.

Contributory Negligence of Plaintiff

[77] The Plaintiff was not wearing a seatbelt at the time of the accident. His vehicle was not equipped, nor had it ever been equipped, with seatbelts. These were not standard equipment when this 1965 vehicle was manufactured. The defendant has argued that the failure of Davis to install and to wear a seatbelt was negligent on his part, and that he has thereby contributed to his own injury and loss.

[78] I have been referred to a number of authorities where the damages awarded a party have been reduced on this account.

[79] Section 175 of the motor Vehicle act chapter 293 SNS as amended, contains the following provision;

(2) While a motor vehicle is being operated on a highway other than in reverse, the driver of the motor vehicle shall wear a seat belt **if a seat belt is available** to the driver. (My emphasis)

[80] One oft cited case is *Shaw Estate v. Roemer* (1982), 51 N.S.R. (2nd) 229 where the “seatbelt defence “ was “analysed”. The trial judge had made a finding of fact that “ the injuries would have been somewhat less severe had the occupants of the Shaw vehicle been wearing seatbelts”. The award was reduced by 10% on that account (Paragraph 21). The decision on appeal was delivered by Hart J.A. who provided an extensive review of a number of cases which had dealt with what was then an emerging issue. Having completed his review he expressed the view that anyone not wearing a seatbelt might be presumed to be taking some unnecessary risk, but, nonetheless at Paragraph 35 he accepted that there may be circumstances where that conclusion would not apply. He then quoted this attributed to Lord Denning “If either the driver or the passenger fails to wear it and an accident happens-and the injuries would have been prevented or lessened if he had worn it – then his damages should be reduced”.

[81] In a second case cited to me *Hawes v Yorston*, 2006 NSSC 26, 17 M.V.R. (5th) 299, Davison J of this court reduced Plaintiffs damages by 20% for his failure to wear a seatbelt.

[82] Both of these cases are readily distinguished from the case of Davis. In both cases the motor vehicles involved were equipped with seatbelts at the time of manufacture. More importantly there was a finding of fact that the wearing of a seatbelt would have reduced the likelihood or the severity of the injury. There was specific testimony to that effect in Hawes where two doctors opinions (Paragraphs 87 and 90) infer/state that this was a factor. An orthopaedic surgeon is quoted as saying

“Mr. Potties lack of wearing a seatbelt undoubtedly contributed to him taking most of the injuries to his head and neck.”

[83] In the present case the evidence is quite the contrary. Davis was in a rear end collision, not one which impacted the front of his vehicle. Unlike Pottie, he was not thrown against the windshield of his car, rather he was forced back, into his seat with the forces on his body as described by Dr. Mahar. In these circumstances the evidence offered by the medical experts is that his failure to wear a seatbelt did not contribute to the severity of his injuries.

[84] In this unusual circumstance then, I find no basis for reducing his claim resulting from his failure to install and use a seatbelt.

Mitigation

[85] I once again refer to *White v Slawter, supra*, where I find this statement:

The presumption is that the plaintiff will behave like a “reasonable and prudent man” with respect to his injuries. I accept as reasonable and the state of the law that even though a plaintiff has suffered injury as a result of the tortious act of another, the plaintiff cannot be excused from seeking and following the best available medical advice.

[86] Freeman J.A., after reviewing comments, he found in *Janiak v Ippolito*, [1985] 1 S.C.R. 146, made the following observation at Paragraph 108:

In the present appeal there was no finding of fact nor evidence on which such a finding could be based that prior to the accident Mr. White suffered from an infirmity that, deprived him of the capacity to make rational choices.

[87] The evidence before the court leads to the same conclusion as that reached by Justice Freeman in *White v Slawter, supra*,(para.111)

While speculation is to be avoided, and there can be no guarantee that rehabilitative measures would have succeeded, it is difficult to avoid the conclusion that reasonable efforts [by the plaintiff to follow the advice of Drs McCann and MacLean and others] would at least have resulted in a level of disability that was neither total nor permanent, . . .

[88] In *Janiak*, to which Justice Freeman was referring, the plaintiff had refused surgery for which there was no guarantee of success. The comments of Wilson J., who delivered that judgment, includes (upon refusal of treatment and advice) these words “one looks to what would have happened on a balance of probabilities had the operation in fact taken place . . . The courts would normally take account of any “substantial possibility” of failure and the amount by which full compensation would be discounted - in this case 70% - would represent his avoidable loss . . .”

[89] MacAdam J reviewed this aspect of damages in *Warner v 2331653 Nova Scotia Limited et al*, 226 NSR (2d) at page 28, 2004 NSSC 142, and on the facts of that case he found that he was not satisfied that any “substantial improvement” might have been achieved by Ms. Warner. He had quote another useful paragraph from the decision of Justice Freeman, Paragraph 89,

If, however, there is medical evidence that 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. See *Janiak*.

[90] Here, the two experts in rehabilitative medicine gave virtually identical testimony that it is statistically established that individuals suffering whiplash injuries of the type suffered by the plaintiff can be expected to entirely or almost entirely recover over a relatively short period of time. Where the symptoms have persisted for a period of time and the patient has developed what they have referred to as the “whiplash syndrome”, the rehabilitative period is extended and demands a psychological or psychiatric treatment component in order to be effective.

[91] The evidence clearly indicates that the plaintiff rejected any consideration of participating in psychological counselling out of hand. As he said himself in his testimony: “If you have a broken bone, talking to somebody is not going to fix it.” The notes of his family doctor, Dr. Saunders, confirmed this position on the part of Davis. When the plaintiff consulted Dr. Saunders a few days after seeing Dr. MacLean, and when they presumably discussed her recommendation, the doctor simply wrote on his notes: “Patient not interested”.

[92] What might have been the result if the plaintiff had accepted this advice and earnestly pursued the recommended treatment instead of continuing his passive sessions of chiropracty? As one of the doctors observed: “You won’t know if you don’t try.”

[93] In the circumstances, I find it appropriate in these circumstances to conclude that the plaintiff, as a reasonable person, could have mitigated his damages and that it is reasonable to think that he might have resumed his occupation after not more than four years. I would therefore apply a reduction of 50% to his claims for general damages, loss of future earnings and loss of valuable services.

[94] Therefore, after applying that reduction to the values discussed earlier I conclude it appropriate to allow damages against the defendant as follows:

1. General Damages at 50% of \$56,000.00		\$28,000.00
2. Past loss of earnings to August 2006 (4 years x \$40,000.00 per year)	\$160,000.00	

3. Less Section B Benefits	(\$12,052.00)	
4. Less earned income of 2005 and 2006	(\$12,315.00)	
Subtotal		\$135,633.00
Loss of future earnings/earning capacity	\$297,000.00	
Loss of valuable services	\$26,000.00	
Subtotal	\$323,000.00	
Less 50%	(\$161,500.00)	
Subtotal		\$161,500.00
Interest on Past Earnings of \$135,633.00 at 5% from 2004	\$34,000.00	
Interest on General Damages of \$28,000.00 at 2.5% from 2002	\$4,900.00	\$38,900.00
TOTAL		\$364,033.00

Costs

[95] The plaintiff will be allowed his costs and reasonable disbursements. The amount involved is \$300,000.00 for cost purposes, exclusive of the prejudgment interest. Counsel are entitled to be heard on the issue of costs and disbursements if they are unable to agree.

J.