C.A. No. 120544

NOVA SCOTIA COURT OF APPEAL
Cite as: Kelly v. Dillon, 1996 NSCA 79

Roscoe, Matthews and Pugsley, JJ.A.

BETWEEN:

JOHN KELLY	)	Murray J. Ritch, Q.C.
	)	for the Appellant
Appellant	)	
	)	
	)	
- and -	)	
	)	
	)	
GLENDA DILLON	)	Hugh R. McLeod
	)	for the Respondent
Respondent	)	
	)	
	)	
	)	Appeal Heard:
	)	February 6, 1996
	)	
	)	
	)	Judgment Delivered:
	)	April 10, 1996
	)	
	)	
	)	
	)	

THE COURT: Cross-Appeal is allowed respecting assessment of general damages, costs of future care and gross-up. Balance of issues on cross-appeal as well as the appeal are dismissed per reasons for judgment of Pugsley, J.A.; Roscoe and Matthews, JJ.A. concurring.

Pugsley, J.A.

This appeal, and cross-appeal, are concerned with the assessment of damages, including past and future loss, for a housewife, mother and employee, who suffers from chronic pain arising from injuries sustained in a car accident.

Glenda Dillon was operating her 1984 Hyundai on the main street of Reserve Mines, on December 10, 1990, when her vehicle was struck on the left front door by a vehicle proceeding in the opposite direction, operated by John Kelly. Mr. Kelly admitted liability for the accident prior to the commencement of trial in December 1994.

After a six day hearing, the trial judge, by written decision in August 1995, concluded that Mrs. Dillon, then 43, was totally disabled from work as a consequence of suffering from "chronic pain" arising out of the injuries she sustained in the accident, and awarded the following damages:

General Damages	$ 45,000.00
Lost Wages to Date of Trial	27,450.00
Loss of Future Earnings	100,000.00
Housekeeping Expense (already incurred)	8,900.00
Cost of Future Care	92,000.00
Gross-up	18,871.60
TOTAL	$292,221.60

Apart from some adjustments, not relevant to this appeal, the trial judge credited Mr. Kelly with the sum of $57,600 consisting of payments made, or available, to Mrs. Dillon by Co-Operators Insurance (hereinafter referred to as "Co-op"), who had issued a standard motor vehicle liability policy to Mrs. Dillon providing Schedule B Benefits, thus reducing the total award to

approximately $235,000.

Mr. Kelly appeals submitting that the award for loss of future earnings ($100,000), cost of future care ($92,000), and gross-up ($18,871.60) are excessive and that the trial judge failed to give adequate, or any consideration to Mrs. Dillon's failure to "mitigate", and the recovery that she would have made, if she had followed a recommended course of treatment.

Mrs. Dillon cross-appeals, submitting in essence, that all of the awards of damages were inordinately low. Her counsel further submits that Co-op was guilty of bad faith in failing to advise Mrs. Dillon of the present value of the payments to which she was entitled, and that the settlement of her claim against Co-op for $17,500 was, in the circumstances at the time, on her part, reasonable and that the total deduction in favour of Mr. Kelly should have been limited to $17,500.

BACKGROUND

Mrs. Dillon was born in Glace Bay, Nova Scotia, in 1951. She has lived most of her life in the area. She commenced employment at a fishplant when she was 17 at a job requiring substantial physical exertion. When she was laid off work in 1988, she obtained employment at "Mike's Lunch" carrying trays loaded with dishes, washing plates, etc. Her attendance at work was good, and she never had any health problems. She was laid off because of a lack of work in the summer of 1990.

She was married in 1971. Her husband is a seasonal worker, transporting fish products to the United States by truck. His work requires him to be away from home for lengthy periods. Their three female children were aged 18, 14, and 10 at the time of the accident.

Her car was "totalled" in the accident. She sustained an injury to her right knee but no

other physical injuries of any consequence. She was driven home by the RCMP from the scene, and the following morning her husband took her to the local hospital where she was assessed by her GP of 16 years, Dr. Martin Brennan.

Dr. Brennan testified that prior to the accident, although somewhat overweight (160 pounds), Mrs. Dillon was in good health and did not suffer from any form of depression. He considered her always to be a "jolly, happy person".

Dr. Brennan found Mrs. Dillon's right knee to be "swollen and tender". He prescribed physiotherapy. She underwent approximately 63 treatments at the local hospital but without any noticeable improvement.

X-rays to the knee were taken on a number of occasions, but they were all found to be normal. An arthroscopic evaluation determined the knee was stable.

Mrs. Dillon gave birth to a fourth daughter in December 1991. The pregnancy was unplanned, the infant was full term, and the confinement and delivery were normal.

Dr. Brennan noted that in April 1992, Mrs. Dillon exhibited signs of depression because of her lack of recovery from her injuries. By early 1993, he diagnosed her as being "chronically depressed".

It was his opinion that she suffered tissue damage to the right knee in the accident, but at the time of trial was suffering from chronic pain syndrome. Various medications for relief of pain, insomnia, and depression had all been prescribed and taken, but with only moderate success. A nerve block had proved unsuccessful.

While acknowledging that there were some stressors that could affect her emotional stability such as an unwanted pregnancy, the litigation process, and separation from her family

while she attended rehabilitation in Halifax, Dr. Brennan was of the opinion that she would not improve, would never be able to work outside the home, or perform normal household work.

Mr. Dillon, and the older children, testified that they took care of most of the household management and child care for Mrs. Dillon.

By agreement of counsel, 10 reports (August 18, 1992, to March 25, 1994) prepared for Co-op by Patricia Smith, styled as a "rehabilitation consultant", were introduced in evidence. Ms. Smith was not called as a witness.

Ms. Smith's background, training or expertise, is not apparent from a reading of the reports. She did, however, express opinions concerning the nature of the injury suffered by Mrs. Dillon, the extent of her disability, and made recommendations to her principals concerning the names and qualifications of physicians who should be asked to treat Mrs. Dillon, as well as the medical devices and physical aids that should be purchased to assist Mrs. Dillon in her rehabilitation.

At Ms. Smith's instigation, Mrs. Dillon was seen by Dr. Renald Simard, a specialist in physical medicine in September of 1992. Dr. Simard recommended that Mrs. Dillon be admitted as an in-patient to the Nova Scotia Rehabilitation Centre in Halifax, where she could be assessed by a team of experts including a physiotherapist, an occupational therapist, a psychologist, and a social worker.

Mrs. Dillon had never been parted from her family for any duration of time and was concerned about being absent from them for the six-week period usually required for such an assessment.

Ms. Smith reported to her principals:

> The client would like her family to be able to visit her every second weekend and would like Section A or Section B to pay for travel and accommodations. The consultant stressed to Mrs. Dillon Co-operators Insurance are not prepared to pay for the travel of her family every second week to visit her.

An admission date to the rehabilitation centre was obtained for November 1992, but Mrs. Dillon refused to attend because funding was not provided by Co-op to assist her family to meet travel and accommodation expenses.

When the assessment was rescheduled to January 28, 1993, Mrs. Dillon travelled to Halifax and was enrolled in the program.

The social worker who interviewed her shortly after admission noted that Mrs. Dillon was:

> . . . suffering from separation anxiety, as this is the first time she has been parted from her children. She is depressed, discouraged, short-tempered, anxious and frustrated . . . There are significant adjustment issues for a person who was previously very active (darts, dancing, bowling, skating) and accustomed to managing her home and family.

Her weight was measured at 205 pounds, substantially in excess of Mrs. Dillon's professed normal weight of 135 pounds.

Dr. Simard concluded that Mrs. Dillon was a classic example of a patient suffering from chronic pain. He testified that:

> Chronic pain is the finest pain that exists after the acute stage of an injury is over, even though there is no specific tissue damage . . . Pain is a sensory, an emotional experience. We cannot touch pain no matter how the pain is. So that's why very often in chronic pain, there are no objective findings and no abnormal tests . . . There is no cure for chronic pain . . . There's only certain techniques that are used that are learning techniques to help the patient cope with the pain and do better. . . .

Although the usual attendance for the chronic pain patient at the rehabilitation centre was six weeks, Mrs. Dillon only stayed for four weeks as she was anxious to get home to her family and was, therefore, discharged "earlier than the initial intention".

The problem was anticipated by Dr. Cornelius Donovan, a psychiatrist, who had assessed Mrs. Dillon on December 10, 1992. Dr. Donovan wrote Dr. Brennan:

> If she is there (the rehab centre) for a month without such visits (from the family), her emotional state will certainly not improve. In fact, she may not be able to stay there at all . . . If things go on the way they are, she will become an

emotional cripple as well as a physical cripple.

Mrs. Dillon was assessed by a psychologist on February 5, 8, 10 and 11, 1993, while in the Rehab. His report notes:

> In looking at her history, it is obvious that she pursued a very narrow life scope from work to home with very narrow-line interest. For example, her hospitalization represented the first time she'd even been away from home with the exception of taking some trips with her husband as he pursued his trucking business. For the first few interviews she was extremely anxious, weepy, and obviously homesick. She gradually became a bit more comfortable here as she got a bit used to the atmosphere, began to know her therapist a bit better, etc. . . The fact that her husband was able to visit on some weekends seemed to increase her feeling of well-being here as time went on.

The nursing notes disclose that on every second weekend the family attended in Halifax to visit with her, and that Mrs. Dillon was on a weekend pass with her husband from February 19-22.

The nursing note on discharge on February 26 discloses that:

> Mrs. Dillon was very pleased with progress made and happy to be discharged, tolerance level for standing was 5-10 minutes before requiring a rest (improvement from 2-3 minutes upon admission) . . . dresses herself independently . . . carries out her personal hygiene . . . preparing light meals in kitchen . . . manages independently.

Mrs. Dillon was also instructed on a home exercise program.

The nursing notes at the rehab reveal that on February 3, Mrs. Dillon's "problem was that she focused on pain". By February 10, it was noted that she was participating in all therapy, and her anxiety level had lessened due to being more familiar with her environment. The nurse's note on February 18 reveal that Mrs. Dillon was "not focusing on pain in therapy" and by February 23, it is noted that "she no longer focuses on pain".

At the conclusion of her assessment, Dr. Simard commented on the improvement he noted:

> Well, I think she got on very well. I think it was obvious that physically she was walking better. She was walking longer distance. Her leg moved better. She was doing more things and I think she did pretty good . . . compared to what she was before. You always compare, you know, to what the patient was before they come in. It doesn't mean that she had attained a high level of function. She was still at very low level of function. . . She was not even still able to look completely after herself, to look after the house, to do outside activities and, you know, to help with, you know, the kids, okay, so she was at a very low level and I didn't expect her to go much further than that and I don't think she did, anyway.

Despite the improvement noted in the nurses' records, and Dr. Simard's report, and her own satisfaction with "progress made", Patricia Smith noted in her report of March 13, 1993:

> Mrs. Dillon states she does not feel much better than she did prior to her admission to the Nova Scotia Rehabilitation Centre and claims she experiences pain as well as emotionally worn out. . . (She) was in hopes she would obtain better mobility and pain management by attending the Nova Scotia Rehabilitation Centre. However, she feels she has not achieved this through her admission to the hospital. Apparently, pain management was suggested, however, Mrs. Dillon was not interested in this treatment as it requires hospitalization.

At the request of counsel for Mr. Kelly, Mrs. Dillon was assessed on March 10, 1993, shortly after her discharge, by Dr. Pankaj Dhawan, a specialist in physical medicine and chronic pain, whose office was also located at the Rehab Centre.

It was Dr. Dhawan's opinion that:

> . . . There is very little organic basis for her current symptoms. She has had very good objective assessment, including arthroscopic examination, radiograph of the knee, bonescan of the knee, EMG tests, x-rays of the lumbosacral spine and all of these have been negative or normal. Objectively, the only findings are of restricted range of motion in the right knee which is also variable. When one couples this with the many non-organic signs and exaggerated pain behaviour, it is quite obvious that her subjective sense of disability and impairment far exceeds objective evidence of organic impairment. . . I feel this individual's impairments are purely psychiatric and emotional, rather than organic. . . The question remains whether her emotional response to her injury, which is predominantly the cause of her ongoing sense of disability, can be truly linked to her injury or is it an intentional exaggeration or production of physical or emotional symptoms motivated by external incentives? I'm not qualified to make the judgment.

Dr. Dhawan was called by Counsel for Mr. Kelly and was asked to comment on the

increase in flexion in the right knee on admission to the Rehab Centre (measured at 25 degrees), to the measurement of 65 degrees, on discharge. He responded:

> It is a significant improvement because there is always an optimum range for any joints functioning. For example, for a knee--improvement from 25 degrees to 65 degrees will certainly ease a person's ability to dress themselves, for example, putting on their--dressing their lower extremities, socks, shoes, et cetera. It will also aid them in walking because certain amount, 30 to 40 degrees of flexion or bending is required for level walking in a normal way. It'll aid their ability to go up and down the stairs. So it is a significant improvement.

He testified that based on her progress during her four weeks of treatment at the Rehab Centre, "there is a great possibility that (she) may have improved further" had she stayed longer.

After her discharge, Mrs. Dillon's condition appeared to deteriorate.

Patricia Smith noted on September 17, 1993:

> At the present time Mrs. Dillon and her family are experiencing a great deal of turmoil with regard to low coping skills dealing with her disability. The client states her family unit is coming apart and she is not quite sure on how to alleviate the current situation. . .
>
> Apparently, Mrs. Dillon's mobility still remains very limited and her ability to do household duties is also limited. This in turn has caused a great deal of turmoil between her and her husband as well as her three daughters.

Ms. Smith suggested that Mrs. Dillon be assessed by Dr. John Gainer, an expert in clinical psychology, located at the Cape Breton Hospital, close to the Dillon residence. Mrs. Dillon expressed a willingness to meet with Dr. Gainer, but apparently this agreement was not followed up by Ms. Smith who neglected to arrange the appointment.

A trial date scheduled for November of 1993 had to be postponed.

Ms. Smith noted in her report of December 22, 1993:

> On December 16, the consultant received a telephone call from Mr. Dillon who was rather concerned with regard to the trial being cancelled and lack of funding for the household. He claimed he had an opportunity to settle this case under Section B and wanted to discuss the issue with the consultant. The

> consultant informed Mr. Dillon, Co-operators Insurance had been more than fair with Mrs. Dillon from the beginning of her file and if indeed he wanted to settle his claim under Section B with Co-operators Insurance by all means do so. Apparently, Mrs. Dillon did settle with Co-operators Insurance and it appears all parties are reasonably satisfied.
>
> Mr. Dillon states his wife has been rather apprehensive when the trial date was cancelled as well lack of funding in the household. Settling under Section B would alleviate her emotional turmoil. The consultant agreed any additional stress on Mrs. Dillon would indeed upset her and if it would assist her to settle under Section B she would have to make this decision with the assistance of her attorney.

A release dated December 16, 1993, executed by both Mr. and Mrs. Dillon, was tendered acknowledging a lump sum payment from Co-op to the Dillons of $17,500 respecting all claims, except for those relating to future medical payments.

Dr. Simard reviewed Mrs. Dillon at his office on February 10, 1994, one year after the Rehab treatment. He noted that her weight was 216 pounds and that she was essentially unchanged regarding "function, pain and coping skills" from the observations he made during her stay at the Centre.

He testified that relations between husband and wife become extremely difficult when one party suffers from chronic pain, often leading to marriage breakdown. In his words:

> Most patients with chronic pain isolate themself in the house. They don't get out. They lose all their friends . . . if they're lucky, they keep their husband.

Mrs. Dillon testified that apart from one act of sexual intercourse with her husband in April of 1991, which resulted in the birth of their fourth child, she was unable to continue a sexual relationship because of the additional pain such an act caused her.

Mr. Dillon testified that prior to the accident "we had a great life", but at the time of the trial "it was not a marriage at all". He further complained of the additional work required of him - "I'm a professional truck driver, not a housewife." The trial judge was "not impressed" with the evidence of Mr. Dillon, a matter on which I will comment later.

Dr. John Watt, a specialist in physical medicine and rehabilitation, who had been treating Mrs. Dillon, wrote to Dr. Gainer on July 11, 1994, to arrange an appointment for Mrs. Dillon stating, "I would appreciate your help in advising this lady."

Mrs. Dillon attended at Dr. Gainer's office on September 28, 1994. He noted in part:

> The patient reports a very significant intake of caffeine and nicotine. She reports smoking between 2 and 3 packages of cigarettes daily and as many as 30 cups of tea per day. In light of this, it is unlikely that any relaxation procedures will be of much use. I discussed with her the implications of her caffeine and nicotine intake, and recommended strongly that this be limited . . . It is unlikely that any psychological intervention will have much effect until her intake of caffeine and nicotine is reduced substantially.

Dr. Gainer, called by counsel for Mr. Kelly, testified that the Cape Breton Hospital where he is situate, operates a day program for chronic pain patients . He testified:

> There is a tendency in chronic pain patients, particularly those who don't adjust well, to become more and more disabled by a condition, less active. As a general rule, the more active someone can be, the better they can function and in fact, their subjective reports of pain appear to be improved as well.

Dr. Gainer testified that he was quite prepared to accept Mrs. Dillon as a patient but acknowledged that "I really do not know what the outcome will be."

No arrangements were made by Dr. Gainer, or by Dr. Watt, or by Ms. Smith, to schedule any further appointments for Mrs. Dillon at the Cape Breton Hospital, or for her admission to the day program for chronic pain patients.

ANALYSIS

It is convenient to deal with certain of the issues raised in the cross-appeal at the outset.

General Damages

The guidelines pursuant to which this Court operates in reviewing the findings of a trial

judge have been set out by McLachlin, J. in **Toneguzzo-Norvel (Guardian ad Litem of) v. Burnaby Hospital** (1994), 1 S.C.R. 114 at 121:

> It is by now well established that a Court of Appeal must not interfere with a trial judge's conclusions on matters of fact unless there is palpable or overriding error. In principle, a Court of Appeal will only intervene if the judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it . . .

The power of an appeal court to substitute a figure of its own for that awarded by a trial judge in the assessment of damages, was expressed by Viscount Simon on behalf of the Privy Council in **Nance v. British Columbia Electric Railway Company Ltd** (1951) A.C. 601 in these words, at 613:

> . . . before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage . . .

This excerpt has been approved by the Supreme Court of Canada in **Woelk v. Halvorson** (1980) 2 S.C.R. 430 at 435-6 and is consistently followed by this Court (**Brown v. Matheson et al.** (1990) 97 N.S.R. (2d) 428).

The trial judge determined:

> I find and agree with the medical evidence that states Mrs. Dillon suffers from chronic pain. She suffers from it steadily. I observed her during the course of the trial and I accept that she feels she is definitely suffering from pain which arose as a result of the injuries she received in the car accident. She also, I find, becomes depressed as a result of her situation. . . I believe that the plaintiff actually experiences the pain she reports. . .
>
> There is no doubt that Mrs. Dillon is suffering from considerable pain which is attributable to the car accident. I am satisfied that her enjoyment of life, participation in recreational and other social activities had been substantially if not almost totally curtailed as a result of her injuries and the ensuing pain. . . . I accept Mrs. Dillon's evidence about the pain and suffering she is going through, and I accept her description of the effect her injuries have had upon her.
>
> I therefore assess damages for loss of enjoyment of life, pain and suffering

in the amount of $45,000.

> In arriving at the award for this heading of general damages, I have borne in mind the decision of Chipman, J.A. in **Smith v. Stubbert** (1992), 117 N.S.R. (2d) 118. Also, in assessing the amount of this award I have taken into consideration the failure of Mrs. Dillon to mitigate her damages as referred to above.

The trial judge specifically rejected a submission that Mrs. Dillon's symptoms were "manifestations of a pre-existing psychological personality disorder", basing his opinion on the medical evidence.

Neither counsel take issue with this conclusion. In my opinion, there was ample evidence from the professional witnesses, supported by evidence from the lay witnesses, to justify the conclusion.

Counsel for Mrs. Dillon makes two points:

1) the range of general damages ($18,000 to $40,000) suggested in **Smith v. Stubbert** is not pertinent because it relates to an award for only a partial disability. Mrs. Dillon's injuries, it is argued, have resulted in permanent total disability as demonstrated by the following limitations:

a) she cannot walk without the assistance of a cane, and then only for a period of ten minutes. When shopping in a department store, she is confined to a wheelchair;

b) she suffers from pain 24 hours a day, a pain which is all consuming, and is made worse by exercise, heat and cold;

c) she has been and still suffers from depression. She cries two or three times a day;

d) she has no marital life because of the pain;

e) there is no possibility of any employment or outside recreational activities;

f) she cannot leave her house without being accompanied.

Counsel submits that the case of **Hubley and Hubley v. Woods** (1996), 146 N.S.R. (2d)

97 recently decided by this Court, where the majority affirmed an award of general damages of $95,000, is comparable.

2) The trial judge erred in concluding that Mrs. Dillon failed to "mitigate her damages".

Is the Range of Damages outlined in **Smith v. Stubbert** appropriate?

In **Smith v. Stubbert**, the plaintiff Donald Smith was 33 when he suffered injuries as a consequence of his vehicle being struck by another car on January 19, 1989. The jury awarded $100,000 for pain and suffering and loss of amenities of life. On appeal, the majority of this Court determined that the award should be reduced to $40,000. Jones, J.A., dissenting, would have reduced the award to $70,000.

Medical evidence was adduced from three general practitioners, two neuro surgeons, two orthopaedic surgeons and a psychiatrist. All, but the psychiatrist, concluded that the soft tissue injury to Mr. Smith's neck while long term, was treatable, and far from totally disabling. The psychiatrist's opinion that Mr. Smith was manifesting chronic pain and depression was reached essentially after one examination lasting fifty minutes to an hour. A second assessment took place after the trial commenced and long after the psychiatrist's initial opinion was formed.

Chipman, J.A. writing for the majority concluded that there were a number of areas in which the psychiatrist was either misinformed or in which he expressed an opinion without facts or support.

Justice Chipman pointed out that:

> I have considered a number of recent cases involving damage awards for injuries not unlike those sustained by the respondent. Most 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 the cases reviewed, the symptoms persisted and usually many doctors were involved in the treatment and/or assessment of the injuries. 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 for nonpecuniary damage awards for such persistently troubling but not totally disabling injury is from $18,000 to $40,000. (emphasis added)

Justice Chipman concluded that a finding that Mr. Smith was permanently disabled from "doing the type of work in which he was engaged at the time of the accident would be, on the medical evidence presented, perverse. The probabilities are that he would regain his abilities to do this work and even if not, a number of other types of gainful employment."

This finding should be contrasted with the conclusion of the trial judge in this case "that Mrs. Dillon's enjoyment of life, participation in recreational and other social activities have been substantially if not totally curtailed as a result of her injuries and the ensuing pain". (emphasis added)

The diagnosis of chronic pain made by Mrs. Dillon's physician and the resulting interference with her enjoyment of life, is, in my opinion, more closely related to those injuries sustained by the claimant in **Hubley and Hubley v. Woods**.

Ms. Woods was 25 at the time she suffered injuries while a passenger in a motor vehicle struck by another car in July, 1989. At the time of trial, the trial judge determined that she was constantly in pain and required medication which she could only take in moderation because of concern of addiction. He found that the chronic pain was attributable to "concrete findings that could cause pain" and there was as well, a "psychological element to her pain". He found her totally disabled, unable to do much of her housework, and unable to enter the workforce. He found that she suffered from "insomnia, low energy, poor appetite, poor concentration, irritability of mood, and depression" - all findings (with the exception of poor appetite) that Mrs. Dillon

experienced.

The majority of the Court affirmed the general damage award of $95,000.

Since the accident, Mrs. Dillon has been assessed by an occupational therapist, a social worker, a clinical psychologist, two orthopaedic surgeons, three psychiatrists, four specialists in physical medicine and rehabilitation, as well as by her general practitioner on more than 70 occasions. She has been subject to arthroscopic examinations, radiograph and bone scans to the knee, an EMG test, x-rays of the lumbo sacral spine, in excess of 60 physiotherapy treatments as well as a month's treatment as an inpatient at the Nova Scotia Rehabilitation Centre.

There is unanimous agreement amongst all the professionals, including Dr. Dhawan, that she suffers from, and is disabled by, chronic pain. The trial judge accepted these opinions.

I conclude that the range expressed in **Smith v. Stubbert** is for an injury considerably less debilitating than that suffered by Mrs. Dillon.

Did the Trial Judge err in concluding Mrs. Dillon failed to mitigate?

The "so-called" duty to mitigate arises from the general proposition that a plaintiff cannot recover from the defendant damages which she herself could have avoided by the taking of reasonable steps (**Janiak v. Ippolito** (1985), 1 S.C.R. 146 at 167).

The trial judge summarized his thoughts on this issue by stipulating seven specific areas in which he found that Mrs. Dillon failed "without reason or explanation" to mitigate her damages.

It is helpful to consider each of the seven areas in turn:

1. Mrs. Dillon failed to meet with Dr. Gainer at the suggestion of her rehabilitation consultant made on or about September 17, 1993.

The evidence does not support the finding.

In Patricia Smith's report of September 17, 1993, it is quite clear that Mrs. Dillon was willing to attend sessions with Dr. Gainer, but that Ms. Smith undertook to make arrangements for an independent medical examination by him. There was no further reference in Ms. Smith's reports to any meeting with Dr. Gainer and it is a fair inference that she simply neglected to arrange the appointment.

As noted, Ms. Smith was not called to give evidence on behalf of Mr. Kelly with respect to this issue and in view of the burden not being satisfied, no inference adverse to Mrs. Dillon's position should have been taken by the trial judge.

2. Mrs. Dillon failed to continue treatment with Dr. Gainer after she was referred to him by Dr. Watt.

There is no evidence to support this conclusion.

The initial reference by Dr. Watt to Dr. Gainer was by way of letter of July 11, 1994, in which Dr. Watt expresses a request that Dr. Gainer will "help in managing this lady". Examination took place in September of the same year and Dr. Gainer forwarded a copy of his findings to both Dr. Watt and Dr. Brennan. Dr. Gainer made no response to Dr. Watt's request for assistance in treating Mrs. Dillon and there is no reference in Dr. Gainer's notes to a further follow-up with her. Neither Dr. Brennan nor Dr. Watt have any recollection of receiving any communication from Dr. Gainer.

Dr. Gainer was called to give evidence by counsel for Mr. Kelly. He was not asked, nor did he give any evidence, concerning any further treatment or sessions with Mrs. Dillon.

The only evidence on the issue was given by Mrs. Dillon:

Q. Do you know that Dr. Gainer is willing to take you on as a patient. . .?

A. No, he never mentioned anything to me. . .

Q. Would you be prepared to go to a program operated by Dr. Gainer?

A. I'd go.

The trial judge in connection with this issue, also made an adverse finding of credibility against Mrs. Dillon. It is noteworthy because it is the only adverse finding against her in the course of his 45 page judgment. He stated: "I do not accept Mrs. Dillon's explanation that she did not understand she was to continue seeing Dr. Gainer."

With respect, Mrs. Dillon's explanation was quite understandable - no one, including Dr. Gainer, Dr. Watt, or Patricia Smith, ever asked her to continue seeing Dr. Gainer. The adverse finding is unwarranted. The conclusion that Mrs. Dillon failed to continue treatment with Dr. Gainer, and thus failed to mitigate, is unwarranted as well.

It is clear that the trial judge considered that her (supposed) failure to follow the advice of Dr. Gainer was the most critical of the seven areas enumerated.

The trial judge stated:

> The pain management techniques and psychological counselling offered to (and I find, refused by) Mrs. Dillon could have substantially improved her quality of life including increasing her mobility and ability to perform household tasks and reducing her perception of pain. Dr. Gainer could have supported her efforts to consolidate the gains she had made at the Nova Scotia Rehabilitation Centre . . . The plaintiff's failure to mitigate in failing to follow the advice of Dr. Gainer impacts on, in particular: cost of future care; pain and suffering; and housekeeping needs. . .

3. <u>Mrs. Dillon failed to follow the recommendation of Dr. Gainer with respect to reduction of smoking and caffeine consumption</u>.

There is evidence to support this conclusion.

4. Mrs. Dillon failed to take the earliest possible admission to the Nova Scotia Rehabilitation Centre.

Arrangements were made for Mrs. Dillon to enter the Centre in the month of November. Her eventual admission was delayed approximately three months until January 26, 1993.

5. Mrs. Dillon failed to enrol in the pain management program when it was suggested to her during her time at the Nova Scotia Rehabilitation Centre.

This conclusion, apparently, was reached as a consequence of Patricia Smith's report of March 13, 1993, which states in part: "Pain management was suggested; however, Mrs. Dillon was not interested in this treatment as it requires hospitalization."

The report is somewhat equivocal in that Ms. Smith also states:

> Mrs. Dillon has been discharged from the Nova Scotia Rehabilitation Centre on a permanent basis. In other words, she will not be re-admitted to the Nova Scotia Rehabilitation Centre for treatment as Dr. Simard feels she is totally and permanently disabled. (emphasis added)

Dr. Simard wrote Patricia Smith on April 21, 1993, reviewing Mrs. Dillon's progress at the Rehab Centre in February. He notes in part:

> Upon discharge, improvement was minimal. She was advised to do things at home that she has learned to do, including pacing her activities, etc. . . .

There is no reference in the letter to any failure on the part of Mrs. Dillon to enrol in a pain management program.

I conclude that the evidence does not support the trial judge's conclusion that Mrs. Dillon

failed to enrol in a pain management program.

6. Mrs. Dillon sought early discharge from the Nova Scotia Rehabilitation Centre for nonmedical reasons.

Dr. Simard confirmed that the usual attendance for the chronic pain patient at the Rehab Centre was six weeks but that Mrs. Dillon only stayed for four weeks because she was very anxious to go home to her family and therefore "was discharged earlier than the initial intention".

The early discharge should, in my opinion, be considered more significant than simply missing one-third of a program. The Rehab approach was a multi-disciplinary approach designed not only to improve function, but also to enable the patient to "work through the pain". The abridgement of an opportunity to improve the ability to cope with chronic pain has, I conclude, played a part in Mrs. Dillon's present condition.

7. Mrs. Dillon failed to implement in her own home the improvements made in her abilities at the Nova Scotia Rehabilitation Centre.

If the trial judge meant by these comments that Mrs. Dillon did not use the devices and aids provided at the Rehab Centre to assist her in carrying out personal hygiene and dressing, then, with respect, he is in error as the evidence is to the contrary.

In summary, I conclude the evidence supports only three of the seven areas in which the trial judge determined Mrs. Dillon failed to mitigate her loss. Two of the three, in my opinion, are of little relevance:

- There is no evidence to suggest that the delay in her admission to the Rehab Centre from November 1992, until the end of January 1993, retarded her efforts to recover;
- Since the evidence does not support the conclusion that any arrangements had been made

for her to continue seeing Dr. Gainer for further treatment, her failure to reduce her intake of caffeine and nicotine, did not affect her receptiveness to psychological intervention;

- Mrs. Dillon's election to leave the rehab program early is, in my opinion, the only failure supported by the evidence that has relevance in the assessment of her general damages.

To what extent would Mrs. Dillon's condition at the date of trial, including her ability to cope with chronic pain, be affected if she had remained in the Rehab centre for a further two weeks?

The burden rests on Mr. Kelly to establish that Mrs. Dillon could have, and should have, mitigated her loss by remaining at the Rehab centre until her course of treatment was finished (**Red Deer v. Michaels** (1976), 2 S.C.R. 324).

I am satisfied that this burden has been met.

Does Mr. Kelly face the further onus of establishing to what extent she would have improved had she finished the course of treatment?

In **Janiak v. Ippolito**, Wilson, J., on behalf of the court, cites with approval the judgment of Walters, J. of the Supreme Court in the Australian case of **Buczynski v. McDonald** (1971), 1 S.A.S.R. 569, and in particular, the following excerpt from that judgment at page 573:

> The authorities show that once the plaintiff has "made out a prima face case of damages, actual or protective, to a given amount", the burden lies upon the defendant to prove circumstances whereby the loss could have been diminished. Not only must the defendant discharge the onus of showing that the plaintiff could have mitigated his loss if he had reacted reasonably, but he must also show how and to what extent that loss could have been minimized (**Roper v. Johnson** (1973), L.R. 8 C.P. 167, per Grove, J. at page 184, **Chriss v. Alexander** (No. 2), (1928), 28 S.R. (N.S.W.) 587 per Street, C.J. at page 596). (emphasis added)

This analysis would, if considered appropriate to this case, seem to impose an unfair, if not

impossible, burden on Mr. Kelly.

Chronic pain is very different from acute pain.

Dr. Simard testified:

> Acute pain usually have a specific site or inflammation or reason, meaning if you have a trauma, you hurt your back, you bruise your muscle, automatically you have probably some--maybe some minor hemorrhage in the muscle. . . . The hemorrhage in the muscle is the cause of the acute pain. Once the hemorrhage has been reabsorbed in the body the muscle heals, therefore the acute pain is over. . . . In almost 30 percent of patient the acute pain disappear but then the chronic pain starts. So chronic pain is the finest pain that exists after the acute stage of an injury is over, even though there is no specific tissue damage. . . . You have to remember that pain is a sensory, an emotional experience. We cannot touch pain no matter how the pain is. So that's why very often in chronic pain, there are no objective findings and no abnormal tests. . .

Dr. Watt, a specialist in physical medicine and rehabilitation, who treated Mrs. Dillon in Sydney put it this way:

> Acute pain, the chief characteristic is that it's self-limiting. If you were to sprain your ankle, over a period of a week the pain would gradually decrease. . . . Chronic pain, though, does not follow that pattern. It's a persistent pain that even though there may be tissue damage that may initiate the problem with pain first, that the tissue damage may well heal, yet (the chronic) pain being an ongoing, persistent problem. . . . Chronic pain has a number of elements . . . emotional, psychological, behaviourial, cognitive components.

The only direct evidence on Mrs. Dillon's early departure was given by Dr. John Gainer and Dr. Dhawan.

Dr. Gainer was asked:

Q. Certainly, she was at the Nova Scotia rehab for almost a month, is that true? And there would have been ample time to apply relaxation techniques there and biofeedback techniques and hypnotic techniques, is that true?

A. Well, a month is better than an hour but a month is still not a long period of time in terms of treating these patients. . . .

Dr. Dhawan testified that she would have benefitted from a longer stay:

> One issue is that increase in range of motion. Also, she became independent for all activities of daily living during her stay at the Rehab Centre,

> according to the notes available, with or without assistive devices. Her standing tolerance improved, even though when she came in it was only reported as two to three minutes. It increased to five to ten minutes. So if she had persisted or was able to stay there longer, there is a great possibility that that may have improved further. However, I must say that involves participation on the part of the patient. . . .

I conclude that Mr. Kelly has satisfied the onus that Mrs. Dillon's ability to cope with her chronic pain would have improved had she remained for the recommended stay at the Rehab Centre, notwithstanding the absence of evidence specifying in particular to what extent that ability would have improved. To require the defendant to adduce further evidence "to what extent that loss could have been minimized", in my opinion, in cases of chronic pain, would impose an unrealistic and unfair burden.

I adopt the following words from Justice Freeman's opinion in **Slawter v. White** (C.A. No. 118453, Judgment delivered March 27, 1996, as yet unreported):

> The authorities cited in **Janiak** for shifting the burden of proof to the defendant to prove an absence of mitigation are focused on the initial injuries, not the secondary cause of disability. The evidentiary issues may not be the same for chronic pain as for initial injuries . . .
>
> 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. See **Janiak**.
>
> The activities--work and/or exercise--required to keep soft tissue injuries from developing into chronic pain syndrome are likely to be painful. This is recognized by the medical profession and summed up by saying that the activities "hurt but do no harm". A diligent plaintiff deserves to be compensated by increased damages for pain and suffering for what he must endure on the road to recovery, but he is not entitled to refuse the necessary discomfort and claim compensation from the defendant for the resulting disability. The governing concept is reasonableness: a reasonable person must be expected to endure a reasonable degree of pain in an effort to avoid long-term disability.

It is relevant in the course of assessing general damages for Mrs. Dillon to consider the improvement, if any, that she would attain, if she were to enrol in the program suggested by Dr. Gainer.

The trial judge determined:

> I am well aware that if Mrs. Dillon attends at Dr. Gainer's office for treatment that she will be able to do some household chores. That was indicated in the evidence from the Nova Scotia Rehabilitation Centre reports and from other medical evidence. . . . Pain management techniques and psychological counselling offered to (and I find, refused by) Mrs. Dillon could have substantially improved her quality of life including increasing her mobility and ability to perform household tasks and reducing her perception of pain.

Mrs. Dillon has testified that she is willing to enter the program. There is evidence to support the conclusion that if she now undertakes the program, there will be some improvement in her quality of life, including an increase in her mobility, and ability to perform household tasks, and reduce her perception of pain. Medical evidence established that she would not cause herself any injury by carrying out the program outlined by Dr. Gainer.

I conclude that the trial judge erred when he determined that the injuries sustained by Mrs. Dillon placed her only slightly above the range considered in **Smith v. Stubbert**.

I further conclude that the trial judge placed undue emphasis on what he considered was evidence of Mrs. Dillon's failure to mitigate.

I am further of the opinion that the assessment of general damages should be discounted (to some extent) by her failure to complete the six week program at the Rehab Centre in Halifax.

Based on the findings supported by the evidence, it is my opinion that an appropriate

assessment of general damages is in the amount of $65,000.

Housekeeping Expense

The trial judge awarded $1,000 to Mr. Dillon, $2,000 to each of two of the children of the marriage, because they provided services "in excess over that which members of the family and Mrs. Dillon might ordinarily be expected to receive and provide".

A further award of $3,900 was made to reimburse Mrs. Dillon for the expenses incurred in hiring outside help to assist in looking after her infant daughter and performing household chores.

Although raised in the amended Notice of Cross Appeal, this issue was not considered in counsel's factum or raised in oral submission. There was, in my opinion, evidence to support the conclusion of the trial judge, and I would dismiss this ground of cross-appeal.

Schedule B

By virtue of the Dillons' motor vehicle liability policy with Co-op, and s. 140 and Schedule B of the **Insurance Act**, R.S.N.S. (1989), c. 231, Mrs. Dillon had received, and was entitled to continue to receive, from Co-op $140 per week to compensate her for her lost wages, as long as she was "continuously prevented from engaging in any occupation or employment for which she was reasonably suited by education, training or experience . . . for the duration of such an ability to perform the essential duties".

On December 16, 1993, Mr. and Mrs. Dillon, in consideration of the payment of $17,500, released Co-operators Insurance from all claims (excluding medical payments) arising out of the accident of December 10, 1990.

Section 146 (2) of the **Insurance Act** provides:

> 146 (2) Where a claimant is entitled to the benefit of insurance within the scope of Section 140, this, to the extent of payments made or available to the claimant thereunder, constitute a release by the claimant of any claim against the person liable to the claimant or the insurer of the person liable to the claimant.

The trial judge concluded on this issue:

> I find based on the evidence that the plaintiff in her particular case had available to her monthly payments, of $170 (sic) for life. This had a capitalized value of $45,000.00. She was apparently unaware of the capitalized value of that monthly sum. This amount was revealed at trial by Clare Wall of Co-op Insurance, the Section B carriers. She took a cash settlement of short-term benefit to herself in the amount of $17,500.00. This unfairly impacted on the defendant's long-term legislated interest in the available payments. She also already had received $12,600.00 in payments.
>
> Accordingly, I will reduce the plaintiff's award by the $12,600.00 already received and the $45,000.00 capitalized value of the Section B offer. This should make a total credit to the defendant of $57,600.00.

While the trial judge erred by referring to monthly payments of $170 rather than $140, the error is of no significance, since the figure of $140 was used to calculate the capitalized value of $45,000.

Counsel for the Dillons submits that as a consequence of financial problems, the Dillons were obliged to accept the lump sum payment of $17,500. It is evident that Co-op never advised the Dillons that the present value, of Mrs. Dillon's right to receive the weekly payment representing her lost wages, aggregated $45,000.

The December 1993, report of Patricia Smith, the rehabilitation consultant retained by Co-operators, discloses an additional reason for the execution of the release:

> Mr. Dillon states his wife has been rather apprehensive when the trial date was cancelled as well lack of funding in the household. Settling under Section B would alleviate her emotional turmoil.

The report continues:

> The consultant agreed any additional stress on Mrs. Dillon would indeed upset her and if it would assist her to settle under Section B she would have to make this decision with the assistance of her attorney.

There is no evidence before the trial judge to indicate whether or not Mrs. Dillon's counsel was consulted with respect to the decision to accept the lump sum payment.

One sympathizes with Mrs. Dillon's concern respecting the difficulties in her household, her own lack of response to treatment, her consequent depression, the disappointment in the postponement of the trial, as constituting factors that could reasonably impact on her decision to reach a settlement with Co-op.

The same considerations do not extend to Mr. Dillon.

The trial judge was clearly disenchanted with Mr. Dillon:

> Mr. John Dillon testified, at great length, about the plaintiff and her activities, welfare, health and their family life. I must say at the very beginning that I was not impressed with the evidence of John Dillon. To me, as I watched him on the witness stand, observed him during the course of the trial, the manner in which he answered questions, gave me the impression that he was in this case to get as much money as he could. In my view, he is out to milk this case for every penny it is worth. I even have concluded in my own mind that I must question whether or not he will remain with Mrs. Dillon once this case is finalized and payment made to Mrs. Dillon for her injuries and damages.

It is a fair inference that Mr. Dillon was, or should have been, responsive to the family's interest, when reviewing the compromise of his wife's claim with Co-op. He was advised by Ms. Smith to seek the assistance of his attorney.

Counsel for Mrs. Dillon argues that Co-op was guilty of bad faith in failing to advise the

Dillons of the present value of the payments to which Mrs. Dillon was entitled, and cites **Corkum v. Sawatsky** (1993), 126 N.S.R. (2d) 317 (N.S.C.A.) in support.

That case may be clearly distinguished. Corkum suffered a serious whiplash injury when his vehicle was struck by the Sawatsky's vehicle on May 26, 1989. Sun Alliance, who had issued a motor vehicle liability policy to Corkum, paid to Corkum weekly indemnity benefits of $140 for 104 weeks. Sun Alliance refused to make any additional payments. After suing the Sawatskys for damages for negligence, Corkum added Sun Alliance as a party defendant, claiming he was entitled to payment of additional weekly accident benefits while he was unable to work because of his injuries.

At a pre-trial conference, Corkum's counsel presented an order for dismissal of his client's action against Sun Alliance advising that a settlement had been reached whereby Sun Alliance paid $9,000 to Corkum. The Sawatskys were not given any notice of the settlement. They claimed that the unilateral settlement prejudiced their rights. Evidence was given that the present value of the stream of payments if continued for the rest of Mr. Corkum's lifetime would have aggregated approximately $64,000.

Chipman, J.A. on behalf of the Court (Freeman, J.A., dissenting, but not on this point) commented:

> In this case, entitlement was the very issue . . . In my view the short answer is that the respondents have failed to establish that the appellant was "entitled" to the future stream of income payments calculated by Mr. Bernell to an amount of $64,065 over his lifetime. Nor have they established that any of these benefits (apart from the $9,000) was "paid" or "available" to him. Sun Alliance entered a denial to his claim. Even though it was established at the trial that as of <u>that time</u> the appellant was permanently disabled from the duties of all employment in which he was capable of engaging by reason or education, training or experience, it does <u>not necessarily</u> follow from that it was shown that this situation would last for a lifetime. His matter of entitlement was in dispute of Sun Alliance and no money was (other than the $9,000) "paid" or "available" to him from Sun Alliance. In the absence of evidence of fraud or bad faith in dealings between the appellant and Sun Alliance, this is a case where the general principal referred to Hart, J.A., in **MacKay v. Rovers** [(1987), 79 N.S.R. (2d) 237] must apply.

Here, there was no dispute between Co-op and the Dillons. The sum of $140 per month was available to Mrs. Dillon as long as she could show that she was permanently disabled from duties of all employment at which she was capable of engaging by reason of education, training or experience. She was not entitled to demand a lump sum payment from Co-op, nor were they obliged to pay it. But when she compromised a claim that had a prospective value of $45,000 by accepting $17,500, she prejudiced Mr. Kelly and/or his insurers. This she did at her peril. It was Mrs. Dillon's position, supported by her medical advisors, that she would never work again at any kind of employment, and was therefore entitled to future lost wages aggregating in excess of $160,000. The compromise of a claim
of $45,000 for $17,500, should not be ignored when determining the payments "available to her" pursuant to s. 146(2).

Counsel for the Dillons stresses the words of Chipman, J.A., "in the absence of fraud or bad faith in dealings between the appellant and the Sun Alliance . . . " and submits that Co-op was guilty of either fraud, or bad faith, in failing to reveal the actual present value of Mrs. Dillon's claim calculated to be $45,000.

I do not agree with this submission. It was not as if the Dillons were without legal representation. Their counsel had been actively participating in the case almost from the time of the accident. In addition, Ms. Smith apparently counselled Mr. Dillon to seek the guidance of counsel before finalizing the arrangement with Co-op. The argument, if it has any force, should not operate to affect Mr. Kelly's rights.

In **Corkum**, Sun Alliance was a party to the action. Here, Co-op was not. Counsel for the Dillons has not demonstrated, in law, the connection between any lack of payment by Co-op to a right of action by Mrs. Dillon against Mr. Kelly for the alleged lack of payment.

I would dismiss this ground of cross-appeal.

Cost of Future Care

The trial judge accepted that $3,600 was the average housekeeping expense incurred by Mrs. Dillon in each of the years 1993 and 1994.

He considered that the children who had assisted Mrs. Dillon in keeping house would at some time "move on", and was not convinced that Mr. Dillon would "continue to remain in the marriage and provide care to his wife".

Balanced against these increases, the trial judge determined that if Mrs. Dillon were to attend at Dr. Gainer's office for treatment, that she would be able to do some household chores as "that was indicated in the evidence from the Nova Scotia Rehabilitation Centre reports and from other medical evidence".

The trial judge fixed a "realistic figure" of $4,000 per annum which he felt would be "fair and just" to both parties.

I agree with this assessment and there is evidence to support it.

The trial judge then concluded an award for future care should be calculated for 23 years, apparently assuming that Mrs. Dillon was 42 at the time of trial, and that the calculation should cease when she became 65.

There is, in my opinion, no basis in reason, or in the evidence, to terminate the assessment of the cost of future care at any point before her life expectancy is reached. Indeed, the conclusion is in conflict with the trial judge's earlier finding that Mrs. Dillon will need help "for the rest of

her days". Her life expectancy was calculated by Mr. Malone, the actuary, at 37.75 years as of the date of trial. I would accept that estimate.

The trial judge apparently multiplied the cost of annual care (ie. $4,000) by what he considered to be the number of years remaining before Mrs. Dillon attains 65 (ie. 23) and awarded $92,000 for the cost of future care.

In my opinion, this approach is flawed in that the award does not reflect 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 (see **Keizer v. Hanna** (1978) 2 S.C.R. 342 at 352).

In order to "gross-up" the award to reflect payment of income tax on the annual income earned by the fund required for future care, the trial judge awarded the sum of $18,871.61 after adjusting an estimate prepared by the actuary, Mr. Malone. This calculation is in error as it is based upon the calculation of the cost of future care.

In view of the approach of the trial judge, which I have concluded was based on a wrong principle, there was no determination at trial that the difference between the present rate of return on long-term investments and general price inflation should be pegged at other than the 2.5 percent provided for by Civil Procedures Rule 31.10(2).

This rule provides:

> The rate of interest to be used in determining the capitalized value of an award in respect of future pecuniary damages, to the extent that it reflects the difference between estimated investment and price inflation rates, is two and one-half (2 1/2) per centum per annum.

I would, accordingly, determine that the appropriate discount rate is 2.5 percent in accordance with Civil Procedures Rule 31.10(2).

After the hearing of this appeal, the court requested additional submissions from counsel

respecting the applicability of **Janiak v. Ippolito** as well as further submissions to assist in the calculation of the cost of future care and "gross-up". The panel appreciates receiving the additional material. Counsel apparently are unable to agree on the manner in which cost of future care and "gross-up" should be calculated.

I would direct that these two issues be referred to the trial judge for determination of the lump sum required to yield $4,000 per annum, over 37.75 years, extinguishing the fund in the process and using a discount rate of 2.5 percent, as well as the determination of the appropriate award for "gross-up". Counsel should have the opportunity to adduce relevant evidence and to make submissions respecting these two issues.

Past Lost Wages

The trial judge determined past lost income for the years 1991 through 1994 at $30,500, and awarded the sum of $27,450, after deducting a contingency factor of ten percent to take into account the possibility that Mrs. Dillon may not have worked steadily during that time.

Mrs. Dillon's counsel submits that based on a loss of approximately $10,000 per annum, lost wages from December 10, 1990, to December 1, 1994, amounted to $40,000, not $30,000, and that applying a ten percent contingency factor would entitle Mrs. Dillon to an award of $36,000 together with interest.

This issue was raised by letter from counsel to the trial judge after the decision of August 11, 1995, had been distributed.

The trial judge responded that he "did not multiply the years by $10,000 . . . as you suggest. I determined I would fix the amount at $30,000 . . . "

The August 11, 1995, decision supports this conclusion. After rejecting Mr. Malone's

actuarial evidence tendered on behalf of Mrs. Dillon, as the assumptions used in the calculations did not reflect the evidence before him, the trial judge took into account "Mrs. Dillon's pregnancy and the reduction of working hours" because of a decline in her employer's business and made his determination.

The evidence supports the trial judge's conclusion, and I would dismiss this ground of cross-appeal.

Loss of Future Earnings

The proper method of calculating the amount of a damage award for loss of future earnings, as for the loss of future care, was expressed by the Supreme Court of Canada in **Keizer v. Hanna** as the determination of the present value of the 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.

It would appear the trial judge attempted to follow this method when determining the award for cost of future care, but I have concluded, as noted, that the approach was flawed.

When faced with the determination of loss of future earnings, the trial judge rejected the actuarial evidence introduced by Mr. Malone, on behalf of Mrs. Dillon, adduced to support an award of $169,572.25, because the "assumption raised in the calculations, did not reflect accurately the evidence".

I agree with the conclusion which was fully supported by the evidence.

The trial judge also rejected the defence submission that loss of future earnings should be assessed at a figure of $25,000 because it, as well, was based on assumptions not borne out by the evidence.

The trial judge made the following findings respecting this issue:

- Mrs. Dillon was totally, permanently disabled from work, her participation in counselling and pain programs would not alter her prospects of vocational rehabilitation;
- She had a good record of productive employment up until the time of her accident, she was resourceful in finding employment, and she had a good work ethic;

- Her employment was not in jeopardy but that the number of hours of employment which she would be able to obtain at Mike's Lunch would in all likelihood be reduced;
- Her lack of education and lessening opportunity for employment in the area hindered her chances of employment;
- She would have returned to work after the birth of her fourth child;
- She would have worked until she was 65.

The trial judge took into account certain contingencies including the prospect of future layoffs, job loss, early retirement, and the possibility of recovery to the point of re-entry into the workforce.

As noted in the section dealing with past lost wages, the trial judge determined past lost income for the four years, 1991-1994, at a total at $30,500, less a contingency factor of ten per cent to take into account the possibility that Mrs. Dillon may not have worked steadily during that time period.

In determining loss of future earnings, it is clear that the trial judge, subject to certain contingencies, considered Mrs. Dillon would have remained working until age 65; the extent to which the contingency should be considered was not stated nor was the amount of wages the trial judge anticipated she would earn.

The trial judge stated:

> In view of the errors used as the foundation for Mr. Malone's calculations I prefer to adopt the approach of Davison, J. in **Poirier v. Dyer and Dyer** [(1989), 91 N.S.R. (2d) 199] in calculating Mrs. Dillon's loss of future income. Although the decisions referred to involve persons with partial disability as apposed to permanent injury as here, this approach appears more appropriate in view of my concerns with the information in the actuarial evidence.

The approach taken by Justice Davison was to award the injured claimant a lump sum for diminution of earning capacity, separated from any award of nonpecuniary damages "in view of the lack of exactitude which can be exercised in predicting the future".

I infer that the trial judge simply determined what he considered was an appropriate figure based upon the evidence since the actuarial approach was too seriously flawed.

The trial judge acknowledged it was "very difficult" to determine the appropriate award but concluded that a "reasonable and proper amount for loss of future earnings" would be sum of $100,000.

The appellant submits that the award was inordinately high and should be set aside in favour of an award of $25,000, in view of Mrs. Dillon's failure to mitigate, the availability of treatment in Sydney, the absence of any organic pathology, the contingencies that suggests she would not have worked to age 65, and the failure of the trial judge to give sufficient weight to the role of her husband and the possible aggravation of her condition by her husband.

For the reasons given earlier, I conclude that the trial judge placed undue emphasis on what he considered was evidence of Mrs. Dillon's failure to mitigate.

The absence of any organic pathology is a common element in cases involving chronic pain. The significant point is that Mrs. Dillon suffers from chronic pain which was attributable

to the car accident resulting in a substantial, if not complete, curtailment of her "enjoyment of life, participation in recreational and other social activities".

Counsel for Mr. Kelly directs our attention to the following comments in a section of the trial judgment dealing with lost income, actuarial evidence and contingencies:

> There is also the very distinct possibility that Mrs. Dillon is the type of person whom, if she follows the medical treatment indicated to her, especially the pain management suggested by Dr. Gainer, also one must recall the improvements which she made at the Nova Scotia Rehabilitation Centre in Halifax when she was there, the opportunity for her to improve her status is definitely there.

Counsel submits that this indicates the trial judge considered a return to employment before she attained the age of 65 was likely.

I do not share the same optimism, nor do I consider it is justified on the evidence or on the findings made at trial.

The trial judge has indicated in a number of areas in his decision that Mrs. Dillon was "totally permanently disabled from work".

I am supported in this conclusion when, after detailing the seven areas in which he determined Mrs. Dillon had failed to mitigate, the trial judge states:

> (Mrs. Dillon's) failure to mitigate in failing to follow the advice of Dr. Gainer impacts on, in particular: cost of future care; pain and suffering; and housekeeping needs.
>
> It is noteworthy that loss of future earnings is not included in this list.

Mr. Kelly's counsel stresses as well that Mrs. Dillon recovery may have been retarded by the negative attitude of her husband.

Dr. Simard testified that relations between husband and wife are significantly strained when one party suffers from chronic pain, often leading to marriage breakdown.

While I might have arrived at a different award for loss of future earnings, I am not convinced that the trial judge applied a wrong principle of law, or that the amount of $100,000 is so inordinately high, as to be a wholly erroneous estimate (**Nance v. British Columbia Electric Railway**).

I am satisfied that trial judge took into account the appropriate contingencies, and I would dismiss the appeal from the award of loss of future earnings.

CONCLUSION

I would set aside the award of general damages of $45,000, allowing the cross appeal from that award, and substitute a figure of $65,000.

I would dismiss the cross-appeals respecting the award of lost wages to date of trial, the award of housekeeping expenses, and the deduction of Section B benefits.

I would dismiss the appeal, and the cross-appeal, respecting loss of future earnings.

I would set aside the assessment of damages of cost of future care at $92,000 as well as the assessment of gross-up at $18,871.00 and refer these matters to the trial judge for determination.

In summary, I would award the following damages:

General Damages	$65,000
Lost Wages to Date of Trial (unchanged)	$27, 450
Loss of Future Earnings (unchanged)	$100,000

Housekeeping Expense (unchanged)	$8,900
Cost of Future Care	To be determined by the Trial Judge
Gross-Up	To be determined by the Trial Judge
These damages should be subject to a deduction respecting Section B benefits in the amount of	$57,600

On balance, I conclude that Mrs. Dillon has been more successful than Mr. Kelly respecting the issues in the appeal and cross-appeal, and accordingly, I would award costs of the appeal, and cross-appeal, to Mrs. Dillon in the aggregate amount of $2000 plus disbursements.

PUGSLEY, J.A.

Concurred in:

Matthews, J.A.

Roscoe, J.A.

C.A. No.120544

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

John Kelly		
	Appellant	
- and -		REASONS FOR
		JUDGMENT BY:
Glenda Dillon		
		Pugsley, J.A.
	Respondent	