CITATION: Johnson v. Lewin, 2018 ONSC 850
COURT FILE NO.: CV-15-123961
DATE: 20180213

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
Stanley Johnson	D. W. Romaine, for the Plaintiff
Plaintiff	
- and -	
Harvey M. Lewin and Neinstein & Associates	W. Scott and M. Shloznikov, for the Defendants
Defendants	
	HEARD: November 21-24, 27-30, December 1, 2017

REASONS FOR DECISION

Minden J.:

A. INTRODUCTION

1. Overview

[1] On the morning of December 15, 2009, Stanley Johnson was walking on a residential street in Newmarket, Ontario. He was heading towards his truck which was parked around the corner, a short distance away. In order to cross the street, Mr. Johnson moved from the sidewalk and stepped on to the paved portion of the boulevard, often referred to as the driveway apron. He did not see the large patch of ice that had formed on this

particular driveway apron. Mr. Johnson slipped, lost his balance and fell hard to the ice-covered pavement.

[2] Mr. Johnson sustained a very serious knee injury. This led to surgery, significant complications and long-term ramifications. The injury continues to impact most aspects of Mr. Johnson's life.

[3] On January 28, 2010, Mr. Johnson retained Harvey M. Lewin, a lawyer with the Toronto personal injury firm Neinstein & Associates, to bring a claim for damages in relation to this fall. Mr. Lewin issued a Statement of Claim on Mr. Johnson's behalf. It named the homeowners in question as well as the Town of Newmarket. In 2013, Mr. Lewin advised Mr. Johnson to consent to the dismissal of his claim against the Town of Newmarket. Mr. Lewin provided this advice because he wrongly assumed that the adjacent homeowners owned the apron of the driveway, or that they in any event bore sole responsibility for the injuries by failing to clear it of snow and ice. In accordance with this advice, Mr. Lewin received instructions and on October 7, 2013, the court dismissed Mr. Johnson's action against the Town of Newmarket, without costs and on consent.

[4] Mr. Lewin's advice to discontinue the claim against the Town of Newmarket was flawed. His advice was based on an incorrect premise. The driveway apron was not owned by the adjacent homeowners. The driveway apron where Mr. Johnson fell was within the road allowance, and within the jurisdiction of the Town of Newmarket.

[5] On January 21, 2015, Mr. Lewin wrote to Mr. Johnson and advised for the first time that he was in a potential conflict of interest and that Mr. Johnson should seek other counsel. Mr. Johnson did so, and thereafter settled his claim against the homeowners. He proceeds here with a claim of solicitor's negligence against both Mr. Lewin, his former counsel, and against Mr. Lewin's law firm.

2. Solicitor's Negligence and Central Issue

[6] Counsel on both sides are able and experienced. At the outset of these proceedings, they indicated that the parties were *ad idem* with respect to the overarching issue of solicitor's negligence. The parties agree that at the material time, Mr. Lewin, a member of the Neinstein firm, was the solicitor advising Mr. Johnson. They agree that Mr. Lewin let the Town of Newmarket out of this action because he was under the belief that the adjacent homeowners either owned the driveway apron in question, or that they nevertheless bore ultimate responsibility for injuries caused by failing to treat ice on the apron. As previously indicated, the driveway apron was actually owned by the Town of Newmarket and Mr. Lewin was mistaken in advising the plaintiff to discontinue against the Town (see Exhibit 1, Tab 1, p. 3, Admissions 11-13).

[7] All of this is not in dispute. The issue can be framed in this way: did Mr. Lewin's conduct, as described, leading to the discontinuance against the Town of Newmarket necessarily deprive Mr. Johnson of a viable route to recovery of damages for his injury? Implicit in counsel's overall approach is the acknowledgment and agreement that if it did, then Mr.

Lewin failed in his duty to meet the requisite standard of care of the "reasonably competent solicitor"; *Central Trust v. Rafuse*, [1986] 2 S.C.R. 147 at p. 208, *Folland v. Reardon* (2005), 74 O.R. (3d) 688 (Ont. C.A.), at paras. 35ff and Stephen M. Grant & Linda R. Rothstein, Lawyers Professional Liability (2nd ed.) (Markham: Butterworths, 1998) at p. 23. A reasonably competent and diligent solicitor would not have made this error and given this advice.

[8] Simply put, the parties agree that if the court determines that the Town of Newmarket would have been found liable had they not been let out of this action, then the court should find Mr. Lewin and Neinstein & Associates liable for negligently failing to meet the aforementioned standard of care. Regarding liability, therefore, the central issue that falls to be determined is the duty and standard of care owed by the Town of Newmarket in connection with the plaintiff's injuries. The parties agree that any finding of liability would, of necessity, compel the court to make a damages award as against the two defendants that otherwise would have been made against the Town of Newmarket.

3. <u>Witnesses, Admissions, Exhibits</u>

[9] The trial took approximately nine days to complete.

[10] The plaintiff called six witnesses: the plaintiff, his orthopedic surgeon, occupational therapist, co-worker, an accountant, an expert in climatology and a tenant who lived in the homeowners' residence. The defendants called one witness: the Director of Public Works and Services from the Town of Newmarket.

[11] In addition to the aforementioned, there were numerous admissions of fact (Exhibit 1, Tab 1). These included the following:

- On December 15, 2009, the plaintiff fell on ice that had accumulated on the apron of the driveway at 37 Coachwhip Trail, Newmarket;
- The apron of the driveway is within the road allowance of the Town of Newmarket;
- Coachwhip Trail is a residential street within walking distance of Poplar Bank Public School and Bonshaw Avenue Park to the west and retail shopping to the east;
- Coachwhip Trail has a sidewalk on the east side only. Street parking on that street is permitted on the west side of the street; and
- In winter, the Town of Newmarket did not maintain sidewalks or aprons on Coachwhip Trail. Nor did the Town patrol to inspect conditions of the sidewalk or aprons on the street.

[12] The parties filed, on consent, five binders containing documents related to the following subject matter: Liability (Exhibit 1), Diagnostic Images and Operative Report (Exhibit 2), Hospital Records (Exhibit 3), Medical Damages Documents (Exhibit 4) and Economic Loss (Exhibit 5). Other than the accountant's "scenario" illustrations contained within Exhibit 5, virtually all documents in these binders were tendered, on consent, for the truth of their content.

B. EVIDENCE

1. Background of Stanley Johnson

[13] Mr. Johnson was born on September 21, 1961. He is now age fifty-six. As a young child, he lived in Scarborough with his parents. His father, now deceased, was an electrician. Mr. Johnson said that even during his public school years, he helped out in his father's shop or did "grunt work" with the crews. Following his parents' divorce, he moved from Scarborough to Newmarket with his mother. His mother remarried and he lived with his mother and stepfather until age fourteen. He struggled in school and did not complete Grade Nine.

[14] Almost immediately after leaving school, Mr. Johnson entered the working world. At age fourteen, his parents moved to Georgina and he began working on a full-time basis for his uncle in the sandblasting and painting business. He moved in with his uncle and aunt in Newmarket and continued working as a sandblaster for a number of years. Following this, he worked in Richmond Hill for a company that sandblasted and prepared large sewer tankers for painting. This was full-time employment for two or three years. In addition, in his early twenties, Mr. Johnson began re-building and renovating old houses. This started as a hobby but for a few years he worked in this field as an independent contractor.

[15] Eventually, when this market turned downwards, Mr. Johnson took advantage of his plumbing experience and started working in the water softening business. For four or five years, he worked for the same firm. That was approximately twenty-six years ago. He has worked continuously in the water softener business ever since. Mr. Johnson received some training but was largely self-taught. Within a very short time, he was doing installations and service calls on his own. He left this company to work for another, Aquafine, and then another, Culligan. Mr. Johnson said that by the time he worked for Culligan, he was doing five or six installations per day. These involved loading of large and heavy boxes of equipment, as well as bags of salt on to his cube van prior to heading out to job sites all over York Region and beyond. He used a forklift at the office, but did all of the job site unloading and reloading by hand. He routinely lifted and carried large, heavy tanks, piping, parts and bags of salt down to basements and back up numerous times per job.

[16] In 2005, after five years, Mr. Johnson left Culligan. For the next two years, he accepted installation jobs from three different companies. One of these was Water Depot. In

approximately 2007, he began working exclusively and on a full-time basis for Water Depot. He worked mainly out of their Newmarket branch, but also accepted jobs routed through the Newmarket office from other affiliates. Mr. Johnson did most of the installations, residential and commercial, by himself. Only on occasion was the job so large that he needed a second set of hands. He estimated that out of one hundred jobs, he completed ninety-five without assistance. Depending on the size of the tank, each could weigh between twenty-five and ninety pounds. The bags of media each weighed thirty to forty pounds, and each job required between three and ten bags.

[17] Prior to the incident giving rise to this litigation, Mr. Johnson typically worked a forty hour week. Sometimes more. He was paid once per week, based on his documents which would reflect each installation and service call. At year-end, Water Depot would provide him with the total of his billings. Mr. Johnson would give that information to his accountant, together with a list of all of his expenses such as tools, parts and material he had to purchase, as well as vehicle-related items. He used his bank books to calculate expenses, doing his best to provide accurate figures. He did not include payments to sub-contractors because other than a little cash on a few jobs, he did not have these expenditures.

[18] Mr. Johnson testified that he rarely missed work due to illness or any other reason. Mr. Johnson described a medical treatment program he had to undergo for approximately eighteen months. This involved injections of powerful medication that made him nauseous and caused mood swings. He elected to receive the injections on Fridays so he could recover over the weekend, thereby not interfering with his work schedule any more than was absolutely necessary. He recalled there were some Mondays that he simply could not work because of this treatment. He also missed one day for cataract surgery. He had no other serious health issues and did not lose any other time from work.

[19] Mr. Johnson found his employment enjoyable and challenging. Despite weighing approximately three hundred pounds, he had no difficulties with its physical requirements which he performed continuously until the date of the incident. He managed to accumulate approximately $27,000.00 in savings.

[20] Outside of work, Mr. Johnson had a long-term passion for motorcycles. He belonged to a motorcycle club. Many of its members were employed in law enforcement and emergency services, but they permitted entry by a few civilians, including Mr. Johnson. He participated in many club events and rides, including several charity rides.

[21] Mr. Johnson married at age eighteen. The marriage ended after five years. He then had a common-law relationship that lasted approximately twenty-five years. The couple had a daughter, now age twenty-six. When his common-law relationship ended, he commenced a relationship with a woman named Lynne Gaser. At the time of the incident in question, Mr. Johnson was living in an apartment in Newmarket. Lynne owned the house at 337 Coachwhip Trail.

[22] Mr. Johnson now lives alone in an apartment in Brampton. He has a new female companion. He maintains relationships with his mother and stepfather, his older sister and his daughter.

2. <u>The Slip and Fall: December 15, 2009, 327 Coachwhip Trail, Newmarket, Ontario</u>

[23] The slip and fall occurred in front of the house at 327 Coachwhip Trail. The owners of that property, Wayne Filmore and Donna Filmore, did not reside there, but their son, Jason Filmore, did. The Filmores also rented out the basement apartment to Ryan White.

[24] Lynne's house was four houses north of 327 Coachwhip Trail; both were on the west side of the street. When Mr. Johnson visited Lynne, he frequently parked his truck on the opposite, east side of the street. Parking was permitted on this side only and limited to a maximum of three hours, which limit was strictly enforced. For longer stays, he often parked near a soccer field located more or less around the corner and along a street called Bonshaw Avenue. On December 14, he planned to stay overnight so he parked near the soccer field.

[25] On the morning of December 15, Mr. Johnson left Lynne's house at approximately 9:00 a.m. He began walking towards his vehicle in order to drive to work. Lynne's driveway was clear; her daughter's boyfriend shoveled the driveway and adjacent sidewalk each morning. Mr. Johnson recalled the lawns were snow-covered. Mr. Johnson said that he was walking at a normal pace. He did not have to be at work at any particular time and was not in a hurry. He was watching where he was going. He was not carrying anything and his attention was not distracted, by cell phone or anything else. He had not consumed alcohol, drugs or medication within the previous twenty-four hours. He was wearing his usual footwear, appropriate for winter weather.

[26] Mr. Johnson explained that when he parked at the soccer field, he sometimes walked south on the sidewalk on the east side of Coachwhip Trail to the intersection of Coachwhip Trail and Bonshaw Avenue, crossed Coachwhip at that intersection and then proceeded westbound and along Bonshaw Avenue to his truck. On other occasions, he would not walk as far as that intersection but would instead walk across the roadway towards the opposite side of Coachwhip Trail, angling towards the Bonshaw intersection, thereby shortening the distance slightly. In order to access the west side of Coachwhip Trail, he would cut across the sidewalk, driveway and driveway apron of one of the houses on the east side of the street.

[27] On the morning in question, he decided to cross Coachwhip Trail prior to the intersection. As he approached the house at 327 Coachwhip Trail, he turned slightly to begin to cross the street. When he took a step with his left leg, his foot started to slide. As he shifted his weight slightly towards his right side to stabilize himself, his right foot and leg slid out from under him and he dropped in a heap to the ground. He had fallen on what he then realized was a large section of ice. While he had observed other small bits of ice in

the vicinity, he had not seen ice in that particular location and therefore could not say how long it had been there.

[28] Mr. Johnson stated that at that point, he was lying on his abdomen. He was unable to gain any traction with his right leg. The pain was excruciating. He tried to phone 911 and to signal passing motorists. Eventually, one of them stopped and offered assistance, using Mr. Johnson's phone to call 911 and his girlfriend. Lynne and a neighbour arrived and did what they could to keep him warm. Mr. Johnson said it felt like he was lying on the ground for an hour or so, in and out of consciousness. He recalled that his right leg looked "coiled". Never before had he experienced pain like this. Emergency services attended and Mr. Johnson was taken by ambulance to Southlake Regional Health Centre.

[29] In cross-examination, Mr. Johnson agreed that as he walked on the sidewalk towards 327 Coachwhip Trail, he noticed little areas of ice, as one would expect on many winter days. He was able to avoid them. He lost his footing because of ice on the driveway apron leading to the road itself. He did not see the ice prior to stepping on the driveway apron and could not say much about its colour or clarity. He believed he was stepping on pavement when in fact he was stepping on ice.

[30] Ryan White, a restaurant manager, was a tenant in the basement apartment at 327 Coachwhip Trail. He had been living there for approximately nine months. He rented from Jason Filmore who lived upstairs. It was his landlord's responsibility to clear snow and ice in the area of the house. In Mr. White's view, Mr. Filmore did not perform this task with much diligence when he was home and, in addition, Mr. Filmore was frequently away from the residence for stretches at a time. Mr. White assumed responsibility for shoveling on these occasions. He had access to a shovel, but there was no salt or sand. Both men would shovel the sidewalk, driveway and driveway apron.

[31] Mr. White recalled the incident of December 15, 2009. As of that date, Mr. Filmore had been out of town for a week or so. Mr. White's girlfriend left for work that morning, but returned into the house to advise him that a man was lying on the paved apron at the end of the driveway. Mr. White went outside and from a position of approximately half way down the driveway saw Mr. Johnson lying on his side, obviously in pain. Mr. White testified that Mr. Johnson was lying on what was, in essence, a sheet of ice. The driveway and portions of the sidewalk were icy and slippery, with fresh snow cover. Mr. White stated that the ice he observed had been present in these locations, including the driveway apron, for approximately one week.

[32] Mr. White described the driveway ice as clear or grey, depending on the location, and perhaps one-half inch in thickness. The sidewalk ice was grey and white; it had thawed and re-frozen where people had walked. From his vantage point of eight to ten feet away, the ice on the apron was difficult to see because it was covered with snow. It, too, was grey and white and approximately three quarters of an inch to one inch in thickness and covered the entire driveway apron.

3. Expert Opinion Evidence re: Ice on Driveway Apron, 327 Coachwhip Trail

[33] Dr. Michael Morassutti, a climatologist, was called by the plaintiff to offer expert opinion evidence concerning the weather-related conditions at 327 Coachwhip Trail, Newmarket on December 15, 2009.

[34] Dr. Morassutti is an accredited consulting meteorologist who has practiced in this field for twenty-five years. He has three post-graduate degrees in climate-related studies, including weather reconstruction. He has considerable experience in using available weather records to reconstruct weather conditions in criminal and civil cases. He has provided these services relative to motor vehicle, aviation and structural accidents, construction-related matters and numerous slip and falls. Frequently, his reconstruction focuses on winter weather. He is retained by lawyers representing both plaintiffs and defendants and has been qualified as an expert in forensic climatology on numerous occasions.

[35] No issues were raised relative to Mr. Morasutti's education, experience and expertise in connection with offering opinions of this nature.

[36] Plaintiff's counsel asked Mr. Morassutti to reconstruct Newmarket's temperature and precipitation conditions in the days and hours leading up to December 15, 2009. Counsel further asked Mr. Morassutti if he was able to arrive at an opinion as to whether atmospheric conditions were conducive to ice formation prior to the slip and fall and, if so, what was the time frame of that process.

[37] Dr. Morassutti reviewed official area weather charts, records and imagery for the one-week period leading up to and including the date of the incident. He compared and contrasted records from various data collection points, federal and provincial, located in the vicinity. The four main weather stations were between twenty and twenty-nine kilometers from Newmarket. Data included, among other things, temperature, wind, rainfall, snowfall and snow depth. Dr. Morassutti examined the records for trends and patterns, placing particular reliance on those compiled at the stations closest to Newmarket. He also reviewed the liability brief in this matter, including witness statements and winter maintenance records from the Town of Newmarket.

[38] Dr. Morassutti offered the opinion that ice had formed in the area of Newmarket under consideration late on December 9, 2009 or early on December 10, 2009. This ice remained on the driveway apron at 327 Coachwhip Trail consistently, for five days, to the date and time of the slip and fall. He estimated this ice had a thickness of one to two centimetres. This opinion was based on the assumption that there had been no clearing or winter maintenance of the area in question.

[39] Dr. Morassutti noted a consistent pattern from the records. There had been a large amount of snow mixed with some rain commencing on or about December 8 but particularly on December 9, a relatively warm day. This created slushing conditions. This was followed by a significant drop in temperature on December 10 to quite cold, sub-zero levels. These

cold temperatures lasted continuously for three days. In this time frame, ice was conducive to forming likely in the early hours of December 10 due to the water production from the mix of rain and snow from December 8 and 9. The increase in temperature that occurred thereafter, up to and including December 15, was not enough to melt the ice. Some rainfall occurred in this latter period, creating wetness on top of the ice, but the ice itself did not melt.

[40] Dr. Morassutti testified that he was fortified in this opinion by reason of the permanent snow pack that sustained from December 9 through to and beyond December 15. Of all stations for which records were obtained, Richmond Hill station was closest to the scene of the incident (approximately 21.2 kilometers) and, in Dr. Morassutti's opinion, most representative of it. That station reflected consistent snow depth from December 13 through 16. This supported his view that there was either no temperature-induced melt of the ice or none significant enough to deplete the ice that he believed existed on the driveway apron.

4. <u>Southlake Regional Health Centre</u>

[41] Mr. Johnson testified that at the hospital, he waited for what seemed like one hour before he was seen by a doctor. Although screaming in pain, the attendants said they could not provide painkillers or a sedative until a doctor examined him. The emergency physician gave him a sedative. When Mr. Johnson woke up, his leg had already been reduced. He recalled being told that there was a problem with his pulse. This probably indicated arterial bleeding. The need for surgical intervention was urgent. Otherwise, it would be necessary to amputate. Mr. Johnson was taken to the operating room. He believed that by that time, it was late at night. When he awoke in the recovery room, there was a bar on his leg and tubes in his arms. He was given an IV morphine drip for pain and monitored closely.

[42] Dr. Thomas Bertoia is an orthopedic surgeon at Southlake Regional Health Centre and the treating surgeon in this case. Dr. Bertoia testified that Mr. Johnson suffered a serious knee injury, the treatment of which involved various complications. Mr. Johnson had hyperextended his right knee and suffered an anterior dislocation of the knee which had been manually reduced by the emergency room physician. Other urgent problems led to the involvement of various specialists. Doctors discovered Mr. Johnson had sustained an occluded section of his popliteal artery running down the back of his femur. Dr. Bertoia described this as limb-threatening. As well, Dr. Bertoia's expertise was required to stabilize Mr. Johnson's knee as cruciate ligaments (ACL and PCL) had become disrupted. Damage had also been sustained to the lateral collateral complex and posterolateral corner, a group of structures at the back, outer corner of the knee.

[43] On an emergency basis, Dr. Deepak Gupta, a vascular surgeon, performed a bypass graft of the popliteal artery. Dr. Bertoia applied an external fixator to hold the joint in position. It was hoped this would stabilize the knee to allow some healing of the posterolateral complex, permit assessment regarding future ligament reconstruction and enable the

vascular surgeon to perform reconstructive surgery of the artery while providing a stable environment for healing of the repair.

[44] Mr. Johnson developed infection from the fixator pins, which was treated with IV antibiotics. One of the pins had to be removed. The fixator remained in place for six weeks and was removed prior to discharge. Mr. Johnson was placed in a range of motion knee brace. Otherwise, Mr. Johnson described his hospital stay as a mix of pain, infections, fever, antibiotics, painkillers and other treatment. His pain and immobility worsened. He remained bedridden for at least two weeks. More painkillers, increased uncertainty about his future, financial and otherwise. His savings were becoming depleted by reason of expenses with no money coming in. He had no idea what he was going to do. Fortunately, Lynne said he could come back to her place and on January 30, 2010, Mr. Johnson was discharged.

[45] Mr. Johnson testified that a friend recommended the Neinstein law firm. He spoke to Mr. Neinstein who sent a law clerk to the hospital. The clerk took a statement from him.

5. Mr. Johnson's Recovery Following Discharge From Hospital

[46] Lynne took time off work, put a bed in her living room and began looking after Mr. Johnson. For a number of weeks, Mr. Johnson remained non weight-bearing. He was very weak and unable to do much for himself. He had to wash with wipes and use a walker or wheelchair to go to the washroom. He remained in considerable pain. Sleeping was difficult. Painkillers made him feel out of control. On at least one occasion, he accidentally overdosed. This led to a frightening experience, involving hallucinations.

[47] On February 9, 2010, Mr. Johnson returned to see Dr. Bertoia. Mr. Johnson described his subsequent physiotherapy which included work with rubber bands, weights and swimming. Still, he was unable to put any weight on his foot. The leg brace remained on at all times. When he tried to walk with the brace, it began sliding down his leg. A different kind of brace was fitted but this, too, was problematic.

[48] By one month post-discharge, Mr. Johnson's energy, spirits and finances were almost drained.

6. Mr. Johnson's Return to Work

[49] In March 2010, Mr. Johnson returned to work at Water Depot. He testified that by this time, he felt he had to get out of the house. His boss allowed him to work as a greeter, helping customers as they came into the shop. He did this from his wheelchair. He had little stamina. On most days, by 2:00 p.m. he could not continue. Mr. Johnson was paid $50.00 per day as a greeter, instead of his usual $50.00 for a fifteen minute service call. He worked as a greeter for a few months. Mr. Johnston testified that he believed he would go bankrupt if this continued. His boss had already replaced him. If he did not return quickly, there would be no service calls or installation work left for him. Accordingly, Mr. Johnson commenced doing service calls while still using crutches. At each call, he

would hobble down to the basement in order to service the equipment. He managed to do one or two such calls per day.

[50] Eventually, by late May or early June, 2010, approximately five and one-half months after the incident, Mr. Johnson began working more hours per day outside of the shop. When he was able to put some weight on his leg, Mr. Johnson hired his cousin to help him and, together, they began to do some installations. His cousin did all of the lifting, loading and physical work. Mr. Johnson would instruct him as to what to do while seated on a stool. Once again, his day would end at 2:00 p.m. By then, his leg was swollen, stiff and painful. He would go home and lie down with his foot up for the rest of the day. Sometimes the leg grew to twice its normal size. It was like "dragging around a bag of cement". He often felt tingling, or no sensation at all in his leg below the knee.

[51] Jacob Klotz, age thirty-five, is Mr. Johnson's second cousin. He testified that prior to the slip and fall, Mr. Johnson was very healthy, hardworking and upbeat. He described Mr. Johnson as one of the strongest men he has ever known. When he heard of the accident, he visited Mr. Johnson. He was in a lot of pain from a gruesome injury. Since the injury, Mr. Klotz has observed that Mr. Johnson has gained a lot of weight. His strength and mobility have been severely compromised. Mr. Klotz noted that the injured leg is about twice its usual size. While Mr. Johnson is much better now than he was when the injury occurred, Mr. Klotz said his cousin is still very immobile in connection with his employment.

[52] Mr. Klotz testified that approximately one year after the injury, Mr. Johnson hired him as a work helper relative to the installation of water softening equipment. They worked together, off and on, for approximately four and one-half years. Mr. Klotz confirmed Mr. Johnson's evidence that for the most part, his task was to lift and carry equipment up and down stairs at the various job sites. Mr. Johnson was not able to do that. For this work, Mr. Klotz started at $15.00 per hour and eventually was paid $20.00 per hour. At the beginning, he worked a thirty to forty hour week. Later this changed to fifteen hours per week or less because Mr. Klotz obtained another job. Mr. Klotz testified that he stopped working for his cousin in January 2017. Mr. Johnson hired other helpers. Mr. Klotz said that throughout their time together, Mr. Johnson continued working on a daily basis, Monday to Friday. To his knowledge, Mr. Johnson never cancelled a job because of illness or not feeling well by reason of his injury.

[53] Mr. Johnson stated that after his cousin left him, finding steady, able helpers was not a simple matter. He estimated he went through more than twenty.

7. <u>Mr. Johnson's Ongoing Medical Situation</u>

[54] On December 20, 2010, Dr. Bertoia reported to counsel (Exhibit 4, p. 31) that Mr. Johnson's MRI confirmed many of the aforementioned injuries, including an osteochondral injury on the medial side of the knee. Dr. Bertoia testified that the observed breakdown in Mr. Johnson's articular cartilage would inevitably lead to more friction and

increased stress on the underlying bone and would result in ongoing bone stiffness and pain. In this one year report, Dr. Bertoia noted that Mr. Johnson had returned to work in June 2010 and while he had achieved "functional recovery", he continued to have "ongoing symptoms of pain, instability, disability". He had hired a work assistant and had not resumed full-time employment. Dr. Bertoia concluded his December 20, 2010 report by stating that the long-term prognosis was "guarded" (Exhibit 4, Tab 3, p. 32):

> ....one anticipates that he will have ongoing pain and disability whether or not he has the surgical reconstruction. I think his stability will be improved with surgery. In the long term, he is likely to develop degenerative changes in the knee. He is unlikely to recover full function to the extent that he enjoyed before his injury with respect to occupational and recreational pursuits.

[55] In January 2011, Dr. Bertoia referred Mr. Johnson to a specialist, Dr. Moo Lee, to determine whether or not ligament reconstruction was a viable option. Dr. Lee said that no surgery could be performed unless Mr. Johnson lost a significant amount of weight. Surgery would be in two stages and rehabilitation would take a year. Mr. Johnson testified he did not undergo this reconstruction because he almost went bankrupt when he was off work and could not afford to take more time. While his boss continued to send some jobs his way, much of Mr. Johnson's business had been given to replacements. He needed to continue working to stay afloat.

[56] As time went on, Mr. Johnson became more mobile. By 2011, he did not need crutches, but still was unable to carry much of a load. His helper continued to do all of the lifting and carrying. By this stage, Mr. Johnson was able to perform the installations himself. However, the pain and swelling in his leg did not allow him to work past 2:00 p.m. each day.

[57] In 2011, Mr. Johnson suffered additional setbacks attributable to his injury. First, he severely burned his leg when, due to the ongoing absence of sensation, he did not realize it had come into direct contact with an extremely hot part of his motorcycle. Second, in November of that year, he developed cellulitis, or skin infection, in his leg. He went to a hospital emergency department and was placed on IV antibiotics. He continued working right through these setbacks.

[58] In addition to the lack of sensation below his knee, the fixator and brace left Mr. Johnson with a leg that was permanently "turned out" to the right. This has affected his gait ever since. In 2012, he sustained a further injury directly attributable to these problems. While working on an installation, he stumbled on something and would have fallen over had he not suddenly grabbed onto the wall. In doing so, however, his arm came right out of his shoulder socket. He did a quick self-repair, finished the installation and later learned that he had sustained a torn bicep and torn rotator in his left shoulder. Surgery was performed in November 2012. He still has a hard time lifting his arm.

[59] Since 2013, there has been no significant improvement in his leg or his situation in general. Mr. Johnson had a second bout of cellulitis in October 2013. The antibiotics treatment was repeated.

[60] Dr. Bertoia reported to counsel again on December 14, 2015 (Exhibit 4, Tab 3, p. 38). Once again, he noted that Mr. Johnson complained of pain, swelling and instability in the knee, deceased functional capacity in connection with standing, walking, kneeling and squatting. He was no longer using his custom brace because it would not stay in place due to the size and shape of his leg. He had twice developed cellulitis, treated with IV antibiotics at the hospital's emergency department. Mr. Johnson had returned to work but with variable hours and only with hired helpers to do the heavy lifting. Dr. Bertoia carried out a comprehensive physical assessment and found abnormal range of motion results with significant impairment of function. Of his four ligaments, only the MCL was performing normal restraining function. The numbness continued from the front of his shin to the top of his foot, as well as in his three middle toes. This indicated incomplete nerve recovery. This loss of protective function was responsible for the incident when Mr. Johnson burned himself while riding his motorcycle. The cellulitis was also related to the primary injury as was chronic swelling. In his December 14, 2015 report, Dr. Bertoia's comments under "Diagnosis and Prognosis" included the following (at p. 44):

> Mr. Johnson suffered a low velocity traumatic anterior dislocation of his right knee subsequent to a slip and fall accident on Dec 15, 2009. He had associated popliteal artery and peroneal nerve injuries. Low-velocity knee dislocations are commonly associated with morbid obesity and ligamentous hyperlaxity.
>
> He suffered disruption of his ACL, PCL, LCL and posterolateral corner. He continues to experience pain and disability on a daily basis. He has developed posttraumatic arthritis in the medial compartment which will progress in time. This will lead to increased pain, swelling and activity limitation. In the fullness of time, he will come to require a total knee joint replacement coupled with a lateral ligament/posterior lateral corner reconstruction. This is a complex procedure and the results will be uncertain in both the short and long-term.

[61] Dr. Bertoia testified regarding Mr. Johnson's conundrum. Once Mr. Johnson had developed arthritis recognizable on imagery, the only definitive treatment would be a knee replacement. However, Mr. Johnson was not a candidate for that. He presented as very high risk due to obesity. This would, potentially, present technical barriers to the operation itself; additionally, even if successfully performed, his weight would lead to early failure. By 2015, Mr. Johnson had gained one hundred pounds and then weighed four hundred pounds. Dr. Bertoia felt Mr. Johnson would need to lose one hundred and fifty pounds or more to facilitate a successful outcome.

8. Current Medical and Employment Status, Prognosis

[62] On July 20, 2017, Dr. Bertoia reviewed Mr. Johnson's situation again and reported to his family physician (Exhibit 4, Tab 3, p. 36). By this time, Mr. Johnson had developed significant medial compartment narrowing. Narrowing of joints reflected loss of articular cartilage. He had developed bone spurs on the medial aspect of his tibia. The knee continued to thrust out on the lateral side because of ligament disruption. Dr. Bertoia's report concluded:

> I would not consider doing Stanley's total knee until he is less than 300 pounds, ideally less than 250 pounds. He will contact the office when he has gotten his weight down to less than 300 pounds and we will see him for reassessment and obtained valgus and varus stress views to evaluate his collateral ligaments.
>
> We reviewed with him that with his current weight, the longevity of a total knee would be significantly impaired. Depending on his degree of instability on stress testing, we may need to use a more constrained prosthesis. I would hesitate to use a fully constrained hinge prosthesis as this would be expected to have a high failure rate.

[63] Dr. Bertoia felt that Mr. Johnson's obesity created several complications regarding knee replacement. In the end, he was of the view that Mr. Johnson should have a bariatric surgery consultation. Beyond that, he felt that Mr. Johnson's previous arterial bypass and areas of possible "quiet infection" might pose other impediments to a successful outcome.

[64] Dr. Bertoia expressed the view that as Mr. Johnson's knee arthritis progresses, he will suffer more functional impairment. His ability to meet his workplace demands will decline over the next number of years. Ultimately, he will not be able to do his job at all. In Dr. Bertoia's opinion, Mr. Johnson will likely not reach typical retirement age of sixty-five. In the case of knee replacement that could not be performed successfully due to the aforementioned complications, the worst case scenario would be amputation. Even if knee replacement surgery could be performed and were successful, Mr. Johnson would probably continue to need a workplace helper.

[65] In cross-examination, Dr. Bertoia stated that people with morbid obesity and "lax ligaments" are more susceptible to "low-velocity" knee dislocations such as the one suffered by Mr. Johnson. Following a slip, when the knee hyper-extends, the load comes down and the force is such that it exceeds the load limits of the ligaments. The ligaments fail in sequence and the knee keeps going to hyper-extension until dislocation.

[66] Mr. Johnson testified that to this day, getting through a work day is hard. There is simply no position he can assume that is comfortable or stable for long. Going up and down stairs still poses problems. Swelling and pain are constants. When asked how he deals with it, he stated: "I just suck it up." He continues to use a helper. Mr. Johnson usually pays helpers $20.00 per hour.

[67] Mr. Johnson currently lives in his new girlfriend's basement apartment in Brampton. He has resumed some bike trips, but his leg often swells up and becomes painful. He frequently pays a price if he rides long distances. He still walks with a limp. Walking, some seated positions and excessive use often still lead to nagging pain. His range of motion remains severely restricted. Bending down is virtually impossible unless he falls to his knee. He still is on a significantly reduced workday. He only receives work from one Water Depot franchise instead of several. He estimates he is able to work at sixty per cent to seventy-five per cent of his former capacity.

[68] Mr. Johnson testified that Dr. Bertoia has advised him that his knee will likely worsen and he will probably require knee replacement. Mr. Johnson acknowledged that he has put on considerable weight since the incident. He now weighs four hundred and twenty-five pounds. Dr. Bertoia has made clear that he cannot have successful knee replacement without losing a lot of weight. Mr. Johnson said that over the years, he has tried everything, including various diets, Herbal Magic, weight watchers and working out. He had some success, losing thirty to thirty-five pounds, but since the accident has gained all of it back. Dr. Bertoia has recommended bariatric surgery, but Mr. Johnson's family physician is against it. Regarding natural weight loss, Mr. Johnson said that since the accident he is no longer able to do treadmill or weight work. Since moving to Brampton, he no longer has his daughter's companionship and encouragement at the gym or his former girlfriend's help with proper food preparation. He is not able to tolerate walking distances as he formerly did. Although he feels he is "eating clean", the weight is not coming off. Realistically, Mr. Johnson does not feel that significant weight loss is achievable at this time.

[69] Mr. Johnson is well aware of the predicament presented by all of these forces. He stated he has "no clue" as to how this will resolve. He is hopeful that he can work for a few more years.

9. <u>Irene Vrckovnik, Occupational Therapist</u>

[70] Irene Vrckovnik is an experienced occupational therapist who offered expert opinion evidence in connection with Mr. Johnson's post-incident functional ability and the impact of the injury on his life, generally speaking, with particular emphasis on his ability to work. In addition, she offered an opinion on Mr. Johnson's future needs in order to facilitate coping and improvement of quality of life. Ms. Vrckovnik's opinion was largely based on a thorough review of Mr. Johnson's medical file, clinical interviews with him as well as a one-half day Functional Abilities Evaluation (F.A.E.), including the use of an Arcon machine. This is a computerized machine that allows the tester, through a software program, to measure and evaluate static and dynamic strength in various positions. She estimated that since the early 1990's, she has performed well over two hundred F.A.E.'s.

[71] Over the years, Ms. Vrckovnik has conducted many such assessments and completed numerous reports on various injuries, including knee injuries, in hospital and other settings. She teaches in her field at the University of Toronto, holding lecture status there

for over twenty-five years. Among other things, she instructs occupational therapy students in connection with the type of assessment she conducted in this case. As a practice leader at the Workplace Safety and Insurance Board, she was heavily involved in attendant care, reviewing medical files, assessing physical capacity and frequently providing her opinion concerning services for personal care for injured persons, as well as their capacity to return to work. Many years ago, she assisted in drafting protocols for such services.

[72] In addition, Ms. Vrckovnik works in a clinical capacity as a treating occupational therapist, often collaborating with physiotherapists and psychologists. In the area of future care, she has completed a life-care planning course program at an American university. She has conducted numerous future care assessments and has been accepted as an expert witness in all of these areas many times. Her future care reports commonly include recommendations to address improvement in quality of life for residual impairment from injuries.

[73] No issues were raised regarding her expertise in offering opinion evidence relative to the aforementioned subject matter.

[74] Ms. Vrckovnik conducted her assessment of Mr. Johnson over the course of two days, January 21, 2016 and February 23, 2016. From her review of the medical records, she learned that Mr. Johnson had no significant orthopedic injury prior to this incident. Specifically, nothing had impacted his ability to function in the one year period leading up to the incident. From interviews, she gathered information concerning Mr. Johnson's lifestyle and workplace activities, including the requirements to lift and carry heavy equipment, all of which he performed regularly and independently prior to the incident. She gained the impression that before the incident, he was a very physically active man in all areas of his life.

[75] From her review of the recent medical file, Ms. Vrckovnik learned that Mr. Johnson had sustained a serious orthopedic injury, with significant vascular and nerve components. Surgery had been required, but had not resolved his knee issues due to severe ligament damage. The recovery was complicated by infection and other issues. Despite the medical intervention, many problems remained. These included pain, decreased sensation in the lower leg and foot, and decreased stability, endurance and mobility. The file disclosed as well that Mr. Johnson now walks with his right foot externally rotated and turned to the outside, causing an unusual gait. Generally speaking, Mr. Johnson's ability to carry on, both at and away from work, continued to be compromised.

[76] In addition to the usual tests, simulation exercises were designed to measure ability and stamina with respect to workplace tasks. Mr. Johnson struggled with pushing and pulling, lifting and carrying, standing, kneeling, crouching, transitional transferring, walking, and stair climbing. Some tests caused so much pain and instability that Ms. Vrckovnik determined it unsafe to continue. Continuous activity caused significant pain and swelling, as Mr. Johnson had reported.

[77] Ms. Vrckovnik stated that physical functioning testing demonstrated that Mr. Johnson has limitations in assuming physical work positions. His left knee prevents him from performing lifting at a low level. He is unable to lift on a repetitive basis or at a quick pace. He has low endurance for standing, walking and stair climbing. His knee injury causes him to walk with a limp and his right foot turned outwards. Transitional movements, such as from low level to standing upright, are difficult. He requires structural support to rise from a low to high level. As previously mentioned, pain and swelling increased with heightened physical activity.

[78] Ms. Vrckovnik formed the opinion that Mr. Johnson did not meet any of the lifting, carrying, climbing and other physical demands of his employment. She recommended that Mr. Johnson hire a work helper at the rate of thirty hours per week. This would enable him to have the assistance of someone who could perform the more challenging workplace demands that he could not achieve on his own. She felt Mr. Johnson could do some light chores around the house, but recommended that he have $60.00 per week worth of housekeeping assistance for tasks he could not perform. She felt he needed $1,400.00 plus HST for lawn care and $500.00 plus HST for snow removal per year if he were to resume living in a house rather than an apartment. He could not perform these tasks safely.

[79] Ms. Vrckovnik included the following as very important future care costs: a gym membership ($600.00 plus HST), personal trainer once per month for two years ($900.00 plus HST per year) and a dietician's one-on-one services for two years ($600.00 plus HST per year). All of these would promote weight loss and provide motivation and guidance as to exercises he could do safely. Based on medical opinion that Mr. Johnson's condition will continue to deteriorate, she recommended occupational therapy intervention (twelve sessions for a total of $1,440.12) before and after any future surgical intervention, physiotherapy (forty-eight sessions for a total of $5,760.00) and massage ($900.00 per year) for ongoing management, as well as a psychological assessment due to reports of depression. Finally, she recommended compression sox ($300.00 plus HST per year) to manage swelling.

[80] If Mr. Johnson were to have knee replacement surgery, he would likely need revision in ten to fifteen years. In that event, Ms. Vrckovnik testified that many of these costs would have to be incurred again.

[81] Finally, she recommended an annual allowance for motorcycle repairs ($200.00) that he can no longer perform himself.

[82] In cross-examination, Ms. Vrckovnik maintained that through many years of work in the OT field she gained considerable multi-disciplinary experience, thus enabling her to make recommendations in all of the aforementioned areas. She insisted that the absence of a specific recommendation by a medical practitioner regarding any of her listed items in no way signified there was no need for that item. Finally, she observed that if Mr. Johnson did not prove to be a good surgical candidate in future, his needs for some of the listed

items would actually increase due to the degenerative aspect of his diagnosis. All in all, she felt her approach to his future care costs was quite conservative.

10. Paul Mandel, Chartered Accountant

[83] Paul Mandel is a Chartered Accountant and Chartered Business Valuator who was called to offer expert opinion evidence regarding Mr. Johnson's past and future economic loss, as well as future care costs. It was during the course of Mr. Johnson's retainer of Mr. Lewin that Mr. Mandel's services were engaged. Mr. Mandel reviewed all of Mr. Johnson's available personal income tax returns as well as other relevant documents. The last tax return filed was 2014, and Mr. Mandel had no other materials to work with relative to subsequent years.

[84] The tax returns that Mr. Mandel examined included Mr. Johnson's annual Statement of Business and Professional Activities, meaning his profit and loss statements from his business as an independent sub-contractor. These statements included Mr. Johnson's revenues and expenses. Mr. Mandel observed that prior to the accident, Mr. Johnson was not deducting anything for "labour" expenses. This deduction commenced only after the accident. Mr. Mandel thus confirmed this aspect of Mr. Johnson's account.

[85] From these materials and after considering relevant Statistics Canada data which confirmed his work, Mr. Mandel arrived at three major working assumptions regarding "the numbers". First, but for the accident, Mr. Johnson would have earned between $30,000.00 and $40,000.00 of "normalized business income", that is to say, earnings from his business after the removal from consideration of certain discretionary and non-recurring deductions, which removal allowed for an "apples to apples" comparison, pre- and post-accident. These figures are expressed in 2010 dollars; they would be somewhat higher in subsequent years taking inflation into account. Second, when Mr. Johnson returned to work in May 2010, his profit from then on was reduced. This was largely attributable to the cost of work-related "helpers". Based on his analysis of the aforementioned sources, Mr. Mandel assumed that for the period Mr. Johnson was able to work, profit reduction from the date of his return was between $10,000.00 and $20,000.00 per year, also expressed in 2010 dollars. Mr. Mandel's third working assumption was that as a result of the incident, Mr. Johnson may retire early, meaning at some point before he might otherwise have been expected to retire, based on various factors including relevant statistics. Finally, the items considered by Mr. Mandel relative to future care costs were drawn from the list prepared by Ms. Vrckovnik.

[86] Mr. Mandel initially charted four different scenarios (see Exhibit 5, Tab A, pp. 1-2) to demonstrate his estimates of past losses, future losses and future cost of care, and the total of all three headings, as at November 20, 2017, the date of his second and final report. Scenarios 1 and 2 are based on the "low ends" of both of the aforementioned ranges; Scenarios 3 and 4 are based on the "high ends" of these ranges. Each scenario also assumes different "notional" retirement dates, based on decisions Mr. Johnson might make or be forced to make and what would have occurred but for the accident. These

retirement dates were also cross-checked with relevant statistical data. Mr. Mandel made the point that these are only four scenarios of many that could have been chosen for the stated purpose. These four were selected mainly to demonstrate points along a fairly wide spectrum of possibilities.

[87] During the course of the trial, Mr. Mandel considered two additional scenarios for calculation of future income loss (see Exhibit 5, Tab C, p. 2), premised upon Mr. Johnson being forced to retire after two years and using two different notional retirement ages.

[88] Mr. Mandel acknowledged that in arriving at an average earnings range of $30,000.00 to $40,000.00, he did not take into account that the pre-incident year, 2008, was an anomalous year for Mr. Johnson in that he missed several Mondays due to the lengthy course of treatment previously discussed. Removing 2008 from the calculation would support the use of a figure at or close to the high end of the range. The statistical data tended to confirm this result. I further understood Mr. Mandel to agree that adopting a similar approach to the profit reduction range of $10,000.00 to $20,000.00, the removal of 2008 would significantly increase the "change" between pre- and post-incident earnings and thus support the use of a figure closer to if not at the range's high end. A figure of close to $20,000.00 was the approximate annual amount, in 2010 dollars, of the cost of work helpers.

[89] In cross-examination, Mr. Johnson stated that the numbers that appear on Mr. Mandel's Schedule 6 (Exhibit 5, Tab 17F) accurately represent his gross business income and net business income for the years reflected thereon. Mr. Johnson agreed that while residing in apartments, at the time of the incident and currently, he has had no responsibilities for outside maintenance.

11. <u>Christopher Kalimootoo, Town of Newmarket</u>

[90] Christopher Kalimootoo is the Director of Public Works and Services for the Town of Newmarket. He has held this position for four and one-half years. He has worked in various capacities for other municipalities for approximately fifteen years. The parties questioned Mr. Kalimootoo concerning many aspects of Newmarket's road maintenance by-laws, policies and practices. As with the other witnesses, while my summary will endeavor to capture its salient portions, I have considered the entirety of his evidence.

[91] Mr. Kalimootoo's current responsibilities include road operations and maintenance, including winter maintenance which encompasses sanding and salting. The Town's annual snow removal budget is approximately $2.2 million.

[92] Mr. Kalimootoo reviewed the Town's policy for Winter Sidewalk and Walkway Maintenance, (Exhibit 4, Tab 9) for three types of roads: larger, "arterial roads", "primary and minor collectors", which feed into arterial roads and "local roads" that met certain criteria, such as those that connected large numbers of pedestrians. The guidelines applicable in 2009 state that in accordance with Town by-laws, snow removal operations must commence when the maximum new fallen or wind-blown snow accumulated on the

sidewalk surface is five centimetres. Sidewalks on most local roads were not generally maintained during winter for budgetary reasons. Only local roads that met certain criteria were maintained. Mr. Kalimootoo gave as an example local roads that connected large numbers of pedestrians, such as a local road with schools on it. He said Coachwhip Trail is and always has been classified as a local road. Its sidewalks were not maintained during winter because it does not have heavy pedestrian traffic and does not have any connecting roads that feed into it. Therefore, during winter 2009, the Town did not maintain the sidewalks on Coachwhip Trail.

[93] He then reviewed Town By-Law 1996-38 (Exhibit 1, Tab 10) which provided for removal of snow and ice from sidewalks. It sets out that occupants and owners of land fronting or abutting a highway where there is a sidewalk have the obligation to remove snow and ice "entirely" within twenty-four hours after any fall of snow, rain or hail. He also referenced Town By-Law 2001-100 (Exhibit 1, Tab 11) that amended By-Law 1996-38. This by-law, in effect in December 2009, deleted "entirely" and added "such that such sidewalk is in a safe, passable condition." The Town By-Law Division had by-law officers who would enforce this by acting on complaints. He said there were no complaints on file with respect to winter maintenance at 327 Coachwhip Trail.

[94] Mr. Kalimootoo also discussed the Town's "Winter Maintenance Program" for roads (Exhibit 1, Tab 29). In this program, in effect in December 2009, roads are classified as "arterial", "collector" and "local". He said "local" roads do not have anything feeding into them, but they feed into "collectors" which then feed into "arterial" roads. Each of the three classes of road has a corresponding "Minimum Maintenance Services" (MMS) classification. Arterial is MMS Class 3. Collector is MMS Class 4. Local is MMS Class 5. In the event of "snow accumulation" or "icy roadway", the Town responds differently to each class. The "Level of Service" is set out in Table A of the aforementioned document. In 2009, Coachwhip Trail was classified as a "local road". In reviewing Table A, Mr. Kalimootoo stated that for local roads, such as Coachwhip Trail, snow depth of ten centimetres would have to be cleared within twenty-four hours and icy roads were to be cleared "as soon as practicable after becoming aware that the roadway is icy" and within sixteen hours. Mr. Kalimootoo stated that in 2009, Newmarket had a system for monitoring weather conditions through radio, television, and weather reports or by local operators simply looking out the window and making their own observations. Operators would pass information to a supervisor who would decide on mobilizing equipment for plowing, sanding and snowing (see Exhibit 29, Tab 29 "Weather Monitoring and Storm Response" sections 3.0 and 4.0).

[95] Mr. Kalimootoo next reviewed Ontario Regulation 239/02 "Minimum Maintenance Standards for Municipal Highways" (Exhibit 1, Tab 30), Coachwhip Trail being a "local" road and designated a "Class 5" road. These contain the minimum standards regarding snow accumulation and icy roadways that are incorporated by and reflected in Table A, previously referenced, of the Town of Newmarket's Winter Maintenance Program.

[96] He then identified the Town's "Winter Storm Event" forms (Exhibit 1, Tab 31) that were the responsibility of the supervisor of road operators. These forms were usually completed by the various operators during or after winter maintenance on a particular day. Coachwhip Trail was on route 10, a "secondary" road, which I understood to be virtually the same as "local" roads previously discussed. Mr. Kalimootoo read and interpreted the forms for the dates between December 7 and the date after the incident, paying particular attention to route 10.

[97] The form for December 9, 2009 reflected a "winter storm event", with approximately seven hours of plowing and sanding/salting operations for the day to address twelve centimetres additional snow accumulation. The form was accompanied by an Environment Canada "Winter Storm Warning for Newmarket area" print-out for that date.

[98] The form for December 10 also reflected a winter storm event. There were two and one-half hours of light sanding operations. In the Comments section, the December 10 form reflected operations were to deal with a light snowfall, with some sun melting of material on the roads.

[99] The December 13 form once again indicated a winter storm event. There was a low temperature of minus 2 Celsius and high plus 2 Celsius, very light snow (one centimetre), with sanding and salting for one and one-half hours. The Comments section included a note that read: "Chris A. had called and left me a message around 9:30 to inform me that the roads were starting to ice up due to the drop in temperature and wet precipitation. He called in staff to commence a full sanding operation." This was the last operation prior to the incident in question. Mr. Kalimootoo stated that the absence of forms for either December 14 or 15, 2009 indicated that there were no plowing, sanding and salting operations for those dates.

[100] Mr. Kalimootoo testified that there are between 23,000 and 25,000 driveways in the Town of Newmarket and he estimated that between 60% and 75% of these have aprons. He stated that winter maintenance of driveway aprons is performed by the resident or owner, despite the fact that the apron is municipal property. Municipal winter maintenance of driveway aprons would not be feasible, due to costs and logistics. He estimated that such maintenance of all driveway aprons would cost the Town between five million and seven million dollars. He also stated that logistically it would be very difficult and impractical to do this, given the additional resources and material that would be required. Finally, he stated that to his knowledge, no municipalities in Ontario perform sanding and salting operations on driveway aprons.

[101] The lengthy cross-examination of Mr. Kalimootoo elicited a number of matters, including the following details concerning the street in question. Mr. Kalimootoo agreed that Coachwhip Trail is a north-south running residential street within relatively short walking distance of major shopping areas, a public school, a park and soccer fields. He agreed that in fact there are streets that feed into Coachwhip Trail, both to the north and to the

south of Bonshaw Avenue, the east-west street that effectively cuts Coachwhip Trail in half. He agreed that for school and park events, it was likely that people would park on these roads, particularly since parking apparently was not permitted on Bonshaw Avenue due to the presence of bike lanes. He agreed that on Coachwhip Trail, there was a sidewalk on the east side only, while parking was permitted only on the west side. He acknowledged that by not putting a sidewalk on the west side, the Town would have contemplated that a resident on the west side of Coachwhip Trail wishing to cross the street would have to walk down the street to the intersection or walk across a driveway apron on the east side. The same would apply to a driver who parked her or his car on the west side of the street. She or he would have to walk on a driveway apron if wishing to access the sidewalk on the east side of the street. He agreed with counsel's suggestion that the Town thereby created and contemplated a "mixed use" (vehicles and pedestrians) for the driveway aprons on the east side of Coachwhip Trail. He agreed with counsel's suggestion that the Town expected residents to leave their garbage receptacles for collection on or near the driveway aprons and that the Town can and does restrict parking on the boulevards and sidewalks.

[102] Mr. Kalimootoo stated that his department is in charge of providing safe conditions for vehicular and pedestrian traffic in accordance with Town Council's directives as to areas of responsibilities. He agreed that ice can be a hazard that poses special urgency, hence the directive to treat it in accordance with the "as soon as practicable" timeline. He agreed that accident or injury is a foreseeable outcome if a vehicle loses control or if a person loses footing on ice, and that treatment of ice on Newmarket roads must occur not later than sixteen hours of the Town becoming aware of ice build-up. He could not imagine a scenario in which the Town should have been aware but did not in fact have some awareness of a hazardous situation posed by ice. He agreed that the shorter time period mandated to clear ice as opposed to snow reflects the greater hazard ice poses.

[103] Mr. Kalimootoo agreed that section 3, MMS (Ontario Regulation 239/2, Exhibit 1, Tab 30, p. 3 of 11) indicates that the minimum standard for the frequency of routine patrols of highways is set out in a Table that shows the minimum is once every thirty days for a class 5 roadway like Coachwhip Trail. He conceded, however, that the Winter Maintenance Program in Newmarket in effect at the time of the incident did not reflect this, and that there was no special winter patrolling requirement. At the material time, there was no winter patrol system in Newmarket with respect to sidewalks or aprons. This is reflected in the "Special Provisions—Winter Patrol" section of the Town's document that reads: "The Town of Newmarket does not carry out winter patrol." "Winter maintenance patrol" is defined elsewhere in this document as follows: "means the assessment of road conditions to assist in detection of deteriorating driving conditions and to call-out, direct, and monitor snow and ice control operations." (See Exhibit 1, Tab 29, Winter Maintenance Program: Special Provisions—Winter Patrol, p. 3 and Winter Maintenance Definitions, p. 7 of 8.) When asked if he regarded this as a significant omission, Mr. Kalimootoo replied "at that time, that was the MMS; at that time there was none."

[104] Mr. Kalimootoo maintained that when road staff are out during the day, they are aware of weather conditions and do look at street conditions. He acknowledged that in 2009 there was no night-time patrol whatsoever and no system of specially-trained patrollers, such as currently exists, in which operators observe and chart operations. He agreed that Newmarket recognizes that ice on areas where pedestrians and motorists can reasonably be expected to travel is a hazard that poses a risk of harm and that this risk is, in effect, underscored, by the sixteen hour timeline for removal of roadway ice. He did not agree that this time limit was intended to cover pedestrians. He said that roads are cleared and maintained mainly for vehicular traffic. At the same time, he acknowledged that there could be pedestrians on the roads in the various scenarios counsel posited and ultimately conceded that by reason of the configuration on Coachwhip Trail, the Town was, in effect, inviting a motorist parking on the west side to walk on the road in order to access the sidewalk on the east side of the street. He did not disagree with the proposition that given this configuration, it would be a "normal expectation" of users that walking on the road and across aprons is an integral, permissible activity.

[105] Mr. Kalimootoo agreed that the longer ice is left untreated, the more people were exposed to potential risk. He agreed that MMS provisions in effect in 2009 were silent as to winter maintenance of sidewalks, pointing out that this situation was altered by 2010 amendments. When asked if this omission meant to him that Newmarket had no obligation to maintain sidewalks, he simply reiterated that the Town had not been directed to deal with winter maintenance of sidewalks. Later in his evidence, he indicated that this applied to aprons as well.

[106] Mr. Kalimootoo was aware that a constituent had complained to the Town on November 24, 2008 about unsafe winter maintenance in front of houses on Coachwhip Trail. The woman who lodged the complaint noted three unsafe properties, 391, 393, and 399, in particular, but left open the possibility there were others, observing that these were "the only numbers that I could remember this morning, on my walk". She had already fallen that weekend, due to these conditions. The woman wrote (Exhibit 1, Tab 18):

> The Town has vehicles driving around the subdivision all the time enforcing the parking by-law, why can they not enforce the snow removal by-law. Why is it up to me to take pen and paper on my walk to ensure that these by-laws are being enforced that town has put in place. Please enforce the bylaws. This is a safety issue.

[107] Mr. Kalimootoo was also aware that the Town responded to this complaint, indicating to the constituent that officials "will monitor to ensure sidewalks are in a safe, passable condition" (Exhibit 1, Tab 18). He agreed that this response did not reflect the absence of winter patrol by the Town.

[108] Mr. Kalimootoo agreed that at the material time, the Town did not subscribe to ARWIS (Advanced Road Weather Information Systems), as recommended in its 2006 Weather Maintenance Program. Data in this program had been examined by Dr. Morassutti and

he was able to glean that some of the reporting stations had reported "icy conditions" in the area during the relevant time frame. Mr. Kalimootoo also agreed that during the relevant time frame, the Town did not use York Region's weather data, also reviewed by Dr. Morassutti, and obtainable at no cost.

[109] With respect to the time frame in question, he agreed that a winter storm warning had issued for the Newmarket area on December 9 at 5:17 p.m. It read: "This is a warning that dangerous winter weather conditions are imminent or occurring in these regions" (Exhibit 1, Tab 31, p. 5). Records reflected that the Town's equipment was dispatched for plowing, sanding and salting operations. He agreed that it would make sense that these conditions would lead to increasing the amount of salt in the usual mix of salt and sand in order to achieve greater deicing capability (Exhibit 1, Tab 29, Winter Maintenance Program Section 4.2 "Sand"). Mr. Kalimootoo acknowledged that those in charge of operations concerned about snow and ice on roads would appreciate the possible, if not likely, presence of snow and ice on driveway aprons. Without a patrol system and without maintaining a number of roads, there would be no real way of knowing which sidewalks and/or aprons were being cleared by homeowners.

[110] Finally, he acknowledged that the sidewalk plow records indicated that there was relatively little use of its equipment in this vicinity over the relevant time frame. Certainly, the sidewalk equipment could have been diverted to deal with hazardous ice on Coachwhip Trail, and the application of salt and sand there would have been at minimal cost. It is noteworthy that in this regard, Mr. Kalimootoo stated that even if a system of patrol had been in place, or if the Town had otherwise become aware of the presence of hazardous ice on a sidewalk or apron, the Town would not have maintained it if the location was not on the sidewalk plow route. It would be up to by-law officers to determine what action they saw fit to take if they learned of homeowners not clearing ice that posed risk. He agreed that by-law enforcement officers had the discretion to remedy such a situation by requesting Mr. Kalimootoo's department to apply sand or salt to the area in question.

C. POSITIONS OF THE PARTIES

1. Liability

[111] On behalf of the plaintiff, Mr. Romaine submits that the evidence clearly points to gross negligence on the part of the Town. Relying on section 44(1) of the *Municipal Act*, he asserts that the Town had a duty to keep the driveway apron in question in a state of repair that is reasonable in the circumstances, including the character and location of this portion of the roadway. He submits that the plaintiff has more than met its obligations to prove, on a balance of probabilities, "non-repair" and "causation", the first two steps of the 4-step test in *Fordham v. The Corporation of the Municipality of Dutton-Dunwich*, 2014 ONCA 891, per Laskin J.A. at para. 26. He further submits that the Town cannot avail itself of any of the step 3 statutory defences set out in section 44(3) of the *Act*, and that it must, therefore, be found liable.

[112] Mr. Romaine submits that the roadway under consideration was designed by and known to the Town to be one of mixed-use. The Town recognized that the location and configuration of this particular street were such that its driveway aprons would, of necessity, be commonly and frequently used by vehicles and pedestrians alike. This factor alone distinguished this situation from others referenced in some of the authorities relied upon by the defendants. A second significant distinguishing feature of this case is that this was not a situation where the slip and fall occurred within a matter of hours of a winter storm, leaving the municipality with only a very short window of time within which to respond. The evidence established that the ice had formed on the driveway apron in question approximately five days prior to the slip and fall. On the date of the incident, the ice was estimated to be approximately three-quarters of an inch or two centimetres in thickness. Throughout the time period in question, the Town performed no ice clearing or treatment on the street whatsoever, completely ignoring it and choosing instead to maintain other roads and sidewalks in the area. In other words, the Town was alive to the hazardous ice conditions generally but chose not to address them on this street.

[113] The plaintiff says that the Town's position to the effect that it was under no obligation and could not afford to clear all icy sidewalks and driveway aprons was unreasonable and untenable in the circumstances. This is underscored by the Town's position to the effect that even if it had been directly informed of hazardous conditions on this part of the roadway, it would not have maintained it, despite minimal cost, because according to its classification system, this street was not on its sidewalk maintenance route.

[114] The plaintiff argues that the defendants can not avail themselves of the MMS defence. Mr. Romaine says that MMS simply did not apply to Town sidewalks or driveway aprons at the material time. Even if the court were to determine that they did apply, common law standards of reasonableness would preclude any viable defence in the circumstances.

[115] The plaintiff points to the fact that only one year before the incident in question, this very street had been the subject of a previous complaint to the Town regarding unsafe winter sidewalk conditions. Notwithstanding this history and the obviously unsafe conditions on this street during the relevant time frame, the Town had not conducted any special winter patrol or proper monitoring of the area or taken any remedial steps to deal with hazardous ice. Nor had the Town even purported to delegate winter maintenance of driveway aprons to homeowners. Mr. Romaine says that this amounts to "doing nothing", which reflects apathy towards risk; this can never equate with "reasonableness" when residents are exposed to a significant risk of harm. The Town's conduct and decisions left this part of the roadway in a state of non-repair, creating an unreasonable risk of harm for persons whose regular use of this portion of the roadway was or ought to have been known to the Town. Taken together, the aforementioned aspects of the Town's conduct amounted to gross negligence.

[116] Mr. Romaine says that there was simply no convincing evidence of the plaintiff's contributory negligence. Mr. Johnson was walking in a normal fashion, paying attention and wearing proper footwear. When he moved briefly from the sidewalk in order to cross

the street prior to the nearest intersection, he was entitled to assume that the Town's property was clear of hazardous ice.

[117] On behalf of the defendants, Mr. Scott submits that the plaintiff has failed to establish liability on the part of the Town of Newmarket. Mr. Scott says that the decision of *Bondy v. The Corporation of the City of London and Lyszczek*, 2014 ONCA 291 is authority for the proposition that the Town of Newmarket was not required to maintain the driveway apron in question for use by both pedestrians and motor vehicles, but rather only for motor vehicles. Moreover, the defendants say that the evidence did not clearly establish that there was a build-up of ice between December 9 and 15, 2009, as the plaintiff contends. The inconsistent if not contradictory evidence should lead the court in real doubt as to whether or not the plaintiff has established that the driveway apron was in a state of non-repair.

[118] Mr. Scott reminds that in this case, the portion of the roadway in question is a driveway apron, the primary purpose of which is to allow the adjoining homeowner to move his or her vehicle from the driveway on to the roadway and back. Given its character, location and that primary use, it is reasonable for the Town to rely on the homeowner to maintain the apron. It is reasonable that the Town does not inspect or maintain the apron but expects and relies on the homeowner to do so as part of its driveway clearance. It would be unreasonable, both in terms of cost and logistics, to expect the Town to maintain the approximately 16,000 driveways in Newmarket. No other municipality in Ontario maintains driveway aprons. There is nothing unique about this particular apron. Aprons are not and cannot realistically be classified according to the extent of pedestrian usage. That would mean that every apron, in every municipality, would have to be maintained to the same standard. Accordingly, it would be unrealistic and unfair to impose on the Town a system of winter inspection and maintenance for driveway aprons, particularly in the absence of any expert evidence as to what type of system would be reasonable and effective.

[119] Mr. Scott, citing *Bondy*, submits that the fact that the driveway apron may also be used by pedestrians does not create a higher standard of maintenance. The applicable standard of maintenance is that of a roadway for motor vehicles. The Town met that standard by snow plowing the route that included Coachwhip Trail on December 9, 10 and 13. He submits, therefore, that the plaintiff has not established non-repair. In the event the court were to hold to the contrary, Mr. Scott says that the plaintiff has failed to establish causation. He points to the fact that the plaintiff led no expert evidence concerning reasonable maintenance procedures that if in place would necessarily have prevented the slip and fall. Mr. Scott says that in any event, Mr. White testified that he had no difficulty seeing the ice on the apron, and Mr. Johnson ought to have been able to see it as well if he had been keeping a proper lookout. There was no hazard posing an unreasonable risk of harm to ordinary, non-negligent users of this portion of the roadway. If a hazard existed, it posed a risk only to someone who was careless or negligent.

[120] Even if the court were satisfied that the plaintiff has established non-repair and that the Town is obligated to maintain driveway aprons for pedestrians as well as vehicles, Mr. Scott submits that the plaintiff's case has not been made out. He says that the Town properly invokes the statutory defences under the *Act*, section 44(3).

[121] First, Mr. Scott says that with respect to section 44(3)(a), the Town did not have actual knowledge of this patch of ice on this particular driveway apron. The previous complaint of one year before does not approach the threshold of actual knowledge concerning the existence of a hazard on this driveway apron. Similarly, the fact that the Town was plowing, salting and sanding elsewhere ought not to lead to a finding of constructive knowledge of this particular hazard. Mr. Scott references again, in this context, the absence of expert evidence as to what system the Town could have put in place to gain knowledge, actual or constructive, about the condition of this apron. A winter patrol system, such as that advocated by the plaintiff, would not have been of assistance. Mr. Scott says that if Mr. Johnson did not see the ice, there is little chance that a patrol inspector would have seen it.

[122] In connection with section 44(3)(b), Mr. Scott says that the Town's Winter Maintenance Program was an appropriate and reasonable one. Absent actual or constructive knowledge that the driveway aprons created an unreasonable risk of harm to users of the aprons, no liability can attach even if the Town unreasonably failed to maintain them: *Lloyd v. Bush,* 2017 ONCA 252, at para. 64. In this instance, there was nothing unreasonable about the measures taken by the Town.

[123] In relation to section 44(3)(c), Mr. Scott argues that the Town fell squarely within the MMS defence and has met its onus of proof in that regard. The roadway in question was a class 5 highway. Relying once again on *Bondy*, Mr. Scott submits that the highest standard for maintenance was for motor vehicles and it applied to the driveway apron. There was no expert evidence that this roadway was improperly classified and no expert evidence to the effect that the Town ought reasonably to have taken measures beyond what is set out in the MMS (Exhibit 1, Tab 30, pp. 2-3 of 11), namely, routine patrolling by driving on or by electronically monitoring the highway to check for potentially hazardous conditions once every thirty days for a class 5 highway. Mr. Scott says that the Town met MMS for a class 5 highway. Its Winter Maintenance Program did not include winter patrol at the material time; however, each plow operator was responsible for observing and recording winter road conditions on his or her route, and the roads supervisor was in charge of coordinating overall response for winter roads maintenance, including operations during storms. The records established that there were in fact operators on the street in question on December 9, 10 and 13. Mr. Scott says that *Bondy* limits any required inspections to vehicle use, and did not require inspection for pedestrian use. Mr. Scott says that in this regard, the Town also complied with the additional MMS relative to "icy roadways" (Ontario Regulation 239/02, section 5, Exhibit 1, Tab 30, p. 4 of 11).

[124] By way of summary, Mr. Scott submits that when one considers section 44 of the *Municipal Act* and a proper application of the principles outlined in *Lloyd v. Bush*, *supra*, together with the aforementioned *Fordham* test, there should be no finding of liability. He submits that the Town of Newmarket does not and is not obligated to maintain driveway aprons anywhere within the municipality. No provisions in legislation or by-laws require the Town to do so. Despite technically being part of the roadway and hence the property of the Town, maintenance of these areas would be entirely untenable given logistics, the large number of driveway aprons in Newmarket and the enormous expenditures that would be required. No other Ontario municipalities maintain driveway aprons. A reasonableness approach must be imported into the by-laws and any applicable minimum maintenance standards. The Town should not be found liable, particularly in view of the established history in Newmarket of homeowner winter maintenance of driveway aprons.

[125] Finally, the defendants submit that if the plaintiff succeeds on steps 1 and 2 of the *Fordham* test, and if the defence is found to have failed to establish one of the statutory defences, there was contributory negligence. If the ice was as visible as Mr. White said it was, Mr. Johnson ought to have seen it and not stepped on the apron. If he did not see it, he clearly was prepared to assume risk given the general conditions at the time.

2. <u>Damages</u>

[126] The position of the parties regarding damages in general and Mr. Mandel's evidence in particular can be summarized briefly.

[127] On behalf of the plaintiff, Mr. Romaine submits that the total damages award should be $983,000.00, comprised of $177,000.00 for past economic loss, $401,000.00 for future economic loss, $150,000.00 for costs of future care and $255,000.00 for general damages.

[128] Mr. Romaine says that Mr. Mandel's Scenario 4 is the one that most closely represents the actual state of affairs. He says that on all of the evidence, including the medical evidence, it is abundantly clear that Mr. Johnson's future is grim. There is no option, surgical or otherwise, that will lead to a positive outcome. For his entire life, Mr. Johnson has been an extremely industrious person. At the time of the incident, Mr. Johnson was a strong, healthy and hard-working installer and serviceman of water softener equipment. Over the course of many years, he put in, minimally, a regular forty hour work week. As a result of the incident, Mr. Johnson was unable to do any work for approximately five and one-half months. When he was able to return to work, only by hiring helpers could he manage an abbreviated work schedule. His efforts to continue working after the incident have been almost heroic. The reality is, however, that this is simply not sustainable. It is a virtual certainty that Mr. Johnson will not be able to work to age sixty. Even if he overcomes many obstacles and becomes a candidate for knee replacement surgery, he will face many associated risks and in any event will require a revision not long thereafter. Without surgery, the current arthritic condition will worsen and will lead

to even more significant impairment. Mr. Romaine argues that the uncontradicted evidence supporting this bleak outlook is credible and reliable.

[129] Further, Mr. Romaine submits that it is appropriate to use the high end of Mr. Mandel's ranges because the plaintiff's average net income was approximately $40,000.00 and the annual cost of hiring helpers averaged very close to $20,000.00. Mr. Romaine submits that if anything, this Scenario 4 would be a conservative forecast, based on all the circumstances. In connection with future care costs, Mr. Romaine argues that Mr. Johnson will require all of the items listed by Ms. Vrckovnik.

[130] On behalf of the defendants, Mr. Scott submits that any damages award should be in the total amount of $568,343.63, comprised of $124,691.00 for past economic loss, $215,992.00 for future economic loss, $77,660.63 for costs of future care and $150,000.00 for general damages.

[131] Mr. Scott agrees that Mr. Johnson suffered a very significant injury with permanent disability. Mr. Johnson's modest success with weight loss and exercise, considered together with the minimum requirements for surgical candidacy, should lead the court to conclude that he will most assuredly not become a candidate for knee replacement surgery.

[132] Past economic loss should be calculated by multiplying the average cost of helpers by the seven years from the accident to present.

[133] Mr. Scott agrees that the evidence, specifically the report of Dr. Bertoia, supports the suggestion that Mr. Johnson will not be able to work until what would otherwise be a normal retirement age. Mr. Scott submits that the court should assume that the plaintiff will work until age sixty. He submits that the court should estimate future loss for the next four years (age fifty-six to sixty) based on the average annual cost of helpers, and the ensuing five years when Mr. Johnson will not be able to work (between age sixty and normal retirement age sixty-five) based on his 2014 normalized income. He reasons that 2014 was a good year for Mr. Johnson and the accountant did not have access to personal income tax returns for later years.

[134] Mr. Scott does not dispute that some of the items on Ms. Vrckovnik's list of future care costs are reasonable. Others are redundant or otherwise unnecessary. For example, he says that a gym membership and personal trainer costs should not be considered given that Mr. Johnson discontinued his efforts at regularized exercise routines. The home maintenance items such as snow and lawn care should not be included since Mr. Johnson was living in an apartment at the material time and does so now as well. The post-surgical items should not be considered given the unlikelihood that he will be a candidate for surgery of any kind. For therapy, he can attend on his family physician or a psychiatrist, at no cost, rather than incur the cost of a psychologist. Finally, Mr. Scott says that the plaintiff has self-managed up to this point without need of ongoing assistance from an occupational therapist. He is unlikely to need one in future.

D. DISCUSSION

1. Liability

[135] I commence with a few general observations regarding the plaintiff's testimony. Mr. Johnson testified in a clear and cogent fashion. He answered all questions put to him fairly, reasonably and spontaneously. He did not exaggerate or endeavour to present his situation in a manner that would inure to his benefit. His account of the slip and fall was straightforward and unembellished.

[136] I find that on the morning in question Mr. Johnson was walking at a normal pace in the circumstances. He was not carrying anything. He was watching where he was going. He was paying attention and was not distracted by anything or anyone. He was wearing appropriate footwear and otherwise taking reasonable precautions given the weather and conditions underfoot. There is no suggestion of involvement of alcohol or drugs, prescribed or otherwise.

[137] Mr. Johnson acknowledged that some bits of ice were visible in other areas along his route. He had no difficulty traversing the distance over the few houses leading up to the Filmore residence and had no difficulty there either, until he stepped on to the driveway apron at 327 Coachwhip Trail. I find that through no fault of his own Mr. Johnson did not see the ice on the driveway apron before stepping on it. The colour and nature of the ice together with the dusting of snow covering made conditions unpredictably treacherous in this portion of the roadway. I am satisfied that he would not have tried to walk there had he seen the ice. Mr. Johnson readily explained why he walked on the driveway apron. I accept that explanation. I accept and believe Mr. Johnson's entire account of the slip and fall incident. In all respects, he was acting reasonably, prudently and with necessary caution.

[138] Other evidence that I accept confirmed Mr. Johnson's version. Ryan White's evidence was clear and cogent. It was also independent and non-partisan. Mr. White testified that he was able to see the ice in the area in question. He was quite familiar with the conditions in front of the residence. He had lived there in the days and weeks prior to the incident and, on occasion, took responsibility for shoveling. He had taken note of the conditions over the previous several days and knew it was slippery in front of the house. I accept Mr. White's evidence to the effect that the entire driveway apron where Mr. Johnson was lying was "a sheet of ice", and that the snow made it difficult to see the ice in that location. I also accept his evidence that the ice had been in that location, untreated, for a number of days.

[139] The fact that the ice may have been visible to Mr. White but not Mr. Johnson is understandable and of no particular moment. When Mr. White emerged from his house and saw the ice, his vantage point was very different from Mr. Johnson's. Of note, as well, is that Mr. White had just been told that a man was lying on the ground at the end of his driveway. It makes perfect sense that he would be looking in this area for the cause

of or explanation for this accident. Finally, even from where he was standing, and notwithstanding that he knew where the ice had accumulated, he said it was difficult to see it.

[140] This testimony regarding the icy conditions on the driveway apron was confirmed by Dr. Morassutti's opinion evidence. Based on his review of all of the relevant weather records, he concluded that the ice formed in this location approximately five days before the incident, likely just before midnight on December 9 or in the early hours of December 10, 2009, and remained there until Mr. Johnson's fall. In my view, his opinion was carefully considered and expressed. It was based on a comprehensive review of all available data and was uncontradicted by any other evidence. His opinion concerning how long the ice had been on the driveway apron as of the date of the incident was entirely in synch with Mr. White's observations. I accept Dr. *Morassutti's* opinion as credible and reliable.

[141] I turn next to a brief examination of statutory provisions and governing principles with respect to the issue of the Town's liability.

[142] Section 44 of the *Municipal Act*, 2001, S.O. 2001, c.25 provides:

> (1) The municipality that has jurisdiction over a highway or bridge shall keep it in a state of repair that is reasonable in the circumstances, including the character and location of the highway or bridge.
>
> (2) A municipality that defaults in complying with subsection (1) is, subject to the *Negligence Act*, liable for all damages any person sustains because of the default.
>
> (3) Despite subsection (2), a municipality is not liable for failing to keep a highway or bridge in a reasonable state of repair if,
>
> a) It did not know and could not reasonably have been expected to have known about the state of repair of the highway or bridge;
>
> b) It took reasonable steps to prevent the default from arising; or
>
> c) At the time the cause of action arose, minimum standards established under subsection (4) applied to the highway or bridge and to the alleged default and those standards have been met.
>
> (4) The Minister may make regulations establishing minimum standards of repair for highways and bridges or any class of them.

[143] Claims against a municipality for failing to meet this statutory obligation are governed by the 4-step test set out by Laskin J.A. in *Fordham v. Dutton Dunwich (Municipality), supra,* at para. 26. In the recent Ontario Court of Appeal decision in *Lloyd v. Bush, supra,* the court summarized the test as follows (at para. 62):

- *Non-Repair*: The plaintiff must prove the existence of a condition of non-repair, that is, a road-based hazard that poses an unreasonable risk of harm to ordinary, non-negligent users of the road, with a view to the circumstances, including the "character and location" of the road.

- *Causation*: The plaintiff must prove the condition of non-repair caused the loss in question.

- *Statutory Defences*: If the plaintiff has proven both non-repair and causation, a *prima facie* case is made out against the municipality. The municipality then bears the onus of proving that one of the three independently sufficient defences in s. 44(3) applies. These defences include proof that the municipality took reasonable steps to prevent the default arising (s. 44(3)(b)).

- *Contributory Negligence*: If the municipality cannot establish any of the statutory defences, it will be found liable. The municipality can, however, still demonstrate that the plaintiff's driving caused or contributed to his or her injuries.

[144] The Court set out some governing principles applicable to cases of this kind. Those principles include the following:

1. In considering the 4-step test, Canadian courts must take into account the difficult winter conditions that exist as well as the cost of winter road maintenance. A municipality is not to be treated as an insurer of the safety of the users of its roads by imposing overly onerous maintenance obligations (para. 63);

2. Proof by a plaintiff of non-repair will not suffice to establish liability. A municipality will only be liable for failing to salt and/or sand where it had actual or constructive knowledge that road conditions created an unreasonable risk of harm to highway users, and where the municipality unreasonably neglected that risk (para. 64). Put another way, to constitute a state of non-repair, the roadway must pose an unreasonable risk of harm to ordinary, non-negligent users of the road in the circumstances (para. 71);

3. When considering whether a road is in a state of non-repair, a court must analyze all of the surrounding circumstances, necessarily including the character and location of the roadway. What is deemed to be a reasonable state of repair will depend on the facts of each case (para. 69);

4. A lower standard will apply with respect to the state of repair on a low-traffic rural roadway than on higher-traffic thoroughfares and highways. The character and population of the area must be considered, as well as the

amount of traffic using the road (para. 70). Non-repair is a relative concept (para. 71);

5. Mere compliance with minimum standards or guidelines is not, in itself, sufficient to avoid liability if there was an obvious deficiency or risk. The overriding question remains: in all of the circumstances, does the condition of the road pose an unreasonable risk of harm to reasonable users (para. 75); and

6. In assessing the reasonableness of the steps taken, section 44(3)(b) "speaks to action rather than to result". The *Act* does not create a regime of absolute liability. The steps to be taken by a municipality "need only be within the range of what is reasonable in the circumstances" (para. 82). Relevant considerations can include the municipality's resources and the cost of the proposed measures (para. 94). On the other hand, financial constraints will not in themselves justify a municipality's failure to take steps to correct a state of non-repair for a particular road (para. 97).

[145] In *House v. Baird*, 2017 ONCA 885, the court again adopted this analysis, adding (at para. 37), that the issue is "not whether something different or something more intensive could have been done—rather, the issue is whether the steps that the [municipality] did take were reasonable: *Ondrade v. Toronto* (City)(2006), 23 M.P.L.R. (4th) 111 (Ont. Sup. Ct.), at para. 67.

[146] Newmarket owns the paved boulevard or driveway apron. That the driveway apron in question forms part of the highway within the meaning of the *Municipal Act* is not in dispute. The Town, therefore, has a duty to maintain the driveway apron: Exhibit 1, Tab 1, Admission #7, the *Municipal Act*, section 1(1) definition of "highway", section 44(1), *Bondy, supra*, at paras. 1-2, *Jacob v. Tilbury*, [1941] D.L.R. 461 (Ont. C.A.) at p. 458.

[147] I turn next to a brief discussion of the applicable standard of care, having regard to the above-noted statutory provisions and governing principles. As I have previously outlined, Mr. Scott submits that the driveway apron in question is primarily if not exclusively for the use of vehicles. Any pedestrian use of the apron is merely occasional, at most, and thus incidental to the main use. He relies on *Bondy* in support of a similar finding here.

[148] I am of the view that the facts in this case are quite different and distinguishable from those in *Bondy*.

[149] While there was some challenge as to whether or not Coachwhip Trail was properly classified as a "local road", the evidentiary record falls short of and does not permit a definitive conclusion that this classification was improper. What is clear, however, is that other streets do feed into Coachwhip Trail. This is an urban roadway with relatively low to moderate vehicular traffic and moderate to relatively high pedestrian traffic.

[150] Mr. Romaine's suggested characterization of Coachwhip Trail as a roadway designed for mix-use as between vehicles and pedestrians was not merely theoretical or a matter of advocacy. I find that Mr. Kalimootoo ultimately accepted that characterization, in virtually every respect. He agreed this is a residential street within close walking distance of a school, parks and shopping. He agreed that the design and configuration of the street itself—with permissible parking on one side of the street and only one sidewalk on the opposite side—necessitated regular, frequent pedestrian use of the entirety of the roadway, including the driveway aprons on both sides of the street. Other available parking for homeowners and visitors was quite limited. All of these factors would inevitably lead many people to choose walking routes similar to the one Mr. Johnson used on the day in question. Moreover, the Town's waste collection by-law specifically directed residents to place waste as close to the curb as possible and not on snowbanks, a further indication that pedestrian use of driveway aprons was anticipated.

[151] Pedestrian use of the boulevard in *Bondy* was sufficiently infrequent as to be expressed as a relatively remote possibility. In its brief endorsement, the Court of Appeal disagreed with the appellant's submission that a higher level of maintenance obligation was imposed on the municipality in that case by reason of the fact that people "may cross" the road at undesignated places "from time to time" (*Bondy*, at paras. 2-3). In short, the court found there were no "special circumstances" applying to the driveway apron under consideration that would lead to an elevated standard of care. I do not read *Bondy* as mandating the same standard - as a roadway for vehicles only or for their virtually exclusive use - in all cases involving driveway aprons, regardless of any specific or special circumstances that may apply in any given situation.

[152] In my view, the pattern of use on this part of Coachwhip Trail was markedly different. I find that a pattern of regular mixed-use was part and parcel of its configuration; therefore, such use would or should have been eminently foreseeable if not expected by the Town. I find that this use constituted special circumstances that created a higher level of maintenance obligation on the part of the municipality. As the plaintiff points out, had the Town wanted to maintain its roadway and driveway aprons only to a standard for motor vehicles, it could have configured the street differently (for example, by prohibiting parking and building sidewalks on both sides). Other analogous cases involving falls by pedestrians on roadways have applied maintenance standards for reasonably expected use by both vehicles and pedestrians: see, for example, *Glazman v Toronto (City)*, [2002] O. J. No. 1881 (Ont. S.C.J.), *Guy v. Toronto (City)*, 2011 ONCA 689.

[153] In light of the elevated standard of maintenance attributable to such use of the portion of the highway in question, I am persuaded that at the material time, the actions and inactions of the Town of Newmarket created an unreasonable gap. The Town did not maintain sidewalks or driveway aprons on Coachwhip Trail. Mr. Scott submitted that the Town reasonably relied on homeowners to clear driveway aprons as an extension of their driveways. It seems to me that this reliance did not take mixed-use into account; it assumed, rather, that each homeowner wanting to drive from his or her driveway onto the roadway would of necessity clear the apron. It contemplated no other use of the aprons

by homeowners, their visitors, motorists parking on the street or pedestrians in general. In any event, while Town by-laws left winter maintenance of sidewalks on local roads to homeowners, there appears to have been little, if any, enforcement during the relevant time frame. Moreover, the by-laws were entirely silent with respect to winter maintenance obligations of driveway aprons on all roads. In the absence of any such notice to homeowners, failure to clear driveway aprons could not be enforced.

[154] In addition, the Town had no system whatsoever of winter patrolling of sidewalks, driveways or driveway aprons. Specifically, the Town did not patrol local roads, including Coachwhip Trail, during December 2009. Nor did it maintain these areas. While perhaps making general observations along their routes, snow plow operators were certainly not tasked with patrolling for potentially dangerous conditions due to ice on sidewalks or driveway aprons. Clearly, they did not do so during the relevant time frame. That is not surprising, given the Town's position that these areas of the roadway were not part of the Town's responsibilities. Consequently, ice that had accumulated on Coachwhip Trail sidewalks well beyond the twenty-four hour period of the sidewalk clearing by-law and on driveway aprons well beyond the sixteen hour period for icy roadways posed a real hazard not addressed by MMS, legislation or Town operations.

[155] The existence of this gap was highlighted by the complaint received by the Town, considered together with the Town's reply to it, in the year prior to the incident. The complaint was not a generic one. The constituent reported that she had actually fallen due to unsafe sidewalk conditions, in winter and on the very street in question. The constituent could not understand why Town by-laws regarding this were not being enforced and why it should be left to her to lodge complaints. As she put it, this was a safety issue. The Town replied that it would "monitor" the situation so as to prevent further falls due to unsafe winter conditions along the street. Mr. Kalimootoo's testimony made it clear to me that this response was at least inaccurate if not disingenuous. Whatever the intentions were of the city official who endeavoured to address the complaint, the truth is that the Town certainly would not be monitoring conditions of this nature in that location. It would not because it took the view it had no responsibility for doing so.

[156] Therefore, the Town had actual notice that notwithstanding the by-law regarding sidewalks, some homeowners on this street were not in fact clearing snow and ice. Yet the Town did not institute a system of patrolling or of sidewalk by-law enforcement between the date of the complaint and the incident in question. Nor did the Town use this prior complaint, together with the other weather information at its disposal, to inform itself regarding the need to patrol this street following the storm of December 9.

[157] I agree with the plaintiff's submission to the effect that in these circumstances, "doing nothing", or leaving a gap of this nature relative to a safety issue cannot amount to meeting the municipality's obligation to take reasonable measures; it is, rather, to leave the public exposed to an unreasonable risk of harm. In *Dorschell v City of Cambridge*

(1980), 30 OR (2d) 714 (Ont. C.A.), the court addressed such a gap with the following admonition:

> In my opinion, if the evidence shows that the municipality has no policy or a policy not to perform its duty to ensure the safety of its citizens from snow and ice on the sidewalk, then there is evidence of serious negligence. In such circumstances if the court is satisfied that the plaintiff's injuries result from such condition, the court may find that the accident was caused by the gross negligence of the municipality unless it can show that it is not liable for what occurred. The onus is on it because its policy to breach its duty to the plaintiff to keep the sidewalk clear of ice and snow has impaired the plaintiff's opportunity of proving liability.

[158] This submission gains force in view of the nature and location of this particular roadway, as discussed, and in the context of the Town having been made aware of hazardous conditions leading to a documented instance of a slip and fall the previous winter.

[159] There were other readily available weather records that the Town could have used to better inform itself as to the icy conditions that existed during the relevant time frame. Frankly, it is apparent that the Town was well aware of those conditions in any event. The Town had actual knowledge of the December 9 "dangerous" storm warning, had documented three winter storm events between then and December 15 and had dispatched plows and sand/salt equipment to remedy and treat ice on "preferred" roads and sidewalks in the vicinity of Coachwhip Trail. This reflects constructive if not actual knowledge of dangerous, icy conditions in the vicinity of and on that street. Fixed with such knowledge, similar conditions ought reasonably to have been expected to be present on this portion of the roadway.

[160] Mr. Scott submitted that a winter patrol system would not have been useful. He contended that an inspector might well have missed the ice on the driveway apron even if he or she had been looking for it, much as Mr. Johnson did not see it under his feet. I cannot accede to this argument. A comprehensive system of winter patrol would have ensured that all inspectors were appropriately equipped and trained to spot hazards of this nature, particularly when armed with all relevant weather data. While human error is certainly possible in this context, it is much more likely that inspectors would become familiar with problem areas and would know precisely where, when and how to look for potentially hazardous ice following a major winter event. To have no winter patrol system whatsoever is to virtually guarantee that ice of this nature will not be seen or remedied.

[161] In terms of both the plaintiff's assumption of risk as well as the reasonableness of action taken by the municipality, it seems to me that this case is, once again, distinguishable from *Bondy*. The plaintiff in *Bondy* chose to walk on city sidewalks in the immediate aftermath of a severe storm despite her awareness of numerous, clear public broadcasts warning against doing so. In the case at bar, the incident occurred several days following the storm. There were no warnings of treacherous conditions and no apparent reason to

expect any as the plaintiff began walking towards his truck. In *Bondy*, the City of London was found to have acted appropriately in the circumstances, meeting the requisite standard of care, by dispatching remedial equipment within the required time. As previously discussed, the incident in question here occurred five days after the formation of the ice with no intervening treatment.

[162] I have considered the issue of the Town's budget and resources. I do not accept the defendants' submission that finding liability in this instance would impose an overly onerous burden on the Town of Newmarket and on municipalities throughout Ontario. Passing and enforcing a by-law specific to driveway aprons would, in my view, go a long way towards addressing issues of cost. It is noteworthy that Newmarket did not suggest that instituting a winter patrol system, or some other system of monitoring potentially hazardous winter conditions, would have been overly expensive, unwieldy or impractical. Indeed, Mr. Kalimootoo stated that at some point after this incident, the Town did in fact institute a system of winter patrol. Moreover, the authorities underscore that issues of non-repair are to be determined on a case by case basis. The defendants' "floodgates" submission does not properly reflect the numerous factors and circumstances that together led to Mr. Johnson's injury. It seems to me that situations such as this would arise infrequently, particularly if municipalities took proactive steps to avoid being labelled as having "no policy" or a "policy not to perform its duty" to ensure the safety of its citizens from icy roadways and sidewalks (*Dorschell, supra.*).

[163] Accordingly, I find that the Town has not met its onus under section 44(3)(a) of the *Municipal Act* to establish that it did not know and could not reasonably have been expected to have known about the state of repair on the driveway apron. I find that the Town has not met its onus under section 44(3)(b) of the *Act* to establish that it took reasonable steps to prevent the default from arising.

[164] I turn next to the "minimum standards" defence in section 44(3)(c) of the *Municipal Act*.

[165] In *Giuliani v. Halton*, 2011 ONCA 812, leave to appeal refused, [2012] S.C.C.A. No. 87, the Ontario Court of Appeal examined the nature of MMS, noting that their very purpose is to provide municipalities with a defence notwithstanding a finding of negligence. A municipality is saved from liability "for negligently failing to maintain a highway if it complied with the *minimum standards that applied to its failure*" (Emphasis added) (para. 22). The court went on to state that MMS do not purport to cover all circumstances that may arise in the course of maintaining highways. As a matter of law, MMS are not and do not purport to be an all-inclusive document (para. 23). In cases where MMS do not address a specific default, one must revert to the common law interpretation of the municipality's duty under section 44(1) of the *Municipal Act*.

[166] The onus is on the defendant to show that minimum standards applied to the roadway in question at the material time, and that such standards were met. I agree with the plaintiff's submission to the effect that O.Reg 239/02 Minimum Maintenance Standards for Municipal Highways (MMS) do not apply to sidewalks or boulevards. Sidewalks,

boulevards, driveways and driveway aprons are not defined or mentioned in the MMS applicable at the time of this incident. Winter patrolling and maintenance of these areas are not addressed. Other sidewalk-related issues have been addressed by subsequent versions of MMS, but driveway aprons have not. Mr. Kalimootoo acknowledged that at the material time, MMS did not specifically address winter maintenance of sidewalks or aprons, a particular failure alleged in this case.

[167] In addition, Mr. Kalimootoo agreed that the Town's Winter Maintenance Program included no special patrolling requirement for inclement weather and suggested that the Town's compliance with MMS "routine patrolling" standards was sufficient. As the plaintiff points out (see Plaintiff's Factum re Liability, Exhibit C, paras. 172 ff.), this position does not take into account the holding in *Thornhill (Litigation Guardian of) v. Shadid* [2008] O. J. No. 372 (Ont. S.C. J., per Howden J.), to the effect that the absence in the MMS of a standard for "non-routine" patrolling, i.e, in inclement weather conditions, is a "significant omission" (*Thornhill*, para. 100) and if left to stand on its own would be inconsistent with the purpose of section 44 of the *Act* (*Thornhill*, para. 103). Howden J's opinion, with which I concur, in connection with this gap was not addressed in subsequent versions of MMS applicable at the time of Mr. Johnson's fall. The Town's modifications to its patrolling requirements were not made until after this incident.

[168] Since there appear to be no "minimum standards that applied to its failure", in accordance with *Giuliani*, Newmarket cannot invoke MMS as a defence to liability.

[169] If MMS do not apply to these circumstances, *Giuliani* holds that pursuant to section 44 of the *Act*, the municipality must take steps to keep the highway in a reasonable state of repair having regard to all the circumstances. This fact-specific exercise involves a standard "grounded in reasonableness" (para. 37). I have already expressed the view that the Town's inaction in the circumstances was unreasonable. The sheet of ice in question had been present for five days as of the date of the incident. This despite the availability of equipment that could easily have remedied this situation, at relatively low cost, had some winter patrol system been in effect.

[170] The plaintiff points out that in *Bondy* the issue of whether or not MMS applied to driveway aprons was not raised. Even if it were assumed here, as the court appears to have done in that case, that MMS did apply to driveway aprons, the regulatory defence would not operate in favour of Newmarket. Coachwhip Trail being a Class 5 roadway, the Town was mandated to remedy roadway ice on local roads within sixteen hours of becoming aware of its presence. Clearly, the Town did not meet this time frame.

[171] In either case, section 44(3)(c) of the *Act* is not an available defence.

[172] Accordingly, on the facts as I have found them, the plaintiff has met its onus relative to steps 1 and 2 of the *Fordham* test and has made out a *prima facie* case. The plaintiff has established that there was a state of non-repair which, having regard to the character and location of the driveway apron in question, posed an unreasonable risk of harm to

ordinary, non-negligent users. I find that the plaintiff has proved that this state of non-repair caused the loss in question. I find that the Town of Newmarket would not have met its onus in respect of any of the statutory defences.

[173] For these reasons, I find that the Town of Newmarket would have been found liable had the action not been discontinued against it.

2. Contributory Negligence

[174] In connection with step 4 of the *Fordham* test, I am unable to say that Mr. Johnson did anything to contribute to this fall. I do not think that Mr. Johnson's decision to cross the street via the driveway apron was in any sense careless or unreasonable. He had parked on the opposite side of the street on numerous occasions in the past, and almost by necessity would have had to traverse driveway aprons such as this to get to and from his truck. He had no reason to think it would be unsafe to do so on this occasion. The dangerous storm warning had issued five days before and was no longer in effect. As I have already stated, while Mr. Johnson was able to see ice elsewhere, he had no difficulty walking along the street that morning. He was paying careful attention and not rushing for any reason. He was walking at a normal, reasonable pace until the moment he slipped on ice that was understandably not visible to him. Nor should he or could he have anticipated a patch of ice covering the driveway apron. There is no suggestion that his footwear was not suited for normal Canadian winter conditions. I accept Mr. Johnson's evidence that he did what he could to brace himself and avoid even more serious injury, and that these attempts were prudent and genuine.

[175] For these reasons, I find that Mr. Johnson was not, subjectively or objectively, taking any particular risk in traversing the roadway in this manner. There was no contributory negligence on his part.

3. Damages

[176] I accept Mr. Johnson's testimony regarding the difficulties he has experienced as a result of this injury. In my view, he did not in any way overstate the amount of pain, swelling, discomfort and immobilization that have been part of daily existence for him. Indeed, at times, it struck me that he was understating if not downplaying the many ways in which the fallout from this incident has impacted his quality of life.

[177] Mr. Johnson testified in an equally convincing manner concerning his employment history, his time off work due to this injury and his return to work in 2010. There can be little debate that Mr. Johnson is and always has been an extremely industrious individual. Ever since entering the work force at a very early age, he has approached his employment with dedication, enthusiasm and vigour. I have no doubt that but for this injury, Mr. Johnson would have continued working for a long period of time. It is more likely than not that setting aside health issues, he would have continued working up to if not well beyond the average retirement age for a self-employed installer.

[178] Mr. Johnson's account of having to hire helpers and alter his work routines and schedules was very matter of fact and not in any way designed to attract admiration or sympathy. At no time did I have the impression that Mr. Johnson was in any way using his injury to avoid work or artificially limit what he could reasonably accomplish during a workday. Quite the contrary. It struck me that he was most anxious to return to work as soon as he became reasonably mobile. Once back on the job, he pushed himself to the limit of what he could possibly manage. I find that Mr. Johnson has taken reasonable measures to manage a new work regime, including hiring helpers and shortening his work day. As I have already observed, he has been hard-working and enterprising since leaving school at a very young age. I find that since the incident he has worked as hard as he could for as long as he could. There is no reason to doubt he will continue to do so. On all of these matters, Mr. Johnson was credible and reliable. I accept his account. Other evidence that I accept as credible and trustworthy confirmed Mr. Johnson's testimony. Jacob Klotz was a believable and accurate witness on these issues. His evidence was not challenged in any respect.

[179] The medical evidence, also largely unchallenged, confirmed Mr. Johnson's testimony concerning the various ways in which the injury and complications impacted on his day to day life, including his employment. I accept that evidence. Further, I accept Ms. Vrckovnik's testimony regarding the testing of Mr. Johnson and her opinion that without a work helper, he could not meet the physical demands of his job on account of his injury.

[180] This extrinsic evidence underscored the rather grim nature of Mr. Johnson's prognosis and the unlikelihood that time or circumstances will improve it. There was very little about this knee injury, and its aftermath, that was routine or typical. From the medical and surgical perspective, as Dr. Bertoia explained, each possible treatment plan, including the option of no further surgical intervention, involves challenges and risks to Mr. Johnson that are serious and concerning. Some routes will lead to the real possibility of a grave outcome, involving amputation. It is apparent to me that Mr. Johnson has few, if any, palatable options. Dr. Bertoia's opinion, confirming Mr. Johnson's view, is that Mr. Johnson will be forced to stop working prior to age sixty because of pain and decreased mobility and function. I accept, as well, that the injury has had a significantly adverse impact on Mr. Johnson's life outside work, including his ability to manage for himself and to exercise. So, too, on his ability to participate in and enjoy his true passion: the activities of his motorcycle club. It is undeniable that Mr. Johnson faces a long, difficult, painful and uncertain road.

[181] Our courts have observed on numerous occasions that the assessment of general damages involves more art than science. Taking everything into account, I would fix general damages at $185,000.00.

[182] In arriving at his opinion concerning economic loss in this case, Mr. Mandel's methodology was logical and reasonable. His approach was cautious, comprehensive and fair. He took into account all relevant circumstances. His presentation was also clear and balanced. Mr. Mandel did not hesitate in pointing out areas of potential frailty in his

work, such as the unavailability of certain records. He explained the basis and purpose of his scenarios, and provided ample support for the approach leading to their creation. He emphasized that the court was in no way limited by these scenarios or the dollar ranges they reflected; they were illustrative only, based on assumptions that could be accepted or rejected. Mr. Mandel did not attempt, overtly or otherwise, to lobby or advocate for the acceptance of any particular scenario. He explained, logically and respectfully, why other possible methods of calculating economic loss were or were not appropriate in these circumstances. He withstood cross-examination and did not fence with counsel.

[183] Having regard to Mr. Mandel's background and considerable experience in cases of this kind, I find he was well qualified to render an opinion on all areas canvassed in his evidence. For the aforementioned reasons, I accepted his evidence on all of these matters. I have carefully considered the ranges and scenarios he posited.

[184] With respect to calculation of past income loss (between 2009, prorated from the date of the incident, and 2017 to the effective date of his final report), I find that Mr. Mandel's Scenarios 3 and 4 incorporate fair and appropriate assumptions for this calculation (Exhibit 5, Tab B, Schedule 2). Past income loss to November 20, 2017 is $177,000.00.

[185] With respect to calculation of future income loss, I find that Mr. Mandel's Scenario 4 (Exhibit 5, Tab 17C, Schedule 3) most closely approximates Mr. Johnson's situation, as far as I am able to determine it. The present value of future income loss from November 21, 2017 to retirement, as at November 20, 2017 is $401,000.00.

[186] These calculations are based on an assumed annual loss of income earning capacity of $40,000.00 per annum for the five and one-half month, full-time work absence period immediately following the incident and thereafter, an inflation adjusted $20,000.00 per annum to age 60 and an inflation adjusted $40,000.00 per annum to age 67.5 (Exhibit 5, Tab A, Schedule 1 Amended). In my view, the assumptions used in the above noted scenarios are fair and realistic; they are grounded in evidence I found to be credible and reliable, including Mr. Johnson's testimony and information available from his income tax returns and supporting documents. They are also in line with statistical information, including the aforementioned Statistics Canada data regarding average income for self-employed persons in similar occupations. As previously discussed, I believe Mr. Johnson will likely have to stop work at age sixty, if not before. On all of the evidence I have previously summarized, I have little doubt that but for the injury, he would have worked until at least age sixty-seven and a half, which is lower than the average retirement age (age sixty-nine) for self-employed installers.

[187] To summarize, based on these findings, I would assess past economic loss at $177,000.00 and future economic loss at $401,000.00.

[188] In connection with future care costs, most of the items listed by Ms. Vrckovnik are, in my view, necessary and appropriate for the reasons she advanced. While Mr. Johnson currently resides in an apartment, he has often resided in houses and that appears to be

his clear preference. I think it quite likely that in the not too distant future, he will find another house to restore and renovate. Once that occurs, he will need assistance with housekeeping as well as with lawn care and snow removal. All items related to diet, exercise and assistance of experts in those areas, such as dietician, nutritionist and personal trainer are clearly necessary, as are items with respect to management of pain and mobility, including occupational therapy intervention, physiotherapy and massage.

[189] However, I agree with Mr. Scott's submission that on all of the evidence, it is quite unlikely Mr. Johnson will become a candidate for knee replacement. The prospect of surgery is especially daunting because of the many attendant risks in Mr. Johnson's case, even were he to lose the required weight. These risks will make it even more difficult for Mr. Johnson to motivate himself. I have taken into account, as well, that Mr. Johnson's preferred medical advice seems to be that he should not undergo bariatric surgery. For these reasons, I would decline to include costs for post-surgical items. That said, I accept Dr. Bertoia's opinion to the effect that Mr. Johnson's arthritic condition will continue to worsen. This underscores the appropriateness of all remaining future care items.

[190] I would assess future care costs at $130,441.00.

[191] The total damages award, therefore, is $893,441.00.

E. CONCLUSION

[192] For these reasons, judgment will issue in favour of the plaintiff as against both defendants, jointly and severally, in the total amount of $893,441.000 plus pre-judgment interest.

[193] If the parties are unable to agree on costs, they may file written submissions as follows: the plaintiff will serve and file a brief costs memorandum, not to exceed four pages plus any bill of costs, within thirty days of the release of these Reasons. The defendants will serve and file a responding costs memorandum, not to exceed four pages, within twenty-one days of service of the plaintiff's submissions. The plaintiff may then serve and file a reply costs memorandum, not to exceed two pages, within seven days of receiving defendants' responding submissions.

Edwin B. Minden J.

Justice E. B. Minden

Released: February 13, 2018

CITATION: Johnson v. Lewin, 2018 ONSC 850
COURT FILE NO.: CV-15-123961
DATE: 20180213

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Stanley Johnson

Plaintiff

- and –

Harvey M. Lewin and Neinstein & Associates

Defendants

REASONS FOR JUDGMENT

Justice E.B. Minden

Released: February 13, 2018