Court File No. 26021 & 26022/92

ONTARIO COURT (GENERAL DIVISION)

B E T W E E N :

JOHN ADRIAN ROYCROFT, MARY CHRISTINA ROYCROFT, TIMOTHY JAMES ROYCROFT, AVERYL ROYCROFT, JULIA SMITH, WILLIAM GOFF, KENNETH GOFF, ELIZABETH GOFF, GREGORY GOFF, HAIG GOFF and OLGA GOFF Plaintiffs - and -	)	T.P. Boland & R.J. Howe Counsel for the Plaintiffs
STEPHEN KYTE, JULIE M. KYTE THE CORPORATION OF THE TOWN OF EAST GWILLIMBURY Defendants	)	P. Boeckle, A. Webster Counsel for the Defendants Stephen Kyte & Julie Kyte D. Neill, E. Swan Counsel for the Defendant The Corporation of the Town of East Gwillimbury Heard: September 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 21, 22, 23, 24, 25, 28 & 29, 1998

REASONS FOR JUDGMENT

SHAUGHNESSY J.:

On July 9, 1992, at approximately 9:50 p.m. Stephen Kyte was the operator of the motor vehicle which was involved in a single car collision on the Second Concession Road in the Town of East Gwillimbury. The passenger in the right front seat of the motor vehicle, Jonathan Roycroft, sustained fatal injuries and the passenger in the rear seat, William (Bill) Goff, sustained catastrophic and permanent injury.

The issues to be determined in this proceeding are the

negligence of the defendant, Stephen Kyte in the operation of the motor vehicle and the liability of the defendant The Corporation of the Town of East Gwillimbury, by reason of its alleged failure to reconstruct a hill at the accident scene and/or its failure to adequately warn the defendant driver of the sharp crest and decline in the roadway in the vicinity of where the accident occurred. The damages under various headings for the plaintiff William (Bill) Goff and the FLA claims of this family are to be assessed. Finally, there is an issue pertaining to the deductibility of statutory accident benefits as well as the application of a *Cox v. Carter* order relating to future care expenses.

Counsel have resolved several matters during the course of the trial. The quantum of the Family Law Act claims for the Roycroft family have been agreed to and are detailed in exhibit number 29 as follows:

Mary Roycroft (mother)	-	$40,000
John Roycroft (father)	-	$35,000
Timothy Roycroft (brother)	-	$20,000
Averyl Roycroft (grandfather)	-	$ 8,000
Julia Smith (grandmother)	-	$ 5,000
TOTAL		$108,000
Less: statutory death benefits paid pursuant to the Insurance Act		$ 10,000
Sub total		$ 98,000
Plus: prejudgment interest [calculated at 75 months at		

5 per cent per annum]	$ 30,625	
Sub total	$128,625	$128,625
The funeral account for Jonathan Roycroft	$ 4,790	
Plus prejudgment interest on the funeral account (75 months at 9 per cent per annum)	$ 2,694.38	
Sub total	$ 7,484.38	$ 7,484.38
The total of all Roycroft claims	$136,109.38	

In the course of this motor vehicle collision, all three occupants of the Kyte motor vehicle were ejected. The parties on consent have agreed that the damages of all the plaintiffs shall be reduced by 20 percent on the basis of contributory negligence for failure to wear a seat belt.

Accordingly, the quantum of the claims of the Roycroft family will be reduced to $108,887.51.

CIRCUMSTANCES GIVING RISE TO THE CAUSE OF ACTION:

Bill Goff, Jonathan Roycroft and Stephen Kyte were all friends who attended high school in Newmarket, Ontario. Bill Goff was 18 years of age and Jonathan Roycroft and Stephen Kyte were 19 years of age at the time this accident occurred. Bill Goff and Jonathan Roycroft lived across the road from each other on Hazelwood Street in Newmarket.

The evening of July 9, 1992, Stephen Kyte was the operator of a 1987 Nissan Maxima four-door motor vehicle which was owned by his mother the defendant Julie Kyte. Mr. Kyte had made plans earlier in the day to go out that evening with a

friend, David Smith, to play darts at a local restaurant. David Smith advised Stephen Kyte that two other friends, Bill Goff and Jonathan Roycroft, had been in contact with him and that they also wanted to go out that evening. Mr. Kyte testified that he arrived at the Roycroft home shortly after 9:00 p.m. where he picked up Jonathan Roycroft and Bill Goff. After leaving the home, it was their intention to travel to a marina in the Holland Landing area where David Smith resided and then to proceed to the restaurant thereafter.

There was no evidence that Mr. Kyte had consumed any alcohol or drugs on July 9, 1992.

After leaving the Roycroft residence, Stephen Kyte proceeded along several streets in Newmarket area and eventually he began to proceed northbound on Main Street in Newmarket, which is a paved road. At the intersection of the Mount Albert Side Road, Main Street becomes the Second Concession Road in the Town of East Gwillimbury.

The Second Concession is a rural road within the Town of East Gwillimbury, running north and south and begins at the intersection of the Mount Albert Side Road to the south and extends to the Ravenshoe Road. The portion of the Second Concession Road that is relevant to these proceedings begins at Doane Road, the first intersection north of the Mount Albert Side Road. At this point, the Second Concession Road has a gravel surface. The distance from the Doane Road to the intersection of the next arterial roadway, namely the Queensville Road, is

approximately 2,100 meters (slightly in excess of 2 km).

After crossing the intersection of the Mount Albert Side Road, Stephen Kyte testified that he was travelling the posted speed limit of 80 km per hour. There was no traffic immediately ahead or behind him.

Travelling further north on the Second Concession Road, the defendant Stephen Kyte crossed the intersection of the Doane Road and encountered the first of two hills that are relevant to the circumstances of this motor vehicle collision. The first hill, or more southerly hill, commenced north of the intersection of the Doane Road. The signage on the Second Concession Road is a relevant factor in assessing liability in these proceedings. At a distance of approximately 100 m north of the Doane Road, Mr. Kyte testified that he observed a road sign indicating that the "speed ahead" was reduced to 50 km per hour. Then at a point 250 m north of the Doane Road, the defendant Kyte observed a road sign indicating that the 50 km per hour speed limit commenced. At a distance 25 m north of this posted speed sign was a yellow diamond shape traffic sign with the symbol warning northbound motorists of a "steep" hill. The defendant Kyte testified that he travelled over this first hill without incident and proceeded on to the second or the accident hill as it will be referred to in these reasons.

The Second Concession Road northbound then more or less flattens out at or near the T intersection with Algonquin Forest Drive, which leads to a subdivision on the east side of the

Second Concession Road. At a distance of 110 m south of Algonquin Forest Drive the road surface became asphalt to a point 160 m north of Algonquin Forest Drive where the Second Concession Road returned to a gravel surface. At a distance of 55 m north of Algonquin Forest Drive there were two further road signs on one pole for northbound motorists which advised northbound motorists that the pavement ends and that there was a "bump ahead". Witnesses have described this as a temporary condition sign. These signs were located approximately 362 m south of the crest of the accident hill. A "Bump" warning sign was then located at the point where the asphalt road surface turned into a gravel road and this sign was located 253 m south of the crest of the accident hill. Finally, there was a 50 km/h speed advisory sign located 145 m south of the crest of the accident hill for northbound motorists.

The accident hill has a moderate upgrade or vertical curve as depicted in photographs filed (exhibit No. 32, tab 2, photographs 10-15 inclusive). The incline commences at approximately 145 m south of the crest of the accident hill in the vicinity of the 50 km/hr speed advisory sign. The Road is relatively flat at the crest of the accident hill for a distance of approximately 10 m as shown on a topographical survey (exhibit No. 31, tab 3). This survey establishes the maximum upgrade was 7.9%.

The down slope commences at a 4.1% grade and rapidly increases reaching a maximum grade downhill of 12.2% before the

road slowly levels off again. The downhill grade is shown in photographs 22-31 of exhibit No. 32, tab 2. The measurements, grades and sign locations are detailed in exhibit No. 31, figures 1 and 2.

The Second Concession Road at or near the crest of the accident hill narrows such that the overall width (including the shoulders of the road) is 6.7 m and the travelled portion of the roadway is approximately 5.4 m at the crest. To the north and south of the accident hill, the overall width is approximately 8 meters (exhibit No. 31, tab 4).

The weather was clear, the visibility good, and the road was dry at the time this accident occurred. It was dark and other than a single streetlight situated in the vicinity of the crest of the accident hill, there was no other artificial lighting in the vicinity of the accident location. Mr. Kyte's testimony was that his headlights were activated as he proceeded along the Second Concession Road, however, he did not recall whether his high beams or low beams were in use.

EVIDENCE OF MARKINGS ON THE ROADWAY:

The police report details findings of physical markings on the down slope of the accident hill. These findings were admitted into evidence on the consent of all parties for the purpose of providing the underlying factual basis for the various expert opinion evidence presented by the plaintiffs and the defendants. The physical findings documented by the police immediately following this accident are superimposed on a scale

diagram filed as exhibit No. 31, tab 6.

At a distance 16 meters north of the crest of the accident hill, the police noted in the northbound lanes of the Second Concession Road what is described as an initial mark of a side slip of the left front tire of the Kyte vehicle. Then at a distance of approximately 20 m north of the crest of the hill, two tire marks began on the roadway and those marks are continuous and proceed in a northwest direction crossing the notional center line of the road. At a point 30 m north of the crest of the hill, the tire marks merge into one set of tire marks which the police determine are the left tire marks and these are located on the west side of the road (or southbound lane). These single tire marks continue in a northwest direction and leave the road at or near hydropole no. 15, which is located approximately 80 meters north of the crest of the hill. The left tire marks are then noted to travel along the west ditch and then proceed out of the west ditch and back onto the road surface at a distance of approximately 100 m north of the crest of the hill. At this point, the police record a gouge mark on the west shoulder which they believe was from the left wheel rim of the car as it returned to the road surface. There are no further markings on the road surface thereafter for a distance of 10.4 m. The police and the various experts who were called by the parties to give evidence, conclude that the motor vehicle was airborne for this 10.4 m distance as it came out of the west ditch onto the road surface. Thereafter on the road surface are found 4

gouge marks as well as striations, scrapes and paint transfers commencing in the southbound lane and heading in a northeast direction along the road surface. There were then two further gouge marks, debris and striations in the northbound lanes leading directly into the easterly ditch. The police investigation revealed that the resting position of the Kyte motor vehicle was on its right side on an embankment to the east of the Second Concession Road at a distance of approximately 175 meters north of the crest of the accident hill.

The police evidence which is corroborated by the expert opinion evidence is that the vehicle after emerging from the west ditch and after being airborne, probably flipped over more than once before it came to its final resting position.

Mr. Kyte testified that he had never travelled on this section of the Second Concession Road prior to this accident. While he had previously attended at the marina in Holland Landing to meet his friend David Smith, he had always travelled by a different route.

Mr. Kyte testified that as he proceeded north of the Doane Road and approached the first or more southerly hill he recalled observing a "speed ahead" sign indicating that the posted speed limit ahead reduced from 80 km to 50 km per hour. He stated that he reduced his speed to approximately 50 km per hour. He next observed the "steep hill" sign. Steven Kyte testified that he travelled over this first hill which was quite steep without any difficulty. As he crested this first hill Mr.

Kyte stated that he could see the roadway ahead of him and he did not observe anything that caused him any particular concern. As he continued to drive northerly, Mr. Kyte testified that he observed a stretch of asphalt on the road surface with a "bump" sign at the transition point of asphalt back to gravel. He stated that he felt a bump at the point where the asphalt ended and the gravel roadway started.

Mr. Kyte gave testimony that he drove up the south side or incline of the accident hill without incident. He stated that he applied the accelerator in order to maintain his speed. It was his evidence that as he reached the crest of the accident hill his vehicle was travelling at approximately 60 km per hour, although he states that this was his estimate of the speed as he did not look at his speedometer. He also testified that as he crested the accident hill he realized that his vehicle was positioned somewhat to the right side of the roadway. He stated that he encountered loose gravel and a washboard effect on the road surface as he approached the crest. After cresting the accident hill Stephen Kyte testified that he was unable to control his motor vehicle. He attempted to brake, but his braking had no effect on the speed of the vehicle. He stated that his motor vehicle felt like it was "swimming" and he encountered difficulty in steering the vehicle.

Mr. Kyte's evidence was that as he travelled on the incline of the accident hill he had an inability to see over the crest of the hill. He had no recollection of any artificial

light at the crest of the hill and he was unaware of the grade on the decline of the hill as he travelled toward the accident hill.

Mr. Kyte recalls that his vehicle was out of control on the decline of the hill, and that it headed into the west ditch. His next recollection was feeling a jolt and seeing gravel outside the driver door window. He was then aware that the motor vehicle had flipped onto its side. He has no further recollection of the accident.

In cross examination, Mr. Kyte admitted that the minor washboarding, potholes and loose gravel were not unexpected by him as he travelled the incline of the accident hill. He also admitted that he was aware that he was travelling up an incline and therefore he would be encountering a decline after he reached the crest of the hill. As he came across the crest of the hill he states that he continued to maintain his speed of 60 km per hour. As he experienced the gravel and wash boarding effect, he took his foot off the accelerator.

In summary, Mr. Kyte's position at trial is that he maintained a reasonable speed as he crested the accident hill and it was the condition of the road surface which caused him to lose control of the automobile. He did state in evidence that he was very surprised by the downgrade of the hill and that it is quite likely that he panicked as he crested the hill and confronted what he described as the steep downgrade. He further testified that one of the reasons that he did not regain control of his motor vehicle was due to the steepness of the downgrade on the

north side of the hill.

SPEED OF THE KYTE VEHICLE:

Sergeant Kelly Ball, an accident reconstruction expert on the York Regional Police Force, gave evidence that based on his calculations the speed of the Kyte vehicle was 63 km per hour at the point where it began to slide on its roof (which is shown at exhibit No. 31 figure 5 and identified as gouge #1). However Sergeant Ball indicated that his calculation of the speed was made on a conservative analysis. He also indicated in his evidence that the calculation of speed in his analysis could be up to 68 km per hour based on less conservative assumptions.

The evidence of Mr. Kyte and the physical findings on the roadway by the police lead me to find that the Kyte vehicle was not under full braking at the time it travelled the down slope of the accident hill. While there were some sideslip or yaw marks on the road surface which would indicate some friction and deceleration of the Kyte motor vehicle, nevertheless, I find that it would not provide for a significant decrease in the speed. The evidence of the engineering experts Mr. Schere, called as a witness by the plaintiffs, supports such a finding.

Mr. Ray Boulding, an accident reconstruction engineer retained by the defendant, the Town of East Gwillimbury, testified that based on his calculations the speed of the Kyte motor vehicle at the point where the vehicle began it's initial sideslip (16 meters north of the crest of the hill) was in the range of 88 to 96 km per hour. This is based on his calculations

which included factoring in engine braking and a minimum coefficient of friction as the Kyte vehicle proceeded on the down slope of the accident hill. Mr. Kyte gave evidence that his braking had little or no effect. Mr. Boulding's evidence was that there would be a very minimal speed loss in the event that there was not full braking.

Mr. Curtis Scherer, an engineer and accident reconstruction expert called by the plaintiff, agreed with Mr. Boulding's conclusion that the speed of the Kyte vehicle was in a range of 88 to 96 km per hour at the point of the initial sideslip. He also testified that the initial marks on the roadway are consistent with a sideslip or yaw as opposed to marks which would be indicative of full braking.

I accept the evidence of Mr. Boulding and Mr. Schere that Mr. Kyte was operating his motor vehicle at a speed between 88 and 96 km per hour at the point of the initial sideslip marks. Further based on the evidence of little or no braking, I find that the speed of Mr. Kyte's vehicle was in the range of 88 to 96 km per hour as he crested the hill. I do not accept Mr. Kyte's evidence of the speed of his vehicle.

FINDING OF NEGLIGENCE AS AGAINST STEPHEN KYTE:

I find the defendant Stephen Kyte was negligent in the operation of the motor vehicle and that his negligence contributed to the injury sustained by the plaintiffs, William Goff and the late Jonathan Roycroft. I find that Mr. Kyte was operating his motor vehicle at a speed well in excess of the

posted speed limit for that section of the Second Concession Road where this accident occurred. I further find that Mr. Kyte failed to operate his motor vehicle with the appropriate level of care and caution required of him, taking into consideration the nature of the road surface and his inability to see beyond the crest of the roadway as he proceeded on the south incline of the accident hill. I further find that Mr. Kyte failed to maintain control of his vehicle and indeed that he lost control of his vehicle shortly after cresting the accident hill.

Pursuant to the provisions of Section 192(1) of the Highway Traffic Act RSO 1990, the defendant Julie M. Kyte, as owner of the motor vehicle is vicariously liable for damages caused to the plaintiffs in this action.

LIABILITY OF THE DEFENDANT THE TOWN OF EAST GWILLIMBURY:

a) The Plaintiff's Position:

It is the position of the plaintiffs that the nature of the accident hill constituted an unusual risk of harm to users of the roadway. The plaintiffs plead that the Town of East Gwillimbury failed to take reasonable steps to eliminate or reduce the risk presented by the accident hill within a reasonable time after it became aware of the existence of the danger. The plaintiffs further maintain that interim measures should have been carried out in an attempt to make the roadway as safe as possible until reconstruction of the roadway could be completed. The interim measures would be the installation of warning signs at the accident location.

The plaintiffs submit that a condition of non repair existed on the Second Concession Road in July, 1992. The elements of non repair consisted of:

(a) Severely restricted sightlines over the accident hill.

(b) A steep down slope on the north side of the accident hill.

(c) Inadequate roadway width at the top of the accident hill.

(d) Inadequate signage to warn motorists of all of the above conditions.

(e) A failure to reconstruct the roadway in a timely fashion.

b) The Town of East Gwillimbury's Position:

The position of the defendant The Town of East Gwillimbury, is that while its council had formed the intention to eliminate the accident hill through reconstruction prior to this accident, nevertheless it was hampered in its efforts to do so by funding restrictions and other urgent priority projects, as well as difficulties in obtaining land acquisitions adjacent to the roadway. It is also this defendant's position that the sole effective cause of the accident was the negligence of Stephen Kyte in driving at an excessive rate of speed, failing to keep a proper lookout, and failing to maintain proper control of his motor vehicle. The defendant argues that this indifference to the posted speed limit by Mr. Kyte demonstrates a complete disregard for the posted advisory signs and that a steep hill warning sign, if it was present on the accident hill, would in

all likelihood have been ignored by him. The defendant the Town of East Gwillimbury relies on the evidence of all the experts who testified that if Mr. Kyte was travelling at the posted speed limit of 50 km per hour over the crest of the accident hill, he would not have lost control of his motor vehicle. It is also the position of the Town of East Gwillimbury that the non repair of which the plaintiffs allege neither caused or contributed to the motor vehicle accident.

c) The Defendant Kyte's Position:

The position of the defendant Kyte is that a "steep hill" warning sign alerted him to a danger of the first hill immediately to the south of the accident hill. It was Mr. Kyte's evidence that if he had been alerted to the steepness of the downgrade on the accident hill he would have adjusted his driving, by slowing down and paying more attention to the roadway. The defendant Kyte claims contribution and indemnity from the Town of East Gwillimbury. It is the defendant Kyte's position that given the Town's knowledge of the deficiencies on the Second Concession Road and the history of accidents which had occurred, it breached its statutory duty and was negligent in not keeping the road in a state of repair and by reason of their failure to post a warning sign.

d) Statutory Duty:

The Town of East Gwillimbury admits that the Second

Concession Road fell within its jurisdiction and that it had a duty to keep the roadway in good repair. The Municipal Act RSO 1990 c. M 45 s.284(1) provides:

> "Every highway and every bridge shall be kept in repair by the corporation the council of which has jurisdiction over it or upon which the duty of repairing it is imposed by this Act and, in case of default, the corporation, subject to the Negligence Act, is liable for all damages sustained by any person by reason of such default."

e) Standard of Care:

Where a duty is imposed by statute to keep a highway in good repair, then it requires that the defendant, the Town of East Gwillimbury "must keep the highway in such a condition that travellers using it with ordinary care may do so with safety" (*The Queen v. Jennings* [1966] SCR 532 at 537 per Cartwright J.). The duty imposed on the municipality includes the duty to eliminate danger of which it was or ought to have been aware. As Mr. Justice Southey stated in the *Gould v. County of Perth* (1983) 420R (2d) 548 at 556:

> "Liability will only result where the situation gives rise to an unreasonable risk of harm to users of the highway, and the authority has failed to take reasonable steps to eliminate or reduce the danger within a reasonable time after it became aware, or ought to have become aware, of its existence. As Lacourciere J.A. said in *McAlpine v. Mahovlich* (1979) 9 C.C.L.T. 241, it is a question of fact in each case whether a condition of non repair exists."

The municipality is bound then to use all reasonable efforts to keep its road in such condition that a traveller using them in the ordinary way and with ordinary care may do so with safety. In the case of *Overland Express Ltd. v. Herron et al* [1965] 2 O.R. 327 at page 334 and 336 (Ont.H.C.J.), the court held that the duty to provide for the safety of those who travel over the highway included the "erection of signs warning them of conditions of danger".

In Thomson Rogers text Municipal Liability (Aurora: Canada Law Book 1996, at page 37-38) the duty to post signs is discussed:

> "The current view is that signage is part and parcel of the duty to maintain the highway in repair and unless there is statutory immunity, a sign must be posted where failure to do so would prevent travellers exercising ordinary care from being able to use the highway with safety."

There have been a number of reported cases where the courts have held that the duty to keep the roads in reasonable repair extends to warning signs. The types of dangers or hazard that the court has found that attract a duty to post a warning sign include a bridge not marked with its limited weight, a T intersection, a dangerous curve combined with road surface conditions and an unmarked excavation. (*Lemieux v. Hallam* [1968] 1 O.R. 534 (C.A.); *Galbliati v. City of Regina* [1972] 2 W.W.R. 40 (Sask.Q.B.); *Houser v. West Lincoln (Township of)* (1983) 29

M.P.L.R. 55; and *Dubois v. City of Sault Ste. Marie* [1970] 1 O.R. 462). In the case of *Dymond and Osika v. Government of Manitoba* (1965) 51 W.W.R. 380 (Man.Q.B.) the court suggested that a sharp decline can create a trap or dangerous situation:

> "whether signs, warning or directional, should be erected must, in the final analysis, depend on the circumstances of each individual case. If the area immediately north of the east-west road had formed a sharp decline or ditch of such a nature as to create a trap or dangerous situation to the unwary traveller, I would have no hesitation in finding that the erection of a warning sign would be required."

In considering the statutory duty to maintain the roads under its jurisdiction, the issue arises whether the Town of East Gwillimbury can avoid liability on the ground that a sufficiently careful driver would not have been put at risk by the state of the road, including the absence of a warning sign. In other words, how far does the duty of the municipality extend? In the case of *Rider v. Rider* [1973] Q.B. 505 at pg. 514, the Court of Appeal, per Sachs L.J. stated:

> "Motorists who thus use the highway and to whom a duty is owed, are not to be expected by the authority all to be model drivers. Drivers in general are liable to make mistakes, including some rated as negligent by the Courts, without being merely for that reason stigmatized as unreasonable or abnormal drivers; some drivers may be inexperienced and some drivers may find themselves in difficulties from which the more adept could

> escape. The highway authority must provide not merely for model drivers, but for all the normal run of drivers to be found on their highways and that includes those who make mistakes which experience and common sense teaches us are likely to occur".

Lord Justice Laughton at page 518 of the same decision stated:

> "In my judgment highway authorities when performing their statutory duty to maintain their roads should keep in mind the driver who may take a corner too fast or may be slow to notice changes in road conditions. Such drivers form part of the traffic on our roads and it would be unrealistic for the highway authorities when deciding what standard of maintenance is necessary to forget their existence and to provide only for those who always use reasonable care - if such paragons of driving virtue are to be found".

The determination of whether a Municipality has satisfied its duty of care is an objective standard and as was stated by the Saskatchewan Court of Appeal in *Levey v. Rural Municipality of Rogers*, (1921) 3WWR 764:

> "in considering the duty of a rural municipality in the repair of highways, regard must be had to the nature of the county, the amount of local traffic, the means at the disposal of the council, the manner in which country roads are usually built, and, in short, all the elements which a person of practical knowledge would naturally take into account".

The case of *Gorham v. The King* [1948] O.R. 641 at pg.

656 (Ont.C.A.) establishes the principle that where a dangerous condition exists on a highway and the authorities by due diligence in inspection would have knowledge of the danger and thereby take steps to avert it or warn motorists, then the failure to adequately inspect is a breach of a duty to maintain. Similarly, it is been held that failure to maintain a stop sign or yield sign constitutes a condition of non repair (*Goudie Estate v. Eramosa (Township)* 1983 O.J. No. 438 (Ont.H.C.), and *Greatrex v. Ennismore (Township)* (1984) 33 M.V.R. 287 (Ont.H.C.J.).

f) Onus:

Once the plaintiff has established on the balance of probabilities that a highway was in a condition of non repair and the non repair was a cause of the plaintiff's damages, then a prima facie case is established against the municipality without proof of negligence. The onus then shifts to the municipality to establish on a balance of probabilities that the condition of non repair existed, notwithstanding all reasonable efforts on the part of the municipality to comply with the law. If the condition of non repair could not have been prevented by the exercise of reasonable care, then the municipality will not be liable for damages arising from the condition of non repair. If however the municipality is unable to discharge the evidentiary burden of satisfying the court that it could not have taken more precautions under the circumstances than it will be liable for the damages arising from the condition of non repair (*Goudie*

Estates v. Eramosa Township [1983] O.J. No. 438 (Ont.H.C.J.), *Nicholls v. Hennion et al* (1989) 49 C.C.L.T. 105 (Ont.H.C.J.) and *Dubois v. City of Sault Ste. Marie* [1970] 1 O.R. 462 Ont.C.A.)

g) Knowledge of the Town of East Gwillimbury Concerning a Condition of Non Repair:

Mr. Jack Cox was the Town of East Gwillimbury engineer from 1980 to June 30, 1991, when he retired. His successor, Mr. Wayne Hunt, was the town engineer on the date that this accident occurred. As town engineers, their responsibilities involved drafting budgets for the construction and maintenance of roads, maintaining a road needs study and generally overseeing the work done by the road superintendent, Mr. Jordan and the work crew. Messrs. Cox, Hunt and Jordan, all gave evidence on behalf of the Town of East Gwillimbury. While Mr. Jordan was responsible for the inspection of the roads on a daily basis, Mr. Hunt and Mr. Cox likewise indicated that they inspected the roads regularly and in particular, they described the maintenance procedures for the Second Concession road during the various seasons of the year.

The records produced by the Town of East Gwillimbury and the evidence of Mr. Cox at trial establish that the Town of East Gwillimbury, for a considerable period of time before the accident occurred, had been monitoring the frequency of accidents on its roadways by obtaining copies of police motor vehicle accident reports. Mr. Cox's evidence was that he had prepared in his office a map of the Town of East Gwillimbury with pins setting out accident locations. At some point in time before

July, 1992, the evidence establishes that the Town of East Gwillimbury had prepared an accident locater map for the rural roads within it's jurisdiction. Yet another accident locator map was prepared showing the location of accidents specifically on the Second Concession Road between the Doane Road and the Queensville Side Road (which is located a short distance north of the accident hill). These accident locator maps for the rural roads are filed as exhibit 41, volume IV, tabs 281 and 282.

The records of the Town, which were produced and filed as evidence at trial, established that the Second Concession Road had significantly more accidents than any other rural road within the Town's jurisdiction.

The Town of East Gwillimbury produced the various police motor vehicle accident reports that it had in its possession relating to the Second Concession Road. The plaintiff's engineering and accident reconstruction expert, Mr. Schere, carried out a detailed examination of the various police reports by comparing the accident location on the various police reports to the diagram of the accident location filed as an exhibit. His objective was to attempt to identify each accident location and whether it was indeed in the vicinity of the accident hill. Based on his analysis, Mr. Scherer determined that there were a total of 28 accidents from 1988 to July of 1992 in the vicinity of the accident hill. In the period January, 1992 to a date just prior to the July 9, 1992, there were six motor vehicle accidents on the accident hill. While Mr. Scherer

could not conduct a truly scientific analysis by contacting the police officers and persons involved in these accidents, nevertheless, I find that his analysis was relevant and cogent in that he focused on single car northbound collisions where alcohol was not a factor. Mr. Scherer classified the frequency of accidents at this location as a high accident location. I do wish to emphasize that the various police reports analyzed by Mr. Scherer came from the productions of the Town of East Gwillimbury. I find that the evidence of previous accidents on the Second Concession Road at the accident hill are relevant and have probative value in terms of the Town's knowledge of a dangerous condition on the accident hill.

The text The Law of Evidence in Canada (J. Sopinka, S.N. Lederman, A.W. Bryant, Toronto: Butterworths, 1992 at pg. 512-522) indicates that "evidence is admissible to prove that previous accidents have occurred as a result of the physical state of the defendant's premises." The authors conclude that the consideration of "prejudice" which is of critical importance in the determination of admissibility in criminal cases, has less of a role in civil cases. Similar fact evidence should be admitted if it is logically probative to an issue in the case, so long as it is not unduly "oppressive or unfair" to the other side. In my opinion, the admission into evidence of the previous accident reports was not oppressive or unfair to the defendant municipality and its probative value far outweighed any prejudicial effect.

Mr. Jack Cox testified that the accident hill was a dangerous hill and he was aware of this prior to his retirement in June of 1991. Both Mr. Cox and Mr. Hunt testified that they knew there existed a complaints file and that there were specific complaints made by local residents about motorists speeding along the Second Concession Road. One such letter of complaint is found at exhibit #41, volume II, tab 85. When Mr. Wayne Hunt commenced his employment with the Town of East Gwillimbury in June, 1991, there was a two week transition during which Mr. Cox reviewed with Mr. Hunt the status of the Second Concession Road and plans to reconstruct it by removing the hill. Mr. Hunt acknowledged he was taken on a road tour by Mr. Cox and that Mr. Cox told him that the Second Concession Road was a priority in the road needs study. Mr. Hunt testified that Mr. Cox told him there were problems with the accident hill and that there had been a fatal accident involving a Mr. John Scheder at the accident hill six months earlier. (The motor vehicle accident report concerning the John Scheder accident forms part of the Town of East Gwillimbury production at exhibit #41, volume II, tab 107).

In September, 1991, the Mayor of the Town of East Gwillimbury, James Mortson, submitted a request to Town Council concerning the status of the Second Concession Road. Mayor Mortson testified that he was concerned about the high frequency of accidents occurring on that roadway. This request by the Mayor resulted in Mr. Hunt being asked to investigate the

frequency of accidents and to make recommendations to the mayor and council. On October 7, 1991, Mr. Hunt provided a report to council which included various recommendations which are detailed in a memo found at exhibit #41, volume III, tab 159. Mr. Hunt recommended that the following additional signs be installed on the Second Concession Road:

1) A "pavement ends" sign be installed at the end of the pavement immediately north of Algonquin Forest Drive.

2) A "bump ahead" sign and a "bump" sign be placed to warn of the change in road profile at the referenced "hill".

3) That the existing "50 km per hour ahead" speed limit sign for southbound traffic approaching the hill be moved north of the hill.

4) An additional "50 km per hour speed limit" sign be posted south of the "hill" for northbound traffic.

Mr. Hunt shortly thereafter made a further recommendation to install a streetlight to illuminate the crest of the hill.

In his report to council dated October 7, 1991, Mr. Hunt stated:

> "In some cases it is difficult to tell from the accident reports provided by the York Regional Police the exact location of the accidents. However, in the area of the hill on the Second Concession Road north of Algonquin Forest Drive on the unpaved portion of the road, it appears that between December 31, 1988 and June 20, 1991, 13 accidents. In all cases, only one vehicle was involved which while travelling northbound, lost control and ended up in the ditches or the adjacent fields ...
>
> The posted speed limit in the area is 50 km per hour, however, some speeds were estimated by the police to be in the order of 80 km per hour to 120 km per hour."

A plain reading of the second recommendation of Mr. Hunt to council would imply that Mr. Hunt wanted a "bump ahead" and a "bump" sign placed somewhere in close proximity to the crest of the accident hill. Apart from the bump where the pavement ended and the gravel road began, there was no other localized bump on the roadway of which to advise motorists. Mr. Jordan, the road superintendent, and his crew installed the recommended signs, however the "bump ahead" sign was installed some distance south of Algonquin Forest Drive and a "bump" sign was installed at the point where the pavement ended, which was a distance some 253 m south of the crest of the accident hill. Mr. Hunt testified that on subsequent tours of the roadway he was aware of the location of the "bump" sign. He further gave evidence that he took no steps to have the bump sign placed at or near the crest of the accident hill where he originally intended it to be situate.

The 50 km per hour regulatory speed limit sign was installed 145 m south of the crest of the accident hill pursuant to Mr. Hunt's recommendation #4.

It is also noteworthy that the records produced by the Town of East Gwillimbury indicate that motor vehicle accidents continued to occur frequently following the installation of the signs and the street light as detailed in Mr. Hunt's recommendation to council on October 7, 1991.

The evidence of Mr. Boulding, an engineer and accident reconstruction expert called on behalf of the Town of East

Gwillimbury was that the "bump" sign provided no information about the crest of the accident hill or the down slope on the north side of the hill. Therefore he stated that the "bump" sign was an inappropriate sign to install for that purpose. Mr. Boulding on cross-examination agreed that the "bump" sign would be "useless" for the purpose of conveying information to motorists of the nature of the accident hill. He stated that a "bump" sign warns of the change in the road surface at a localized condition. Equally as important is the evidence of Mr. Jack Cox who testified that the "bump" sign was inappropriate to warn motorists of the nature of the accident hill and that if Mr. Hunt installed it for that purpose then this would constitute a mistake or misunderstanding.

Essentially, all of the expert witnesses called by the plaintiff and the defence, as well as Mr. Cox and Mr. Jordan on behalf of the Town of East Gwillimbury, clearly indicated that the bump sign was for a localized condition on the road surface and that it certainly did not constitute notice of reduced sightlines or a significant downgrade over the crest of the hill.

Accordingly, I find that despite what Mr. Wayne Hunts original intention was concerning the "bump" sign, nevertheless the installation of this sign was ineffectual in warning motorists of reduced sightlines as well as a significant downgrade over the crest of the hill.

I also noted that in relation to the 50 km per hour speed limit sign installed at the direction of Mr. Hunt, that

there was more or less agreement amongst the expert witnesses that this black and white speed sign is a regulatory sign which is intended to advise motorists of the speed limit for a certain stretch of the roadway. It is not a road hazard advisory sign. Mr. Boulding agreed that a yellow sign with a speed limit on it can give a higher level of warning to the public.

In summary, I make a finding that prior to the accident of July 9, 1992, the Town of East Gwillimbury through its servants, agents and employees was aware that the accident hill on the Second Concession Road was a high accident frequency location. I find that they had access to police motor vehicle accident reports and they charted information off of those reports on to their own accident locater maps. I find that as early as 1985, the accident hill on the Second Concession Road was identified as a priority matter on a road needs study and that in the ensuing years the recommendation to council was that the hill should be removed. I further find that the Town through its servants, agents and employees were well aware before the accident occurred that motorists were travelling at speeds in excess of the speed limits and that they were losing control of their vehicles as they proceeded northbound over the accident hill. In all the circumstances I find that the Town, prior to the motor vehicle accident had actual knowledge of a serious hazard for northbound motorists travelling the Second Concession Road in the vicinity of where this accident occurred.

The attempts by Mr. Wayne Hunt, the Town engineer to

rectify this hazard in the fall of 1991 were completely inadequate to warn motorists of the hazard.

After carefully reviewing the evidence, I find that the hazards of the accident hill consisted of two factors namely the significantly reduced sightlines and a steep downgrade on the north side of the crest of the hill. The combination of these two factors, compounded with the lack of adequate signage to warn motorists of the above conditions, were a contributing and direct cause of the motor vehicle accident of July 9, 1992.

REDUCED SIGHTLINES:

There was acknowledgement by almost all the witnesses who were qualified to provide expert evidence that there were severe sight line restrictions for northbound motorists over the crest of the accident hill. The plaintiff's expert Mr. Scherer, calculated stopping distance in relationship to the sightlines to be 33 m. Applying this calculation the appropriate posted speed limit or design speed for the roadway would have been approximately 30 km per hour. All of the engineering expert witnesses stated that it was a good and safe practice to have a design speed either equal to or preferably higher than the posted speed limit. The evidence establishes that in the present case the posted seat speed limit exceeded the design speed by 15 to 20 km per hour.

The plaintiffs' expert Mr. Scherer gave evidence that restricted sightlines over the crest of the hill posed serious problems for motorists, in particular, when vehicle speeds are in

excess of the posted speed limit. Mr. Scherer opined that the sudden awareness of a steep grade could promote a quick braking action once the motorist was at the crest of the accident hill or just beyond the crest, particularly if the motorist was travelling fast. He further testified that skidding of the vehicle could likely result on that downgrade under the circumstances.

At this point, I wish to refer to the evidence of Mr. Kyte. In his statement to the police (filed as exhibit 45) he stated:

> "Going up the second hill there were potholes, washboard and loose gravel at the top of the hill. As I was driving over the washboard the car began sliding in the gravel as it went over the potholes and washboard. I tried steering out of the slide but it just kept getting worse. At the same time I pumped the brakes a couple of times in order to regain control of the car.
>
> Because of the slide my foot slipped off the brake pedal..."

In his evidence at trial Mr. Kyte, who had never travelled on the Second Concession Road previously, admitted that his view of the roadway beyond the crest of the accident hill was restricted as he travelled northbound.

Mr. Boulding the engineering expert on behalf of the Town of East Gwillimbury agreed that a northbound motorist had severely restricted sightlines at the accident hill. He characterized the crest of the accident hill as "sharp" and that the sharp crest on the accident hill is undesirable from a safety

perspective because of the limited sightlines.

Both Mr. Cox and Mr. Boulding agreed with the statement in the Ministry of Transport guideline book titled Geometric Design Standards for Ontario Highways manual, where it states that drivers in general do not usually adjust their speeds to compensate for sightline restrictions.

Mr. Hunt gave evidence that for motorists who travelled at or below the speed limit, the sightline deficiencies provided no particular difficulty. He did agree that for motorists travelling at higher speeds than the posted speed limit the restricted sightlines would pose a potential safety problem.

Mr. Scherer and Mr. Hunt testified that there are two ways to deal with severely restricted sightlines on hills. One solution is to remove the hill and the other is to implement appropriate signage.

STEEP DOWNGRADE DEFICIENCY:

Mr. Scherer attended at the scene shortly after the accident and he characterized the down slope of the accident hill for northbound motorists as "steep". His evidence was that a steep downgrade would promote the initiation of braking, which in turn would cause the vehicle to be pitched forward resulting in a skidding of the vehicle. Mr. Scherer also gave evidence that a steep downgrade would have a tendency to increase the stopping distance for a motor vehicle.

Mr. Boulding and Mr. Cox on behalf of the Town of East Gwillimbury also agreed that the downgrade on the north side of

the accident hill could be characterized as "steep". It was Mr. Kyte's evidence that he did not observe the steepness of the north slope of the accident hill until he crested the hill and proceeded on to the downslope.

DUTY TO WARN AND INADEQUATE SIGNAGE:

The combination of the reduced sightlines and a steep downgrade lead me to the conclusion that the Town of East Gwillimbury had a duty to warn motorists of the hazard. The Town of East Gwillimbury had more than adequate knowledge of the hazard. The Town's engineer Mr. Hunt, in his evidence acknowledged that the purpose of the appropriate signage is to communicate information to the driver about the road conditions and features of the road ahead. He also agreed that drivers rely on the information communicated by signs to adjust their speed and to make plans about how they will react. He also testified that the lack of appropriate signage can increase the likelihood of an inappropriate response by motorists.

Mr. Kyte testified that he was surprised by the steep downgrade and that it is possible that he may have panicked. He said that he could not see the steepness of the downgrade on the north side of the accident hill when he was at the crest of the accident hill. He further testified that one of the reasons that he did not regain control of his motor vehicle was due to the steepness of the downgrade on the north side of the accident hill.

Mr. Kyte's evidence was that his view of the roadway

beyond the crest of the accident hill was restricted as he travelled northbound up the accident hill. He did not have any recollection of there being any artificial light which assisted him in detailing the roadway ahead. Mr. Kyte also testified that he was not aware of any potential hazards on the down slope of the accident hill, including the severity of the grade as he travelled up the accident hill.

However, the measures undertaken by Mr. Hunt in the fall of 1991, were insufficient to adequately warn motorists of the hazard. In particular, I find that Mr. Hunt's measures in the fall of 1991 at the direction of the Town Council to install a "bump" sign did not warn motorists of the steep downgrade and reduced sightlines. Mr. Hunt in his evidence insisted that motorists would slow down in response to the "bump" sign and thereby traverse the hill at a reduced speed. However, his contention overlooks the fact that this "bump" sign was located 253 m south of the crest of the hill, and it does not convey any accurate information pertaining to the steepness of the grade and the reduced sightlines. The Town of East Gwillimbury's expert Mr. Boulding admitted that the "bump" sign provided no information about the crest of the accident hill or the severity of the downslope of the north side of the hill. Furthermore, he testified that it was an inappropriate sign for the purpose of conveying information to motorists about the nature of the accident hill.

While it is clear that Mr. Hunt in October, 1991, had

installed a 50 km per hour speed limit sign on the accident hill, I nevertheless find that this regulatory speed limit sign was not an effective measure to inform motorists, and Mr. Kyte in particular of the condition and features of the accident hill.

I also find that the installation of the streetlight by Mr. Hunt in or about December, 1991, at the crest of the hill failed to provide any adequate illumination of the downslope of the hill. The plaintiffs' expert Mr. Scherer, testified that the road surface at the crest may have been somewhat illuminated by the presence of the streetlight. However, he opined that the streetlight would not be effective in warning the motorists about the steepness of the downgrade on the north side of the hill. In cross examination, Mr. Hunt testified that the streetlight would have no impact on a motorist's direct line of sight at the accident hill. He further conceded that the streetlight would only assist when a motorist is at or nearly at the crest of the hill. He acknowledged that the streetlight would be even less effective if the motorist was speeding.

If the signs located along the roadway at the time of this accident were totally inadequate, then what ought the Town of East Gwillimbury have done to adequately warn motorists concerning the steepness of the downgrade and the limited sightlines of the hill?

The plaintiffs prepared and filed as exhibit 34 to these proceedings, a prototype "steep hill" sign with a flashing amber light on top. Mr. Scherer gave evidence that while the

Manual of Uniform Traffic Control Devices did not mandate the installation of such a sign at the location of the accident hill, it was nevertheless the most appropriate sign to adequately warn motorists of the condition and features of the accident hill. Mr. Boulding in his evidence testified that it would have been prudent to have a steep hill sign with the flashing amber light, even though it was not mandated by the standards. Mr. Cox, the retired Town engineer agreed that a steep hill sign with the flashing amber light would have been appropriate for the south side of the accident hill. He further agreed that such a sign would be particularly effective under night time conditions insofar as it would have provided a higher level warning of the dangerous condition which existed ahead.

Mr. Scherer testified that studies in Canada and the United States indicated that where there is a warning sign combined with the flashing beacon, the accident reduction rate would be in the range of 25-54%.

Mr. Hunt testified that after this accident, a delegation of the public attended the Town Council meeting on July 20, 1992 to express their concerns about this accident hill on the Second Concession Road. Following this meeting, Mr. Hunt at the direction of the Town Council arranged for a steep hill sign with the flashing amber beacon to be installed on the south side of the accident hill. A speed study conducted in September, 1992, after the sign was installed established that motorists drove slower over the hill at night (see exhibit No. 41, tabs 186

and 187). Further, the evidence established that there were no further accidents on the hill after the sign was installed to the date that the hill reconstruction was completed (November 30, 1992). This fact seems to corroborate Mr. Scherer's evidence concerning the American and Canadian studies, and accident reduction rates relating to warning signs with overhead beacons.

The evidence relating to the installation of the steep hill sign and flashing amber beacon subsequent to the motor vehicle accident on July 9, 1992 was essentially admitted unchallenged. However, I do not view such evidence as being relevant to the issue of negligence, but it is relevant as to what effective measures were available and could have been taken to adequately warn motorists concerning the hazard of the roadway. I was referred to three relatively recent decisions where evidence of subsequent repair was admitted into evidence. (*Rutherford v. Niekrawietz* [1994] O.J. No. 2439, *Brown v. Gravenhurst* [1995] O.J. No. 561, *Anderson v. Maple Ridge* [1993] 1 WWR 172 (BCCA). However, I wish to stress that this evidence is not an admission of liability and is relevant only as it pertains to what effective steps could have been taken to adequately warn motorists.

When asked at trial about the appropriateness of the steep hill sign with a flashing amber beacon to the location of the accident hill and its adequacy in notifying the northbound motorists about the blind hill, Mr. Hunt responded as follows:

Q. Mr. Hunt, would you agree with me that this sign at the back of the court room (exhibit 34) was appropriate for this

location after you installed it?

A. I would agree that it didn't hurt.

Q. Would you agree with me that it provided adequate notice to motorists proceeding northbound on Concession Two?

A. I'm sorry, adequate?

Q. Adequate notice of the blind hill?

A. Yes.

Mr. Kyte stated in his testimony that if there had been a steep hill sign with a flashing amber light prior to the accident hill, he would have been warned of and prepared for the steep hill, and that he would have slowed down and paid more attention to the upcoming roadway.

NON STANDARD SIGNS:

There is also evidence provided by Mr. Scherer that as an alternative to the steep hill sign, the Manual on Uniform Traffic Control Devices (MUTCD), has provisions for nonstandard signs that could have been used with a printed message warning a motorist of the nature of the hill. Examples of such nonstandard signs were filed as exhibit No. 31, figure 6. The MUTCD is a guideline for road authorities to use standard signs for standard conditions. Non standard conditions or high-frequency areas can warrant the use of non standard signs. Nevertheless, the MUTCD is simply a guideline and a municipality such as the Town of East Gwillimbury has the discretion to post a steep hill sign or a nonstandard sign.

All the experts without exception, including the Town engineers, acknowledge that the cost of the non standard sign or

the steep hill sign with the flashing amber beacon was nominal.

WIDTH DEFICIENCY:

The plaintiff and the defendant Kyte take the position that the width of the Second Concession Road was deficient in the vicinity of where this accident occurred. The documentary evidence (exhibit 31, figure 2 and 3) and the evidence of Mr. Scherer is that at the crest of the hill the width of the roadway fell below the Ministry of Transportation Ontario Geometric Design Standards for Ontario highways. Mr. Scherer testified that the width deficiency in conjunction with the limited sightlines over the hill could tend to force motorists to the right as they proceeded up the accident hill. This action in turn could have the potential for the right wheels of the motor vehicle to come into contact with looser gravel which may have accumulated outside the travelled path. In his evidence at trial, Mr. Kyte testified that as he was going over the crest of the hill he could see that he was very close to the right shoulder of the road. However, in examining his statement to the police following the accident, there is notably an absence of any reference to being close to the right shoulder of the road. His statement to the police refers to potholes, washboard and loose gravel at the top of the hill. Similarly, the evidence of Mr. Scherer and the photographs with a template of the Kyte vehicle on the road surface (exhibit 32), do not support the contention that Mr. Kyte was close to the right shoulder of the road at the point he began to lose control of his motor vehicle. I find that

while the road may have been deficient in width, this deficiency nevertheless was not an effective cause of this accident.

DELAY IN THE RECONSTRUCTION OF THE ACCIDENT HILL:

The position of the plaintiff and the defendant Kyte is that the Second Concession Road, north of Algonquin Forest Road was a priority matter in the road needs study prepared by Mr. Cox. Mr. Cox made his successor Mr. Hunt aware that the reconstruction of the Second Concession Road from Doane Road to the Queensville Sideroad was third on the priority list of the Town of East Gwillimbury in June, 1991. The evidence also established that the reconstruction of the Second Concession Side Road was approved as early as 1985 due to the increased volume of traffic on the roadway. The Town of East Gwillimbury's position is that there were a number of delays which prevented the reconstruction project from proceeding. The Mayor, Mr. Mortson, and Mr. Hunt testified that one of the reasons for the delay in the reconstruction of the Second Concession Road was that property owners whose lands were adjacent to the roadway had to be contacted concerning acquisitions of a strip of land sufficient to enable the road to be widened. The funding for the acquisitions was approved in 1987. By 1988, all land acquisitions had been completed except for the property referred to as the Hefis land. While an agreement had been entered into to acquire the Hefis land in 1988 this deal failed to close. During the summer of 1988 the Town's evidence is that the acquisition of the Hefis land was pre-empted by serious problems with the Rogers

reservoir which required emergency repairs. Accordingly, budgetary restraints required that work on the Rogers reservoir be completed in priority to the Second Concession Road.

The evidence establishes that the Town solicitors made numerous attempts in 1990 and 1991 to contact the solicitors who they believed were acting on behalf of the Hefis group. Subsequently, the Town through its solicitors, became aware that the Hefis land had changed ownership by way of a power of sale proceeding on June 13, 1991, wherein the new owner Dr. Lo acquired the property. Negotiations with the new owner of the property commenced in September, 1992, however the actual closing of the sale of the land to the Town of East Gwillimbury did not take place until January 29, 1993.

The plaintiffs and the defendant Kyte argue that there were inordinate delays in acquiring the Hefis property, and that with the Town of East Gwillimbury's knowledge of increasing traffic volumes, restricted sightlines, steep downgrade and a high accident frequency, they were negligent in failing to acquire the Hefis property within a reasonable period of time, and thereby complete the reconstruction of the accident hill well before July, 1992.

Both the plaintiff's and the defendant Kyte's counsel point to the dispatch with which the reconstruction of the accident hill was completed (November 30, 1992) after this accident, even though the closing of the purchase of land from Dr. Lo did not take place until January 29, 1993.

However, I do not find cogent evidence of any callous disregard by the engineering department of the Council of the Town of East Gwillimbury in relation to land acquisitions and reconstruction of the accident hill. While there may have been delays in acquiring the Hefis land, this delay was not caused by any of the actions of the Town's servants, agents, or its employees. The evidence suggests that the reconstruction of the Second Concession Road was a priority for the Town. However, the recognized need for reconstruction was impeded by the budgetary restraints as well as the process of land acquisition which was a necessary part of the process for the road reconstruction project.

I do not find that there was inordinate delay on the part of the Town to reconstruct the roadway or that they were negligent in failing to reconstruct the hill before July, 1992.

FINDING OF NEGLIGENCE AS AGAINST THE CORPORATION OF THE TOWN OF EAST GWILLIMBURY:

I do find that the budgetary constraints and land acquisition difficulties did not prevent the Town from implementing effective remedial measures such as the installation of a steep hill warning sign with a flashing amber beacon or the use of other non standard signs. Indeed the evidence established that there was ample funding available for such traffic control signs in the maintenance budget of the roads department. There was no explanation provided by any witness called on behalf of the Town of East Gwillimbury to justify why interim measures such as adequate warning signs could not have been installed to warn

of the hazard and make the situation as safe as possible pending the completion of the reconstruction project. I have found that the Town had clear and unequivocal knowledge that the hill on the Second Concession Road had limited sightlines, a "sharp" crest, a steep downslope, and a high-frequency of single car accidents including the Scherer fatal accident on December 30, 1990. I find that the Town of East Gwillimbury taking all these factors into consideration, had a duty to warn motorists of the danger of the accident hill. I find that the duty to warn Mr. Kyte includes a duty to warn him even though he was operating his vehicle at a speed in excess of the advisory speed limit. I find that the Town of East Gwillimbury failed to implement reasonable interim safety measures by posting adequate warning through the use of signs, and this failure constitutes negligence and a breach of their statutory duty to keep the road in a state of repair. Accordingly, I find that the negligence and breach of duty by Corporation of the Town of East Gwillimbury caused and contributed to the injuries sustained by the plaintiffs.

JOINT AND SEVERAL LIABILITY:

As a result of my findings of fact, I therefore conclude that the defendant Stephen Kyte (and by operation of law Julie Kyte) and the Town of East Gwillimbury are jointly and severally liable for damages sustained by the plaintiffs, pursuant to the negligence that RSO 1990 c N-1 s.1.

The apportionment of liability will be 60% to the defendant Kyte and 40% to the defendant the Town of East

Gwillimbury.

DAMAGES

1) The injuries of the plaintiff William (Bill) Goff:

Bill Goff was taken from the accident scene by ambulance to the York County Hospital and subsequently transferred to the Sunnybrook Medical Center. His injuries may be summarized as follows:

i) basal skull fracture with haemorrhagic contusion of the right frontal lobe and a Glasgow Coma Scale of 8

ii) scalp laceration

iii) spinal fractures C7 T1 and T2 with associated tetraplegia at C8-T1

iv) neurogenic viscera

v) left hemopneumothorax

vi) right pneumothorax

vii) dislocation of his left knee

viii) scarring

Mr. Goff's chest injuries were treated by insertion of chest tubes. On July 10, 1992, an external fixator was applied to immobilize his left knee and on the same date a Richmond Bolt was inserted into his skull to relieve and monitor intra cranial pressure. On July 13, 1992, he underwent a posterior spinal fusion with the application of a halo vest. The external fixator was removed from his left knee approximately six weeks following the accident, and the halo vest was removed late in September, 1992.

A detailed summary of Bill Goff's various surgeries, medical attendances and treatment is set forth in exhibits No. 8 and 9.

2) Impairment:

As a consequence of his injuries Bill Goff has suffered serious neurological, psycho-emotional and cognitive impairments. I find that these impairments have profoundly affected Bill Goff's ability to enjoy the amenities of life and that these impairments prevent him from obtaining any remunerative employment now and in the future.

a) ***neurological impairment***

As a result of the spinal injury Bill Goff has been rendered completely paralyzed through his trunk and lower extremities. He is dependent on a wheelchair for mobility. He lacks muscular control of his trunk, pelvis, girdle and lower extremities, which in turn present serious problems with his balance. His inability to maintain sitting balance without bracing himself, places significant limitations on his ability to lift and work.

A significant complicating factor for Mr. Goff is that in the past few years, he has had a return of some sensation in his buttocks and hips. However, when he sits for more than two to three hours, he experiences pain and discomfort in the buttocks. There is a cumulative effect such that as the day progresses, his sitting tolerance is further reduced. In order to deal with the pain and discomfort, the plaintiff will

repeatedly lift his body up off the seat of the wheelchair, bearing the weight on his arms in order to relieve the pressure from his buttocks. Sitting beyond two to three hours results in intolerable pain requiring him to transfer from his wheelchair to a bed. The nature of this impairment seriously affects Mr. Goff's day to day routine activities, as well as his ability to drive a motor vehicle any significant distance.

Dr. Bharatwal, an expert in the area of physiatry as well as in her sub specialty of spinal cord injuries, treated the plaintiff at Lyndhurst Hospital. She testified that pain such as it is experienced by Bill Goff is very common in the spinal cord injured population. She stated that this neuropathic pain, which occurs below the level of the lesion, can be very debilitating and that unfortunately analgesics do not alleviate this type of pain.

Bill Goff experiences muscle spasms and spasticity throughout his torso and legs on a daily basis. He has no voluntary control over his bowel or bladder. He requires the use of special night time and day time drainage bags, as well as a catheter to void his bladder. He controls his bowel with laxatives, diet and morning disimpactions. He is prone to bladder and urinary tract infections and other complications as a result of his bladder and bowel impairment. His ability to function sexually is also severely limited.

Dr. Bharatwal also identified a neurological condition that Mr. Goff may experience in the future known as post-

traumatic synirgomyelia. This condition occurs in persons who have sustained spinal cord injuries and a cavity or cyst develops above the lesion in the spinal cord. It results in a further loss of function and the pain becomes much more intolerable. The clinical presentation includes pounding headaches, excess sweating, and a rise in blood pressure. If not treated, it can lead to strokes. Dr. Bharatwal testified that recent studies including one which she published and presented in June of 1998, revealed that the instance of this condition developing is as high as 50% in persons with spinal cord injuries.

As a further consequence of his spinal cord injury, Bill Goff experiences right upper arm and hand difficulties, including a decrease in his grip strength, reduced fine motor skills, decreased psychomotor speed, cramping and fatigue. Bill Goff is right hand dominant.

The plaintiff gave evidence of his extensive morning bowel and bladder routines, as well as his ability to prepare breakfast and then attend university classes. Suffice to say these routines and activities leave him chronically fatigued and requiring several rest periods on a bed during the day. In the course of this trial, the court room was equipped with a hospital bed and Mr. Goff gave much of his evidence while lying on the bed. While he did periodically sit in a wheelchair, he also regularly transferred to the bed during those sessions of the trial that he attended.

b) ***psycho-emotional impairment***

Perhaps not unexpectedly, the psycho-emotional consequences of this accident have had a profound effect on Bill Goff's perception of himself and his future. Reports concerning his psycho-emotional status are detailed in the medical reports of Dr. M.J. Lacroix dated July 12, 1993 and January 8, 1995 (exhibits number 17 and 18) and Dr. Adrian Hanick dated July 5, 1993 and July 27, 1998 (exhibits number 22 and 23). The findings, opinions, and conclusions set forth in these reports largely went unchallenged by the defendants.

Bill Goff has been unable to accept his injuries and functional restrictions.

His lack of acceptance of his condition motivated him to work very hard at rehabilitation at the Lyndhurst Hospital, in order to develop some level of independence and leave the hospital as soon as possible. His father, Ken Goff, gave evidence that following the release from the hospital his son became increasingly resistant to assistance and struggled to function as independently as possible. In September, 1993, despite advice to the contrary, Bill Goff enrolled at Wilfrid Laurier University.

Dr. Hanick, in his medical report of July 5, 1993, concluded that Bill Goff displayed marked features of denial and suppression, and that his severe levels of stress lead to the development of what he characterized as a depersonalization disorder. While psychotherapy was clearly indicated, Bill Goff emotionally was unable to accept the necessity for such treatment

at that time.

The plaintiff was also assessed by Dr. Voorneveld, who was qualified as an expert witness in clinical psychology and neuropsychology. She gave evidence that by June, 1993, psychological testing demonstrated that Bill Goff was in considerable emotional distress. His lengthy relationship with his girlfriend had deteriorated since the motor vehicle accident. One week prior to his departure to Wilfrid Laurier University, the relationship ended.

Dr. Voorneveld indicated that by the fall of 1993, testing and interviews with Bill Goff clearly indicated that he was exhibiting signs of withdrawal, introversion, and feelings of inferiority and insecurity. He was having difficulties in dealing with the consequent feelings of dependency. He struggled at Wilfrid Laurier University, as he did not feel comfortable in the presence of other people. There was suicidal ideation in or about New Year's, 1994.

It is significant that Dr. Voorneveld viewed Bill Goff's attempts to be as active as possible, including making plans and attending Wilfrid Laurier University so soon after the accident as a denial mechanism associated with sublimation. In essence, his coping mechanism was to become as busy as possible with a view to avoiding stressful emotional issues.

By March, 1994, Bill Goff, realizing that he required psychological help, contacted Dr. Voorneveld. It was the evidence of Dr. Voorneveld that Bill Goff remained at a very high

risk of suicide at that time.

The plaintiff was assessed on May 11, 1995 by Dr. Henry Berry, a psychiatric medical expert retained on behalf of the defendant Kyte. His report dated May 30, 1995, was filed as exhibit No. 24. At the time of his assessment, Dr. Berry states:

> "Medical status examination reveals a calm, somewhat reserved patient who is able to laugh occasionally, who tends to minimize his symptoms and who describes some improvement but with significant depression, anger and frustration."

Bill Goff gave evidence that in the spring of 1996, upon completion of his third year at Wilfrid Laurier University, his emotional state again began to deteriorate and again he consulted Dr. Voorneveld in the summer of 1996. Dr. Voorneveld testified that Mr. Goff's mental condition continued to deteriorate through the fall of 1996. He expressed fears that he would never have a normal girlfriend/boyfriend relationship and he was anxious about his future, including whether he would ever marry or have children. A Beck Depression Inventory psychological test administered to him at that time suggested he was severely depressed, and at a high risk for suicide.

Bill Goff graduated in October, 1997, with a general B.A. Degree in English and Philosophy.

The plaintiff was reassessed by Dr. Hanick on July 27, 1998, shortly before the trial. His report is filed as exhibit No. 23. The report indicates that Mr. Goff continues to suffer "a persistent undercurrent of depression" each day, although the intensity of the depression varies day to day. The report notes

that Mr. Goff finds it difficult to concentrate on any single issue. He grows quite irritable, quick tempered, and emotionally distressed if he has to deal with two or three matters simultaneously. The report concludes that Mr. Goff still suffers from "the mental mechanism of active denial, and it is seen that Mr. Goff has still not fully accepted his disabilities, especially in terms of their ramifications for his future and future ability to work." The report opines that in 1998, he continues to suffer from "a chronic adjustment disorder with features of despondency and anxiety and anger which still likely reflects upon his denial and a pathological grief reaction."

Dr. Voorneveld also assessed Bill Goff in July, 1998. She testified that Mr. Goff had indicated that his goal was to progress with his university studies. Dr. Voorneveld also testified that in July, 1998, there was a realization by Bill Goff, for the first time since the accident, that he had been directing all of his time and energy struggling with his studies at university at the expense of quality of life issues. Therefore, to bring some balance into his life, Bill Goff testified that he wanted to concentrate more on quality of life issues in the future.

Mr. Goff has been involved in two relationships since the motor vehicle accident. He met Karrie Brezina in 1994, during his second year of university. Ms. Brazina gave evidence at trial that while she was able to accept Bill Goff's disabilities, nevertheless he was uncomfortable, frustrated, and

even angry about his perceived inadequacies. This relationship ended at the instance of Bill Goff, who felt that he could not have a lasting and meaningful relationship.

Bill Goff met Cassandra Hendricks at university in June of 1997, and they dated for six months. Ms. Hendricks also testified at trial that Mr. Goff was often frustrated and periodically he was depressed and guarded about his emotions. She also testified that he would become distressed about his perceived inadequacies.

While Bill Goff and Cassandra Hendricks indicated that there relationship ended in December, 1997, they nevertheless continue to see one another and go out to dinner on a periodic basis at the present time.

Mr. Goff in his evidence, testified that he felt it was unfair to be involved in these relationships when he was not able to reach the required emotional depth necessary given his limited capacity for physical intimacy.

c) *Cognitive Impairment*:

Bill Goff in the course of this collision, sustained a basal skull fracture with haemorrhagic contusion of the right frontal lobe. Dr. Berry in his medical report filed at trial, indicates that the plaintiff had an interval of pre-traumatic amnesia of 15 to 20 minutes and a post-traumatic interval of about three weeks, which he concludes is evidence of a "severe closed head injury". Dr. Berry's report goes on to state:

> "He (Bill Goff) describes a reduction in his academic performance from the honours level

> which he achieved in high school, and although depression can interfere significantly with intellectual function, the psychological test results in combination with the clinical picture and prolonged post-traumatic amnesia, would all indicate that he has suffered a degree of permanent brain damage".

While Dr. Berry describes the brain damage as mild, he nevertheless concludes that the:

> "pre-accident educational potential has probably been diminished".

Dr. Berry also opined that Mr. Goff should be able to continue with university and enter into a career at that level of education. However, there is no evidence that Mr. Goff's pre-accident and university educational records were sent to Dr. Berry despite his request for the same.

In his medical report of August 28, 1995, (exhibit no. 19), Dr. Lacroix reviewed Mr. Goff's cognitive defects and stated:

> "Neuropsychological examination has identified fronto-temporal effects, with impairment in executive cognitive functioning, with planning, organization and initiation. Dr. Kenny also identified impairments in both the rate and capacity of learning in both verbal and nonverbal modalities. It is interesting in this context that the pattern of his performances in school suggests difficulties in courses which require a good deal of memorization, and better performance in courses that allow for open ended discussions. The neuropsychological profile will obviously have any impact on his vocational options".

Dr. Voorneveld testified at trial that in her opinion Bill Goff continued to experience "diminishment with respect to

his educational attainment", and that he continued to exhibit mild neurocognitive problems.

NON PECUNIARY GENERAL DAMAGES

The plaintiff's actuary, Mr. Robert Collins, testified that the $100,000 maximum award for general damages as dealt with in Andrews v. Grand and Toy Alberta Ltd. [1978] 2 SCR 229, 83 D.L.R. (3d) 452 is computed at $260,561 adjusted for inflation to September, 1998.

The position of counsel for the plaintiff, is that Bill Goff experienced a catastrophic injury and physical disability with severe functional restrictions, as well as psycho-emotional impairment. Prior to the accident, he was active in sports and body building activities and he enjoyed an active social life.

The position of counsel for both defendants is that an award of $225,000 would be a more appropriate award for non-pecuniary general damages. Counsel for the defendants rely on the statement in Roberts v. Morana et al (1997), 34 O.R.(3d) 647 at 678-679, wherein it is stated that the maximum amount of general damages should only be awarded in those cases "where there is no longer any meaningful life activity for an injured plaintiff". The defendants also referred to the award of $200,000 in Ligate v. Abick et al (1996), 28 O.R.(3d) 1 for the authority to award less than maximum. I take note however that both of the cases relied on by the defendants involved brain injury, and they can be distinguished on their facts.

I find that Bill Goff has suffered a catastrophic

injury and the permanency of his condition and the degree of pain and disability that he has endured and will continue to endure in the future, bring this case well within the principles set forth by the Supreme Court of Canada in Andrews v. Grand and Toy Alberta Ltd.. Bill Goff was only 18 years of age when he suffered this injury. He had enjoyed a superior lifestyle at the time the accident occurred. He had been accepted into the faculty of arts program at Queen's University, commencing in the fall of 1992. It is likely that he would have gone on to enjoy the same superior lifestyle had this accident not occurred. However, now he is severely restricted in all of his activities and is dependent on others for help and assistance. He experiences pain and discomfort on a daily basis, which cannot be alleviated by medication. I assess the general damages for pain and suffering and the loss of amenities of life at $260,561.

PAST LOSS OF INCOME:

Bill Goff commenced employment as a summer student at a construction company, Norco Fixtures Inc. in July, 1992. A letter from Norco dated November 18, 1992 (exhibit 5), details that Mr. Goff was being paid $10 per hour plus bonuses. The letter further indicates that Bill Goff was working very well and that he would have been employed as long as he was available. The evidence of Bill Goff is that he was working 12 hours a day, five days per week, and accordingly he was earning $600 per week income, for the summer months.

The plaintiff's position is that Bill Goff would

continue to work at Norco Fixtures Inc. each and every summer pending the completion of a Masters degree at Queen's University. Bill Goff did give evidence that he enjoyed the construction work and he would have worked throughout the summers while he was attending university. The evidence of the plaintiff and his parents at trial, established that from a very early age Bill Goff on his own initiative had various part-time jobs which he continued throughout his high school years. The plaintiff therefore claims a past income loss for summer employment as follows:

a)	Summer of 1992: 9 weeks x $600 per week =	$5,400
b)	Summers 1993-1997 inclusive: 16 weeks x $600 per week = $9,600 x 5 years =	$48,000
	TOTAL =	$53,400

In addition, the plaintiff testified that he probably would have worked while attending university. His evidence was that he would earn $80 per week for the 36 weeks while at university. This calculates to $2,880 per annum. Based on the assumption that Bill Goff would have obtained his Masters degree at university, the plaintiff then claims a further loss of income of ($2,880 per annum x 6 years) $17,280.

The total then of all past loss of income claims is ($53,400 + $17,280) $70,680.

The position of the defendants is that while they concede that Bill Goff would likely have worked in the summer months and during the university year, it does not follow however

that he would have secured a well paying job every year. The defendants further take the position that the plaintiff did not call as a witness anyone from Norco Fixtures Inc. to testify about possible summer employment for Bill Goff in any year after the summer of 1992. The defendants argued that the November 18, 1992 letter from Norco Fixtures Inc. (exhibit 5), cannot be used for the assumption that Bill Goff would have worked in construction every summer, nor can it be used in determining what Bill Goff would ever earned during the university year. Accordingly, the defendants urged the court to apply a 40% negative contingency deduction to this claim for loss of income.

The onus to establish a past loss of income lies with the plaintiff. The standard of proof is based on a balance of probabilities.

I find on a balance of probabilities that Bill Goff would likely have secured summertime and part-time employment whenever and wherever it was available to him. However, I further find that there is some merit to the position taken by the defendants and that the number of hours and rate of pay suggested by the plaintiff may not always have been available to him over the course of six years. I therefore have reduced his past loss of income by 10% to reflect that he may not have always been employed for the entire university period, or that his income may have been less than he anticipated. I therefore allow his past loss of income claim at $63,612.

FUTURE ECONOMIC LOSS:

The plaintiff's position is that Bill Goff had a pre-accident earning capacity of $80,000 to $90,000, based on the evidence of a number of witnesses, including expert testimony, detailing Bill Goff's personal characteristics and aspirations as well as his academic ability. The plaintiff relies on the evidence they introduced that there is a correlation between educational levels and income as between a parent and child. The plaintiff further maintains that he is competitively unemployable by reason of a substantial number of employment barriers, his extreme limitations including restricted work hours, mobility limitations, reduced cognitive capabilities and emotional health problems.

The defendants' position is that the appropriate way to compensate the plaintiff for loss of future earning capacity is to use a statistical annual income average. The defendants further argue that the plaintiff is capable of earning $10,000 per year in the future and that this sum should be deducted from the calculation of this future earning capacity.

In the trilogy of cases, Andrews v. Grand and Toy (Alberta) Ltd. [1978] 2 S.C.R. 29; Thornton v. School District No. 57 [1978] 2 S.C.R. 267 and Teno v. Arnold [1978] 2 S.C.R. 287 (and as a refined and elaborated in Lindal v. Lindal [1981] 2 S.C.R. 629), the general principles governing the assessment of damages are set forth.

In relation to loss of future earning capacity the trilogy of cases directs a court to apply the principle that an

injured person is to be restored to the position he would have been in had the accident not occurred, insofar as this can be done with money. The Supreme Court of Canada has also enunciated the principal that in determining an award for lost future earning capacity, where the evidence permits, the court should compare what the plaintiff would have earned had he not been injured with what he will earn in his injured state. Further, where evidence is not available, then statistics as to average earnings, adjusted as necessary for the individual situation of the plaintiff may serve as the basis of the award for lost earning capacity. Finally, in recognition of the fact that the future cannot be foretold, an allowance must be made for the contingency that the assumptions on which the award for pecuniary loss is predicated may prove inaccurate. In some cases this may result in a deduction since the earnings are based on an uninterrupted stream which does not reflect contingencies such as a loss of employment and early death. Where no evidence is available, the courts have made a deduction for such matters in the range of 20%. Where evidence is available, the deduction for contingencies may be increased, decreased, or eliminated according to the proof presented.

STANDARD OF PROOF:

It is not necessary for the plaintiff to prove on a balance of probabilities that a future pecuniary loss will occur. In Graham et al v. Rourke (1990) 75 O.R.(2d) 622 (Ont.C.A.), Mr. Justice Doherty explained:

> "A trial judge who is called upon to assess future pecuniary loss is of necessity engaged in a somewhat speculative exercise ... A plaintiff who seeks compensation for future pecuniary loss need not prove on a balance of probabilities that (his) future capacity will be lost or diminished ... if the plaintiff establishes a real and substantial risk of future pecuniary loss, (he) is entitled to compensation ..."

At the time this accident occurred, Bill Goff had graduated from grade 13 as an Ontario Scholar, and he had been accepted into the general arts program at Queen's University. His evidence was that he had not chosen any career path, but his high school marks suggested that he was more suited to the humanities than to the sciences. Accordingly, where the plaintiff is not established in a settled career at the time of his injury, it cannot be said with precision what he would have earned for the rest of his life if he had not been injured. In the circumstances of this case where there is no chosen career or earnings history, there are obvious difficulties in predicting the plaintiff's long-term loss of working capacity. Where the lost earnings cannot be ascertained by precise mathematical calculations, the court must take a more general approach and "assess such sum for loss of future income as may be determined from a reasonable appraisal of all the evidence". (Conklin v. Smith [1978] 2 S.C.R. 1107)

The plaintiff's grades and his interest in particular areas of study as well as childhood/adolescent and parental aspirations with respect to a field of employment are relevant factors in determining the level of earnings which provide the

foundation for a future economic loss award. (McKay v. Govan School Unit No. 29 (1968) 68 DLR(2d) 519 at 525). In Houle v. Calgary (City) (1985) 6 OAR 366 at 376, the Alberta Court of Appeal accepted that major determinants of income are schooling, motivation, family income, father's occupation and income, the individuals own I.Q., social class and mother's education.

Other cases have held that it is not necessary that a court predict that a particular occupation would have been pursued. It is rather sufficient for the court to find on the basis of the plaintiff's characteristics and abilities that he would have had a successful career. (MacDonald v. Neudfeld (1993), 17 C.C.L.T. (2d) 201 at 227 B.C.C.A.)

PRE-ACCIDENT EARNING POTENTIAL:

Counsel for the plaintiff have proposed two scenarios as to what Bill Goff's income would have been had the accident of July 9, 1992 not occurred. The first scenario is that Bill Goff would have earned the average of his father's income, as detailed in exhibit No. 16. The second scenario is that Bill Goff would have earned an income comparable to the average of the top 10 humanities occupation chosen from Statistics Canada's report on the 25 highest paying occupations in Canada, as detailed in exhibits 27 and 28.

The plaintiff called several witnesses in support of the two propositions advanced concerning Bill Goff's pre-accident earning potential. Ms. Elaine Sandor of Rehabilitation Management Inc., conducted an employability analysis. In view of

the fact that Mr. Goff did not have a pre-accident earnings history, Ms. Sandor analyzed a number of factors in order to project the pre-accident earning potential.

Ms. Sandor gave evidence that Mr. Goff's intellectual abilities indicated a high I.Q. based on his 84% average graduating from grade 13, and his acceptance into Queen's University. It was also stated that the plaintiff had a strong work ethic and throughout high school he obtained part-time employment both during the school year and in the summers. He came from a home where there was significant parental support and guidance.

Ms. Sandor also reviewed what were described as "family member comparables" as an indicator of what the potential earning capacity of Bill Goff would have been had this accident not occurred. His father, Ken Goff has a Bachelor of Science degree, and an Honours Bachelor of Science Degree in Geology and a Masters Degree in Hydro-Geology.

Ken Goff worked as a Senior Hydro-Geologist for a number of years and then entered into a partnership as an environmental Hydro-Geologist Consultant, where he remained until 1996. He then began his own business as a Geologist consultant.

Ken Goff's income tax returns from 1990 to 1997 were filed as exhibit 16, and his employment income for those years is summarized as follows:

1990 - $85,099.84

1991 - $90,000.00

1992 - $68,461.88

1993 - $78,951.72

1994 - $78,769.40

1995 - $86,893.98

1996 - $58,904.12

1997 - $25,000.00

The plaintiffs argue that Mr. Ken Goff's change in employment towards the end of 1996 and his self-employed earnings in 1997 are not representative of his self-employed earning potential. Ken Goff gave evidence that he expected to achieve a level of earning between $90,000 to $100,000 within the next few years. Accordingly, for the purpose of presenting the first scenario the plaintiff's counsel argues that if the 1996 and 1997 earnings for Ken Goff are removed from the calculations then his average annual earnings between 1990 and 1995 is in the sum of $81,363.00. If his 1997 earnings in the sum of $25,000 alone is deducted than the average annual earnings is $78,155.00. Finally, if his highest income year ($90,000 in 1991) and his lowest income year ($25,000 in 1996) are deleted from the calculations, then his annual average earnings are $76,180.00.

Another family member comparable is the plaintiff's older brother, Greg Goff, who was an Ontario scholar and graduated from Queen's University in Life Sciences. At the time of trial, Greg Goff was interning in orthotics at Sick Children's Hospital in Toronto. He testified that a graduate in his field of work would have a starting salary of $40,000 a year in an

institutional setting, however in private practice, he would expect to earn $75,000 to $125,000 per annum.

The final family member comparable was the plaintiff's mother, Betty Goff. She holds a high school diploma. She did not work outside the home for a number of years while raising the children. She did upgrade her work skills, and has been employed in accounting and general office duties on a consistent basis for a considerable number of years. No details of her income was disclosed in her evidence.

The evidence relating to Bill Goff's personality and aspirations indicated that prior to the accident, he was a highly motivated and goal orientated individual. He set high standards for himself and demonstrated a strong determination to succeed by obtaining excellent grades in his final year of high school, which in turn facilitated his acceptance at the university of his choice. He was portrayed, prior to the accident as a mature individual with a good sense of confidence and self-esteem. While he had not established any clear vocational goals prior to the accident, nevertheless his parents had instilled in him the importance of a good education. Bill Goff testified that while he may not have chosen a career path, he wanted to obtain a good job which paid him well so he could support a family of his own and enjoy a comfortable life.

The plaintiff, in establishing his second scenario concerning pre-accident earning potential, also introduced into evidence a Statistics Canada study of the 25 highest paying

occupations and their average earnings by sex for Canada in 1995 (exhibit no. 27). The plaintiffs also introduced evidence of the average 1995 earnings for men in the 10 highest paying humanities occupations as published by Statistics Canada (exhibit no. 28). The position is advanced that because of the plaintiff's interest and strength in the humanities as demonstrated by his grade 13 marks, the court should calculate a pre-accident earning potential for Bill Goff based on exhibit no. 28, in the amount of $87,999 (calculated in 1998 dollars).

In summary then, the plaintiff's position based on either of the two scenarios provided and taking into account the factors enumerated in Ms. Sandors evidence, that there is sufficient evidence to establish as a very real and substantial possibility that Bill Goff would have established himself in a career that would have generated earnings in the range of $80,000 to $90,000 per annum.

The defendant's actuary, Mr. Murray Segal, gave evidence as to why the two scenarios advanced by the plaintiff were inappropriate. He testified that while historically there has been a correlation between the educational level of a parent and a child, there has been little corresponding correlation between the income of a parent and child.

The defendant's position is that the best way to compensate the plaintiff is to use a statistical annual income average, and they have referred to a number of cases where this method was employed. (Tiessen (Next friend of) v. Ontario

(Minister of Environment) [1980] O.J. no. 953 at 35 (H.C.J.) and Roberts v. Morana [1997] 34 O.R.(3d) 647 (Ont.Gen.Div.).

Therefore, the defendant's method of calculation of the pre-accident earning potential for Bill Goff was to use the average of all Canadian male university graduates working a full year and on a full-time basis, since this would reflect the spectrum of earnings through a lifetime. Mr. Segal gave evidence concerning a recent statistics published by Statistics Canada that the average earnings of male university graduates employed on a full-year and full-time basis was $57,677 and adjusted for inflation, $59,186 per year in 1998 dollars. This is the average income over the working lifetime of the individual.

NON WAGE BENEFITS:

The case of Cunningham v. Wheeler, 1994 20 C.C.L.T. (2d) 1 establishes the principle that non wage benefits are an aspect of earnings and must be considered in the calculation of earning losses. Therefore, in assessing the pre-accident earning potential it is necessary to consider non wage benefits which can essentially be characterized as follows:

a) unconditional benefits such as the provision of accommodation or an automobile

b) insurance-type benefits, including life insurance, short-term and long-term disability, drug and health plans

c) pensions

The plaintiff's actuary, Mr. Bob Collins, testified that the value of non wage benefits are in the range of 5 to 10%. Mr. Segal did not dispute this range for employer supported

pension plans and other fringe benefits.

I find that 10% is a reasonable value to be applied to the non wage benefits, and it is the amount of that I have utilized in calculating the pre-accident value of non wage benefits.

CALCULATION OF THE PRE-ACCIDENT EARNING POTENTIAL:

I find that the most appropriate method in this particular case to calculate the pre-accident earning potential, is to begin with the statistical data published, including the average earnings of male university graduates employed on a full year and full-time basis, which is $59,186 expressed in 1998 dollars. I find that Bill Goff, in all likelihood, would have successfully completed his studies at Queen's University and graduated. I find that he would also have likely pursued postgraduate studies, and there is a substantial possibility that he would have attained a Masters degree.

The statistical analysis is helpful as an objective factor. However, in my opinion, it is only the starting point for consideration of the analysis of pre-accident earning potential. It is necessary then to consider the subjective components so that the court can ultimately make the assessment from a reasonable appraisal of all the evidence. The personal characteristics and aspirations of Bill Goff, including his strong work ethic and competitive spirit, demonstrate that he was an above average student. I find that the support and direction that he obtained from his parents combined with his high

standards and strong motivation to succeed would likely have resulted in him achieving a well paying job and certainly earning more than the average male university graduate. His father and brother both have pursued very successful careers with significant earning potential.

I therefore find that Bill Goff would have earned more than the average male university graduate, and I fix the amount of pre-accident earning potential at $70,000 per annum.

Mr. Collins and Mr. Segal agreed on a present value factor of 24.549 for Bill Goff's working life expectancy. This calculation assumes that Bill Goff would have retired at the first of the month following his 65th birthday, which is December 1, 2038. Therefore, the present value for Bill Goff's pre-accident future earning capacity is $1,718,430.00. To this sum must be added the amount of non wage benefits calculated at 10% which totals $171,843.00.

The total amount then for pre-accident earning capacity is $1,890,273.00.

POST-ACCIDENT EARNING CAPACITY:

The plaintiff's position is that there are numerous factors which will have a negative impact on the plaintiffs employability in the future, including his physical, psycho-emotional and cognitive impairment.

The defendant's position is that Bill Goff is an intelligent and motivated young man who has limited prospects for future employment, as a result of his severe physical

limitations, but who is capable of earning some reduced income, in the range of $5,000 to $10,000 per annum.

There was a great deal of evidence adduced at trial by counsel for the plaintiff, which clearly and unequivocally indicated that Bill Goff is competitively unemployable in today's job market, even on a part-time basis. There was no evidence by a vocational rehabilitation expert called by the defendants to challenge the plaintiff's evidence.

Mr. Sandor and Dr. Voorneveld identified a number of barriers to employment for Mr. Goff, including the extensive daily routine involving management of his bladder and bowels. His reduced sitting tolerance is also a barrier in that it requires him to spend a considerable period of the day lying down. The fact that his pain cannot be alleviated by analgesics and his chronic fatigue as the day progresses impede his employability. Ms. Sandor also testified that Bill Goff's limitations in areas of memory concentration, initiation, planning, organization and reduced learning capacity, all impede his employability in the workplace. The fact that Bill Goff has a limited work history and few transferable skills and limited flexibility in his hours, all would have a negative impact on his marketability. Finally, he is vulnerable to bladder infections, skin break down, and other medical complications which combined with his psycho-emotional difficulties, place him at a competitive disadvantage in the workplace.

Dr. Voorneveld testified that although his physical

limitations make it difficult for him to get out into the community and work nevertheless in her opinion working at home and being confined to the home would have a negative impact on Mr. Goff psychologically.

Dr. Bharatwal in discussing employability, testified:

> "I think Bill's limitation is not based on lack of access or lack of environment that is not suitable. Bill's limitation is the pain that we have no way of treating at the moment, either conservatively or surgically."

Dr. Bharatwal in cross-examination, when asked to comment whether there was any glimmer of hope for employment for Bill Goff responded:

> "I think he has the makeup of charm and personality and motivation. But his body, which is permanently disabled, confined to a wheelchair and limited from doing the task of just personal care ... because from where I see he's got two hours of sitting and a couple of hours of rest. There is no way any employer is going to accommodate that lifestyle... In all honesty, I can just say that I don't think of any type of work that will fit into his ability to perform from a wheelchair."

Dr. Hanick in his report of July 27, 1998 (exhibit no. 23) opines:

> "Quite clearly, in terms of his cognitive difficulties and especially in terms of his paraplegia and related problems, it is evident that Mr. Goff continues to suffer a quite severe and even overwhelmingly physical impairment, although, also given his cerebral insult and the emotional consequences of his disabilities, there is still seen to be quite a substantial and significant psychological psychiatric impairment. When all these various problems and impairments are summed in their totality, it is again evident that Mr. Goff remains unemployable and will likely

remain so unemployable through his lifetime."

Since the accident, Bill Goff did apply for employment at the Special Needs Office at Wilfrid Laurier University, and he was interviewed for a receptionist/office duties position. However, he was not offered the position. He was involved in volunteer work at his campus residence in 1996 in which he greeted people and offered verbal assistance.

A labour market survey of employers was conducted by Ms. Sandor, and she concluded that none of the potential employment fields identified were suitable for Bill Goff given his significant limitations.

The evidence then in my opinion, establishes that in view of the significant restrictions and impairments of Bill Goff, including his pain and reduced sitting tolerance, his mobility limitations and reduced cognitive capabilities, and psycho-emotional problems, he is not capable of employment now or in the future. I find therefore that there will be no allowance for post accident earning capacity.

CONTINGENCIES:

The matter of a deduction for general and specific contingencies has to be considered. In Graham et al v. Rourke (1990), 75 O.R.(2d) 622 at 636 (Ont.C.A.), Dougherty J.A. stated that general contingencies are "not readily susceptible to evidentiary proof and may be considered in the absence of such evidence". Whereas specific contingencies whether positive or negative which are relied on by the plaintiff and the defendant

require "that party must be able to point to evidence which supports an allowance for that contingency. The evidence will not prove that the potential contingency will happen, or that it would have happened had the tortious event not occurred, but the evidence must be capable of supporting the conclusion that the occurrence of the contingency is a realistic as opposed to a speculative possibility". (See also Shrump v.Koot (1997) 18 O.R. 337 at 343 (Ont.C.A.).

The defendant's position is that there should be a 20% general contingency deduction applied to the future earning capacity to take into account labour force interruptions (strikes, lockouts), early retirement, sickness, accident, career changes or unemployment. Mr. Segal gave evidence on behalf of the defendants of negative contingencies such as the unemployment rate in Canada and the requirement of university graduates to move to regions based on employment opportunities and availability.

The plaintiff's position is that general contingencies must be considered in the context of the plaintiff's individual circumstances. Counsel for the plaintiff argues that the possibilities of labour force interruption having a negative impact on Bill Goff are remote. Further, benefits covering work interruption such as sickness and accident would be available to the plaintiff. The plaintiff also relies on the evidence of Mr. Segal that if an individual has a good work history, and a good ability to obtain a first job and stay with it, then there is

less possibility that that individual will become unemployed. With respect to the contingency of early retirement, the plaintiff relies on the evidence of Mr. Segal that the extent to which a pension plan provides generous early retirement benefits is a positive factor to be considered in assessing a contingency. Mr. Segal testified that approximately 50 percent of the people employed in Canada are covered by pension plans and that there is a substantial possibility that Bill Goff would have been in an employment situation where contributions would have been made by the employer to a pension plan.

The plaintiff asks the court to consider positive contingencies such as the possibility of promotion, advancement, increasingly remunerative employment, general good fortune and stability of the family environment. It is the position of the plaintiff that these positive contingencies counterbalance any negative constituencies as advanced by the defendants.

Finally, the plaintiff's counsel has argued that the discount rate in Rule 53.09 (1) of the Rules of Civil Procedure should be reduced to reflect that general productivity will outpace inflation for some aspects of the plaintiff's claim. With respect to this issue, I find there was not sufficient evidence to support such a contention and accordingly, there will be no reduction in the 2.5% discount rate under Rule 53.09(1).

In considering the matter of general and specific contingencies, I have directed my mind to the principles provided by Dixon J. in Lewis v. Todd (1980) 115 D.L.R.(3d) 257(SCC):

> "In principle, there is no reason why a court should not recognize and give effect to those contingencies, good or bad which may be reasonably foreseen. This is not to say the courts are justified in imposing an automatic contingency deduction. Not all contingencies are adverse. The court must attempt to evaluate the possibility of the occurrence of the stated contingency."

I find that the evidence presented by the defendants with respect to specific contingencies is balanced by the evidence of the plaintiff's evidence of specific positive contingencies and accordingly, I am not persuaded that the amount for future economic loss should be reduced or increased based on specific contingencies.

I do find however that the plaintiff, William Goff was subject to the usual general contingencies of life which are likely to be the common future of us all, and I apply a 20% discount to the calculation of future economic loss of earning capacity.

Therefore, the total amount of the future economic loss of earning capacity is $1,512,218.40 ($1,840,273-$378,054.60).

PAST ATTENDANT CARE EXPENSES:

Ms. Borovoy, an occupational therapist called by the plaintiff, was asked to prepare an assessment of Bill Goff's past attendant care needs based on a retrospective review of the attendant care provided by Ken and Betty Goff.

The defendants do not dispute the amount calculated for past attendant care by Bill Goff's parents which, calculated on

an hourly basis, applying market rates for various levels of service as detailed in exhibit No. 25, is in the total amount of $23,622.98.

PRESENT CARE EXPENSES:

There are a number of care items that the plaintiff, Bill Goff, requires at the present time. These various present expenses and their cost is detailed at exhibit 35 (pages 1-4 inclusive). The plaintiff has presented two different tables in relation to the calculation of the present expenses. The difference between the "lower version" and the "higher version" of the present expenses is based on two separate cost projections for certain items, namely a urolome surgical insert, a three phase fertility testing, and child care expenses.

Dr. Bharatwal testified that the plaintiff had a complete urological review, and it was determined that he had a high pressure bladder and a condition known as sphinctdysergia. Accordingly, in the medical opinion of Dr. Bharatwal and her colleagues, a urolome insertion may prove to be beneficial for Bill Goff. The evidence of Dr. Bharatwal was that a urolome is a mechanical coil that is introduced into the bladder at the site of the sphincter that contracts at the same time that the bladder contracts. The urolome has an opening at both ends which keeps the sphincter open at all times so that the urine drains into a bag instead of being retained. The evidence establishes that bladder infections are a serious complication in the spinal cord

population. One of the causes of bladder infections is that not all of the urine will empty with the result that the urine is retained in the bladder, which over time promotes infection. A person with a high pressure bladder such as Mr. Goff, left untreated will eventually make the sphincter incontinent with the result that the urine will start to back up into the kidneys, which has the potential for serious and permanent damage. The difficulty is that the surgery to insert urolome may have to be repeated in order to properly open the sphincter. The plaintiff claims the cost of two urolome inserts. I find that this is a necessary and reasonable expense, and I allow it in the amount claimed in exhibit 35.

The defendants disputed the reasonableness of the fertility testing and child care expenses for two children. The plaintiff testified that he would like to have at least two children. Ms. Borovoy consulted with a Mr. Ron Lepage of the Robson clinic at Lyndhurst Hospital to obtain information about fertility issues. The evidence was that Bill Goff would have to proceed with three phases of fertility tests. The first phase would be a determination if Mr. Goff's sperm can be used for fertilization. The cost associated with this phase is $750.00. The second phase involves a female partner and would require monthly medication as well as lab costs. There is a reported 25% chance of a successful fertilization in this phase. The costs associated with phase 2 is $2,700.00. The third or final phase, in the event the second phase is not successful is in-vitro

fertilization. Ms. Borovoy testified that there is no guarantee that one attempt at fertilization would be successful. The costs associated with phase 3 is $6,000 for each attempt. The plaintiff's position is that allowance should be made for at least two attempts for each child, for a total cost of $24,000, assuming that Bill Goff will have two children.

The plaintiff further takes the position that since Bill Goff will have at least two children, then he will require assistance with caring for his children. Ms. Borovoy based her calculations for child care expense on the number of hours of assistance per week that would be required at various stages in the children's lives until they attained the age of 12 years. Ms. Borovoy identified the child care cost as follows:

Age	Cost
Birth to 3 years	$48,438.00
3 years to 6 years	$31,590.00
6 years to 11 years	$14,040.00

Ms. Borovoy then identified that the overall cost of the additional assistance required for a second child to be $32,292.00.

The defendants dispute the reasonableness of the amount of the child care claim on the basis that it is too speculative. The defendants further maintain that there is a good possibility that Bill Goff and his spouse would both have worked, and this expense would have been incurred in any event. The defendants accordingly take the position that this claim should only represent the portion of child care expenses resulting from the

plaintiffs disability.

The first issue to be decided is whether Mr. Goff is likely to have children. He testified that he enjoys children, and that he would very much like to have at least two children. The advances in medical science and technology mean that there is any substantial possibility that Mr. Goff may have children. I have taken into consideration that Mr. Goff had two unsuccessful relationships since the motor vehicle accident, and it has been stated throughout the medical evidence that he continues to experience psycho emotional problems, which have directly affected his personal relationships. However, applying the principles of law in Graham v. Rourke *supra*, I am persuaded that the plaintiff has established a real and substantial risk of future pecuniary loss for which he should be compensated. There was no evidence from any witness that Mr. Goff could not or should not have children. The principle of restitute in integrum mandates that serious consideration be made of the plaintiff's wish to have two children. The total of all the expenses for this item of child care amounts to $126,357. While the plaintiff has presented the fertility and child care as present expenses, it is my view, based on all the evidence, that they are in fact future expenses. There are a number of contingencies which must be considered, including the fact that the fertilization may not be successful, the plaintiff may have only one child, the plaintiff's spouse may through choice assume a traditional role of caring for the children, to mention but a few. As Mr. Justice

Doherty stated in Graham v. Rourke, ***supra***, at page 634, "a plaintiff who establishes a real and substantial risk of future pecuniary loss is not necessarily entitled to the full measure of the potential loss. Compensation for future loss is not an all or nothing proposition. Entitlement to compensation will depend in part on the degree of risk established. The greater the risk of loss, the greater will be the compensation". Accordingly, on this item of expense which peculiarly counsel for the plaintiff presents as a present expense, I propose to apply a deduction for contingencies in the order of 30%. The amount that will be allowed for this item of damage is rounded to $88,450.00.

I reject the defendant's submission that the claim for child care is not an extraordinary expense. I accept the evidence that the amounts being claimed are for the extra cost of the care of the children which Mr. Goff is likely required to incur by reason of his disability. I also find the cost of the child care expenses to be reasonable.

I also find that the cost of the fertility testing expenses are likewise reasonable, and a pecuniary loss for which the plaintiff should be compensated. However the uncertainties involved in this aspect of the claim for present expenses causes me also to apply a 30% discount to this item of damage.

In view of my findings that Mr. Goff would <u>not</u> be employed in the future, I also disallowed the following items under exhibit 35, namely vocational plan development, vocational counselling strategies, job search strategies and labour market

research.

The defendants do not seriously dispute the balance of the present expense claims.

SUMMARY OF PRESENT EXPENSES:

I therefore find the following present expenses to be reasonable, and I award the plaintiff the following on account of present care expenses:

Category	Item	Amount
Medical Professional Services	Urolome Surgical Insert	$3,990.00
	Psychological Counselling	$6,825.00
	Vacuum Construction Device	$500.00
	Fertility Phase #1	$525.00
	Fertility Phase #2	$1,890.00
	Fertility Phase #3	$16,800.00
	Physiotherapy	$540.00
	Occupational Therapy Assmt.	$2,337.50
	Cognitive Treatment	$1,050.00
	CPA Membership	$26.75
Mobility	Other Wheelchair	$6,934.75
	Van	$29,325.00
	Wheelchair Lift	$4,555.00
	CAA Plus Membership	$15.00
	Leather Gloves	$42.74
Personal Support Services	Long Handled Broom	$57.95
Child Care Expenses	Child-Birth to 3 years	$33,906.60
	Child-3 years to 6 years	$22,113.00
	Child-6 years to 11 years	$9,828.00
	Second Child	$22,604.40
Residential	Stove/oven	$1,393.31
	Refrigerator	$1,953.85
	Washing Machine	$1,523.75
	Reacher	$24.94
	Moving Costs	$8,560.00
Recreational Activities	Membership	$535.00
	Total Present Expenses	$177,857.54

FUTURE CARE EXPENSES:

A future care expense table is set out in exhibit 35

(pages 8 to 11 inclusive).

Ms. Borovoy again prepared this list of future care expenses and Dr. Bharatwal reviewed the various items under medical care expenses and testified that they are all reasonable.

The parties agreed to a mortality rate of 200% for Bill Goff to be used in the assessment of future expenses.

The defendants dispute the reasonableness of the amounts claimed for the vacation assistance, the future housing expense, future attendant care and meal preparation cost.

The defendants have advanced a position that most if not all the present and future care expenses should be submitted to the no-fault insurer, and therefore do not form the basis of a claim in this court action. I will review this issue further in my Reasons for Judgment.

As with the loss of future earnings capacity, the standard of real and substantial risk equally applies to future care expenses.

The authorities which I have reviewed establish the principles for assessment of future care loss as follows:

(1) there must be a medical justification for claims for cost of future care

(2) the award must be moderate and fair to both parties

(3) the plaintiff need only prove that an item of expense is, from an objective point of view, "reasonably necessary" having in mind his or her particular circumstances;

(4) a division of future care costs must be made between initial capital outlay (present expenses) and ongoing expenses because the initial capital outlay (present expenses) will be calculated as a simple lump-sum, the

ongoing expenses (future expenses) must be discounted to present value and then grossed up to account for taxation of the interest generated by the lump-sum.

(5) an allowance must be made for the effect of taxation in computing damages for cost of future care

(6) to avoid duplication (with the award for costs of future care), a deduction for personal living expenses must be made from the award for lost earning capacity. (Andrews v. Grand and Toy (Alberta) Ltd. 1978 2 S.C.R. 229; Jaubert v. Rosetown (Town) 1987 60 Sask.R.200 (Sask.C.A.); Graham et al v. Rourke 1990 75 O.R.2d 622 (Ont.C.A.); Watkins v. Olafson 1989 61 DLR(4th) 577 (SCC); Tonneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital [1994] 1 S.C.R. 114)

With respect to the items of future care expenses, there was no duplication with respect to the personal living expenses in this case.

The plaintiff had Ms. Lori Borovoy, an occupational therapist, testify concerning the long term functional needs and cost of future care. Her assessment of the needs for Bill Goff were based on a review of the medical and rehabilitation files, personal interviews and assessment.

VACATION ASSISTANCE:

The plaintiff testified he wanted to travel in the future and he stated that he wanted to travel once a year overseas and once a year to Florida, or other such southern destination. His evidence was that the only way to accommodate a flight of more than one hour would be to lie down during the flight given his limited sitting tolerance. He indicated he would require three airline seats to permit him to lie down. He also would require assistance with transferring his luggage, a commode chair, as well as the wheelchair throughout the vacation.

It would also be reasonable for him to utilize a transportation service that could accommodate his requirements. Ms. Borovoy testified that the extra cost of the airline tickets would be the cost of two additional seats that he required. The present value of all future expenses in the vacation assistance category is $109,037.70, which is premised on two vacations a year. The defendant's position is that it is unlikely that Bill Goff will need or desire two vacations a year, and as well that his propensity to travel will likely diminish as he gets older. The defendants suggest that the amount of the claim should be reduced by 50% to $54,518.85.

The yearly calculation for vacation assistance amounts to $4,208.00. I do not consider the amount claimed to be unreasonable, nor do I consider two vacations a year to be excessive. I therefore reject the defendants' position and I accept this claim as reasonable.

FUTURE HOUSING EXPENSE:

The plaintiff called Mr. Jeffrey Baum as a witness to provide evidence on a future housing cost and accessibility issues. Mr. Baum is the president of Adopt-Able Design, which is a company which specializes in design and renovation of housing to accommodate the disabled.

Mr. Baum testified that he analyzed different housing options for Bill Goff, assuming that accommodation in Newmarket, Ontario would be the likely location of Mr. Goff's residence in the future. Bill Goff testified that he would likely choose to

live in the Newmarket area as he enjoyed growing up there. The housing options investigated by Mr. Baum included:

i) public rental housing
ii) private rentals
iii) purchasing a condominium
iv) purchasing a re-sale bungalow home
v) purchasing a new home
vi) constructing a new home

Mr. Baum investigated the housing market in the Newmarket area and he testified at the present time there are no rental units available that meet Mr. Goff's specific requirements. He further stated that there are very few condominium units available, and therefore he did not consider this a viable option. He also indicated that based on his research of the market, there were only two re-sale bungalow homes available and both would require modifications to accommodate Mr. Goff.

The plaintiff gave evidence that he felt a bungalow style home would be most suited to his needs. He testified that he would not like to live in an apartment or condominium, as they reminded him too much of the institutional hospital setting. The plaintiff indicated that he wanted to have a home with "green space", similar to the home he grew up in.

Mr. Baum testified that the cost to Bill Goff in purchasing his first home would be greater than the cost he would have incurred had he not sustained the injuries in the accident. He also stated that the additional cost associated with the purchase of a new home would include a lot premium which would allow for a larger lot to accommodate the larger garage which Mr.

Goff would require in order to facilitate the lift for the wheelchair in and out of his motor vehicle.

The evidence of Mr. Baum is that the extraordinary cost incurred by the plaintiff with respect to the purchase of this first home will be the difference between what he is required to pay for his home, and the average cost of a starter home. Mr. Baum testified that the average cost of a starter home in Newmarket is $155,000.

The plaintiff and Mr. Baum testified that there was a new home development built by Coughlan Homes in Newmarket, Ontario which would meet Mr. Goff's requirements. Mr. Baum testified that the purchase price for the Coughlan homes ranged from $299,900 to $359,900, not including the lot premiums of between $10,000 to $25,000.

Mr. Baum also testified that the average Canadian moves every five years, but that it would be reasonable to assume that Bill Goff would move once every 10 years. This would result in a total of two to three moves over the course of the plaintiff's lifetime. The evidence of Mr. Baum is that each time the plaintiff moves he will incur costs associated with accessibility modifications in the range of $50,000 to $70,000.

Filed as exhibit 26 in this proceeding, is a summary of the plaintiff's claim for future housing expenses. The exhibit provides for a low, mid and higher range for the purchase price, as well as a range for modifications and lot premium. The plaintiff urges the court to consider the mid-range costs for

purchase of a home, and to assume 2.5 moves over the lifetime of the plaintiff for the purpose of calculating the modification costs.

The defendants' position is that the future housing costs are more accurately reflected by only considering the extraordinary cost of renovating the home in addition to the cost of borrowing the monetary difference between the required three-bedroom home and the starter home. The defendants argue that the only extraordinary component of the plaintiff's claim is that he has to buy a three-bedroom home five years earlier than he would have. The premise of the defendants' is that if the plaintiff was likely to have been successful in his career upon graduation from Queen's University, then he would in all likelihood have purchased a starter home for $155,000. Then, based on the evidence that the average Canadian moves every five years, it is assumed that the plaintiff would then purchase the larger new bungalow such as is now proposed by the plaintiff. The defendants then argue that the measure of damages should be the calculation of the cost of borrowing additional funds to purchase the larger home now as opposed to five years from now.

In cross-examination the actuary, Mr. Collins, was asked to calculate the present value of the cost of borrowing $192,400 ($347,400 (cost of a three bedroom bungalow) - $155,000 (cost of a starter home) from January 1, 2000 (the time when Mr. Goff is required to buy the larger home) to January 1, 2005 (the date when Mr. Goff would have purchased a larger home in any

event). The total present value of the cost of borrowing $192,400.00 is $23,473.00 as detailed in exhibit 26.

In response to the defendants' position, counsel for the plaintiff refers the court to the decision in Dube (Litigation Guardian of) v. Penlon Ltd. (1994) 21 C.C.L.T.(2d) 268 (Ont.Gen.Div.) and Roberts v. Morana [1997] 34 O.R.(3d) 647 (Ont.Gen.Div.). The plaintiff points out that Mr. Justice Zuber's awarded $415,000.00 in the Dube case and Mr. Justice O'Brien's awarded $347,711.00 in the Roberts case for extraordinary accommodation, modification and moving expenses. Therefore the plaintiff's position is that the midpoint of the range for future housing expense ($329,900.00 to $474,900.00) namely $402,400.00 is reasonable under the circumstances.

It is my opinion that the simple comparison of the results obtained for housing costs in other cases is not of any particular assistance to the court, nor does it provide an effective measure of what is reasonable and fair to the parties to this litigation. It is trite law that the findings in each case are dependent on its own set of facts and evidence adduced at trial. A closer review of the Dube and Roberts cases indicates that the trial judges were presented with unique and quite different criteria for consideration of accommodation costs.

The standard for compensation is outlined in the trilogy of cases. In Andrews supra Dickson J. stated at page 603:

> "the money for future care is to provide physical arrangements for assistance, equipment and facilities directly related to the [plaintiff's] injuries. Additional money to make life more endurable shall then be seen as providing more general physical arrangements above and beyond those directly related to the injuries."

The physical arrangements to be used in assessing the cost of future care are based on what is required to preserve and promote the plaintiff's health. Again in Andrews, supra, Dickson J. said at page 586:

> "... to the extent, within reason, that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of the claim."

In Thornton, supra, the Supreme Court of Canada in defining "optimal care" stated at page 609:

> "... it is clear from the medical evidence that the term merely connotes an ongoing practical level of orderly care in a home environment."

Madam Justice McLaughlin in Milina v. Bartsch, supra, at page 34 stated:

> "It follows that I must reject the plaintiff's submissions that damages for cost of future care should take into account the amenities which serve the sole function of making the plaintiff's life more bearable or enjoyable. The award for cost of care should reflect what the evidence establishes is reasonably necessary to preserve the plaintiff's health. At the same time, it must be

> recognized that happiness and
> health are often intertwined."

The defendants' position namely of calculating the cost of borrowing funds to purchase a larger home now as opposed to five years later at first blush is attractive, nevertheless fails in my opinion. I acknowledge that in the realm of future care costs and future earning capacity the words of Justice Doherty in Graham v. Rourke, at page 634 ring true:

> "The trial judge who is called upon
> to assess future pecuniary loss is
> of necessity engaged in a somewhat
> speculative exercise."

Nevertheless, the purpose and focus of the court in assessing future care expenses is to assess the real and substantial risk of such expenses being incurred as a consequence of the accident. In my opinion, it does not follow that the court should speculate on the lifestyle of the plaintiff had the accident not occurred. I therefore reject the defendant's position.

I find that Bill Goff has an extraordinary expense for the purchase of a home which is directly related to the injuries that he sustained in the accident. As detailed previously, the plaintiff through its expert witness gave a range of values for the purchase of a home as well as the lot premium and future modifications. I noted however that Mr. Baum did not suggest that the lower value provided for the home purchase, the lot premium and renovations were inadequate to meet the plaintiff's needs. I also interpret Andrews v. Grand and Toy (Alberta) Ltd.

supra, to say that the standard is compensation not provision. As Mr. Justice Zuber stated in the Dube v. Penlon Ltd. at page 7:

> "...the principle that compensation should be for pecuniary loss is well established ..... The overriding principle is that damages should be reasonable, neither extravagant nor generated by sympathy or compassion but neither should they be niggardly or parsimonious."

Although the plaintiff asks for a mid range value between the lower and the higher range of values provided by Mr. Baum, there was no evidence that the low range would not meet or satisfy the plaintiff's requirements. Accordingly I propose to use the lower range of values as detailed in exhibit No. 26 and utilizing the present value factors as provided by Mr. Collins at exhibit No. 35, page 13, I calculate the future housing expenses as follows:

Purchase Price of Home	$299,900.00
Lot Premium	$10,000.00
Modifications	$50,000.00
	$359,900.00
LESS average cost of starter home	$155,000.00
Difference	$204,900.00

Cost of modifications for each future move $50,000.00
Total moves over lifetime - 2

Present Value of Housing Expenses
(based on a 200% mortality rating)

Date	Amount	Factor	Capital Amount
January 1, 2000	$204,900.00	0.965	$197,728.50
January 1, 2010	$50,000.00	0.735	$36,750.00
January 1, 2020	$50,000.00	0.551	$27,550.00

Total Present Value for Future Housing Cost $262,028.50

FUTURE LATE LIFE ATTENDANT CARE:

Dr. Bharatwal testified that once an individual such as Bill Goff has been in a wheelchair for 10 to 15 years, the likelihood of dependent care becomes essential. She further testified that between 10 to 15 years, post-injury, Bill Goff would require some level of care to assist him with his morning bladder and bowel routines on a daily basis.

Ms. Borovoy testified that she utilized Form 1 of Ontario Regulation 403/96 of the Insurance Act which provides an hourly rate of $15 for level three care (complex health/care and hygiene functions). Mr. Collins, the plaintiff's witness, prepared a late life attendant care expense calculation (exhibit 35, page 12) based on the evidence of Dr. Bharatwal and Ms. Borovoy and the need for future care at 12.5 years post-accident. Mr. Collins calculated the capital amount for future attendant care at $105,100.00. The plaintiff's counsel however, in their submissions to the court, suggested an hourly rate of $25 to be applied (present capital value of $183,485.00), as a more realistic reflection of the quality of attendant care that is required.

The defendants position is that the hourly rate of future attendant care costs is $15 per hour, and the plaintiff's submissions are not supported by the evidence. The defendants also had Mr. Segal calculate the figures for future care after age 50 at $40,502.00, and they submit that the award should be

made at an amount somewhere between Mr. Segal's calculations and Mr. Collins' calculations.

I find that the only evidence before the court is the calculation of future attendant care provided by Ms. Borovoy at $15 per hour. I further find that Mr. Segal's calculations of future care commencing at each 50 is inconsistent with the evidence of Dr. Bharatwal. Accordingly, I am allowing the claim for future late life attendant care in the amount of $105,100.00 (reference exhibit 35 page 12).

SUMMARY OF CLAIM FOR FUTURE CARE EXPENSES:

Based on the findings that I have made, and after reviewing the balance of future expenses which are not in serious dispute and which I find to be reasonable, the summary of future care extraordinary expenses are calculated as follows (reference exhibit 35, pages 8 to 12 inclusive):

Category	Capital Amount (present value and 200% mortality)
Medical	$196,524.75
Professional Services	$623,511.21
Mobility	$198,643.19
Personal Support Services	$364,884.51
Personal Care Equipment	$6,434.73
Residential Devices	$21,707.52
Vacation Assistance	$109,037.70
Recreational Activities	$23,705.60
Communication Expenses	$12,437.76
Future Housing Expense	$262,028.50
Late Life Attendant Care	$105,100.00
TOTAL	$1,924,015.40

CONTINGENCIES AND FUTURE CARE EXPENSES:

Counsel for the plaintiff's have referred me to Wenden

v. Trikha (1991) 8 C.C.L.T.(2d) 138 (Alta.Q.B.), where it was stated as a principle of law that contingencies for damages for cost of care should be given a separate consideration form those relating to the future loss of earning. I agree that the analysis under the two heads of damages has a different focus. Whereas the inquiry under loss of earnings focuses mostly on "what had been, but for the accident", the cost of future care analysis is the consideration of "what will now occur as a result of the accident". It follows then that the contingencies figure arrived at for loss of earnings should not therefore simply be transferred to apply to future cost of care.

The defendants position is that with the exceptions noted previously, the future expenses are largely necessary, reasonable in terms of costs, and are required for particular periods of time. However, the defendants urge the court to consider that not all the future expenses will necessarily be required over the full period, and that it is unreasonable to assume every expense will be required for the entire period of time. I have noted that the actuarial calculations of the future expenses are based on a 200% mortality rate and this has to be factored into the consideration of contingencies.

I find that there should be a deduction for contingencies for future care expenses in the amount of 10%, and that this sum would be reasonable to both parties in the circumstances.

The total amount of the future care expense after

deducting for contingencies is $1,731,613.90.

DEDUCTION OF PAST NO FAULT BENEFITS:

The parties agree that Bill Goff has received $32,005.00 in weekly no fault benefits from the accident benefit carrier, State Farm Insurance Company. The details of the amount of the payment are confirmed in a letter dated September 1, 1998, from State Farm and marked as exhibit No. 14 in these proceedings.

The motor vehicle accident occurred on July 9, 1992, and Section 267 of the Insurance Act RSO 1990 c.18 provides:

> 267.(1) "The damages awarded to a person in a proceeding for loss or damage arising directly or indirectly from the use or operation of an automobile shall be reduced by
>
> (a) all payments that the person has received or that were or are available for no fault benefits and by the present value of any no fault benefits to which the person is entitled."

The Statutory Accident Benefits Schedule-Accidents Before January 1, 1994, R.R.O. 1990 Reg 672, formerly the No-Fault Benefits Schedule ("SABS"), provides as follows:

PART IV

WEEKLY BENEFITS

Income Benefit

12(1) The insurer will pay with respect to each insured person who sustains physical, psychological or mental injury as a result of an accident a weekly income benefit during the period in which the insured person suffers substantial inability to perform the essential tasks of his or her occupation or employment if the insured person meets the qualifications set out in sub-section (2) or (3).

(2) The following qualifications apply to an insured person who claims a weekly benefit under subsection (1):

1. He or she must have been at the time of the accident,

i. employed or self-employed,

ii. on a temporary lay-off, or

iii. entitled to start work within one year under a legitimate offer of employment made before the accident and evidenced in writing.

2. He or she as a result of and within two years of the accident must have suffered a substantial inability to perform the essential tasks of his or her occupation or employment.

(4) Subject to subsection (5), the weekly benefit under subsection (1) will be the lesser of,

(a) $600 plus, if Option Benefit 2 has been purchased, the amount of the benefit chosen; and

(b) 80 per cent of the insured person's gross weekly income from his or her occupation or employment, less any payments for loss of income, except Unemployment Insurance benefits,

(i) received by or available to the insured person under the laws of any jurisdiction or under any income continuation benefit plan, or

(ii) received under any sick leave plan.

Benefit If No Income

13(1) The insurer will pay with respect to each insured person who sustains physical, psychological or mental injury as a result of an accident, a weekly benefit during the period in which the insured person suffers substantial inability to perform the essential tasks in which he or she would normally engage if he or she meets the qualifications set out in subsection (2).

(2) The following qualifications apply to an insured person who claims weekly benefits under subsection (1):

1. He or she as a result of and within two years of

the accident must have suffered a substantial inability to perform the essential tasks in which he or she would normally engage.

2. He or she must not be entitled to receive a benefit under section 12 at the time of the payment of a benefit under this section or, if entitled to a benefit under that section, he or she must be a primary caregiver as described in subsection (4) and have only income from self-employment from work in his or her home.

3. He or she must attain the age of sixteen years before being eligible to receive the weekly benefit.

(3) The weekly benefit under subsection (1) will be $185 less any payments for loss of income, except Unemployment Insurance benefits,

(a) received by or available to the insured person under the laws of any jurisdiction or under any income continuation benefit plan; or

(b) received under any sick leave plan.

* * * * *

(7) A person cannot receive benefits under this section and section 12 at the same time.

(8) The insurer is not required to pay a weekly benefit under this section,

(a) for the first week of the disability;

(b) for any period in excess of 156 weeks unless it has been established that the injury continuously prevents the insured person from engaging in substantially all of the activities in which the person would normally engage.

The first issue for determination is whether Bill Goff was receiving a S.12 Income Benefit or a S.13 Benefit if no income payment.

The defendants' in their submissions, acknowledge that the evidence at trial regarding the characterization of the

benefit was "conflicting and confusing". I note that in the case of Bannon v. McNeely (1998) 38 O.R.(3d) 659 (Ont.C.A.), Mr. Justice Finlayson stated at page 673 that the onus of establishing entitlement to future (and I would add past) payments of no fault benefits rests with the defendants:

> "In this appeal then, if the defendants (now appellants) wish to benefit from the operation of S.267(1)(a) then the appellants bear the onus of establishing the present value of any no fault benefits to which the plaintiffs (now respondents) are entitled.
>
> The standard of proof for establishing entitlement to no fault benefits under S.267(1) is very strict".

The defendant's position is that whether the no fault benefit is characterized as "income benefit" under Section 12 of Regulation 672, or a "benefit if no income" under Section 13, the past payment and the present value of future payments should be deducted pursuant to Section 267(1)(a) of the Insurance Act.

The defendants further submit that the past payment and the present value of future payments should be deducted from past and future loss of income respectively as they argue that the weekly no fault benefit relates to the income earning status of the plaintiff at the time of the accident. Accordingly, the defendants take the position that if the amount is not deducted there is double recovery by the plaintiff.

The evidence at trial concerning Bill Goff's employment status at the time of the accident is a letter from Norco, dated

November 18, 1992 (Exhibit 5), which states that Bill Goff had been working for approximately a week at the time of the accident. Therefore, based on that letter Bill Goff should have received a Section 12 benefit which would have been calculated as 80% of $232 or $185.60 per week (reference Section 4(b) and 12(7)1.iii Regulation 672).

However, the evidence establishes that Bill Goff actually received under Section 13(3) of Regulation 672, a weekly no fault benefit of $185.00 which is the "benefit if no income" amount.

The evidence further established that Bill Goff did not receive payments while he was a student at Wilfrid Laurier University. This fact further supports the suggestion that he was receiving the Section 13 benefit. The Section 12 benefit is not affected when the individual is a student.

The defendants called as a witness Ms. Helen Green, a claims specialist on behalf of the State Farm Insurance Company. She candidly admitted that there was considerable confusion as to whether Mr. Goff had been paid a weekly no fault benefit under Section 12 or Section 13 of the regulation. However, in her evidence Ms. Green acknowledged that it was probably the Section 13 benefit that Bill Goff was being paid.

I therefore find that the benefit that Bill Goff was receiving from the State Farm Insurance Company was a Section 13 "benefit if no income" payment.

Mr. Justice Finlayson, in Bannon v. McNeely supra at

page 671, indicated that:

> "Mrs. Bannon is entitled to future weekly disability payments of $185.00 per week as long as she remains disabled pursuant to Section 13 of the SABS as reproduced above. The parties agreed at the hearing of this appeal that the present value of these weekly disability benefits from the time of trial forward was $83,129, and the post no fault disability benefits already received was $34,780. The parties further agreed that through inadvertence, the trial judge failed to make these deductions that total $117,909 from the award, and therefore this amount should be deducted from the award."

In Bannon at page 675, the Court goes on to state:

> "Some of my responses to the appellants submissions on the general principles surrounding Section 267(1)(a) will become evident as I analyse their specific assertions below, but first I will address the issue of whether a deduction of no fault benefits under Section 267(1)(a) may be made against any head of damage under a tort award or whether the deduction must be from a head of damage covering that portion of the loss to which the no fault benefit can be attributed. Though some elements of the issue are not raised by the appellants, the issue is alive in this appeal at least to the extent of whether a no fault benefit received must be deducted from a tort award even if it is not claimed or brought into issue in the tort action and no damages for losses akin to which these no fault benefits were intended to compensate are awarded."

It is significant to note that Mr. Justice Finlayson in

Bannon v. McNeely, stated that the issue of Section 12 and Section 13 SABS payments was not being considered in that case. At page 680 he states:

> "The weekly disability no fault benefits as they are described presently in Section 12 and 13 of the SABS are not in issue in this appeal by reason of the agreement of the parties. The question of where and when they should be deducted was not argued and I do not propose to deal with the treatment these sections have received in the authorities referred to above."

It is essential to delineate the principles set forth in Bannon v. McNeely in order to determine the deductibility, not only of the past and future Section 13 payments, but also in relation to the future care expenses and Section 6 & 7 of the SABS which I will deal with later in these reasons for judgment.

In Bannon v. McNeely, the correctness of the reasoning in Marshall v. Heliotis (1993) 16 O.R.(3d) 637 (Gen Div) and the several cases which have followed it is discussed. The comments of Justice Finlayson in Bannon supra, in my opinion, are significant in relation to the position taken by the defendant's in this proceeding. I interpret the reasoning in Bannon v. McNeely to mean that it does not follow that there is an automatic deduction of Section 13 past and future payments from a tort award, unless it can be clearly shown that it relates directly to a head of damage in the tort action. Indeed at page 678 of Bannon v. McNeely supra, it is stated:

> "In my respectful opinion, the

> conclusion that a particular no fault benefit does not relate squarely to a head of damage, does not support necessarily the further conclusion that *any* no fault benefits must be deducted from the totality of a tort award regardless of the manner in which the award was structured."

Justice Finlayson in Bannon v. McNeely, cites with approval the reasoning of the British Columbia Court of Appeal in Jang v. Jang, (1991) 54 B.C.L.R. 2d 121 and the matching principle delineated in that case. Accordingly, Justice Finlayson in Bannon v. McNeely (at page 679), states the principle that:

> "where possible, any no fault benefit deducted from a tort award under Section 267(1)(a) must be deducted from a head of damage or type of loss akin to that for which the no fault benefits were intended to compensate. In other words, and employing the comparison of Morden J. in Cox, supra, if at all possible, apples should be deducted from apples and oranges from oranges."

In considering this matter, I have noted Justice Finlayson's comments that it is a principle of statutory interpretation that courts are to respect the intent of the legislature as much as possible, and therefore a section of a statute should be read to comply with the legislative text as well as to promote the legislative purpose and also to produce a reasonable and just meaning.

The policy underlying the abolition of the collateral source rule and its replacement by Section 267(1)(a) and the SABS

is that:

> "there is to be no duplication in a tort judgment with respect to no fault benefits obtained or obtainable under the SABS. Paragraph 267(1)(a) was not intended to penalize plaintiffs in a tort action arising from a motor vehicle accident." (Bannon supra at page 679)

In summary then, Bannon v. McNeely supra directs a consideration of the heads of damage awarded in a tort action, and the deduction of no fault benefits from any tort award to the extent required to prevent double recovery.

With those principles of law in mind, I then turn to a consideration of what if any head of damage the Section 13 benefits should be deducted. The section provides that:

> "the insurer will pay .... a weekly benefit during the period in which the insured person suffers substantial inability to perform the essential tasks in which he or she would normally engage ...."

It is worthwhile contracting this language with that under Section 12(1) which provides that:

> "the insurer will pay .... a weekly income benefit during the period in which the insured person suffers substantial inability to perform the essential tasks of his or her occupation or employment ...."

Applying the matching principle, payments under Section 12(1) would clearly be income benefits and accordingly, any weekly payment made in the past or future would be deducted from a past loss or future loss of income claim. The amount of the

benefit as detailed under Section 12(4) is significantly greater than the benefit under Section 13(3) of the Regulation.

However, it is evident that Section 13(1) is a benefit to compensate for an inability to perform essential tasks which is markedly different from the purpose of Section 12(1). Further, Section 13(8)(b), provides that the insurer is not required to pay a weekly benefit:

> "for any period in excess of 156 weeks, unless if has been established that the injury continually prevents the insured person from engaging in substantially all of the activities in which the person would normally engage".

The defendants position, as stated previously, is that the Section 13(1) payment should be deducted from the past and future loss of income respectively as the weekly benefit relates to the earning status of the plaintiff. I find that the defendants position fails. A clear and simple reading of Section 13(1) demonstrates that the benefit is not in any way related to a loss of income, past or future. Instead the section details that it provides a benefit for those insured persons who suffer an inability to perform essential tasks in which he or she would normally engage. The wording of the statute does not, in my opinion, proport to award or compensate damages for a loss of income. Indeed, that is the function of Section 12(1).

Applying the onus and standard of proof referred to in Bannon v. McNeely, I find that Section 13(1) payments are not income related payments, and the defendants have failed to

establish that the past and future payments are to be deducted from the past loss of income or future loss of income head of damage.

I was also referred to a recent decision of Brownell v. Tannahill [1998] O.J. No. 4216 (Ontario Court General Division), wherein Justice Murphy decided that payment for benefits under Section 13 are not akin to an award under general damages for loss of amenities. Non pecuniary general damages are intended to compensate for past and future pain, suffering, psychological distress, cognitive impairment, physical disfigurement and loss of enjoyment of life. The post 156 week test under Section 13(8) of the SABS, on the other hand is exclusively related to activities. Therefore, I find that Section 13(1) benefits, past and future, are not a payment which matches a general damage award.

Therefore, based on the findings which have been made, there will be no deduction for the past or future Section 13(1) payments. I further find that there is no double recovery to the plaintiff who receives a benefit under Section 13(1) of the SABS.

DEDUCTIBILITY OF FUTURE CARE BENEFITS:

Applying the principles of the Bannon case supra, which sets forth a "matching" and "entitlement test", and which places an onus on the defendant seeking a no fault benefit deduction to meet the following fourfold criteria:

i) identify or characterize the benefit;

ii) present evidence that the benefit matches up with a head of damages in tort;

iii) demonstrate that it is "beyond dispute" that the plaintiff is entitled to the no fault benefit "in every respect" and

iv) quantify the benefit by establishing its present value as required by Section 267(1) of the Insurance Act.

In Bannon supra, Justice Finlayson stated at page 687:

> "Supplementary medical and rehabilitation and care no fault benefits prescribed under Sections 6 & 7 of the SABS .... are intended to compensate for a head of damage or type of loss akin to that of future care."

The defendant's position with respect to the deductibility of benefit payments received under Sections 6 & 7 of the SABS is that:

a) since the plaintiffs have not claimed in the tort action for past costs of care, the defendants are not asking the court to deduct the $220,914.37 in supplementary medical and rehabilitation no fault benefits already received by the plaintiff (Exhibit 14, Tab 7).

b) that all future supplementary medical and rehabilitation no fault benefits and future attendant care no fault benefits should be deducted from the corresponding head of damages in the tort judgment.

c) that all future housing costs and present expenses are likewise covered under the SABS, and therefore deductible.

The defendant's called Ms. Gail Green, a claims representative on behalf of State Farm Insurance Company, to establish that the plaintiff Bill Goff is entitled "beyond dispute" to the future no fault benefits in every respect. While Ms. Green's evidence was to the effect that it was beyond dispute that Mr. Goff was entitled to the various benefits enumerated

under Sections 6 & 7 of the SABS, nevertheless, the past course of conduct of the Accident Benefit Insurer and the requirement to qualify for benefits do not suggest that the plaintiff will automatically be paid the benefits to which he may be entitled.

In the circumstances, I am persuaded that the application of a Cox v. Carter Order is appropriate in the circumstances of this case. I do not think in the circumstances relating to the serious and catastrophic injuries sustained by Mr. Goff that there is any serious dispute about his entitlement to the various benefits under Sections 6 & 7 of the SABS. However, there are limits to the payments as detailed in the regulations, and as stated previously, a substantial amount of supplementary medical and rehabilitation no fault benefits have been paid out to date. There is a real doubt in my mind as to how long the entitlement will continue, and which benefits will actually be paid by the No Fault Benefit carrier. Accordingly, a Cox v. Carter Order will require the plaintiff to hold in trust for the defendant the future long-term disability payments received from the no fault carrier, and to the extent of the Judgment, pay them over to the defendant.

The Cox v. Carter Order will then specifically apply to any of the present expenses and future housing costs as detailed in this Judgment, and which are provided for under Sections 6 & 7 of the SABS, as well as all future supplementary medical and rehabilitation no fault benefits and future attendant care benefits as provided by the Regulation.

The defendants did not provide evidence of the present value of these various deductible no fault benefits, however, in the circumstance of a Cox v. Carter Order, I find such evidence is not necessary.

In order to implement the Cox v. Carter type Order, I accordingly order:

(a) There will be a declaration that the plaintiff, William Goff, shall hold in trust for the defendants and pay over to the defendant all present and future housing expenses as detailed in the Judgment, as well as all future supplementary medical and rehabilitation no fault benefits and future attendant care benefits received from the State Farm Insurance Company subsequent to September 8, 1998, up to a total amount not to exceed the amounts the defendants have been ordered in this Judgment to pay Bill Goff.

(b) In the event that the State Farm Insurance Company should terminate or refuse to pay benefits, this court orders that Bill Goff shall immediately assign to the defendants his right against State Farm Insurance Company.

(c) This court further orders Bill Goff to co-operate in the prosecution of any action taken by the defendants against State Farm Insurance Company.

(d) After the resolution of any such action, the defendants are to credit the proceeds of the action as though the monies had been received by Bill Goff from State Farm Insurance Company and paid to the defendants.

(e) The defendants are then to re-assign to Bill Goff his rights against State Farm Insurance Company, unless he is a party to any settlement which the defendant may reach with it and consents to the settlement satisfying his claims against State Farm Insurance Company.

FAMILY LAW ACT CLAIMS OF THE GOFF FAMILY:

The parties have agreed that the Family Law Act claims of Haig and Olga Goff, the grandparents of Bill Goff, are agreed to in the amount of $5,000 each and accordingly I find this sum

to be reasonable and it is so awarded.

I find that Bill Goff had a close and supportive relationship with all his family members prior to the motor vehicle accident. The Goff family participated in numerous activities including vacations together. While Bill Goff remains close to his family members, it is also evident that the relationship has changed dramatically, both in terms of activity level and on the psycho-emotional level, as Bill Goff attempted to cope with his catastrophic injury.

There is also ample evidence that both parents and his brother Greg Goff have suffered a loss of care, guidance and companionship.

All of the family members have been diligent in their efforts to visit with Bill Goff regularly, and to provide emotional support to him.

I therefore award non-pecuniary damages, pursuant to Section 61 of the Family Law Act, as follows:

(A)	Betty Goff (mother)	$50,000
(B)	Ken Goff (father)	$50,000
(C)	Greg Goff (brother)	$20,000

PRE-JUDGMENT INTEREST & GROSS UP:

The parties have agreed that they will make further submissions concerning the calculation of pre-judgment interest. Further, on consent, the applicability of a gross up or a structured settlement will be the subject of further submissions upon the release of these Reasons for Judgment.

DAMAGE SUMMARY FOR THE PLAINTIFFS' GOFF:

(A) BILL GOFF:

1)	Non-Pecuniary General Damages	$260,561.00
2)	Past Loss of Income	$63,612.00
3)	Future Economic Loss	$1,512,218.40
4)	Past Attendant Care	$23,662.90
5)	Present Expenses	$177,857.54
6)	Future Care Expenses	$1,731,631.90
	TOTAL	$3,769,543.70

There has yet to be added the amount for pre-judgment interest and of course the amount of the damages has to be reduced by 20% to reflect the agreement of the parties concerning the seat belt defense.

FLA CLAIMS:

Betty Goff	$50,000
Ken Goff	$50,000
Greg Goff	$20,000
Haig Goff	$5,000
Olga Goff	$5,000
TOTAL	$130,000

Once again, pre-judgment interest has not been calculated on the above amounts, and as well these amounts are subject to the 20% reduction by reason of the seat belt defense.

Pre-judgment interest and the matter of gross up are to be argued after the Judgment has been delivered with appropriate

consideration of Section 116 of the Courts of Justice Act, RSO 1990 c.C.43.

I would therefore request that counsel for all the parties contact the Trial Co-ordinator at Whitby in order to make further submissions concerning Section 116 of the Courts of Justice Act, as well as pre-judgment interest and costs and to bring to my attention any mathematical error that may be disclosed in these Reasons for Judgment.

Judgment Accordingly.

JUSTICE J.B. SHAUGHNESSY

RELEASED: FEBRUARY 2, 1999.

Court File No. 26021 & 26022/92

ONTARIO COURT (GENERAL DIVISION)

B E T W E E N :

JOHN ADRIAN ROYCROFT, MARY CHRISTINA ROYCROFT, TIMOTHY JAMES ROYCROFT, AVERYL ROYCROFT, JULIA SMITH, WILLIAM GOFF, KENNETH GOFF, ELIZABETH GOFF, GREGORY GOFF, HAIG GOFF and OLGA GOFF

Plaintiffs

- and -

STEPHEN KYTE, JULIE M. KYTE THE CORPORATION OF THE TOWN OF EAST GWILLIMBURY

Defendants

REASONS FOR JUDGMENT

SHAUGHNESSY, J.

RELEASED: February 2, 1999
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