COURT FILE NO.: 01-CV-215985CM3
DATE: 20040415

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

JUDITH LYTLE, MIKE MCCALLION, YVONNE LYTLE AND ALAN LYTLE	)	*L. Craig Brown,* for the Plaintiffs
PLAINTIFFS	)	
- and -	)	
CITY OF TORONTO AND ROANNE ROBERTSON	)	*Adriana De Marco,* for the Defendant, City of Toronto
DEFENDANTS	)	
	)	*Glenn Harvey-McKean,* for the Defendant, Roanne Robertson
	)	HEARD: November 17 – 28, 2003 & December 8 – 12, 2003

DAY J.

Facts, Law and Findings on Liability

[1] On May 24, 2001, Judith Lytle was walking westerly on the sidewalk on the north side of Lawrence Avenue West, just east of Avenue Road destined for Yonge Street. She caught her foot and fell forward landing on her hand, her right knee and face. She stated in her evidence that she saw nothing ahead of her before the fall and that immediately after the fall she saw pipes, including an L-shaped pipe, strewn across the sidewalk. She severely injured her right elbow in the fall.

[2] Site pictures taken by Ms. Lytle's friend, Christine Desmond, very shortly after the fall indicated pipes, including an L-shaped pipe, standing vertically against the retaining wall at the edge of the property at 216 Lawrence Avenue West, with the base of the L-shaped pipe running

parallel and close to the wall. The evidence of Ms. Lytle was that when she first saw the pipe immediately after the fall, it was strewn across the sidewalk. The inconsistency regarding the position of the pipe between the taking of the photo and Ms. Lytle's evidence, taken at face value, could be explained by someone having lifted the pipe and placed it against the retaining wall at 216 Lawrence Avenue West between the time of the fall and the time when the pictures were taken.

[3] The property at 216 Lawrence Avenue West is owned by the defendant, Roanne Robertson, who cohabits at that location with her spouse, John Miles. The pipe had been used in the backyard as a trellis. Mr. Miles had removed it for disposal. Mr. Miles testified that he put the rods out on the street on Saturday of the Victoria Day weekend in 2001, and left them standing against the wall. The accident occurred some five days later, on Thursday, May 24th, 2001.

[4] The Garbage and Recycling Collection Calendar applicable to the time in question, distributed to all householders, provided as follows:

> Appliances and Scrap Metals
>
> - Call 392-7742 for collection
> - Picked up by appointment only.

[5] City of Toronto, By-law No. 235-2001, Article II, §844-7 A provides:

> The City shall provide special collection services to an owner with respect to the items referred to in Schedule A of this chapter provided that:
>
> (1) The owner contacts the department prior to setting out the item requiring special collection services; and
>
> (2) The owner complies with all directions of the department with respect to the preparation of the affected item for setting out and collection.

[6] Schedule A includes a number of items. Of those, Item (10) provides for "Large metal objects (e.g. aluminum door)." The subject pipes are large metal objects and clearly the subject of a special collection as provided in the bylaw and referred to in the Garbage and Recycling Calendar distributed to householders. "Aluminum door" is given only as an example and does not provide a limiting factor.

[7] City of Toronto, By-law No. 235-2001, Article V, §844-20 provides:

> No person shall:

> A. Place, permit to be placed or permit to remain on or in any street abutting the property which they own or occupy any waste, except as expressly authorized by this chapter.

[8] Neither Ms. Robertson nor Mr. Miles was aware of the special collection provisions. Hence, no call was made by them to the City for collection of the subject pipes.

[9] David Gardner, a foot patroller for the City, gave evidence on behalf of the City. The subject location is within his territory. The pipes in question are not the kinds of things he would be looking for. Principally, he looks for defects in the road allowance, such as pot-holes, deviation in sidewalk, missing signs, wires down and the like. He was shown a photograph of the pipes in question and said he would not consider that to be a hazard because there was lots of room on the sidewalk. He said he did not recall seeing those pipes on April 9, May 2 or May 23, being the days that he canvassed that particular area.

[10] Mr. Arnold Ridge gave evidence on behalf of the City. He supervises collections. The subject area is within his territory. His primary focus is to ensure that the garbage collection trucks are keeping up to schedule. When he looked at the photograph of the subject pipes against the retaining wall at 216 Lawrence Avenue West, he stated that those would not be picked up by regular collection. They are the subject of special pick-up. He would have been by the subject area on Tuesday, May 22, 2001 and does not recall seeing the pipes. Nor was he aware of their presence prior to the lawsuit.

[11] No one witnessed the event other than Ms. Lytle herself. Her first recollection of seeing the pipe was observing them lying across the sidewalk immediately after her fall. From this I would conclude that the pipe upon which she tripped was either lying flat on the sidewalk perpendicular to the wall or that it was vertical, leaning up against the retaining wall, when she walked into the pipe, causing her to trip and fall, and causing the pipe to fall with her, again taking her evidence at face value.

[12] The photos of the subject pipes at exhibit 9 indicate that the pipes do not stand out, clearly presenting a hazard to the unwary pedestrian. The pipes are variously coloured green, grey and rusty yellow, and partially coloured a mottled green, yellow, rust and grey. If a pedestrian was not looking for them or paying close attention to her immediate environment, it is understandable that she would miss them altogether. By contrast, a refrigerator or stove left on the sidewalk would be obvious to the passing pedestrian to step around. Sidewalk pedestrians are entitled to expect the sidewalk to be free of obstacles, more so if the obstacles do not visually stand out.

[13] The weight of the pipes alone would exacerbate their unforgiving nature to the unwary pedestrian. Also, the positioning of the pipes against the wall was precarious and lent the pipes to being knocked over.

[14] There were opportunities for the City to spot and deal with this obstruction; however, in fairness to City personnel, the pipes would be easy to miss if they were not being specifically

sought out. Neither of the City's witnesses who canvassed the area would have had such obstruction within their terms of reference. Nor was any evidence adduced or authority presented indicating a policing obligation on the part of the City to ensure that homeowners refrain from putting out such obstructions. Accordingly, I do not find that the City owed a duty of care to pedestrians in such circumstances.

[15] In the case law presented, where contributory negligence was found on the part of the municipality, it was where the municipality had failed in its obligations to repair. The obligation on the municipality comes from s.284(1) of the *Municipal Act* R.S.O. 1990, c.M.45 which provides:

> The council of the corporation that has jurisdiction over a highway or bridge shall keep it in the state of repair that is reasonable in light of all the circumstances, including the character and location of the highway or bridge.

[16] While a highway includes a sidewalk under the *Municipal Act*, keeping the sidewalk in a reasonable state of repair does not include an obligation on the City to right the wrong of an adjacent owner who illegally or negligently creates an obstruction. The primary liability is on the original tortfeasor, being the owner of the adjacent property who single-handedly caused the obstruction.

[17] Thus, I find no liability against the City.

[18] Even if negligence were to be found against the City of Toronto, in ***Holland v. York (Township),*** [1904] 7 O.L.R. 533, Meredith C.J.C.P. stated that where a municipality is sued for a highway being in a state of disrepair owing to the negligence of a third party, such third party is liable over the municipality. At paragraph 21, Chief Justice Meredith said:

> I found at the trial that the third parties placed the cinders upon the road, and it follows therefore that the defendants are entitled to recover over from them the damages and costs, together with their (the defendants') costs of defence and of the third party proceedings.

[19] I quote from the above to highlight that in like circumstances, even if the municipality were found to be liable for the misfeasance of the adjoining owner, the municipality could recover those damages plus costs from that adjoining owner. In ***Holland, supra,*** only the municipality was sued; the adjoining owner was not sued. Thus, applying the rationale of *Holland* to the present case, even if there should be a finding against the City, the City would be able to claim over against the adjoining owner for full recovery.

[20] Moreover, the municipality has a statutory right to indemnification set out in s.289 of the *Municipal Act*:

> (1) Where an action is brought to recover damages sustained by reason of any *obstruction*, excavation or opening in or near a highway or bridge placed, made,

> left or maintained *by an person other than the corporation* or an employee or agent of the corporation, or by reason of any negligent or wrongful act or omission or any person other than the corporation of an employee or agent of the corporation, the *corporation* has a *remedy over against such other person* for and *may enforce payment of the damages and costs that are recovered against the corporation*.
>
> (2) The corporation is entitled to such remedy over in the same action if the other person is a party to the action and it is established in the action as against that person that the damages were sustained by reason of an obstruction, excavation or opening so placed, made, left or maintained by that person.
> [emphasis added]

[21] As to the question of Ms. Robertson's liability, the plaintiff argued that Ms. Robertson was negligent and in breach of her duty under the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2. Subsection 3(1) of the *Occupiers' Liability Act* provides:

> An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.

[22] In order for Ms. Robertson to be liable under that Act, she must be considered an "occupier" of the sidewalk abutting her property. "Occupier" is defined in s. 1 as including:

> (a) a person who is in physical possession of premises, or
>
> (b) a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises,

[23] Under either definition of "occupier", I do not find Ms. Robertson, as the owner of the property abutting the sidewalk, to be an "occupier" of the sidewalk. Ms. Robertson is not in physical possession of the sidewalk, as sidewalks are clearly the City's property. Nor can Ms. Robertson be considered to have assumed control of the sidewalk simply on the basis that she put garbage out on the sidewalk for pickup. *Moody v. Toronto (City),* [1996] O.J. No. 3418 (Gen. Div.) makes clear that property owners do not owe a duty of care to users of a public sidewalk adjacent to its property absent special circumstances. The facts before me do not disclose such special circumstances. I therefore find that the *Occupiers' Liability Act* does not apply.

[24] There remains, however, the question of whether Ms. Robertson owes a common law duty of care to Ms. Lytle. In *Bongiardina et al. v. Corporation of the City of Vaughan* (2000), 49 O.R. (3d) 641, the Court of Appeal held that the municipality has legal responsibility for snow and ice accumulating on public sidewalks, but it also described two exceptions to this general principle at paragraphs 21 and 22:

> … First, a property owner may be deemed in law to be an occupier of adjacent public property if the owner assumes control of that property….
>
> The second exception to the general principle that a property owner is responsible only for his or her property is that the duty of care on the owner extends to ensuring that conditions or activities on his or her property do not flow off the property and cause injury to persons nearby….

[25] Applying the second exception to the facts before the Court, I find that Ms. Robertson failed in her duty of care as the owner of the property adjacent to the sidewalk. She acquiesced in the removal of the pipes from her property to the sidewalk against her property wall. She continuously observed the pipes at their location, and she should have been aware of the hazard that such pipes would present to pedestrians. She should have ensured that such pipes would not be taken from her property and left where they were, creating the nuisance and the hazard that resulted in the accident. She did nothing.

[26] I therefore find liability against Ms. Robertson.

[27] This leaves the question of contributory liability on the part of Ms. Lytle.

[28] In terms of contributory negligence by the victim, the cases go from high percentages to zero.

[29] In *Dean v. Credit Valley Conservation Authority*, [1993] O.J. No. 2389 (Gen. Div.) (QL), MacKenzie J. found that the plaintiff was not at all negligent when he fell on an accumulation of water in a hallway of a swimming pool complex.

[30] This was stated by MacKenzie J. at para. 30 to be in contra-position to the findings of Justice Then in *Bogoroch v. City of Toronto*, [1991] O.J. 1032 (Gen. Div.), which was a slip and fall on the sidewalk:

> Mr. Justice Then found that the plaintiff did not focus his attention onto the sidewalk but rather focused it on the front door of the store and that by reason of his failure to keep a proper lookout, the plaintiff must be deemed to have contributed to the accident. In that case, the court found that the plaintiff was 40% liable for injuries occasioned as a result of his slip and fall on the sidewalk.

[31] Mackenzie J. found at para. 32 that the plaintiff before him was not in the same position as the plaintiff in *Bogoroch* because it was this plaintiff's first visit to the facility and there were no warning signs or notices to users of the facility about the accumulation of water.

[32] In *Ellington v. Castles,* [1990] O.J. No. 622 (H.C.J.), involving a slip and fall on a patch of ice on the sidewalk, Sutherland J. found at para. 52 that "… The conditions were such as to put a reasonable person very much on her guard. In the circumstances, she was not keeping a

proper lookout or walking with sufficient care and attention." He imposed 25% contributory negligence on the plaintiff even where there was an expectation of hazard.

[33] *Collict v. Loblaws Supermarket Ltd.,* [1995] O.J. No. 4168 (Gen. Div.) was about a slip and fall over loose, missing and broken tiles. In that case, Mandel J. found at paragraph 26 that "…The condition that the area was in was evident and manifest. The weather was clear. There was no obstructions whatsoever." And at paragraph 27:

> In my view, the plaintiff in the circumstances of this case was negligent in that she neither observed her surroundings, having traversed the area and having stood in the area for a period of time and which area was an unsafe area, nor watched where she was walking in an area where in effect the danger which she described was apparent and evident. She was not taking care for her own safety. I would assess such contributory negligence at 25 percent.

[34] The present case has characteristics remarkably similar to *Ellington v. Castles*, *supra,* and to *Collict v. Loblaws Supermarkets Ltd, supra.* If Ms. Lytle had a critical eye out for her surroundings, she would have spotted the obstruction. Applying the rationale of both the above-noted cases, I find 25% contributory negligence on the part of Ms. Lytle to be appropriate in the present circumstances.

General Damages

[35] Ms. Lytle suffered minor injuries to her chin and right knee. Her major injury was a fracture of the right capitellum on which Dr. Axelrod performed surgery using two Herbert screws. Dr. Axelrod performed open reduction and internal fixation of the elbow intra-articular fracture with gross displacement, under general anesthesia. The elbow was successfully reconstructed. The fracture clinic record 1½ years after surgery indicated ongoing chronic pain at the right elbow. The fracture clinic record in March of 2003, almost two years post-accident, indicates continuing pain at the right elbow.

[36] Ms. Lytle was left with a nine-centimeter scar in the radial aspect of her right elbow. While the scar is clearly visible, I find her aesthetic disfigurement to be minimal.

[37] Her range of motion is compromised to a minor degree.

[38] A prognosis of avascular necrosis of the capitellum is speculative.

[39] Dr. Robin Richards is Surgeon-in-Chief at Sunnybrook and Women's College Health Services Centre. He examined Ms. Lytle in January 2002 and on May 12, 2003. Dr. Richards considered Ms. Lytle to have permanent occupational, household and recreational limitations as a result of the accident. She is not able to use her right upper extremity for impact activity, heavy lifting and activity requiring full range of elbow motion or any type of repetitive or forceful activity. He also stated that Ms. Lytle may require further surgical treatment if she were to develop post-traumatic degenerative arthritis in her elbow. He placed the possibility of this

occurring in the 5-10% range over her lifetime. If she were to develop post-traumatic osteoarthritis, the probable intervention that might be required would be an arthroscopy, a soft tissues release, and elbow arthroplasty or even an elbow arthrodesis.

[40] In his oral evidence, Dr. Richards said that he considered her symptoms to be permanent and that the likelihood would be that they would increase with the passage of time combined with further wear and tear on the elbow.

[41] Ms. Lytle's pre-accident medical history indicates a number of health issues including lupus and fibromyalgia which are under control. Lupus causes significant photo-sensitivity as well as fatigue. In addition, she suffers from a hypo-thyroid condition which is also under control.

[42] Ms. Lytle also suffered a remarkably similar left arm injury from a bicycle accident some time prior to the subject accident. The strength in her left arm was substantially reduced following her prior accident, as a result of which she compensated by relying on her right arm. With the subject accident and consequential injury to her right arm, she is doubly affected because she does not have the strength in her left arm to compensate.

[43] In short, Ms. Lytle's health and overall fitness were in a compromised state at the time of the subject accident. Thus, the effect of the subject injury has seriously exacerbated her ongoing health concerns prior to and following the accident. It has had a multiplier effect.

[44] The ongoing pain breeds its own ongoing fatigue. The combination of loss of range of motion, pain at the ends of the range, loss of strength in the right arm, increased fatigue and loss of endurance has a far-reaching effect on her ongoing quality of life. As a result, her previous outdoor activities such as hiking, skiing, canoeing and camping have been substantially curtailed.

[45] The fact that Ms. Lytle managed to lose such little time from work and from her musical endeavours appears to be because of her ability to tough it out. Dr. Lista, in his evidence, was of a view that this was likely to change. He said:

> … Patients can overcome pain and they can accomplish tasks in pain for a certain period of time, but eventually it just hurts too much. … Patients just have to decide whether or not that activity is worth the constant pain. And eventually they will slow down, they decrease or they give it up altogether.

[46] Dr. Lista also spoke of her reduced ability to do housework and of her requiring assistance for daily living.

[47] Counsel for the plaintiff in the circumstances suggested general damages in the range of $85,000 to $90,000.

[48] I liken the plaintiff's case somewhat to the plaintiff in *Carreiro v. Ontario (Superintendent of Insurance)* (1994), 19 O.R. (3d) 332, a decision of Wilkins J. of this Court.

In that case the plaintiff suffered a fractured elbow joint; surgery was required and resulted in a four-inch scar directly over the bend in the elbow. There was medical evidence that the plaintiff had a 50/50 chance of developing post-traumatic arthritis. Looking at the plaintiff's life as a whole in that case, there was no area in which she was seriously impaired, nor was there any area in which she was probably going to be seriously impaired in the future. Notwithstanding that she suffered disability and discomfort and had restrictions, none of those restrictions had, in any significant way, affected her employment, her social life or her recreational life to a degree that could be described as serious impairment. She had some restrictions and inability to move heavy furniture or conduct heavy work chores. Otherwise her evidence disclosed that she functioned quite normally. She continued to ride a bicycle, swim, attend a gymnasium and clean and maintain her own home. She had recently taken up roller-blading. Her social life remained substantially unimpaired.

[49] While the facts in the present case are remarkably similar to those in *Carreiro,* a major difference between these two cases is that Ms. Lytle was already in a vulnerable condition before the accident, which magnified the consequences of her injury. As the Supreme Court of Canada has noted in *Andrews v. Grand & Toy Alberta Ltd.,* [1978] 2 S.C.R. 229 at 263, figures for non-pecuniary losses "must be viewed flexibly … in recognition of the inevitable differences in injuries, the situation of the victim, and changing economic conditions."

[50] The injuries to the plaintiff in *Carreiro* are noticeably different from the injuries to Ms. Lytle in terms of their future impact because of the differences in their pre-accident conditions. As described above, Ms. Lytle already had a weakened left arm prior to the accident. As a result she has substantially reduced strength in her left arm which prevented her from being able to compensate for the subsequent injury to her right arm. The plaintiff in *Carreiro* had no such pre-existing condition.

[51] I am, therefore, awarding general damages at $75,000 to reflect the fact that the injuries sustained by Ms. Lytle, unlike the plaintiff's injuries in *Carreiro*, are made more pronounced by her pre-accident condition. The award of $75,000 calculates to a conservative 25% higher than the $60,000 awarded in *Carreiro.*

Special Damages

Past Income Loss

[52] Ms. Lytle states her past income loss at $5,224.85. Mr. Colangelo calculates her past income loss at $3,110. Mr. Colangelo's number is not challenged.

[53] Accordingly, past income loss is calculated at $3,110.

Massage Therapy

[54] Ms. Lytle claims $5,980 for massage therapy following the subject injury.

[55] Dr. Engineer did not recommend physiotherapy. In his evidence he said that it might improve range of motion and that it was doubtful that it would add any strength. The evidence of Ms. Percy, an occupational therapist, seemed on balance to favour massage therapy for the overall well-being of Ms. Lytle, without being specific. Counsel for Ms. Lytle invites the Court to allow the injured party latitude unless the claims are shown to be frivolous. I take a different view. The onus is on the plaintiff to establish the requirement for at least the advisability of massage therapy to assist Ms. Lytle in her post-accident recovery on a balance of probabilities. I do not find sufficient evidence to make such a finding and make no award in favour of the plaintiff as regards massage therapy.

Taxi Service

[56] Ms. Lytle claims $353 for taxi service to meet her travel needs as a result of the accident. The amount seems eminently reasonable, almost minimal to what would be expected. Accordingly, an award is made for $353 for taxi service.

OHIP Subrogated Claim

[57] The amount of the OHIP subrogated claim is $5,556.44. It is unchallenged.

Future Care Costs

[58] The principle invited by counsel for the plaintiff to determine future care cost comes from the decision of Lacourciere J.A. in *Schrump et al v. Koot* (1978), 18 O.R. (2d) 337 at 339-40:

> In this area of the law relating to assessment of damages for physical injury, one must appreciate that though it may be necessary for a plaintiff to prove, on the balance of probabilities, that the tortious act or omission was the effective cause of the harm suffered, it is not necessary for him to prove, on the balance of probabilities, that future loss or damage *will* occur, but only that there is a reasonable chance of such loss or damage occurring. The distinction is made clear in the following passages in 12 Hals., 4th ed., pp. 437, 483-4:
>
> > 1137. *Possibilities, probabilities and chances*. Whilst issues of fact relating to liability must be decided on the balance of probability, the law of damages is concerned with evaluating, in terms of money, future possibilities and chances. In assessing damages which depend on the court's view as to what will happen in the future, or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will happen or would have happened and reflect those chances, *whether they are more or less than even*, in the amount of damages which it awards.

> 1199. *Proof of damage*. The plaintiff must prove his damage on a balance of probabilities. In many cases, however, the court is called upon to evaluate chances, such as the chance of a plaintiff suffering further loss or damage in the future; in these cases the plaintiff need only establish that he has a *reasonable*, as distinct from a *speculative*, chance of suffering such a loss or damage, and the court must then assess the value of that chance.

The principle concisely stated in the passage quoted is directly applicable in this case. Speculative and fanciful possibilities unsupported by expert or other cogent evidence can be removed from the consideration of the trier of fact and should be ignored, whereas *substantial possibilities based on such expert or cogent evidence must be considered in the assessment of damages for personal injuries in civil litigation.* [emphasis added] This principle applies regardless of percentage of possibility, as long as it is a substantial one, and regardless of whether the possibility is favourable or unfavourable. Thus, future contingencies which are less than probable are regarded as factors to be considered, provided they are shown to be substantial and not speculative: they may tend to increase or reduce the award in a proper case.

[59] Paul Colangelo is a chartered business valuator and a litigation support specialist for assessment of damages. He gave evidence for the plaintiff.

[60] Below is a document prepared by Mr. Colangelo. This is the departure point for calculations of future costs which follow.

SCHEDULE 1.0 AMENDED
JUDITH LYTLE
FUTURE CARE COSTS
NOVEMBER 17, 2003 TO LIFE

Item/Service		Total/Fixed Cost	Yearly Costs: To Age 65	Yearly Costs: Age 65 to Life	Yearly Costs: For Life	Total
Housekeeping and Home Maintenance						
Housekeeping, Regular Service			$3,380.00	$1,690.00		
Seasonal Cleaning			975.00	487.00		
Property Maintenance			625.00	312.50		
Professional Services						
Pain Management					$2,000.00	
Travel to Pain Management					76.50	
Fitness Program, Yearly Fee					347.75	
Physiotherapy Consultation		$215.00				
Ergonomic Evaluation		625.00				
Ergonomic Equipment		600.00				
Personal Care / Attendant Care		321.00				
Physiotherapy Treatment / Future Treatment		11,287.50				
Travel to Physiotherapy		472.50				
Medical Benefits						
Hot/Cold Pack					11.25	
Home TENS Unit					67.00	
TENS Rechargeable Batteries					11.50	
Advil					12.63	
Total	(A)	13,521.00	4,980.00	2,490.00	2,526.63	
Present Value Factor (2)	(B)	1,000	14.8117	7.4164	22.2281	
Future Costs of Care (Before Income Tax Gross-Up) Rounded	(C=AxB)	$13,521	$73,762	$18,467	$56,162	**$162,000**

[61] The following are modifications suggested by counsel for the plaintiff in summing up:

(1) There are a number of items in the first column headed "Total/Fixed Cost" that are highly contingent and these would include:

(a) personal care/attendant care

(b) physiotherapy treatment

(c) future treatment, and

(d) travel to physiotherapy

Counsel for the plaintiff concedes reducing $13,521 to $3,000.

(2) Under the heading "Yearly Costs" the amounts under the sub-heading "Age 65 to Life" are calculated at 50% of "To age 65".

The totals of those two columns being $73,762 and $18,467 are conceded by plaintiff's counsel to be reduced to $80,000 in total.

(3) The last column under "Yearly Costs" being under sub-heading "For Life" $56,162 is reduced nominally to $56,000.

(4) Taking the revised totals for each of the aforesaid columns, the total would reduce from $162,000 to $139,000.

[62] In keeping with the language of Lacourciere J.A. in *Schrump et al v. Koot et al,* the calculations and assessments by Mr. Colangelo would, in my view, fall validly under the category of substantial possibilities. However, the indications for the future are sufficiently tenuous to call for a substantial reduction, which I have quantified at 75%, to reduce the suggested $139,000 to $34,750, rounded to $35,000.

Loss of Earning Capacity

[63] Despite the setback endured by Ms. Lytle as a result of the subject accident, she has had the good fortune to enjoy progressive continuingly improving income. However, Ms. Lytle's present employment is about to expire.

[64] Exhibit 22 is a copy of calculation shown at trial, prepared by Mr. Colangelo and it reads as follows:

Exhibit 22: Future Loss

Annual Loss:	$5,000 ÷ 1,000
	= 5
Loss per $1,000 (Schedule 3.0)	x $15,000
Present Value:	$75,000

This is premised on a $5,000 annual loss to which formulae are applied to arrive at a $75,000 present value calculation. The premise is arbitrary; so the conclusion can be no less arbitrary.

[65] Prior to the subject accident, Ms. Lytle's lifting capabilities were already compromised by the injury to her left arm. As a result of the accident weakening her right arm, her lifting capabilities have become substantially compromised.

[66] Ms. Lytle's training and skill base best suit her for an ongoing career as a librarian, and the position of librarian requires some amount of lifting. The injury to Ms. Lytle's right arm, when her left arm is already in a weakened state, puts her at a competitive disadvantage from serving as a librarian in the future. Moreover, her earning capacity as a librarian is likely higher on an ongoing basis than other areas of employment open to her.

[67] Not knowing what the future will hold for Ms. Lytle makes it immensely difficult to quantify the damages for her future loss of earning capacity. Quantification of that disadvantage could range from a modest amount to a significant amount.

[68] Regardless, it comes within the ambit of substantial possibility, as articulated in *Schrump et al. v. Koot et al., supra.* The Court, therefore, has an obligation to use its best efforts to quantify her competitive disadvantage as a result of the accident.

[69] Given the indefiniteness of such a possibility in the circumstances, I am limiting the quantity of the disadvantage at $10,000.

Family Law Claims

[70] Mike W. McCallion, the spouse of Ms. Lytle, makes a claim under the *Family Law Act.* Such claims are limited to loss of care, guidance and companionship.

[71] Under the category of care, there are many contributions to the family and home that Ms. Lytle made that have been reduced substantially. These include: outside household work, painting, maintenance of the front yard, shoveling snow during the week, cooking, bulk laundry, vacuuming, lifting groceries, pushing a grocery cart in the supermarket, and decorating. These reductions in contributions were more extreme during the acute stages at the beginning of recovery, but they continue on an ongoing basis.

[72] Under the heading of companionship, Mr. McCallion advised that camping, hiking, canoeing and cross-country skiing have been all but eliminated. He and Ms. Lytle would go camping at least twice a summer, take canoe trips three to four times a summer and go cross-country skiing one or two times per month from January to March for 4 to 5 hours per outing. Their social life on weekend evenings and occasionally during the week has diminished. The duration and frequency of seeing friends have been reduced. Ms. Lytle's companionship in the evenings is diminished: whereas prior to the accident Ms. Lytle would wind down before the evening ended, post-accident she would be "more likely to fall into bed with an ice pack".

[73] In the circumstances, I would quantify Mr. McCallion's post-accident loss of care and companionship at $7,500 to the present and at $7,500 for the future for a total of $15,000.

[74] No evidence was advanced to support the claims of Yvonne Lytle and Ellen Lytle and thus, no findings are made in their favour.

Summary of Damages

[75] To Ms. Lytle:

General Damages		$75,000.00
Loss of Income		$3,110.00
Massage Therapy		Nil
Taxi Service		$353.00
Future care		$35,000.00
Loss of Earning Capacity		$10,000.00
	Gross Total :	$123,463.00
Less 25% contributory negligence		($30,865.75)
	Net Total :	$92,597.25

Family Law Damages in favour of Mike McCallion		$15,000.00
Less 25% contributory negligence		$3,750.00
	Net Total :	$11,250.00
Damages in favour of OHIP under subrogated claim		$5,556.44
Less 25% contributory negligence		$1,389.11
	Net Total :	$4,167.33

Costs

[76] If the parties are unable to come to terms as to costs, I will be available to make a finding in chambers on appointment by counsel.

[77] Counsel may contact me to deal with any outstanding issues.

DAY J.

Date: April 15, 2004

COURT FILE NO.: 01-CV-215985CM3
DATE: 20040415

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

JUDITH LYTLE, MIKE MCCALLION, YVONNE LYTLE AND ALAN LYTLE

Plaintiffs

- and -

CITY OF TORONTO AND ROANNE ROBERTSON

Defendants

REASONS FOR JUDGMENT

DAY J.

Released: April 15, 2004