newfoundland labrador hydro
a nalcor energy company

Hydro Place. 500 Columbus Drive.
P.O. Box 12400. St. John's. NL
Canada A1B 4K7
t. 709.737.1400 f. 709.737.1800
www.nlh.nl.ca

January 21, 2014

The Board of Commissioners of Public Utilities
Prince Charles Building
120 Torbay Road, P.O. Box 21040
St. John's, NL
A1A 5B2

ATTENTION: Ms. Cheryl Blundon
Director of Corporate Services & Board Secretary

Dear Ms. Blundon:

Re: An Application by Newfoundland and Labrador Hydro for approval of the terms and conditions applicable to the supply of electricity to North Atlantic Refinery Limited (NARL)

Enclosed please find the original plus eight copies of Hydro's reply to NARL's submission of January 16, 2013 with regard to the above-noted application.

Should you have any questions, please contact the undersigned.

Yours truly,

NEWFOUNDLAND AND LABRADOR HYDRO

Geoffrey P. Young
Senior Legal Counsel

GPY/jc

cc: Gerard Hayes – Newfoundland Power
Paul Coxworthy – Stewart McKelvey Stirling Scales
Thomas Johnson – Consumer Advocate
Thomas O'Reilly, QC – Cox & Palmer

IN THE MATTER OF the *Electrical Power Control Act, 1994*, RSNL 1994, Chapter E-5.1 (the *EPCA*) and the *Public Utilities Act*, RSNL 1990, Chapter P-47 (the *Act*), and regulations thereunder;

AND IN THE MATTER OF an Application by Newfoundland and Labrador Hydro, pursuant to Section 71 of the *Act*, for approval of the terms and conditions applicable to the supply of electricity to North Atlantic Refinery Limited (NARL).

Introduction

Hydro admits that the Board's finding in Order No. P.U. 7(2002-2003) have been in effect for over 11 years and Hydro has not sought to have the Board reconsider its findings prior to the present Application. However, Hydro submits that following the Board's decision in Order No. P.U. 7(2002-2003), Hydro was subsequently able to secure insurance coverage with respect to Failure to Supply Service and felt that its exposure for such claims was adequately addressed. As this insurance is no longer available with respect to NARL, Hydro submits that circumstances have changed such that the status quo is no longer sufficient and therefore seeks the inclusion of clause 9.04, limiting the liability of Hydro, as contained in the draft Service Agreement appended to its Application.

Insurability

As stated in its Application, Hydro no longer has insurance liability coverage for failure to supply claims by NARL. Following the decision in Board Order No. P.U. 7(2002-2003), Hydro was able to secure insurance coverage for Failure to Supply Service for all its Industrial Customers (IC). However, since the power outage on February 4, 2013, Hydro's insurer has refused to provide this type of coverage with respect to NARL. In fact, Hydro's insurance policy now contains a specific exclusion for this type of claim as it relates to NARL. As stated in a letter from Hydro's broker, this new exclusion in Hydro's insurance coverage is a direct result of the fact that Hydro's Service Agreement

with NARL does not contain a limitation of liability provision: "When the NARL claim arose and the NARL contract was reviewed by Hydro's insurers, they determined the exposure was such that they were no longer willing to offer the coverage going forward due to the absence of a limitation of liability clause." (emphasis added, Hydro's Application, Schedule A).

In relation to securing Failure to Supply Service coverage from another insurer, Hydro's broker indicated that no insurer would provide Failure to Supply liability insurance under the terms of the current NARL Service Agreement (NA-NLH-006). Hydro has experience in these matters as to insurers' responses and relies upon the advice and information it receives from its broker. Hydro submits that this is a reasonable approach and that Hydro cannot reasonably be expected to contact every potential broker to investigate this matter further.

Industry Standard

Hydro submits that there is more than ample evidence to support its position that there ought to be a $1,000,000 limit of liability in NARL's Service Agreement. NARL submits that Hydro is seeking a greater protection than that offered in Ontario and Quebec, but ignores the fact that Hydro is seeking protection equal to what is offered in British Columbia in terms of a monetary limitation on liability. The protection provided in Ontario relates to wilful misconduct or negligence. The protection in Quebec relates to wilful misconduct and gross negligence. Hydro is seeking to limit its liability for *"any negligent act or omission"*, i.e. ordinary negligence. While the courts have noted the difficulty in defining gross negligence, it is recognized as imposing a higher standard of negligence, requiring more than ordinary negligence. As stated by Green J. in *Mayo v. Harding* (1993), 111 Nfld & PEIR 271, 1993 CanLII 8335 (NL SCTD) (attached as Schedule 1) at paras 45-48

> [45] To say that the courts have had difficulty in defining the distinction between gross negligence and ordinary negligence would be an understatement. Hickman, C.J.T.D., in *Andrews v. Leger and Leger* (1981), 30 Nfld. & P.E.I.R. 258;

84 A.P.R. 258 (Nfld. T.D.), described the distinction at p. 263 as an "invisible juridical line" which has been "bent and positioned as the exigencies and justice of the cause persuaded the trial judge or jury was necessary to ensure that justice be done".

[46] In *Kerr v. Cummings*, 1953 CanLII 32 (SCC), [1953] 1 S.C.R. 147, gross negligence was defined as "very great negligence". In *Holland v. Toronto*, [1927] 1 D.L.R. 99 (S.C.C.), at 102, Anglin, C.J.C., said:

> "The term 'gross negligence' ... is not susceptible of definition. No a priori standard can be set up for determining when negligence should be deemed 'very great negligence'."

[47] The test to which most courts return is that stated by Duff, C.J., in *McCulloch v. Murray*, 1942 CanLII 44 (SCC), [1942] S.C.R. 141, at p. 145 to the effect that gross negligence constitutes:

> "a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves."

[48] The question whether or not there has been very great negligence or a marked departure from the standards by which responsible people habitually govern themselves must be decided by reference to all of the circumstances of the particular case; it is a question of fact: *McCulloch v. Murray*, supra. While individual acts of negligence may not in themselves constitute the necessary degree of "marked departure" so as to constitute gross negligence, they may, when taken with other individual acts of ordinary negligence be regarded, in their totality, as gross negligence.

Hydro therefore submits that by agreeing to be liable for acts or omissions of ordinary negligence, it is in fact subjecting itself to a lower standard of liability than both Ontario and Quebec.

In addition to the evidence submitted from Ontario, Quebec, and British Columbia, Hydro has Service Agreements with four other IC, each of which contains a clause identical to the proposed 9.04, limiting Hydro's liability to $1,000,000. While evidence from other jurisdictions in helpful, the comparator that should be provided the most weight is the Service Agreements with other IC on the island.

Section 73 of the Act requires that "All tolls, rates and charges shall always, under substantially similar circumstances and conditions in respect of service of the same description, be charged equally to all persons and at the same rate, and the board may by regulation declare what shall constitute substantially similar circumstances and conditions." The concept of a rate extends to the terms and conditions that apply to that rate. As the Board has established that Island IC are a class of customers and where there are substantially similar circumstances and conditions, the rates should be equal. To reflect this legislative requirement, in its General Rate Application, filed July 31, 2013, Hydro is seeking the same rate for all of the Island IC. This is based on the assumption that the Service Agreements for the IC contain similar conditions.

Hydro admits that there is a precedent for separate contractual terms being imposed on IC. The example provided by NARL, Board Order No. P.U. 1 (2007) relating to Aur Resources Inc. (now Teck Resources Limited), wherein Aur Resources Inc. received a preferential base rate for power from Hydro, is a perfect example of where there were not substantially similar circumstances and conditions to justify the charging of a rate equal to that of other IC. As stated by the Board in Order No. P.U. 1(2007) the Board was satisfied that the conditions were such that Aur Resources be charged a different rate than other IC's:

> **WHEREAS** in relation to the demand charge Hydro states in its response to information request PUB 1.0 NLH that the intent of basing the demand charge on firm monthly demand is to provide Aur Resources Inc., with reasonable flexibility during the construction, testing and commissioning processes that it will be undertaking in its first year of receiving power from the Island grid; and
>
> **WHEREAS** in relation to the exclusion of the Historical Plan Balance of the Rate Stabilization Plan, Hydro states in its response to information request PUB 25 NLH that Aur Resources Inc., should not pay a portion of the Historical Plan Balance primarily on the principle of cost causation, in that all costs being recovered in the Industrial Customer RSP Historic Plan are costs incurred by the Industrial Customer class prior to 2004; and
>
> **WHEREAS** in relation to the specifically assigned charge, as stated in its response to information request PUB 4.0 NLH, Hydro proposes to exclude the specifically

assigned charge until the appropriate specifically assigned charges can be determined in a new test year cost of service study, given that the Board approved 2004 Cost of Service Study contained no specially assigned charges applicable to that customer; and

.....

WHEREAS the Board is satisfied in the circumstances and, in particular in the context of the Agreement filed with the Board in this matter, that rates, rules and regulations for Aur Resources Inc., should be similar to those of the other Island Industrial customers of Hydro except that:

i) for 2006 the demand charge should be based on the highest firm demand in the month;
ii) rates should exclude the historical plan balance of the RSP; and
iii) until a new full cost of service study is completed and reviewed, rates should not include a specifically assigned charge.

If it is NARL's submission that NARL does not operate "under substantially similar circumstances and conditions" as is required by Section 73(1) of the Act and therefore should not have a Service Agreement that contains the same terms and conditions as other IC (NARL's submission, page 15 at lines 16-17) then NARL cannot expect to be charged the same rate as other Island IC but should rather be charged a rate that is designed to recover the costs that it imposes on the system. This would include the additional liability of exposure and risk that NARL submits Hydro assume. This is addressed further in the Mitigation section below.

Hydro further submits that NARL's suggestion of a $10,000,000 limit is unreasonably high. As per its own evidence, NARL has admitted that four power outages in 1995 and 1996 altogether resulted in a total of approximately $20,000,000 in damages, only $9,000,000 of which were related to direct damages for repair costs, lost product and damages to catalyst. NARL has not provided a breakdown of the direct damages associated with each power outage during that time. Further, another outage in 1997 only resulted in $670,000 in direct damages, well below the $10,000,000 limit that is being proposed by NARL (NARL's submission, page 13 at lines 12-17). The examples provided by NARL do not substantiate a liability limit higher than $1,000,000.

Mitigation

Hydro concedes that the matter before the Board at present addresses the contractual relationship which exists at the time that an event occurs which can be alleged to have given rise to a claim by NARL. In that sense, it is not "mitigation" in the way that term is used in tort or contract litigation. That being said, the issue in the present matter, whether discussed within the concepts of mitigation, contributory negligence, or otherwise, is whether it is reasonable for Hydro's customers to expect Hydro to be exposed to potentially large damage claims where NARL decides, purely for economic reasons, against taking steps that will protect its assets and processes from damage or losses.

NARL knows, or ought to know, that it would be exceedingly expensive to all ratepayers to build an electrical system to a standard that would absolutely guarantee that unplanned outages do not occur. The standards to which the system is built, staffed and operated are planned and executed by the utility but approved by this Board. It provides a reasonable and adequate level of reliability with due consideration to the customer mix and cost. It is an unfortunate but inevitable fact that unplanned outages will occur from time to time due to system events or more localized transmission events.

The points that the Board ought to consider when setting the terms and conditions of service are as follows:

- Whether NARL, which has particular sensitivity to a power outage, can protect itself from the effects of an unplanned outage through backup generation or other means more economically than the utility can to assure that such an outage never occurs?
- If NARL decides, as is contended, that it cannot economically take physical steps to protect itself from the effects of an outage, and nonetheless determines that

it will carry on operations, should the utility bear the risk of NARL's business decision?

- If NARL is granted a different standard of the utility's liability with respect to either the causes of the liability or the quantum of damages, should it get that at the same rates as the other, otherwise, similar customers?

Whether NARL, which has particular sensitivity to a power outage, can more economically protect itself from the effects of an unplanned outage through backup generation or other means than the utility can to assure that such an outage never occurs?

NARL knows, or ought to know, that it would be exceedingly expensive to all ratepayers to build and operate an electrical system to a standard that would absolutely guarantee that unplanned outages do not occur. The standards to which the system is built, staffed and operated are planned and executed by the utility but approved by this Board. It provides a reasonable level of reliability with due consideration to the customer mix and cost. It is an unfortunate but inevitable fact that unplanned outages will occur from time to time due to system events or more localized transmission events.

The economic considerations as to backup generation provided by NARL in this instance pertain to co-generation opportunities where natural gas is available. Though there is a reference to a 1997 study being completed for a 30 MW generator, the only capital cost supplied in the NARL's submission is for a 175 MW plant. These observations miss the point. The object of the exercise and the only evidence that would be useful is whether a backup generation source of an appropriate size which uses an available fuel source could be installed. By its nature, running a backup generation source for any appreciable amount of energy is expensive. These units are characterized as being relatively inexpensive for the amount of immediate electrical capacity they can provide and relatively expensive as energy sources.

Internal combustion diesel units and diesel-fired combustion turbines are used in this province by utilities and other industries to provide relatively inexpensive capacity.

While NARL has some backup generation to provide for a safe shutdown (NARL's submission, page 13 at lines 29-30), it provided no further information with this regard to an additional amount of capacity that would have been required to run more of its processes—enough to prevent damage or significant production losses but perhaps less than the 30 MW the refinery uses in full production mode. Hydro submits that the capital and operating cost estimates for a 175 MW co-generation are not relevant or useful to this assessment. In this connection, Hydro would indicate that in its 2014 Capital Plan filed with its 2014 Capital Budget, it has given preliminary capital costs for a utility grade, combustion turbine of at least twice the capacity of that which would be required to provide the backup power needed at the refinery. While it is obvious that Hydro cannot judge whether a solution of this sort would be the most economic type of backup generation source for NARL's specific needs, it is clear that the values quoted in NARL's submission are far in excess of that which is relevant to this question.

If NARL decides, as is contended, that it cannot economically take physical steps to protect itself from the effects of an outage, and nonetheless the customers determines that it will carry on operations, should the utility bear the risk of NARL's business decision?

The very premise of this question assumes that it is appropriate for there to be variability amongst similar customers as to the terms and conditions under which service is provided. Section 73 of the Act reads:

> **Equality of rates**
>
> 73. (1) All tolls, rates and charges shall always, under substantially similar circumstances and conditions in respect of service of the same description, be charged equally to all persons and at the same rate, and the board may by regulation declare what shall constitute substantially similar circumstances and conditions.
>
> (2) The taking of tolls, rates and charges contrary to this section and the regulations is prohibited.

It is clear that rates are to be equal for those customers for whom the conditions and circumstances of service are the same. A corollary of that is that the conditions of

service should be the same for customers who pay the same rates. The Board has been granted powers to investigate and remedy situations (Sections 82, 84, 87) where rates or regulations are unjustly discriminatory. Hydro submits that the rates and rules of providing service should be uniform unless differential treatment can be justified. Notwithstanding that NARL receives its power and energy at the same voltage and via the same sort of electrical equipment as other customers in its class, for reasons of economic decisions it has made as to its own plant or operations, it claims to deserve different rates or terms and conditions for that service. The policy behind uniformity of rates for similar customers does not envisage or permit scalability of rates, commercial terms or the apportionment of risks for each customer.

If NARL is granted a different standard of the utility's liability with respect to either the causes of the liability or the quantum of damages, should it get that at the same rates as the other, otherwise, similar customers?

There is obviously a relationship between the standards used in providing service and the cost of providing that service. Under generally accepted sound public utility practice (Section 4 of the *Electrical Power Control Act, 1994*), customers are generally expected to pay the costs of providing service to them. While, practically speaking, some element of subsidization is unavoidable amongst customers, the policy inherent in the legislation does not permit deliberate discrimination amongst customers in a class through providing different rates, standards of service or material differences in their terms of service. To be fair to the other customers and to avoid cross subsidization, differences in standards of services or of the apportionment of risk should trigger differences in rates. Hydro submits that while this is to be avoided, continuing to provide service in a situation where the liability terms are more preferable to NARL than they are for Hydro's other IC is unfair and contrary to sound public utility ratemaking practice.

Summary

The limitation of liability in proposed clause 9.04 is required as 1) Hydro is no longer able to obtain insurance coverage for Failure to Supply Service to NARL; 2) it is industry

standard, in Newfoundland and Labrador and across Canada, to include limitation of liability clauses in Industrial Customer Service Agreements; 3) because it is extremely sensitive to power outages, NARL should be required to mitigate against the risk of damage from such power outages; 4) as a member of the Island Industrial Customer class of customers, NARL should be subject to the same terms and conditions as other Island Industrial Customers, and 5) it is not appropriate for NARL to impose such a financial risk on Hydro.

All of which is respectfully submitted by Hydro.

DATED at St. John's, Newfoundland and Labrador, this 21st day of January 2014.

Geoffrey P. Young
Counsel for the Applicant
Newfoundland and Labrador Hydro
500 Columbus Drive, P.O. Box 12400
St. John's, NL, A1B 4K7
Telephone: (709) 737-1277
Facsimile: (709) 737-1782

Mayo v. Harding, 1993 CanLII 8335 (NL SCTD)

Date:	1993-08-04
Docket:	1989 G.B. No. 89
Parallel citations:	111 Nfld & PEIR 271
URL:	http://canlii.ca/t/g08j1
Citation:	Mayo v. Harding, 1993 CanLII 8335 (NL SCTD), <http://canlii.ca/t/g08j1> retrieved on 2014-01-20
Print:	PDF Format
Noteup:	Search for decisions citing this decision
Reflex Record	Related decisions, legislation cited and decisions cited

---

Newfoundland Supreme Court Trial Division

Citation: Mayo v. Harding
Date: 1993-08-04
Docket: 1989 G.B. No. 89

Between:
Sandra Mayo (Plaintiff)
and
Suzanne Harding (Defendant)

Green, J.

Counsel:
Donald MacBeath, for the plaintiff;
Terry Rowe, for the defendant.

[1] Green, J.: In this proceeding the plaintiff claims damages for physical injuries suffered by her while a passenger in the defendant's motor vehicle, which she alleges were caused by the negligence of the defendant in the operation of the vehicle on or about June 21, 1987. The defendant claims that the plaintiff was a guest passenger in her vehicle and cannot recover without proof of gross negligence, which is denied. In the event of liability being found, she puts the plaintiff to the strict proof of her damages.

The Issues

[2] The questions for determination in this case can be stated as follows:

1. At the time of the accident was the plaintiff being transported by the defendant as a "guest without payment" within the meaning of s. 221 of the *Highway Traffic Act,* R.S.N. 1970, c. 152, as it existed at the time of the accident.

2(a) If the plaintiff was a guest without payment, was the accident caused by the gross negligence or wilful and wanton misconduct of the defendant in the operation of her motor vehicle?

2(b) If the plaintiff was not a guest without payment, was the accident caused by the negligence of the defendant?

3. If the defendant is found liable, what is the proper measure of the plaintiff's non-pecuniary damages for facial scarring?

4. Is prejudgment interest payable on special damages relating to the cost of insured hospital and medical services recoverable by the plaintiff and on non-pecuniary (general) damages?

The Accident

[3] On or about June 21, 1987, the plaintiff, an 18 year old resident of Burin, Newfoundland, arranged for transportation from Burin to St. John's in the defendant's motor vehicle. The plaintiff occupied the rear seat on the passenger side of the vehicle. Also present in the car were the defendant, as driver, and another passenger, Dawn Beazley who was seated in the front passenger seat. The plaintiff and the defendant knew each other but were not close friends or acquaintances.

[4] Beazley had paid the sum of ten dollars to the defendant prior to commencement of the trip as her contribution to the cost of transportation. Although the plaintiff did not pay any money to the defendant, the plaintiff testified that, in accordance with the local custom and understanding, she expected to pay a contribution upon arrival at St. John's.

[5] The defendant, although a licensed driver for 3½ years before the accident, had only recently acquired her own car and had driven the approximately four hour drive from Burin to St. John's only three or four times before.

[6] The Burin Peninsula Highway runs in a generally northerly direction from Marystown to a point where it intersects with the Trans Canada Highway. The road is paved and consists of one lane in each direction. On the day in question the weather was clear and sunny and the pavement was dry. The parties left Burin somewhere between 3:30 and 4:30. At the time of the accident it was still light. The speed limit on the highway, outside of the local communities, was 90 kilometres per hour.

[7] As the car left the traffic lights at Marystown, the defendant told the others that there would be no stopping until they reached Goobies, some 3½

hours' drive distant, at the intersection of the Burin Peninsula highway and the Trans Canada Highway. The plaintiff took that comment to mean that the intention was to get to Goobies as fast as they could.

[8] During the drive, the defendant's vehicle passed a number of other cars going in the same direction. None passed her. The plaintiff says that the defendant drove at speeds "a lot more" than 90 km/h. At the Clam Brook bridge approximately two km from the accident scene, the plaintiff had occasion to notice that the speedometer on the defendant's vehicle registered, at that point, 120 km/h. The defendant herself acknowledges that she exceeded the speed limit at times but says that the fastest speed at which she would have been going was between 110 and 115 km/h on straight stretches of road. At the time of the accident, she estimates she was travelling at a speed of between 100 and 105 km/h.

[9] Beazley, with little driving experience, could not give an estimate of how fast the car was travelling. She did say, however, that she noticed nothing unusual about the way the defendant was driving. The plaintiff herself also acknowledged that she did not feel uncomfortable with the way the defendant had been driving prior to the accident and that although she felt nervous when she noticed the 120 km/h speed on the speedometer at Clam Brook, she was not nervous to the point where she felt she should say anything.

[10] Having considered all of the evidence, including the fact that the road between the Clam Brook Bridge and the curve in the road where the accident occurred is a relatively straight stretch of road, as well as the defendant's acknowledgement that she was speeding from time to time and the plaintiff's ascertainment of the 120 km/h speed just minutes before the accident, I find as a fact on a balance of probabilities that the defendant was travelling immediately before the accident at a speed of between 110 and 120 km/h.

[11] The accident itself occurred as the vehicle approached a curve to the left approximately two km beyond Clam Brook bridge. The defendant spoke to the plaintiff who was in the back seat. When she did not reply, the defendant turned her head to the right to see why the plaintiff did not answer. Her eyes, she says, were parallel with her shoulder. This occurred just as the car was entering the curve in the road.

[12] As a result, the defendant did not "cut the turn", as it was put by the police officer who visited the scene, and took measurements and photographs. The front passenger-side wheel of the vehicle went over the edge of the pavement and struck the gravel shoulder on the right hand side of the high way. Eventually, all four tires left the pavement and began to dig into the gravel, causing the car to begin to slide sideways. The defendant lost control of the vehicle. She turned the steering wheel to the left. The car veered sharply back onto the paved portion of the highway, crossed over the centre line, rolled (most likely end over end as described by the witnesses in an oncoming vehicle) several times, struck the shoulder on the left hand

side of the highway and came to rest in a ditch. The final resting place was 178 metres, or about 1/10 of a mile, from the point where the tires of the car first left the pavement.

[13] There was no evidence presented to indicate that the defendant's vehicle at or before the accident was in anything but a proper mechanical operating condition, nor was there anything to indicate that the curve in the road at the point of the accident was inherently dangerous, in the sense that a person driving within the speed limit in normal driving conditions and paying attention to her driving could not negotiate the turn successfully and safely.

[14] At the end of the accident, the defendant and Beazley, the front seat passenger, were wearing available seat belts. The plaintiff, sitting in the back seat, was not.

[15] Although the failure on the part of the plaintiff to wear her seat belt was raised as an issue in the pleadings, counsel for the defendant candidly indicated at trial that he did not intend to call any evidence directed to showing that the failure of the plaintiff to wear a belt on the facts of this case meant that the injuries she suffered were greater than they otherwise would have been. Additionally, there was nothing raised either on cross-examination or in the case for the plaintiff herself that established any causal connection between the extent of the plain tiff's injuries and the absence of a seat belt at the critical time. Accordingly, this matter need not be considered further.

The Injuries

[16] As a result of the accident, the plaintiff suffered a number of significant scalp and facial lacerations. In particular the skin of her scalp was peeled back from the top of her head exposing the bone of the skull and pieces of glass and grains of dirt were embedded in the scalp. As well, she suffered lacerations on the left side of her face both above and below the eye and on her cheek, ear and chin. She also received a fracture of her left cheekbone and small lacerations to the front of her neck and to both hands.

[17] Although the defendant and the other passenger also received injuries, they were of a relatively minor nature.

[18] The plaintiff was treated initially on an emergency basis at the Burin Cottage Hospital and then transferred immediately to the Health Sciences Centre in St. John's for a specialist care and treatment. She required a significant number of sutures to repair the lacerations to her face and scalp. She was released from the Health Sciences Centre approximately a week later and was seen in the Burin Hospital for the purpose of removing the scalp and facial sutures. The plaintiff felt at the time in excess of 150 stitches had been removed. As a result of scarring to her face, the plaintiff was referred to Dr. Kenneth Anderson, a plastic surgeon at the Health

Sciences Complex. He first saw her on January 13, 1988, and concluded that no improvement could be offered at that time, but that the scars would continue to improve spontaneously. He reassessed her on June 27, 1988, and noted that the scars on the left side of her face, although well healed, had faded to a "mature white scar". He described the scar as follows:

> "The major scar is a four centimetre, slightly, slightly depressed curvilinear lesion on the inferior border of the cheek, running from nasal labial fold laterally across the parotid area and hairline. All of the tissues enclosed within this, up to and including the lower lid, is anaesthetic (without feeling) and likely to remain so. This is the major scar."

[19] He also described another flat nondepressed lineal scar parallel to the first one but indicated that this one was "virtually unnoticeable". As well, there were two or three other noticeable "star shaped" depressed scars on the face which were the result of penetrating wounds.

[20] Dr. Anderson also concluded that, because the fold of skin at the corner of the plaintiff's left eye was obliterated by scar contracture, reconstructive surgery of that area should be undertaken. This surgery was carried out on September 13, 1988, and on reassessment on October 19, 1988, he concluded that the skin graft was setting in and relieving the contracture. He observed, however, that "the patient has been cautioned that improvement can be expected, but, complete removal of scar is not possible". He later concluded, as his final diagnosis:

> "The cheek scar, as the lid defect, is permanent and cannot be removed by surgery."

[21] Following surgery, the plaintiff continued to complain of firm nodules in her scalp which she thought were likely foreign bodies. She also complained of scalp tenderness. She required repeated surgical excisions of foreign material fragments after initial healing to relieve her discomfort. As. late as September 1992 Dr. Anderson noted, and the plaintiff confirmed in evidence, that she still experienced pain and discomfort in her scalp. With respect to the subsequent excision of foreign bodies and dirt from her scalp, Dr. Anderson described this as follows:

> "This was a painful procedure for the patient, because of the heavy scarring it was difficult to get good anaesthesia."

[22] By the time of the trial, the plaintiff had had all the surgery and medical intervention that could be undertaken for her injuries. The scarring that remains is permanent. As the plaintiff said in evidence "I have to live with it".

Analysis: Liability

[23] (a) Was The Plaintiff A Guest Passenger? Section 221 of the *Highway Traffic Act*, as it existed at the time of the accident, provides as follows:

> "A person who is being transported by the owner or operator of a motor vehicle as a guest without payment for the transportation or entering or getting on the motor vehicle to be so transported or alighting from the motor vehicle after being so transported does not have a cause of action for damages against the owner or operator for injury, death or loss in case of accident unless the accident was caused by the gross negligence or wilful and wanton misconduct of the owner or operator of the motor vehicle and unless the gross negligence or wilful and wanton misconduct contributed to the injury, death or loss for which the action is brought."

[24] Accordingly, if the plaintiff was a "guest without payment for the transportation" in the defendant's car at the time of the accident, she would have to establish gross negligence or wilful and wanton misconduct on the part of the defendant before she would be able to maintain her claim. If on the other hand the plaintiff is not a "guest without payment" all she would have to establish would be "ordinary" negligence.

[25] The concept of the "guest without payment" has been the subject of considerable judicial antipathy. Linden in *Canadian Tort Law,* (3rd Ed. 1982), expressed it thus at p. 614:

> "The Canadian Courts have not been hospitable to the legislative purpose of these guest passenger provisions. Indeed, they have consistently sought methods of restricting the application of the partial immunity."

[26] This hostility is due in part no doubt to the feeling that there is no continuing justifiable legislative policy basis for such provisions and that their wholesale application would have the effect of wreaking injustice in individual cases. Academic criticism abounds with statements that the supposed rationales for the law do not stand up to close scrutiny. See, e.g. Gibson, *Guest Passenger Discrimination* (1968), 6 Alta. L.R. 211. Indeed, most Canadian jurisdictions have now repealed their legislation, Newfoundland being one of the last to do so in 1988. See S.N. 1988, c. 33, s. 212.

[27] The accident in the instant case having occurred approximately 12 months prior to the repeal of s. 221 is therefore nevertheless subject to the legislation and must be determined by application of it to the facts of this case.

[28] As a result of the judicial hostility to the section, the courts have attempted to keep its operation within narrow bounds and have developed a number of techniques of interpretation and application to limit the concept of "guests".

[29] The test that has been developed as to whether or not a person is a "guest without payment" is whether the purpose of the transportation is social only or whether it is in performance of a contractual obligation or otherwise for a commercial or business purpose: *Manuge v. Dominion Atlantic Railway Company,* 1972 CanLII 142 (SCC), [1973] S.C.R. 232; 4 N.S.R.(2d) 884; 32 D.L.R.(3d) 49, at p. 54 (D.L.R.), where it was held that a gardener who was driven home from work by his employer solely out of courtesy or friendship, or as a neighbourly favour, was a guest without payment.

[30] Although Mifflin, J., in *Gilbert et al. v. Upshall* (1969), 1 Nfld. & P.E.I.R. 12 (Nfld. S.C.T.D.) at p. 23, referred to the notion of a relationship "clothed with a contractual character", it is clear that the notions of "contractual obligation" and "commercial or business purpose" have been stretched beyond their usual technical meaning in many cases in order to take a particular plaintiff outside of the statute. Indeed, Mifflin, J., in *Gilbert et al. v. Upshall* commented at p. 21:

> "I am not prepared to accede to the contention that this provision confines liability to those engaged in the business of carrying passengers for hire."

The circumstance that will take the case out of the statute is therefore broader than what would normally be considered contractual or commercial in the business sense.

[31] Frequently, the payment of money or the agreement to pay money will be enough to take the travel arrangement out of the purely social nature contemplated by the statute. In *Tower v. Hubert* (1972), 6 N.J3.R.(2d) 587 (S.C.Q.B.D.), Dickson, J., applied a test of whether there was "any arrangement for remuneration" and in *Prince v. Vandenberg et al.* (1973), 6 Nfld. & P.E.I.R. 292 (Nfld. C.A.), Puddester, J., at p. 311 postulated a test of whether the plaintiff's "paid or were expected to pay for their transportation". But a payment that is accepted or an agreement to pay is not always a sufficient requirement. Thus, where there is contribution to common expenses in a joint social adventure involving the use of an automobile, the contributing passenger may still be regarded as a guest without payment: *MacKay et al. v. Minard* (1952), 5 W.W.R.(N.S.) 175 (Man. Q.B.). In such cases, the fact that the parties are engaged in a social excursion, such as a holiday, that has a common purpose may override any commercial colouring that might be given to the arrangement by an agreement to share expenses. In the case at bar, however, there was no common social purpose. Each person in the vehicle had her own separate destination; it was plainly and simply transportation from one point to another. As well, there is no sufficient evidence to indicate that the payment made by Beazley and the one which the plaintiff expected to make had any direct proportional relationship to the sharing of the expenses of the trip.

[32] It also appears that it is not necessary that there be an express agreement to pay money. In *Gilbert et al. v. Upshall,* supra, it was held that passengers were not guests without payment on the basis that they had

paid a dollar or two to the driver (the father of one of the passengers) on previous occasions for their transport home from school, even though they had never discussed payment with the driver and he had never asked for payment and would have driven them without payment on that, and previous, occasions. The fact that there was a past practice of payment, known to the passengers, was sufficient in the circumstances of. that case to take them out of the category of guest passengers. Mifflin, J., stated at p. 23:

> "The arrangement between the parties in this case goes farther than to show that these trips were merely social occasions where the parties shared expenses. In the present case, the plain fact is that the passengers made regular payments to the owner or driver, which were accepted by him, for his driving them from school to home and return and that these payments were not related in any way to the cost of the trips."

It is therefore not necessary that there be an express request for payment; it is sufficient if there is a past practice or a custom in existence that creates a reasonable expectation on the part of the passenger that payment will be required and on the part of the driver that payment will be received. A firm contractual relationship is not necessary to elevate the arrangement beyond that of a purely social or neighbourly act.

[33] In this case, payment for the ride was actually made by Beazley and it is likely therefore that she would not have been regarded as a guest without payment. Can the plaintiff shelter under that payment? In *Spracklin and Spracklin v. O'Flaherty's Estate, MacNeill's Estate, MacDonald and MacNeill* (1977), 15 Nfld. & P.E.I.R. 488; 38 A.P.R. 488 (Nfld. S.C. T.D.), payment was made by one of a group of passengers and the court held, in the circumstances, that all passengers were not guests without payment; however, in that case the payment was made in effect on behalf of all the passengers, who were regarded by the court as guests of the paying passenger and not of the driver. See also *Blackwood v. Butler, Patten and Reliable Ambulance Service Ltd.* (1984), 48 Nfld. & P.E.I.R. 110; 142 A.P.R. 110 (Nfld. C.A.). That is not the case here. It is clear from the evidence that there was no prior relationship between the plaintiff and Beazley and when she paid her money she was doing it for herself and nobody else.

[34] It might also be said, however, that when Beazley paid the money, she effectively purchased a standard of care for the operation of the vehicle of which the plaintiff would then be an indirect beneficiary; however, duties of care and the standards of care flowing therefrom, are owed to individuals and it is clear that s. 221 applies to eliminate the complete cause of action in favour of an individual plaintiff unless the requirements of the statute are satisfied. Thus, the plaintiff in this case cannot directly rely on the payment by Beazley to take her out of the statute.

[35] Nevertheless, the fact that Beazley did pay something, on this and other occasions when she travelled with the defendant, supports the contention of the plaintiff that there is a custom in the Burin Peninsula area

for persons to pay for transportation to St. John's when carried as passengers in private motor vehicles. The plaintiff testified that this practice was well known and she had never had a ride to St. John's when she had not paid something for the trip. She said she did not discuss this with the defendant at the start of the journey because it would have been automatically understood by her that payment would be forthcoming.

[36] In this case, I find as a fact that it was a social convention to offer to pay for a ride to St. John's whenever the driver is someone other than a close family member. Such a drive is really a substitute for a commercial taxi ride. Considering the length of the journey it is not reasonable to expect that a person could free-load on another's gas and car maintenance for that distance. This is confirmed by the evidence of other witnesses who testified that it was common to pay, or at least offer to pay, something for a drive to St. John's from places on the Burin Peninsula. Beazley testified that $10 was the "going rate" for a one way trip.

[37] The defendant said that it would not have surprised her if at the end of the trip the plaintiff had offered some money, but she did not know whether she would have accepted it or not. Yet the fact that she accepted it from Beazley strongly suggests that if offered she would have accepted from the plaintiff as well, especially in view of the fact that the plaintiff's destination in St. John's would have necessitated the defendant deviating from her normal route, thus causing her additional inconvenience.

[38] In *Leonard v. Ryan et al.* (1976), 10 Nfld. & P.E.I.R. 581; 17 A.P.R. 581 (Nfld. T.D.), Furlong, C.J.N., applied and accepted the approach taken by Mifflin, J., in *Gilbert et al. v. Upsball,* supra, and commented as follows:

> "He arrived at the conclusion that where payments for transportation is regularly offered and accepted, then the facts demand examination to see whether or not the question of free transportation enters into the arrangement between the owner of a motor car and his passengers."

Thus, the existence of a past practice may give strength to a passenger's statement that she intended to pay (which I find the plaintiff in this case intended to do) and take such statements beyond a mere ex post facto rationalization. In my view, evidence of past practice is not necessarily limited to evidence of conduct between the particular plaintiff and the defendant. A community practice or custom known to the parties would also be sufficient for this purpose. In this case, the defendant acknowledged that such a custom existed, although she would not concede that it was universal.

[39] The fact that a social convention existed with respect to payment is the background against which the actions and intentions of the plaintiff and the defendant in this particular case must be analyzed.

[40] To obtain the benefit of s. 221, the burden is on the defendant to prove by a preponderance of evidence that the plaintiff was a guest:

Williams and Reid v. Brown and Brown, [1955] 4 D.L.R. 454 (N.S.C.A. en banc), affd., [1956] S.C.R. vii; *Yasinski's Estate v. Deneschuk Estate, Garrett Estate and Remus Estate reflex*, (1977), 6 A.R. 335 (T.D.). The question in any case therefore becomes: has the defendant, on a balance of probabilities, established that the purpose of the trip is purely social in nature?

[41] I am satisfied that the relationship between the plaintiff and the defendant in this case was not purely social in nature. Taking into account the social convention that existed and the fact that Beazley paid for the trip, I conclude that the request by the plaintiff for transportation to St. John's carried with it an implied obligation to make a payment for that trip and that, when offered, the defendant would have accepted. I am satisfied that such an arrangement is sufficient to take the relationship out of the statute. It was not purely social in nature. There was no common social purpose. The plaintiff was not a guest without payment.

[42] (b) Did The Actions Of The Defendant Constitute Gross Negligence? As a result of finding that the plaintiff was not a guest without payment in the defendant's vehicle at the time of the accident, all that is necessary for the plaintiff to establish liability is to show that the defendant was negligent in the operation of the vehicle. Counself for the defendant concedes that the actions of the defendant did constitute "ordinary" negligence. Accordingly, the defendant is liable to the plaintiff for the damages suffered by her.

[43] In the event that I am wrong in characterizing the plaintiff as not being a guest without payment for her transportation, I propose to consider whether the defendant demonstrated gross negligence in the operation of the vehicle. Counsel for the defendant has argued vigorously that the actions of the defendant in this regard cannot constitute gross negligence.

[44] Section 221 provides for liability to guest passengers if either gross negligence or wilful and wanton misconduct is established. The focus in this case was on gross negligence. The requirements of either gross negligence or wilful and wanton misconduct are disjunctive: *Drake v. Power* (1960), 46 M.P.R. 91 (S.C.N. T.D.); and while the reference to "wilful and wanton misconduct" requires a subjective enquiry into the mental attitude of the defendant, the requirement of "gross negligence" imports an objective standard that is to be determined entirely apart from what the driver thought or intended: *Studer v. Cowper,* 1951 CanLII 34 (SCC), [1951] S.C.R. 450, per Kerwin, J., at p. 455.

[45] To say that the courts have had difficulty in defining the distinction between gross negligence and ordinary negligence would be an understatement. Hickman, C.J.T.D., in *Andrews v. Leger and Leger* (1981), 30 Nfld. & P.E.I.R. 258; 84 A.P.R. 258 (Nfld. T.D.), described the distinction at p. 263 as an "invisible juridical line" which has been "bent and positioned as the exigencies and justice of the cause persuaded the trial judge or jury was necessary to ensure that justice be done".

[46] In *Kerr v. Cummings,* 1953 CanLII 32 (SCC), [1953] 1 S.C.R. 147, gross negligence was defined as "very great negligence". In *Holland v. Toronto,* [1927] 1 D.L.R. 99 (S.C.C.), at 102, Anglin, C.J.C., said:

> "The term 'gross negligence' ... is not susceptible of definition. No a priori standard can be set up for determining when negligence should be deemed 'very great negligence'."

[47] The test to which most courts return is that stated by Duff, C.J., in *McCulloch v. Murray,* 1942 CanLII 44 (SCC), [1942] S.C.R. 141, at p. 145 to the effect that gross negligence constitutes:

> "a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves."

[48] The question whether or not there has been very great negligence or a marked departure from the standards by which responsible people habitually govern themselves must be decided by reference to all of the circumstances of the particular case; it is a question of fact: *McCulloch v. Murray,* supra. While individual acts of negligence may not in themselves constitute the necessary degree of "marked departure" so as to constitute gross negligence, they may, when taken with other individual acts of ordinary negligence be regarded, in their totality, as gross negligence. In determining if there is gross negligence, the cumulative effect of all of the factors contributing to the accident must be assessed: *Thistle v. Ryan et al.* reflex, (1987), 66 Nfld.& P.E.I.R. 11; 204 A.P.R. 11 (Nfld. S.C.T.D.), per Cameron, J., at p. 13.

[49] The defendant argued that the speed at which the defendant was driving was not inordinately high and could not in itself be considered to amount to gross negligence, citing *Prince v. Vandenberg et al.,* supra, per Puddester, J., at p. 308. He says that, at most, the defendant demonstrated a momentary inattention to driving when she turned to speak to the plaintiff in the back seat. He relies on a number of cases which held that momentary inattention to driving does not necessarily constitute gross negligence: See, e.g. *Bennett v. Edwards* (1983), 44 N.B.R.(2d) 89; 116 A.P.R. 89 (C.A.).

[50] He also says that it is not sufficient to look at the end result of the accident, with its serious consequences, and conclude from that that the behaviour which led to it must have constituted gross negligence. He rightly points out that even a minor deviation from an expected standard of care can in some cases have catastrophic consequences. In *Edwards v. Strang and Strang* (1983), 42 Nfld. & P.E.I.R. 116; 122 A.P.R. 116 (Nfld. Dist. Ct.), Riche, D.C.J., said at p. 119:

> "Surely it [i.e. gross negligence] should not be determined by what is the end result, caused by that negligence. ... The negligence of the defendant must be judged by his driving conduct immediately prior to the accident. Sometimes a very minor error in judgment or loss of concentration might cause the most serious of accidents."

[51] In this case, it is not necessary to extrapolate in reverse from the results of the accident. Here, there is evidence of speed in excess of the speed limit and inattention by a driver who was not familiar with the road at a point when she was entering a curve in the road. At the point of navigating the curve, she chose to take her eyes and concentration off the road and turned to speak to the plaintiff in the back seat. That action, at a time when concentration on the road was more important than normal, in order to navigate a curve successfully at a speed greater than was permitted, constitutes, in my view, gross negligence. It is not one factor alone, but the confluence of all factors, namely speed, inattention, curve in the road and unfamiliarity with the road which constituted, at that instant, gross negligence.

[52] The fact that her driving earlier in the trip was uneventful (as confirmed by the lack of concern on the part of the passengers) and may not have even been negli gence, does not detract from the fact that at the moment of the accident, her conduct constituted a marked departure from the standard of conduct expected of responsible people. This is not a case like *Page v. Starker* (1982), 36 A.R. 19; 18 Alta. L.R.(2d) 343 (Q.B.), a case cited by the defendant, where the driving leading up to the accident was not alarming and the court found that there was no gross negligence. There the court had no specific indication as to why the vehicle in that case left the road. Here, the simultaneous occurrence of the factors that I have previously mentioned shows that a previously uneventful trip escalated into a marked departure from the standards expected in the circumstances. Other causes having emphasized the significance of the coincidental occurrence of a number of factors which, by themselves, would not constitute negligence but, taken together, could constitute gross negligence: *Thistle v. Ryan, supra; Burry v. Chaytor* (1973), 4 Nfld. & P.E.I.R. 414 (Nfld. S.C.); *Hicks v. St. Croix Estate* (1982), 36 Nfld. & P.E.I.R. 17; 101 A.P.R. 17 (Nfld. S.C. T.D.); and *Bonnell and Bonnell v. Hannam* (1983), 42 Nfld. & P.E.I.R. 43; 122 A.P.R. 43 (Nfld. Dist. Ct.).

[53] There are also a number of cases where inattention to driving, in circumstances that call for care, was held to amount to gross negligence: *Wright et al. v. Burrell et al.*, 1972 CanLII 430 (ON CA), [1973] 1 O.R. 761 (C.A.), where failure to keep a proper lookout by concentrating attention on a car heater and allowing a vehicle to drift over to the wrong side of a through highway on which other traffic was either present or could be anticipated and which demanded the driver's full attention on the road, constituted gross negligence; *Ziebert v. Grieser, MacDonald, Hooge, Hooge and Larry David Hooge Professional Corporation* reflex, (1980), 23 A.R. 596 (Q.B.), where a young driver, ignoring oncoming vehicles, moved her head and upper body below the dashboard to locate a "slurpy drink" which had fallen onto the floor constituted gross negligence; *Tower v. Hubert* (1972), 6 N.B.R.(2d) 587 (Q.B.D.), where a driver reaching down to the floor for a cigarette and taking his eyes off the road when driving at an appreciable speed on a snowy day constituted gross negligence; and *Stevens et al. v. Kachman* reflex, (1978), 10 A.R. 192 (S.C.T.D.), where talking to a

passenger in the vicinity of a curve on a mountainous road leading to the vehicle crossing the centre line and plunging over an embankment was held to amount to gross negligence.

[54] In my view, although the defendant in this case only turned her head for a short time to speak to the plaintiff in the back seat of the vehicle, it was foolhardy to do so when travelling at that speed and when navigating a turn. Considering the other factors involved, this cannot be said merely to be a momentary lack of attention as argued for by the defendant. Just as in *Wright et al. v. Burrell et al.,* supra, where the inattention there was "the result of a conscious decision on his part to devote his attention to the heater rather than to his driving", the inattention in this case was the result of a conscious decision on the defendant's part to devote her attention to obtaining an answer to her question from her passenger rather than to her driving in circumstances which demanded that her full attention be devoted to the road.

[55] Accordingly, even if the plaintiff was a guest without payment for transportation in the defendant's vehicle at the time of the accident, I find that the defendant's actions at and immediately before the occurrence of the accident constituted gross negligence and that this negligence was the cause of the accident and of the plaintiff's injuries.

Damages

(a) Pecuniary (Special) Damages.

[56] Special damages were agreed except for a portion of the Department of Health Account relating to x-ray films concerning a subsequent motor vehicle accident in which the plaintiff was involved on July 12, 1990, and except for a portion of the claim for lost wages.

[57] During a trip to St. John's for further surgery on her scalp to remove dirt and embedded glass resulting from the accident, the plaintiff was involved in a rear end collision on July 12, 1990, and, as a result, suffered from stiffness of the neck. When she arrived at the hospital, she was examined for this injury as well and certain x-rays were taken. It is not clear from the Department of Health account which and how many of the x-rays charged for relate to this subsequent injury; however, a comparison of interim accounts rendered before and after the subsequent accident shows six additional x-ray films were taken sometime during the plaintiff's overall treatment subsequent to the accident. Some of those would have related to the plaintiff's treatment for the original accident. Because there does not appear to have been any follow-up with respect to the subsequent accident, other than the initial investigation, I conclude that two x-ray films at $16 per film should be attributed to the subsequent accident. The Department of Health account should therefore be reduced by $32. There might also have been a charge, included in the overall charge for "professional services" in the Department of Health account relating to the examination of the plaintiff

in the Outpatients Department in connection with the subsequent accident, but I have no way of determining how much should be attributed to such examination. I would regard it as minimal in any event. I will make no allowance for this.

[58] With respect to lost wages, there is no dispute with the plaintiff's contention that she lost $1,950 wages with respect to the summer job that she would have had at Cornwallis, Nova Scotia, from July 1 to August 19, 1987, if she had not been involved in the accident. The plaintiff, addi tionally, claims for lost wages on days when she had to leave her employment to travel to St. John's for further medical examinations and surgery. On some of those days, it appears that she did not actually lose money, being able to claim absences as sick leave. In other cases, she did in fact lose some money. Having assessed the evidence, I conclude that her lost wages were as follows:

Date	Employer	Time Off	Amount
July 13, 1988	F.P.I., Burin	One day	$ 60.00
July 27, 1988	F.P.I., Burin	One day	60.00
Sept. 13-21, 1988	F.P.I., Burin	Six days	360.00
Oct. 19, 1988	F.P.I., Burin	One day	60.00
July 7, 1992	Pollett Ford, Marystown	Two days	112.00
	Total		$652.00

[59] To summarize, the plaintiff is entitled to recover special damages as follows:

Department of Health Account	$5,226.21
Less: X-rays on Department of Health Account attributed to subsequent accident	32.00
	$5,194.21
Travel meals and accommodation expenses	1,604.00
Ambulance Service	20.00
Loss of Wages Summer Employment	1,950.00

Subsequent lost wages	652.00
Damaged Clothing	50.00
Medical Reports	457.60
Total	$9,927.81

(b) Nonpecuniary (General") Damages.

[60] The plaintiff is entitled to be compensated in money for the pain and suffering, loss of amenities of life and permanent disabilities resulting from the defendant's negligence. In this case, no future pecuniary loss is claimed.

[61] The approach to be taken in assessing nonpecuniary damages is, as stated by Dickson, J., in *Andrews et al. v. Grand and Toy (Alberta) Ltd. et al.,* 1978 CanLII 1 (SCC), [1978] 2 S.C.R. 229; 19 N.R. 50; 8 A.R. 182; [1978] 1 W.W.R. 577; 83 D.L.R.(3d) 452; 3 C.C.L.T. 225, at 476 (D.L.R.): "... to assess the compensation required to provide the injured person 'with reasonable solace for his misfortune'." The aim, therefore, is to provide a reasonable measure of consolation to the victim for what the victim has suffered and will continue to suffer. The emphasis, therefore, must be on the impact on the particular plaintiff in question and must take account, not only of any external physical manifestation of the injuries suffered but also her own feelings and the psychological scarring that may have been suffered as a result of the accident. I accept the observation of Phillimore, L.J., in *Dimmock v. Miles* (1969 C.A. No. 436; cited in Kemp & Kemp, *The Quantum of Damages,* volume two, 5-751) to the effect that the specific reaction of the person suffering the injury is important in assessing the quantum of damages:

> "... the real difficulty here is that, again she was not asked about her own feelings with regard to the scar and that is a much more serious matter in this sort of case. After all, some may treat a scar on the forehead as comparatively trivial but to another it would be a source of serious worry"

[62] In my view, therefore, the plaintiff in this case ought to be compensated by way of an award of general damages for the initial severe trauma experienced by her as a result of the accident, the pain and suffering that she subsequently underwent during her course of treatment, the continuing symptoms of pain which she will continue to experience in the future and not only the permanent residual physical results of the injury but also the psychological effect which the injury has had on her and on her ability to enjoy life and interact with others in society.

[63] I disagree, therefore, with the approach urged upon me by counsel for the defendant to the effect that the main determinant of the level of general damages in this case should be the degree of visible scarring which remains. While the visible manifestation of the injury is no doubt an important factor in assessing the degree of injury and its impact on the

plaintiff, it is not an objective assessment by the court as to how others will react to those injuries that determines the matter, but rather the reasonable reaction of the plaintiff as to how she thinks she is perceived by others. In other words, it is how the plaintiff sees herself that is key, not how she is seen by others.

[64] In this case, at the time of trial, a number of the scars in the plaintiff's' facial area had healed considerably. There still remained, however, the main scar running from the side of her nose in a curving line across her left cheek and upwards towards the left ear. This scar is still visible from greater than a conversational distance although, on a fair assessment, it cannot be said to be ugly nor, I would think, would it be regarded by most people as off-putting.

[65] To the plaintiff's credit, she says that she has attempted to ignore her disfigurement by adopting a nonchalant approach and by trying not to let the injury "control" her. Nevertheless, it is clear to me that the injury has considerably affected her and will continue to so affect her in relation to social intercourse.

[66] At the time of the accident, the plaintiff was a young woman just having graduated from high school with the world ahead of her. She was active socially and had a steady boyfriend. To a person in such a circumstance, appearance is obviously very important.

[67] Following the accident, she described her initial reaction to seeing herself in the mirror. She said that she initially didn't recognize the "animal" looking back at her; she screamed and ran away. Her relationship with her boyfriend immediately ceased following the accident. He visited her once in hospital and never contacted her again. She became a recluse in the months following the accident and lived in her grandmother's summer cabin outside of Marystown so that no one would be able to see her. Her social life became non-existent.

[68] She was persuaded by her sister to attend university in the fall. She says now that it was a mistake to attend university at that time. She was always conscious of people staring at her and was consequently very uncomfortable whenever she was around others. At that time, her hair had not grown back and the injuries on her face and scalp were still raw. As a result of the stitching near her left eye, the eye was half closed and gave a distorted appearance to her face. (Although this was subsequently corrected by surgery, the skin in that area still has an unnatural "white" look to it.) She related an incident on a bus where a young girl stated to her mother, within hearing of the plaintiff that "she's some ugly; what happened to her?". The plaintiff immediately left the bus and walked home crying. As a result, the plaintiff did not do well at university and dropped out after Christmas.

[69] In the three years following the accident, the plaintiff has had subsequent surgery to deal with the problem with her eye, to remove further embedded grit and glass from her scalp and to improve, by plastic surgery,

some of the facial scars. She now has to live with her surgeon's conclusion that further plastic surgery will not improve her appearance any further.

[70] She says that the injuries, including the remaining bits of gravel and other material in her scalp, are not so painful today as they have been in the time following the accident. The part of her face between the cheek scar and her left eye is now completely without feeling. She says, however, that the other scars and the injury to her scalp still cause her some physical discomfort and all of her injuries cause her considerable social embarrassment. She still does not feel confident in group situations and even in one-on-one encounters, she constantly wonders as to whether the other person will notice her scars and what he or she will think of them. This is a constant problem because she is presently in a job where she deals with the public.

[71] I fully accept the plaintiff's description of the impact of the injuries on her. I believe it to be a reasonable and understandable reaction in the circumstances. In my view, the impact of the injuries has had a socially disabling effect on her.

[72] Numerous cases were cited to me by counsel for the plaintiff and the defendant as indicating the range of awards for general damages relating to facial scarring. I do not propose to refer to them all. Each depends upon its own facts.

[73] I will initially deal with some of the cases cited on behalf of the plaintiff.

[74] In *White v. Regional Municipality of York* (Ont. Gen. Div.; released April 26, 1990; Goldsmith, Digest #16.38) the plaintiff suffered serious lacerations to her leg, left eyelid and left side of the nose. The facial lacerations required skin grafts. The facial scars were apparent at a conversational distance but not disfiguring. The plaintiff was self-conscious about the scars. MacFarland, J., assessed general damages at $30,000. It is to be noted that in this case, there was evidence that the plaintiff was self-conscious about the scars.

[75] In *Pelletier v. Olson* reflex, (1987), 59 Sask.R. 212; 42 C.C.L.T. 129 (Q.B.), an infant female plaintiff received, amongst other injuries, multiple scarring to her face and forehead. Those scars were noticeable and lasting. None of the scars was as long as the plaintiff's major scar in the instant case. Malone, J., assessed damages at $18,000.

[76] In *Wattier v. Draper* reflex, (1988), 52 Man.R. (2d) 125 (Q.B.), a young girl who received extensive lacerations to the right side of her face required plastic surgery on several occasions. She initially suffered depression, sleeplessness and self-consciousness about her scars but eventually overcame the psychological reaction to them. The scars were prominent and visible when in close proximity but were less visible and

disfiguring from a distance. General damages were assessed by Kennedy, J., at $30,000. He stated at p. 126:

> "Damages for scars and lacerations ... attract the higher end of the scale when the scars are to a plaintiff's face, and remain visible and dominant, as opposed to scarring which is cosmetic only and hidden, either in the hairline or in other lines in the face."

[77] In *Santos v. McMaster* (B.C. S.C.; released February 24, 1989; Goldsmith, Digest #16.15) Meredith, J., awarded $18,000 general damages to a female plaintiff who suffered scarring to her right eye area and neck and who suffered considerable embarrassment as a result. The award also encompassed damages for a back injury.

[78] In *White v. Murphy & Singleton et al.* reflex, (1986), 58 Nfld.& P.E.I.R. 181; 174 A.P.R. 181 (Nfld. Dist. Ct.), a seventy year old female plaintiff suffered a serious cut to her forehead requiring thirty-five sutures to close and leaving a six inch scar. The court awarded damages of $7,000 with respect to the scarring which it expressly related to the plaintiff's advanced age. The court indicated that if the same scarring had been suffered by a younger person, the award would have been increased.

[79] In *Power et al. v. McDonald et al.* 1992 CanLII 7360 (NL SCTD), (1992), 96 Nfld. & P.E.I.R. 181; 305 A.P.R. 181 (Nfld. S.C.T.D.), Puddester, J., awarded $12,000 general damages for scarring to the ear of a male plaintiff and for a foot fracture. As far as can be gathered from the report of that case, it appears that the plaintiff's scarring in that case was less of a consequence than in the present case.

[80] It is noteworthy that with respect to the cases cited by the plaintiff, most, particularly those at the higher end of the scale, made reference to the impact of the scars on the particular plaintiff in terms of self-consciousness and interference with future enjoyment of life. They did not involve merely an objective assessment of the visible extent of the scar to a reasonable observer. The range of damages for facial scarring in the cases cited by the plaintiff (some of which have not been referred to in this judgment) is $7,000 to $50,000.

[81] By contrast to the foregoing cases, the defendant relied upon a number of cases which indicated a range of damages between $3,500 and $12,000.

[82] In *Both v. MacFayden* (Ont. Dist. Ct.; released November 5, 1986; Goldsmith, Digest #16.161) a male plaintiff received $5,000 for multiple facial lacerations requiring thirty-six stitches. By the time of trial, there were practically no scars left.

[83] In *Starrs v. Taylor* (Ont. Dist. Ct.; released March 13, 1986; Goldsmith, Digest #16.155) the plaintiff received $3,500 general damages

for cat scratches and cuts to the left side of the face which, by the time of trial seemed to be fading.

[84] In *Roy v. Stewart* (Ont. Dist. Ct.; released August 9, 1985; Goldsmith, Digest #16.151) a male plaintiff received $7,500 for lacerations to his cheek, jaw and chin which had healed uneventfully leaving scars visible on close scrutiny. There was also a loss of sensation to the plaintiff's lip which caused him embarrassment from being unable to detect food particles on his lip when eating. The degree of impact on the plaintiff in that case, in terms of the plaintiff's future social intercourse, does not appear to be as great as in the present case.

[85] In *Hurley v. Moore* reflex, (1990), 85 Nfld. & P.E.I.R. 271; 266 A.P.R. 271 (Nfld. S.C.T.D.), Wells, J., awarded $3,000 damages for pain and suffering and $2,000 for a scar to the left eye of a female plaintiff. As well, $20,000 was awarded for post traumatic stress disorder. The scar in that case was of a minor nature and the most serious result was the post traumatic disorder. The case, I am told, is under appeal.

[86] Finally, in *Stewart v. Mayer* (N.B. Q.B.; released May 12, 1989; Goldsmith, Digest #16.20) a fifteen year old female plaintiff who suffered cuts to her face, upper lip and the tip of her nose, leaving scars visible from a normal conversational distance but which were less than obvious from a distance greater than six feet, was awarded, $8,500.

[87] With the exception of the decision of *Roy v. Stewart,* the materials submitted respecting the cases cited by the defendant do not indicate the degree of impact which the scarring had on the individual plaintiff. I do not find those cases as helpful as those cited by the plaintiff.

[88] In this case, it is important to compensate the plaintiff, not only for whatever visible residual scarring remains but also for the subjective impact which those scars have had and will continue to have on her ability to live a normal life in society.

[89] Having considered the matter carefully, I believe an award of $22,500 nonpecuniary damages for the plaintiff's initial pain and suffering, subsequent surgery, loss of sensation in the injured area, facial scarring and loss of enjoyment of life is appropriate.

(c) Prejudgment Interest:

[90] (i) On pecuniary loss to trial. Section 3(1) of the *Judgment Interest Act,* R.S.N. 1990, c. J-2, requires the court to award prejudgment interest on the award of pecuniary damages calculated in the accordance with the rate of interest prescribed from time to time pursuant to s. 6 (as to which see *Nfld. Reg.* 64/84 and 79/93) from the day the cause of action arose to the date of judgment. In respect of damages for lost income, s. 4(2) of the *Act* will apply.

[91] (ii) On insured hospital and medical expenses. The defendant argued that I ought not to award prejudgment interest on the hospital and medical expense portions of the award of pecuniary (special) damages. Although s. 5(1) of the *Hospital Insurance Agreement Act,* R.S.N. 1970, c. H-7 and s. 43(1) of the *Medical Care Insurance Act,* R.S.N. 1990, c. P. N-5, both permit the plaintiff to sue for and recover medical and hospital costs relating to her injuries notwithstanding that those services are insured services paid for by the province, and require the plaintiff, on recovery, to pay any such amounts over to the Minister of Health or the Medical Care Commission as the case may be, the defendant argues that what can be recovered in that regard is limited to the actual expenses and not interest thereon. In support of this proposition, the defendant relies on the following obiter statement of Cameron, J., in *Thistle v. Ryan et al.* reflex, (1987), 66 Nfld. & P.E.I.R. 11; 204 A.P.R. 11 (Nfld. S.C.T.D.), at p. 15:

> "These statutes [i.e. the *Hospital Insurance Agreement Act* and the *Medical Care Insurance Act]* permit the recovery of the amount the insurer would have had to pay for the services which I do not interpret to include interest."

[92] With respect, I have come to a conclusion different from that of Cameron, J., on this point. The entitlement of the plaintiff (and by subrogation, the Crown) to prejudgment interest on insured services does not flow from the hospital or medical care insurance legislation, but from the *Prejudgment Interest Act.* Section 3(1) of that **Act** provides that where a person "obtains a judgment for the payment of money" the court "shall award interest" on the judgment.

[93] Sections 5(1) and 43(1) of the hospital and medical care insurance statutes merely preserve a right of recovery in the plaintiff even though the services are actually paid for by a third party, thereby eliminating any barriers to recovery based on notions of collateral benefits. It is that right to "recover the cost of those insured services" which may ultimately be perfected by a judgment for the payment of money equal to those costs. Once such a judgment is obtained, the provisions of the *Judgment Interest Act* then kick in and require the court, subject to the discretion under s. 3(3), to award prejudgment interest on that judgment. Such a requirement applies whenever a plaintiff obtains a judgment regardless of what the plaintiff may be obligated or permitted to do with that money once the judgment is satisfied.

[94] I note as well that s. 43(3) of the *Medical Care Insurance Act* specifically provides that where the cost of the insured services is paid by the Medical Care Commission, the commission is "subrogated to all rights of recovery or on behalf of the insured person against the tortfeasor" and may sue in the name of the commission or in the name of the insured to enforce those rights against the tortfeasor "in respect of the costs of the insured services". The intent of the legislation is clear: The Crown, represented by the commission, is to stand in the shoes of the insured person for the purpose of recovery in respect of the cost of the insured services. The entitlement to prejudgment interest on any judgment in that connection

under the *Judgment Interest Act* is clearly "in respect of" those insured services.

[95] The language of s. 5(3) of the *Hospital Insurance Agreement Act* is not as clear in that it does not expressly state that the Minister of Health is subrogated to the insured person's rights of recovery but it does provide that the minister may bring an action in his or own name or in the name of the insured for the recovery of the costs of the insured services. In my view, the intent is the same. In any event, once the right to recovery of the cost of the insured services is perfected by judgment, the court will then award interest on that judgment under the *Judgment Interest Act*.

[96] It is true that the court retains a discretion under s. 3(3) of the *Judgment Interest Act* to refuse an award of interest or to award a rate of interest different from the prescribed rate, when it is "just to do so". However, I do not see why it would be just, as a general rule, not to award interest simply because of the party entitled to it is obligated to pay that money, once recovered, over to a third party, in this case the Crown or its agent. The expenditure of public funds by the Crown on hospital and medical services surely should attract the same rate of recovery as when private funds are expended. There is no reason in principle why taxpayers in general ought to bear the burden of a lesser degree of recovery then when an injured plaintiff recovers for his own expenditures. If he or she is entitled to interest to compensate for loss of use of money, so ought the Crown.

[97] Accordingly, I conclude that prejudgment interest is payable under s. 3(1) of the *Judgment Interest Act* on the hospital and medical account from the date of incurring of the cost of each service to the date of judgment at the applicable prescribed rate.

[98] (iii) On nonpecuniary damages. The *Judgment Interest Act* draws no express distinction in the awarding of interest between pecuniary loss and nonpecuniary damages even though nonpecuniary damages are assessed as at the date of trial whereas pecuniary loss, being a monetary expenditure or deprivation, is necessary ascertained at the earlier time of the actual expenditure or loss.

[99] As Puddester, J., pointed out in *Power et al. v. McDonald et al.* 1992 CanLII 7360 (NL SCTD), (1992), 96 Nfld. & P.E.I.R. 181; 305 A.P.R. 181 (Nfld. S.C.T.D.), it is theoretically arguable that, inasmuch as nonpecuniary damages are assessed at the date of trial, there is already inherent in any assessment a "gross-up" to take account of differences between the time when the injuries actually occurred and when they are assessed, thereby preserving the real value of the loss in the hands of the plaintiff. Accordingly, the award of prejudgment interest at the full prescribed rate on any "gross-up" amount will result in additional compensation to the plaintiff beyond what he should or would have received had the appropriate amount been paid at the date the injury occurred. To account for the difference between pecuniary and nonpecuniary loss, some courts, in fixing general damages,

fix a global sum that includes entitlement to prejudgment interest. See, eg. *Wattier v. Draper,* supra, at p. 127.

[100] I agree with Puddester, J., however, that from the construction of the Newfoundland legislation, "the intention of the legislature is that the award of nonpecuniary damages will be treated the same as all damages in the judgment" and that "the mere existence of nonpecuniary damages in a particular case does not, within the scope and intent of s. 3(3) of the *Act,* constitute a "circumstance" rendering it just, from that fact alone, to vary or exclude the operation of the *Act ...".*

[101] I conclude, therefore, that prejudgment interest is payable on the nonpecuniary damage portion of the award in this case at the prescribed rate as it existed from time to time.

Summary And Disposition

[102] The plaintiff may enter judgment against the defendant for $32,427.81, representing $9,927.81 for special damages and $22,500 for general damages. The plaintiff is also entitled to interest on her judgment together with her costs to be taxed. Action allowed.