** Unedited **

Indexed as:

De Meyer v. National Trust Co.

Between
Kathleen De Meyer, plaintiff, and
National Trust Company, Prudential Assurance Company Limited,
The Toronto Dominion Bank, John A. Flanders Limited,
defendants

[1995] M.J. No. 313
File No. CI 90-01-50551

Manitoba Court of Queen's Bench
Winnipeg Centre
Clearwater J.

August 2, 1995.
(38 pp.)

[Ed. note: A Corrigendum was released by the Court August 21, 1995; the correction has been made to the text and is appended to this document.]

Torts — Occupiers' liability for dangerous premises — Negligence of particular occupiers — Shopping malls — Damages — General damages for personal injury — Loss of future income incidental to contingent surgery — Special damages — Cost of housekeeping services and yard maintenance — Mitigation - In tort — Personal injuries, treatment for.

Action for damages. The plaintiff slipped and fell in the parking lot of the defendant mall. In support of her claim in negligence pursuant to the Occupiers' Liability Act, the plaintiff alleged that the portion of the parking lot on which she fell on a November afternoon in 1988 was extremely icy. The evidence established that these icy conditions existed on the mall's driveway and sloped parking lot as early as 7:30 a.m. on the day in question. The property manager received a warning about the situation at about 10:00 a.m. from one of its employees and immediately communicated with its sanding subcontractor. However, the subcontractor's employee did not arrive until four hours later, approximately one hour after the plaintiff's fall. Also, the evidence established that the maintenance man, whose duty it was to check the entire premises before the opening of the mall to business, did not attend at all to do the inspection. The 48-year-old plaintiff suffered a severe fracture of her right ankle which had left her with a significant permanent disability in the form of a limited range of motion and persistent pain. Although she had had three operations on the ankle since the accident, an ankle fusion in the future was part of her prognosis. While the plaintiff was able to return to her work as a credit administrator approximately three months after the accident, her injury had forced her to give up other activities that she routinely participated in. Also, she was no longer able to undertake her housekeeping duties. The plaintiff had not followed the recommendation of her doctors with respect to losing weight. She conceded the claim of the defendants that she might not require future surgery if she lost weight.

HELD: Action allowed. The defendants were negligent and failed to take reasonable care to see to the safety of the plaintiff and other members of the public who were, or who ought to have been expected to be, on the mall premises during business hours on the day of the accident. This conclusion was proper notwithstanding that the defendants had in place a system of maintenance and inspection that was reasonable. Having such a system in place

was not an absolute answer to liability. General damages were assessed at $40,000, which amount included an allowance for approximately four months of lost future income incidental to the contingent ankle fusion operation. That award was justified not only by the plaintiff's past, present and future pain and suffering arising out of her injury but also by the effects which those injuries had had on her family, activities and lifestyle. Compensation for cost of future housekeeping and yard maintenance assessed at $18,000. In the circumstances of this case, it was erroneous to characterize the housework and the yard work as things that were done for her pleasure. In determining the award to which she was entitled in that respect, the appropriate amount had to be one representing the present value of the expense the plaintiff would incur on those two items over the next 15 years. In the absence of appropriate expert evidence that the plaintiff was incapable of losing weight and maintaining a lower weight, the defendants had succeeded in showing that she had failed, to some extent, to reasonably mitigate her damages. That justified a 10 per cent reduction in her award for general damages.

Statutes, Regulations and Rules Cited:

Occupiers' Liability Act, R.S.M. 1987, c. O8, s. 3(1).

Counsel:

M. Finlayson and R.J. Van Walleghem, for the plaintiff.
D. Hill and J. Holmstrom, for the defendants, National Trust Company, Prudential Assurance Company and John A. Flanders Limited.
No appearance for the defendant, The Toronto Dominion Bank (action against The Toronto Dominion Bank discontinued prior to trial).

¶ 1 **CLEARWATER J.** :— The plaintiff, a 48-year-old credit administrator and homemaker, sues for damages for injuries suffered by her when she slipped and fell in a parking lot at the Westrow Industrial Mall ("the Mall") located at the southeast comer of the intersection of Dublin Avenue and St. James Street, in Winnipeg, on Tuesday, November 29, 1988. The Mall lands and premises are tenant-occupied commercial premises owned by the defendant National Trust Company as registered owner and by the defendant Prudential Assurance Company Limited as beneficial owner. The defendant John A. Flanders Limited ("Flanders") is the property manager. The Toronto Dominion Bank ("the Bank") operates a bank branch as a tenant at 1580 Dublin Avenue, in the Mall.

¶ 2 The plaintiff slipped and fell on what she alleges was an extremely icy portion of the parking lot at the Mall after conducting some banking business at the Bank and while in the process of walking across the parking lot to her car. The plaintiff sues in negligence and pursuant to The Occupiers' Liability Act, R.S.M. 1987, c. 08 ("the Act"). The plaintiff's action as against the Bank was discontinued prior to trial. The remaining defendants deny liability and plead, alternatively, contributory negligence on the part of the plaintiff.

¶ 3 At the outset of the trial the defendant Flanders acknowledged that on the day in question, in its capacity as property manager for the defendant owners, it was responsible for the maintenance of the parking lot. The pleadings, evidence and argument raise the following issues:

1) Were the plaintiff's injuries and resulting damages caused or contributed to by the negligence of the defendants, or any of them, and (or) by the breach of any duty owed by the defendants to the plaintiff pursuant to the provisions of the Act?

2) What is the quantum of damages sustained by the plaintiff as a result of any negligence and (or) breach of duty owed to her by the defendants?

3) Should the plaintiff's damages be reduced by reason of any contributory negligence on her part and (or) by reason of any failure on her part to mitigate damages?

THE EVIDENCE RE LIABILITY

¶ 4 At all material times the plaintiff and her husband lived on an acreage near Oak Bluff, Manitoba, and the plaintiff was employed as a credit administrator for a business known as Lyman Tubeco, a division of Ferrum Inc. The plaintiff's regular hours of work were from 8:00 a.m. until 1:00 p.m., Monday to Friday. On Tuesday, November 29, 1988, the plaintiff had finished work at approximately 1:00 p.m. She drove to the Mall to make a deposit at the Bank (she described this as her "normal routine" before going home from work). The plaintiff had parked her car, gone into the Bank, completed her banking business, and was walking back to her car after exiting the Bank premises when she slipped and fell, sustaining a severe fracture of the right ankle.

¶ 5 The fall was witnessed by Denys Fraser, the owner and manager of the Westbrook Inn (a hotel carrying on business in the same general area of the City). Mr. Fraser had driven into the parking lot just prior to the plaintiff's fall, on his way to the Bank to do his own banking. He had stopped just before he got to the door of the Bank to permit the plaintiff, who was exiting the door, to walk across the driveway in front of his car to where her car was parked. Both the plaintiff, Mr. Fraser and Gloria Jones (an employee of the Bank) testified to the effect that the parking lot, at least in front of and near the Bank, was extremely slippery on the day in question prior to and at the time of the plaintiff's fall. The plaintiff was taken by ambulance to the Misericordia General Hospital where she subsequently underwent surgery. She has received ongoing medical and physiotherapy treatment. Although she has been able to return to work, she has been left with a significant disability as a result of the injury and the subsequent development of osteoarthritis in the ankle. Depending on the degree of pain that she may be able to tolerate in the future, she faces the possibility of further surgery to fuse her ankle.

¶ 6 The fall in question occurred at approximately 1:30 p.m. The plaintiff is approximately 5'2" tall and at the time of the accident weighed approximately 220 pounds. When she got out of her car to go into the Bank she immediately recognized that the parking lot was very slippery. She was wearing rubber-soled winter boots with a heel of 1 1/2" high. She had to walk a distance of approximately 5 to 6 car lengths in a southwesterly direction from her car to the Bank door. The parking lot surface had a slight slope down from the Bank door north towards Dublin Avenue. Because the surface was so slippery, the plaintiff described herself as "sliding" her feet as she walked to and from the Bank in an attempt to keep from falling. All that she could remember of the actual fall was that her feet went up in the air and when she landed her one leg was close to, if not partially under, one of the cars parked near her car. She landed on her back.

¶ 7 Mr. Fraser witnessed the fall. His evidence essentially confirms the limited recollection of the plaintiff; that is, the parking lot in question was extremely slippery at that point in time and as she passed in front of his car on her way to her car, her feet suddenly went out from under her. Mr. Fraser immediately got out of his vehicle to come to her assistance and Gloria Jones, the Bank employee, came out of the Bank to her assistance. Ms. Jones came out with a pillow to assist the plaintiff until the ambulance arrived. The plaintiff arrived at the Misericordia Hospital by ambulance at approximately 2:00 p.m.

¶ 8 The plaintiff testified that there was definitely no sand on the slippery parking lot surface at the time in question and she could not see any salt. This evidence was confirmed by the witness Fraser (who also described the lot as being "very slippery") and by the witness Gloria Jones. Ms. Jones had arrived at work early that morning (sometime before 8:00 a.m.), as was her usual practise. She described the lot as being "sheer ice" and "very slippery" at that relatively early hour. The defendant Flanders was, to her knowledge, responsible for maintaining the lot, including snow and ice removal in the winter. Ms. Jones acknowledged on cross-examination that this branch of the Bank (by the time of the trial she was working at a different branch downtown) probably did not open for customers until approximately 9:00 a.m. or 9:30 a.m. Nevertheless, she was firm in her recollection that she

arrived early that morning, well before 8:00 a.m., and she was firm in her evidence as to the condition of the parking lot surface at that time (which evidence I accept). She had a good recollection of the event and she was truthful in her testimony; she had worked at this branch for about five years at that time and this was the first time, to her recollection, that someone had fallen and injured themselves in the parking lot. She testified that usually the lot was kept in a reasonably good condition.

¶ 9 Ms. Jones testified that she seldom had to phone Flanders (or anyone) about the condition of the parking lot. However, on that morning, she phoned Flanders at approximately 10:00 a.m. and asked them to sand the parking lot because it was extremely slippery. Sandra Martin, the employee at Flanders at the time who was responsible for overseeing the maintenance of this parking lot, was called as a defence witness by Flanders. Flanders managed the property for the owner pursuant to a written management agreement (Ex. 8). Under the agreement Flanders was responsible for hiring and contracting, on behalf of the owner, for those services necessary for the proper maintenance, operation and security of the property and Flanders undertook to "superintend" such persons or firms. In turn, Flanders had engaged the services of a contractor, Ken Palson Enterprises Ltd. ("Palson") (owned by Mr. Ken Palson), to look after the snow and ice removal from the Mall premises for the 1988-89 "snow removal season".

¶ 10 Ms. Jones testified that at approximately 11:00 a.m. on the morning in question (about one hour after she had alerted Flanders of the icy conditions) her (Ms. Jones's) mother attended at the Bank to go for lunch with her. The two of them exited the Bank and walked across the driveway and parking area in question to get to the restaurant. Ms. Jones testified that she had to walk "arm-in-arm" with her mother because of the slippery conditions. She recalled mentioning to her mother that she had already called Flanders about the icy conditions. Notwithstanding that the situation had not been rectified when she went for lunch (and when she returned from lunch), Ms. Jones (apparently no one on behalf of the Bank or any other tenants) placed a second or additional call to Flanders to advise that the icy conditions had not yet been rectified.

¶ 11 It was some time after 1:00 p.m. and prior to 1:30 p.m. that the plaintiff slipped and fell on the ice. After the accident, Ms. Jones phoned Flanders immediately. She again asked them to come and apply sand to the surface in question and told them that someone had now slipped, fallen and injured herself. According to Ms. Jones's uncontradicted evidence, approximately 20 minutes after she placed the second call to Flanders, a truck arrived on the scene and deposited enough sand to, in her words, make the lot "look like Grand Beach". Ms. Jones testified that there were no further problems that day.

¶ 12 Ms. Martin, testifying for the defendant Flanders, stated that she received a message from her secretary on November 29, 1988 to the effect that Ms. Jones from the Bank had called at 10:00 a.m. concerning icy conditions at the premises. Ms. Martin was not examined or cross-examined as to when (how long after 10:00 a.m.) she received this message and when (what time) she passed on the concern to the contractor, Palson. Ms. Martin left the impression with this court that she got the message and made the call to the contractor very shortly after 10:00 a.m. She was told by whoever answered the telephone at Palson that they would get out to the premises "right away". Mr. Palson, Flanders' subcontractor responsible for the maintenance of this lot and Mr. Leclair, one of his employees, also testified for the defence. I will review their evidence in detail later, but suffice it to say that the sand arrived after the accident (consistent with the foregoing chronology).

¶ 13 Consistent with the evidence of Ms. Jones, Ms. Martin acknowledged that she (or Flanders) had received a second call from someone at the Bank later that day, with a message to the effect that someone had fallen and been injured on the premises (I am satisfied that this is the call that Ms. Jones made to Flanders' office immediately after the ambulance attended and took the plaintiff to the hospital). Ms. Martin was not examined directly (or cross-examined directly) as to whether or not she placed a second call to the contractor, Palson. According to Ms. Martin, after she received this second call from the Bank, she advised Flanders' lawyer and someone who she described as her "boss" at Flanders about the accident.

¶ 14 No evidence was given by anyone on behalf of Flanders as to why she (or her boss or the lawyer), now fixed with knowledge that the icy conditions had not been rectified some 3 1/2 - 4 hours after the initial notification from Ms. Jones (the Bank), did not immediately call the contractor, Palson, to find out why he had not attended. It may or may not be "coincidence" that within approximately 20 minutes of the second call from Ms. Jones to Flanders' office a truck with sand appeared on the scene. According to the evidence of Ken Palson, the principal and owner of Palson, although he or someone from his office recalled a telephone call coming in (from Flanders) on the morning of the 29th, they (Palson) did not know that they had to attend, as he put it, "to the minute". Mr. Palson testified that when the call came in their sanding truck was tied up elsewhere. Testifying from his recollection and with reference to an invoice that was produced (Ex. 20), he testified to the effect that because his sanding equipment was tied up elsewhere he called Wakshinsky Bros. Ltd. ("Wakshinsky") another contractor apparently in the same or a similar business of sanding, and arranged to meet them at the site to show them "where to sand". Mr. Palson gave no evidence as to when (what time) he called Wakshinsky. As they did not attend until some 20 - 30 minutes after the accident, it is apparent that someone (either Flanders or Palson or Wakshinsky or all of them) did not treat the requirement for services at the premises as any sort of emergency or urgent situation. Ken Palson, again testifying from recollection, stated that he only had 'one call' on November 29 to go out and sand at the premises. Unfortunately Mr. Palson did not have any specific records of what he did that day and when (what time). He acknowledged in cross-examination that he did not today (the day of the trial) have a specific recollection of what he did that day back in 1988. The business premises of Wakshinsky was, according to Mr. Palson, located only approximately 10 to 15 minutes from the Mall. Palson's business premises were located a considerable distance from the Mall. Palson's office address, according to his invoice (Ex. 19) was 328 Wallace Avenue. Mr. Palson did not elaborate on where this was in relation to the Mall, but he did testify that his equipment was kept on Dugald Road which is in the very east end of the City of Winnipeg, some considerable distance from the Mall. According to Mr. Palson, 2 to 3 hours is a "good response time" when his firm received a call such as it did in this case from Flanders.

¶ 15 Maurice Leclair, a long-time employee of Palson and a heavy equipment operator, also testified for the defence. According to a "Job Record" produced by Palson from its records (Ex. 18), Mr. Leclair worked for approximately three hours between 6:00 a.m. and 9:00 a.m. at the Mall on Monday, November 28, 1988, one day before the accident. This document indicates that he "scraped and sanded by bank". There was some confusion over this record and its preparation (if not its accuracy). Mr. Leclair was quite definite in his evidence, both in direct examination and again in cross-examination, that the only handwriting that was his handwriting on this document was his own signature near the bottom, opposite the printed words "operator's signature". Mr. Leclair denied that he filled out this sheet and indicated that Mr. Palson would have filled it out and that he (Mr. Leclair) would have looked at it and signed it, probably at the end of the day as he usually did these on a daily basis. Palson, on the other hand, testified, both on his direct and cross-examination, that the only handwriting that was his on Ex. 18 was his own signature where it appears to the right of the printed words "KP. Ent. signature" and that it was likely Leclair who filled it out. Given the weather records (the monthly meteorological summary [Ex. 2]), it is difficult to understand how the conditions could have been so icy (as they clearly were) on Tuesday, November 29, 1988, when, according to Ex. 18, a fairly significant amount of sanding (2 hours of work on a relatively small area) was supposed to have been done by Palson early on Monday, November 28, 1988. The high and low temperatures on November 28 were -10.8 degrees Celsius and -21.1 degrees Celsius, respectively. The high and low temperatures on November 29, 1988 were -5.9 degrees Celsius and -14.2 degrees Celsius, respectively. The total precipitation on each of these two days was minimal (0.2 mm. each day). There was no evidence to suggest a sudden unexpected amount of precipitation and (or) freezing and thawing such that the icy conditions as existed on November 29 should have occurred or accumulated subsequent to a sanding of the premises between 6:00 a.m. and 9:00 a.m. on Monday, November 28. The weather conditions on Thursday, November 24, through Friday, November 25, most likely caused the surface conditions which would have required sanding either on the weekend or early Monday morning as appears was done (Ex. 18). The weather summary (Ex. 2) for November 1988 shows temperatures moving just above and below the freezing mark between November 23 and November 25 with 1.0

mm. of rain and 1.4 mm. of snow on November 24. On Friday, November 25, 3.7 mm. of snow fell with temperatures ranging from a high of 0.60 Celsius to a low of -10.2 degrees Celsius. After November 25 the temperatures remained consistently below freezing for the rest of the month. As no invoices or job records were produced by the defendants to show that the lot was serviced (scraped and/or sanded) after the rain and snow on November 24 until early November 28 (Ex. 18), I am satisfied that the icy surface in question, which would have resulted from the rain and snow on Thursday and Friday, was not dealt with until Mr. Leclair attended early Monday morning. Assuming Mr. Leclair did the work on Monday that he said he did (Ex. 18) and assuming the next sanding was done by Wakshinsky at or about 2:00 p.m. on Tuesday, Mr. Palson's explanation for how the extremely icy conditions which existed on Tuesday makes sense.

¶ 16 Mr. Palson's explanation as to how there could have been such icy conditions on November 29 if the lot had been sanded on the morning of November 28 (Ex. 18) was that the sand would get tracked in and out with vehicles and there was a lot of traffic in this lot. In addition, he suggested that if a wind blew snow either off of or around the buildings onto the lot in question, it would be packed down by the traffic and the sand would be "out of sight". According to Mr. Palson, who is very experienced in the ice and snow removal business, the heavily trafficked parking lot would become "slick" within 2 or 3 hours from the cars travelling over what he described as "a skin of snow on the lot". He said that a lot could be perfect in the morning; two hours later it could be a sheet of ice, just from the traffic. Given the weather conditions that existed at the Winnipeg International Airport on November 28 and 29 (Ex. 2), the Airport being reasonably close to the Mall (within 2 or 3 miles), Mr. Palson's explanation as to how the extreme icy conditions which existed before traffic commenced on the lot (before 8:00 - 8:30 a.m. on November 29) is reasonable. This may not be particularly relevant because, whatever occurred or did not occur on the lot on Monday, November 28, on Tuesday, November 29:

(a) by 8:00 a.m. the lot was extremely icy;

(b) by 10:00 a.m. Flanders had been called by the Bank;

(c) by 11:00 a.m., when Ms. Jones went for lunch with her mother, nothing had been done and it was still extremely icy;

(d) nothing was done until after the accident occurred and until at or about 2:00 p.m.

¶ 17 This extremely icy and dangerous condition on a sloped parking lot existed for at least six consecutive hours during a business day without any maintenance from anyone. It is only good luck and not good management that the plaintiff was the only person to be injured on that lot that day.

¶ 18 Mr. Palson confirmed the plaintiff's evidence about the slope on the parking lot. He said there was probably a 6" fall from the building to the curb across about 60' or 70' (the 60' or 70' being from the front of the Bank north across the driveway portion and that part of the lot where the cars parked with the back of the cars facing the Bank and their front end up against the curb [Ex. 9]).

¶ 19 Referring again to Ex. 18, in response to a question from myself, Mr. Palson stated that the three hours noted on Ex. 18 (from 6:00 a.m. to 9:00 a.m.) would include travel time from wherever Mr. Leclair and his equipment started out. According to Mr. Palson this probably included the time from leaving the shop, travelling to the site, doing the work with the loader, and then returning to the shop. Mr. Palson acknowledged that Mr. Leclair would not spend three hours on the site doing the work that he did according to the job record; it is difficult to imagine that it would take more than 1/2- 1 hour (absolute maximum).

¶ 20 The plaintiff acknowledged that she has lived in the Winnipeg area all of her life and that she was fully cognizant of the fact that icy conditions occur from time to time during Manitoba winters. She acknowledged that her own walks and driveways at home are sometimes slippery and that she could not always remove ice and snow immediately but would remove it as soon as practical. She acknowledged that she had parked in a parking lot at work regularly for over 15 years and that the surface was sometimes slippery and snowy. She further acknowledged that it was often her employer's practice to clean the parking lot after work, when cars had left (and not necessarily during business hours when the parking lot was occupied). The plaintiff attended the Bank, on average, 3 to 4 times a week. She had never fallen in this parking lot before and she had never complained to anyone of the condition of this parking lot on any prior occasion.

¶ 21 Mr. Fraser's evidence was not as kind to those responsible for maintaining this particular parking lot. In 1988 Mr. Fraser was the owner and manager of the Westbrook Inn, a hotel located in close proximity to the Mall. Mr. Fraser did his business banking at this particular bank. He testified that he regularly went to the Bank at least once a day and sometimes two or three times every day over the nine years that he was involved at the Westbrook Inn. Mr. Fraser's evidence about the condition of the parking lot in question on the day of the accident was consistent with the evidence of the plaintiff and Ms. Jones. He confirms that the lot was extremely slippery. He further confirmed (as did Ms. Jones) that the surface in question sloped from the Bank door down towards the area where the cars were parked. He testified that he had to be very careful when he went to assist the plaintiff after she fell, because of the icy conditions. He further testified that when the ambulance people came to pick up the plaintiff where she was lying in the parking lot they could "hardly stand up" because of the icy conditions. Mr. Fraser also testified that on the day before (Monday) when he attended at the Bank to do his business, the parking lot in question was so slippery that when he went into the Bank on that Monday he advised someone in the Bank of the condition, using somewhat colourful language which paraphrase as follows:

> "The day before I walked into the Bank and said 'What the hell is the matter - do you wait for someone to break something before you sand?'"

¶ 22 Mr. Fraser's evidence (which would suggest comparable extremely icy conditions sometime on Monday as well as Tuesday until the plaintiffs fall occurred) was not confirmed by the Bank employee, Gloria Jones, as to the Monday conditions. Neither she, nor any other witness, had any recollection of a similar problem on the Monday. Mr. Fraser was testifying based on his recollection; there was no evidence that he had been interviewed or had given a statement to anyone about these events at any time near the date of the accident (1988). He insisted that the lot was in a slippery or poor condition for customers quite often (at least half of the time according to him). This is contrary to the evidence of Ms. Jones and the plaintiff herself who were both also regular attenders at the Bank. To the extent that Mr. Fraser's evidence differs from the evidence of other witnesses (including the plaintiff) as to the usual or general condition of the lot in the winter, I reject this part of his evidence and accept that of the other witnesses. I find that he tended to exaggerate on this point. However, I do accept his evidence as to the condition he observed on the Tuesday in question.

¶ 23 Mr. Fraser acknowledged from his own experience as the owner of a public parking lot (at his hotel) that it was difficult to keep good conditions in a parking lot in Manitoba winters. He acknowledged that he would not necessarily put salt at the doors to his hotel or any place out in his parking lot (at least at all times). It was his practise to have snow and ice removed from the parking lot early in the morning when as few cars or customers as possible were present. Slippery conditions that occurred and existed while customers were present were not necessarily attended to at his own business premises until most of the traffic had departed. There is no doubt in my mind as to the existence of extremely icy conditions on the Tuesday morning and until the lot was sanded after the plaintiff fell. I do not have the same confidence as to similar conditions having existed throughout the entire day on Monday (as Mr. Fraser implies by his statement that he says he made on that particular Monday to someone in the Bank). It may well be that over the many times that Mr. Fraser attended in this parking lot he did from time

to time encounter icy conditions (as one may expect to encounter in any parking lot in Winnipeg in the winter). He may well, and probably did, make the comments or statements in question to someone in the Bank but I am not convinced that he necessarily made those comments or suggestions on this particular Monday. It may be that Ms. Jones (the Bank employee) and all other defence witnesses have "an interest" in convincing the court that this particular parking lot was usually reasonably maintained. In my opinion, the best evidence on the "usual" condition of the parking lot comes from the plaintiff herself; she had been going to this Bank and across that parking lot several times a week for several years, summer and winter, and she did not attempt to exaggerate or find fault with the condition of the parking lot surface on any prior occasion.

¶ 24 Setting aside for the moment the conditions which existed on the Tuesday, November 29, 1988, I am satisfied that this lot was usually reasonably maintained (as to snow and ice conditions in the fall and winter). Further, from the evidence of the defence witnesses, I am also satisfied that there was a reasonable system in place with respect to inspection and notification (put in place by Flanders) such that unexpected icy conditions would usually be seen at the earliest possible moment (certainly before the businesses and, in particular the Bank, would generally be expected to open in the mornings). The system provided for notification to be given to the subcontractor responsible for snow and ice removal and for sanding if the subcontractor (Palson) had not already ascertained this need for such services and tended to them without notification. Flanders had managed this property since 1988 and, as required by its management agreement with the owner, had taken reasonable steps to identify and retain (contract with) a competent and qualified maintenance company (Palson) to look after snow and ice removal and sanding. Palson's evidence which I accept on this point, was that he would normally and regularly inspect the various premises that his company was maintaining during winter months usually early in the morning and particularly almost always after weather conditions (such as sleet or freezing rain or heavy snowfalls) to ensure that proper maintenance was performed. However, it is apparent that he did not check this lot on the Tuesday morning, or if he did, he did not see the icy condition that was readily apparent to Ms. Jones at about 8:00 p.m. I accept the witness Leclair's evidence when he testified that the Bank was "priority one" for Palson (and, therefore, for Flanders).

¶ 25 Flanders knew (or ought to have known) that the Bank drew heavy traffic to the Mall and the lot required regular inspection and reasonably prompt removal of any ice or snow which constituted a hazard to the public. As part of the system in place, Flanders had a maintenance man employed to attend at the Mall and other buildings that Flanders had in its portfolio. This maintenance man (Al Wittam), as part of his regular duties, at least on business days, was to attend in the morning and open up the building or buildings at the Mall, make sure that the heating inside the office buildings was properly temperatured, sweep the sidewalks and shovel snow off of the sidewalks and sand the sidewalks, if necessary. Unfortunately, Mr. Wittam died in or about 1994 and could not testify, but the witness Martin testified as to his regular duties (supra) and confirmed that Mr. Wittam was to sand the entranceways to the office buildings in question if it was needed. It was not Mr. Wittam's responsibility to sand the entire parking lot (or perhaps even any significant portion of it) but it was, or ought to have been, his responsibility to immediately notify either Flanders or Flanders' subcontractor (in this case Palson) of the extremely icy conditions that existed as early as 8:00 a.m. on the morning of Tuesday, November 29, 1988. For some unexplained reason this did not occur. Flanders produced no records (such as time sheets, diaries, written statements of any interviews, etc.) to establish, on a balance of probabilities, that Mr. Wittam (or anyone on behalf of Flanders) attended to these duties on Tuesday, November 29, 1988. The evidence (particularly the evidence of Ms. Jones from the Bank) as to the conditions which persisted from approximately 8:00 a.m. continuously until approximately 2:00 p.m. satisfies me that the system of inspection and notification, which was otherwise reasonable, was not performed on the day in question. That brings one to the real issue in this action (as regards liability); does a failure in the otherwise reasonable system of inspection and maintenance that had been put in place by Flanders constitute actionable negligence and (or) a breach of duty under the Act such that the plaintiff should recover?

THE LAW RE LIABILITY

¶ 26 The law in situations such as this is thoroughly canvassed by Monnin, J. in Sandberg v. Steer Holdings Ltd. (1987), 45 Man. R. (2d) 264, where he states at pp. 266-7:

> "Since October 1, 1983, occupiers' liability cases in Manitoba are now subject to the Act. Section 2 of the Act abolishes the common law rules established over time and has replaced them with the occupier's duty as set out in s. 3(1). That section reads as follows:
>
> "Occupiers' duty.
>
> 3(1) An occupier of premises owes a duty to persons entering on the premises and to any person, whether on or off the premises, whose property is on the premises, to take such care as, in all circumstances of the case, is reasonable to see that the person or property, as the case may be, will be reasonably safe while on the premises.'"

¶ 27 The plaintiff in this case submits that s. 3(1) of the Act places an onus on an occupier to insure that in all of the circumstances reasonable care is taken to see that a person in the position of the plaintiff will be reasonably safe while on the premises. In effect, and as found by Monnin, J. in Sandberg (supra), there is a "positive" or "affirmative" duty on an occupier (in this case Flanders) to insure that the premises are reasonably safe. Justice Monnin goes on to conclude in Sandberg (supra) at p. 268:

> "The standard of care owed by an occupier of premises to a person on those same premises has been changed by the Act from what existed under the common law. The standard imposed on an occupier, although reasonable, is now more onerous. If an occupier has failed to take certain actions which if taken would have prevented injury to a person on the premises, it is incumbent upon the occupier to demonstrate that in the circumstances it was reasonable not to have taken any preventative action. An occupier's duty to take reasonable care is to be judged not by the result of his efforts but by the efforts themselves, ... "

¶ 28 Monnin, J. again considered the applicable law in his more recent decision in Qually v. Pace Homes Ltd. and Westfair Foods Ltd. (1993), 84 Man. R. (2d) 262, where he stated at p. 266:

> "... The standard is reasonableness, not perfection. Windle, J., dealt with the application of this standard in Kopen v. 61345 Manitoba Ltd. et al. (1992), 79 Man. R. (2d) 250 (Q.B.), at p. 9 of her reasons:
>
> 'I am satisfied that the occupier in this case took such care as, in all circumstances, was reasonable to see that persons would be reasonably safe while on the lot. To demand more is to demand that occupiers insure the safety of persons using their lot, as opposed merely to taking reasonable steps to see to their safety.'"

DECISION RE LIABILITY

¶ 29 Taking into account all of the circumstances, I am satisfied, on balance, that Flanders and the remaining defendants (all of whom are "occupiers" within the meaning of the Act) were negligent and failed to take reasonable care to see to the safety of the plaintiff and other members of the public who were, or who ought to have been expected to be, on the premises on Tuesday, November 29, 1988, during business hours (at least until Palson

and Wakshinsky arrived with sand at or about 2:00 p.m.). I come to this conclusion, notwithstanding my earlier findings that the system of maintenance and inspection put in place by Flanders (the party responsible for the system) was reasonable. Having a reasonable system of inspection and maintenance is not an absolute answer to liability. The system must be "reasonably" implemented. Although the system may have been reasonably implemented on Monday, Wednesday, Thursday and Friday of the week in question, it was not reasonably implemented on the Tuesday. The negligence (failure to take reasonable care in the circumstances) of Flanders consists of the following:

(a) either the maintenance man (Mr. Wittam) failed to attend at all to do the inspection that he was required to do early in the morning of November 29, 1988 and before the office premises opened or, if he did attend, he failed to see and report to Flanders on what was clearly visible, namely, an extremely icy condition on the driveway and parking lot in front of the Bank. Although the witness Martin testified as to the maintenance man's responsibilities in this regard, she failed, inadvertently or otherwise, to establish that the maintenance man did in fact come to work on that day as he was required to do. I am mindful that Mr. Wittam passed away about one year before the trial but one would have expected that he would have been interviewed and that there would be some business records available to establish what he did or did not do, if anything, on the day in question (particularly when Ms. Martin immediately advised Flanders' lawyer upon learning of the accident). Whatever records may or may not have been available, there is no evidence that he did what he should have done;

(b) the maintenance man having failed to perform his duties that morning, I am satisfied that this extremely icy condition was in existence as early as 7:00 a.m. to 7:30 a.m. and certainly before 8:00 a.m. I accept Ms. Jones's evidence to the effect that she arrived at work sometime between 7:00 a.m. and 7:30 am. as was her usual practise and that this condition existed. It was obviously extremely dangerous. One might speculate as to why Ms. Jones waited until 10:00 a.m. to alert Flanders of the situation but, in any event, she did do so at that time;

(c) whatever communication was made by Flanders to its subcontractor, Palson (or Palson's office), after receiving the warning from Ms. Jones, it was not adequate to alert Palson to the fact that this was an urgent and unusual situation as opposed to one where he could take his time and arrive within what he said was a reasonably acceptable period of time, namely, 2 to 3 hours. In fact, Palson did not arrive until almost four hours after Flanders had been notified;

(d) while I appreciate that perfection is not the standard, a delay of four hours (5 to 6 hours after the maintenance man should have reported the condition) is, in my opinion, an unreasonable length of time, having regard to the particular icy condition that existed on that sloped parking lot that morning. Again, for whatever reasons, and after having had to cross the icy lot with her mother to go for lunch sometime after 11:00 a.m., Ms. Jones appears not to have followed up with Flanders to see why the sand had not arrived by lunch time;

(e) Flanders failed to follow up with Palson and (or) with the Bank within a reasonable length of time to ascertain whether or not the sand had arrived in view of the 10:00 a.m.

warning from Ms. Jones.

¶ 30 The evidence to the effect that there were no other incidents or accidents that day (or the previous day when Mr. Fraser testified it was also extremely icy) or that there have been no such incidents before or since is interesting but does not permit the defendants to escape liability. There is no suggestion that the defendants or any of them were regularly negligent in their inspection, maintenance and servicing of the parking lot in question. However, they were negligent on this day and, unfortunately, their negligence is the primary cause of the plaintiffs fall and resulting injuries.

EVIDENCE AND DECISION RE DAMAGES

¶ 31 The plaintiff's injury was serious and she has been left with a permanent disability. She sustained a trimalleolar comminuted fracture dislocation of the right ankle. Upon initial attendance at Misericordia Hospital a closed reduction of the ankle was performed, under sedative. A splint was applied. The next day, under general anaesthesia, an open reduction of the fracture dislocation was performed. One screw was inserted to immobilize a fragment of the lower end of the tibia bone. A further two screws were then inserted to complete the compression of the fracture. The plaintiff was then casted and remained in hospital until December 9, 1988. Over the next few months the casts were changed once or twice and the pins and screws were removed on April 18, 1989. In May 1989 she was found to have developed an infection at the site of the pin removal and this was treated over the next few months. She was initially assessed for physiotherapy on March 8, 1989 and between March 8 and August 29, 1989 she underwent approximately 24 physiotherapy treatments. She underwent some additional physiotherapy in March 1990 and again in May 1991.

¶ 32 Notwithstanding her treatment, including her physiotherapy and continued attempts at prescribed exercises, the plaintiff has a significant permanent disability. The underlying cause was the development of what was described by the physiotherapist as a "significant post traumatic osteoarthritis of the ankle joint" (Ex. 7). She was examined by Dr. J.E. Irving, an orthopaedic specialist, November 1991 and at that time Dr. Irving reported that she was left with "quite a limited range of motion and pain with activities". She had continuing pain and Dr. Irving was of the opinion that if the pain persisted to where it became "incapacitating", she would likely have to have her ankle fused. If fusion became necessary, this would likely result in her missing approximately 4 to 6 months of work if the surgery were successful.

¶ 33 She underwent additional surgery (Dr. Kayler) in September 1994 at the Grace General Hospital and was hospitalized for three days at that time. This surgery was performed by Dr. Kayler in an attempt to provide her with some increased range of ankle motion. He removed some osteophytes and a loose fragment from the right ankle. His report of October 6, 1994 (Ex. 3) is consistent with the reports from Dr. Irving; that is, she will likely have further progressive arthritic changes in the ankle joint which may eventually require an ankle fusion to control pain.

¶ 34 The plaintiff is far from being a complainer or a malingerer in terms of her treatment and recovery. Nevertheless, the injuries have had a significant and permanent effect on her lifestyle. Although she was able to return to her job as a credit administrator (this activity being sedentary) on or about March 1, 1989, she has had to give up other activities that she routinely participated in (such as curling, social dancing, walking moderate or long distances, heavy housework, certain yard work, and Belgian bowling). She had taken some golf lessons the summer before this accident but could not continue with this activity. She continues to ride an exercise bike approximately a half hour per day because, according to her, this is the easiest way to keep her legs strong as she is no longer able to walk as she used to. Her gardening activities have been somewhat limited by the injury, although she continues to do her best in that regard. The parties live on a 47 acre parcel of land near Oak Bluff, Manitoba with a significant amount of trees, flowers and gardening area. She has difficulty in climbing stairs and her husband has been required to install railings on the outside stairs of their home to assist her in entering and exiting

the house. She regularly takes medication to assist with the pain and has been taking medication for pain and inflammation since the accident. Her current medication costs are approximately $110 per year.

¶ 35 I assess the plaintiff's damages as follows:

(a) Non-Pecuniary General Damages

The plaintiff seeks damages in the area of $65,000 under this heading, which amount includes approximately $13,000 for future loss of income predicated upon a fusion operation together with future medication costs approximating $2,000. Dr. Kayler has been treating the plaintiff over the past six years. In his report following the most recent surgery in September 1994 he opines that if the future fusion operation is required she probably will need approximately three months to recover and return to her sedentary occupation. Dr. Irving had not seen the plaintiff for approximately 2% years when he delivered his second report and suggested that a reasonable recovery period for this type of operation, if it was required, would be in the area of 4 to 6 months. Admittedly, there is no certainty as to the requirement for a future fusion of the ankle. However, when all of the medical evidence is considered together with the plaintiff's personal circumstances (her age, height, weight and current level of disability and pain), I am satisfied that an allowance should be made for this contingency.

The defendants submit an allocation of something in the area of $6,500 for possible future loss of income predicated on a fusion operation, to be included in general damages in the $20,000 - $30,000 range are more appropriate to this fact situation. The defendants point out that if the fusion operation is performed, then the plaintiff will not likely continue to experience the pain in her ankle as she has to date. Both parties have provided authorities to support their respective positions on damages. The assessment of general damages is always somewhat problematic. The effects on the plaintiff, her lifestyle and activities, and her family are significant. It must be remembered, however, that the Supreme Court of Canada has established a ceiling for non-pecuniary general damages at $100,000 (1978) for the most serious and debilitating of injuries (Andrews v. Grand & Toy Alberta Ltd. (1978), 83 D.L.R. (3d) 452); that is, a permanent and complete incapacity such as quadriplegia where 24-hour-per-day care may be required for the balance of an injured person's life and where that person may be young, fully cognizant of his or her complete incapacity or dependency on others, and yet with a lengthy life expectancy. Adjusted for inflation, this maximum would now approximate $240,000 (Mumford v. Health Sciences Centre (1991), 77 Man.R. (2d) 1). These principles must be kept in mind, particularly when general damage figures slightly exceeding 25% of this maximum are being suggested.

Taking all of the foregoing into account, I am satisfied that something closer to the general damage award argued and submitted by counsel for the defendants is most appropriate. Including an allowance for approximately four months of lost future income with a contingent ankle fusion operation, I would assess general damages at $40,000;

(b) Special Damages

The plaintiffs special damages are hereby fixed at $8,021.55 arrived at as follows:

- hospital and medical claims

(MHSC) (Ex. 11)	$6,821.55
- costs as agreed for orthopaedic shoes, medication to date and transportation	1,200.00
TOTAL	$8.021.55

Under this heading the plaintiff also advances a claim in the area of $8,100 being her assessment of the approximate value of housekeeping services or assistance provided by her sister following the accident until January 1995 (in January 1995 she hired a casual or part time housekeeper to provide some assistance after she ascertained that the second surgery was not as successful as she had hoped). I have no doubt that the plaintiffs sister and other family members, including her husband, have helped her over these years with her housekeeping, gardening, etc., but the evidence falls short of establishing, on balance, anything other than a moral obligation which the plaintiff may feel to pay these family members for those services. Accordingly, I disallow the plaintiffs claim in that regard;

(c) Loss of PreTrial or Past Income

The plaintiff claimed the sum of $4,798.50 under this heading, being the amount of her salary for the period that she was initially off work while she was employed at Lyman Tubeco (November 29, 1988 to March 1, 1989) (Ex. 10). The plaintiff did not actually lose this income; that is, her employer at the time paid her full salary to her while she was off work and recuperating. It was not until June 1994 when a new company took over the business of her former employer and offered her continuing employment (Ex. 22) that the plaintiff observed that the new employer increased her salary from her previous salary with her old employer but then took off deductions to pay premiums for an accident/ disability benefits insurance plan. The plaintiff (or her counsel) opines that this establishes, in effect, that she was receiving a "reduced" salary in 1988 from what she should have received to compensate the employer for any income loss it may pay. In effect, plaintiff argues she paid valuable consideration (had a lower salary over the years) to compensate or pay for the wages which were paid to her by Lyman Tubeco while she was off work. Counsel for the defendants refers to and relies on decisions of the Supreme Court of Canada in Ratych v. Bloomer (1990), 69 D.L.R. (4th) 25, and Cooper v. Miller and two other actions (1994), 113 D.L.R. (4th) 1. In these decisions the Supreme Court had occasion to fully consider the principles of recovery in a tort action, collateral benefits, and the "insurance exception" which permits an employee-plaintiff who has paid in some manner for his or her benefits (under a collective agreement or a contract of employment) to make a double recovery for lost income. I have no hesitation in finding that the plaintiff has failed to establish that she paid in any manner (provided any consideration) for the benefit that she received from her former employer (the voluntary payment of wages to her while she was recuperating). Accordingly, I disallow any claim by her in that regard;

(d) Future Costs For Housekeeping and Lawn Maintenance

The plaintiff, in addition to or alternatively as part of her claim for general damages, advances a claim for approximately $25,000 for these estimated future expenses. The plaintiff and her husband live in a 1,440 square foot home on a 47 acre parcel of land near Oak Bluff, Manitoba. The evidence satisfies me that the plaintiff was a meticulous and excellent housekeeper

throughout the marriage and that she has done her best, with the assistance of her sister and other family members, to maintain these standards as regards her house and her gardening. She was always responsible for the garden and flower gardens (prior to the accident) and her husband was responsible for maintaining the trees and the windbreaks around the home. The gardening in question would, according to the husband, take approximately a full day every two weeks simply to keep up. The plaintiff is no longer able to do this. The plaintiff was a woman who took pride in her housekeeping and gardening and continues to do so. Her evidence (it is indicative of her tenacity and I accept her evidence in that regard) was that she kept thinking and hoping that the surgery which she had in September 1994 would improve her ankle by up to 50% and that she would be much better able to look after her house and yard in the future. This did not happen and she hired a woman (Anna Toews) in January 1995 to do the heavy housework twice a month. She pays Ms. Toews $8 for five hours every two weeks (a total of $80 per month). Of the 47 acre yard site, approximately 2% acres are comprised of lawn, flower gardens and garden. She testified that she tried to manage this portion of the outside work (the 2% acres) as she had in the past for about two years after the accident, at which time she could not keep up. She hired her nephew, approximately once a week for about three hours a week to assist with her yard work. She paid her nephew $5 per hour ($15 per week). As with the housekeeping costs, she is of the view that she will require this outside assistance in the future, for at least another 15 years. She calculates her claim in this regard to be $25,200 arrived at approximately as follows:

- future housekeeping costs ($80 x 12 x 15)	$14,400.00
- future yard costs ($60x12x15)	10,800.00
TOTAL...	$25,200.00

The defendants take the position that the plaintiff, both before and for some 6 to 7 years after the accident, managed to look after her house and yard without any significant out-of-pocket costs. The defendants categorize these future expenses as being more of a lifestyle decision than a necessity (a direct result of the accident).

The defendants quite properly point out that the method of calculation of the $25,200 is erroneous and that, at best, the plaintiff should only be entitled to present value of this amount. The defendants also submit that claims such as this are more properly advanced under the heading of non-pecuniary damages and they refer to a decision of McLellan, J. of the Saskatchewan Court of Queen's Bench in Finch v. Herzberger, [1993] 4 W.W.R. 179. In that case the plaintiff advanced a claim for loss of homemaking capacity (past and future) by presenting evidence of the value for housekeeping services in the marketplace and the value of services to perform gardening that the plaintiff used to perform. The Saskatchewan court held that the plaintiff should be compensated for those household tasks that she was unable to perform but not those which took her more time or that she performed with pain as these latter services were covered under an award of non-pecuniary damages. It was further held that the plaintiff should not be compensated for "loss of gardening time" as there was no proof that failure to maintain a garden was an economic loss. The circumstances in the case before me are different. This plaintiff continues, despite her disability and pain, to do most of the housework that she did in the past and to do most of the yard work that she did in the past. It is wrong to suggest that this housework or this yard work is unnecessary or simply done for one's pleasure. The plaintiff can simply no longer do the additional work she used to do. Either she hires it done or it does

not get done and it is necessary. Her expenses in that regard are modest (other than her failure to determine a reasonable present value of these future costs). I appreciate that my calculation or estimate of present value may be somewhat arbitrary and that actuarial evidence is usually required to quantify the present value of a continuing expense such as this. Nevertheless the plaintiff is entitled to recover a reasonable amount for those expenses which have found necessary. Using a net discount rate of approximately 3% and anticipating (as counsel have submitted) that these expenses will probably occur for approximately another 15 years, fix the amount to be paid to the plaintiff under this head of damages at $17,500. This amount, having regard to future fluctuations in interest rate and inflation, properly invested, could provide a fund which will pay for these services, at reasonable rates, over the period of time which a person the age of the plaintiff might reasonably expect to maintain both a full time career outside of the home and do the work in question.

EVIDENCE & DECISION RE CONTRIBUTORY NEGLIGENCE AND MITIGATION

¶ 36 I am not satisfied that any degree of contributory negligence should be assessed against the plaintiff. She was aware of and took all reasonable care to make her way across this extremely icy parking lot and driveway and she was wearing adequate footwear. This was an unusual and extremely icy condition and the defendants had not taken reasonable care to protect the plaintiff and other members of the public from similar occurrences. Both the witness Fraser and the witness Jones stayed with the plaintiff until the ambulance arrived. In addition to the evidence as to the icy conditions that have reviewed previously, the witness Fraser described the problems that the two ambulance attenders had in getting the plaintiff on the stretcher and into the ambulance, and the fact that he and Ms. Jones had to help them in that regard. This illustrates further the severity of the situation.

¶ 37 With respect to her injuries, subsequent treatment and continuing disability, the defendants submit the plaintiff has failed to follow the recommendations of her doctors with respect to losing weight and (as was done by the Saskatchewan Court of Queen's Bench in Klyne v. Gossen (1986), 49 Sask. R. 75) her damages should be reduced by some reasonable percentage to reflect her failure to mitigate. The plaintiff is a heavy woman for her height. At the time of the accident in 1988 she was 5'2" and weighed 220 pounds. Now, with a severely injured ankle and being approximately seven years older, she currently (at the time of trial) weighs approximately 250 pounds. There is ample evidence in the medical reports filed in this action to establish, on balance, that the plaintiff's pain and suffering, disability, and the possible need for a future fusion of her ankle, would all be lessened if she lost weight. The plaintiff recognizes this and testified that she had tried to lose weight but she cannot do so (other than perhaps for short periods). She acknowledged the recommendations of the doctors and that future surgery might not be necessary if she lost weight. She further acknowledged that when she lost weight the ankle felt somewhat better. Although she has lost weight from time to time, she has not yet been able to keep the weight off permanently. While the court recognizes and sympathizes with the plaintiff's inability, at least to date, to lower her weight and maintain a lower weight, in the absence of the appropriate expert evidence to establish that this particular plaintiff, notwithstanding all reasonable efforts, is incapable of losing weight and maintaining a reasonable weight loss, the defendants have satisfied me that she has failed, to some extent, to reasonably mitigate her damages for pain and suffering. I adopt the reasoning of Maurice, J. in the Klyne decision (supra) and I deduct 10% from the plaintiff's non-pecuniary damage award for her failure to mitigate as recommended by her physicians.

SUMMARY

¶ 38 In summary, the plaintiff shall recover from the defendants the sum of $61,521.55 arrived at as follows:

(a) Non-Pecuniary General Damages of $40,000 less 10% for failure to mitigate;	$36,000.00

(b) Special damages - hospital and medical accounts and agreed specials; 8,021.55

(c) the cost of future housekeeping and yard maintenance; 17,500.00

TOTAL $61,521.55

¶ 39 The statement of claim was issued in this action on March 30, 1990. The pre-judgment interest rate for the quarter in which this action was commenced was 12.5%, but this rate dropped steadily from January 1, 1991 to a low of 5.5% on April 1, 1994 and has remained in this lower range to date. Pursuant to s. 80 of The Court of Queen's Bench Act, S.M. 1988-89, c. 4 - Cap. C280 and, in particular, sections 80(1)(b) and 81(1)(b), the plaintiff will have prejudgment interest on her special damages, calculated from April 1, 1990 at the rate of 8% per annum. As her future housekeeping and yard maintenance costs commenced more recently, and the statement of claim was not amended to include these amounts specifically until shortly before trial, no pre-judgment interest is allowed on the award of damages under this head. The plaintiff will also have pre-judgment interest on her special damages of $8,021.55 from and after April 1, 1990 at the said rate of 8%.

¶ 40 The plaintiff shall also recover her costs pursuant of the Queen's Bench Rules and tariff for a Class II action. Pursuant to s. 80(3) of The Court of Queen's Bench Act (supra), the plaintiff will have an allowance of 3% per annum on her non-pecuniary general damages of $36,000, calculated from April 1, 1990, as an allowance for her loss of opportunity to invest this amount.

CLEARWATER J.

* * * * *

SCHEDULE "A"

¶ 41

Statutes Considered:

The Occupiers' Liability Act, R.S.M. 1987, c. O8.
The Court of Queen's Bench Act, S.M. 1988-89, c. 4 - Cap. C280.

Cases Re Liability:

Carstensen v. F.J.R. & Associates Real Estate Co. et al. (1981), 29 A.R. 411 (Alta. Q.B.).
Preston v. Canadian Legion (1981), 123 D.L.R. (3d) 645 (Alta. C.A.).
Sandberg v. Steer Holdings Ltd. (1987), 45 Man. R. (2d) 264.
The Attorney-General of Canada v. Barthel and Vandenberg (unreported), March 16, 1988, Man. Q.B.
Stevenson v. City of Winnipeg Housing Co. (1988), 55 Man. R. (2d) 137.
Waldick v. Malcolm, [1991] 2 S.C.R. 456.
Kopen v. 61345 Manitoba Ltd. et al. (1992), 79 Man.R. (2d) 250; affd. 83 Man. R. (2d) 239.
Francis v. IPCF Properties Inc. et al. (1993), 136 N.B.R. (2d) 215 (N.B.Q.B.).
Qually v. Pace Homes Ltd. and Westfair Foods Ltd. (1993), 84 Man.R. (2d) 262.
Shewfelt v. Robin's Supermarket et al., unreported, Man. C.A., November 7, 1994 (affd. Hirschfield, J. January 26, 1994).

Cases Re Quantum:

Andrews v. Grand & Toy Alberta Ltd. (1978), 83 D.L.R. (3d) 452 (S.C.C.).
Upsdell v. Hergott, unreported, November 27, 1986, Ont. H.Ct.
Klyne v. Gossen (1986), 49 Sask.R. 75 (Sask. Q.B.).
White v. Sheaves (1987), 63 Nfld. & P.E.I.R. 290 (Nfld. Sup. Ct.).
Poitras v. Goulet (1987), 46 Man.R. (2d) 87 (Man. C.A.).
Berry v. Heyarat, unreported, July 27,1987 (B.C.S.C.).
Savignac v. Canada (1989), 30 FTR 76 (Fed. Ct.).
Sims v. Lawless, unreported, November 2, 1989 (B.C.S.C.).
Marchand v. Heil, unreported, April 26, 1990, Ont. H.Ct.
Boyle v. Taylor, unreported, December 19, 1991 (B.C.S.C.).
Hannah v. Pollard (1991), 91 Sask.R. 67 (Q.B.).
Mumford v. Health Sciences Centre (1991), 77 Man.R. (2d) 1 (Q.B.).
Ismaily v. Dartmouth Surplus Ltd., unreported, January 30, 1992 (N.S.S.C.).
Daniels v. Carlson, unreported, June 25, 1992 (B.C.S.C.).

Cases Re Cost of Future Housekeeping and Lawn Maintenance:

C.E.D. (Western), Vol. 11, Title 44, Damages, s.s. 194.2 (Jan. 1994).
Blatz v. Wong (1989), 60 Man.R. (2d) 287 (Man. Q.B.).
Logozar v. Golder (1992), 7 Alta.R. (3d) 44 (Q.B.).
Knoblauch v. Biwer Estate [1992] 5 W.W.R. 725 (Sask. Q.B.).
Hunter v. Manning, [1993] 5 W.W.R. 738 (Sask. Q.B.).
Acheson v. Dory (1993), 8 Alta.R. (3d) 128 (Q.B.).
Finch v. Herzberaer, [1993] 4 W.W.R. 179.

Cases As Loss of Future Income:

C.E.D. (Western), Vol. 11, Damages, s.s. 189 (Aug. 1988).
C.E.D. (Western), Vol. 11, Damages, s.s. 189 (Jan. 1994).
Steenblok v. Funk (1990), 46 B.C.L.R. (24) 133 (B.C.C.A.).
McDonald v. Nguyen (1991), 3 Alta.L.R. (34) 27 (Q.B.).

Cases As Collateral Benefit -- Loss of Pre-Trial Income:

C.E.D. (Western), Vol. 11, Damages, s.s. 321 (Aug. 1988).
C.E.D. (Western), Vol. 11, Damages, s.s. 323 (July 1994).
Nanji v. Habib (1990), 51 B.C.L.R. (2d) 116 (S.C.).
Bruch v. Gregg (1990), 86 Sask.R. 294 (Q.B.).
Ratych v. Bloomer (1990), 69 D.L.R. (4th) 25.
Smith v. Millington (1991), O.R. (34) 544 (Ont. Gen. Div.).
Cooper v. Miller and two other actions (1994), 113 D.L.R. (4th) 1.

ERRATUM

CLEARWATER J.:— Attached are new pages 34 and 35 to replace the existing pages 34 and 35 in the above judgment. The changes to these pages are as follows:

1) Page 34 -- in the second line under the heading "Summary", the amount of "$62,021.55" is to be changed to "$61,521.55";

2) Page 34 -- in subparagraph (c) under the heading "Summary", the amount is to be changed from