NOVA SCOTIA COURT OF APPEAL
Citation: ***McNaughton v. Ward***, 2007 NSCA 81

Date: 20070704
Docket: CA 273090
Registry: Halifax

Between:

Anne Ellen Louise McNaughton

Appellant

v.

Jennifer Ward and Morley Ward

Respondents

Judge(s):	MacDonald, C.J.N.S.; Saunders & Oland, JJ.A.
Appeal Heard:	June 13, 2007, in Halifax, Nova Scotia
Held:	Appeal dismissed, as per reasons for judgment of Saunders, J.A.; MacDonald, C.J.N.S. & Oland, JJ.A. concurring
Counsel:	Anna Marie Butler & Denise Mentis-Smith, for the appellant James L. Chipman & Melissa A. Grant, for the respondents

Reasons for judgment:

[1] On March 13, 2000 the appellant, then a 44 year old registered nurse, was injured when the car she was driving was struck from behind by a vehicle driven by the respondent Jennifer Ward and owned by her husband, the respondent Morley Ward. Liability for the accident was admitted.

[2] The appellant sued, claiming damages exceeding one million dollars for "multi-faceted chronic pain" which she said had caused permanent disability and left her completely incapable of earning an income.

[3] The case was heard by Chief Justice Joseph P. Kennedy who, after a 12 day trial, awarded the appellant total damages of $25,000. He concluded that while Ms. McNaughton did suffer a compensable soft tissue injury in the collision, the motor vehicle accident had neither caused nor materially contributed to the appellant's present condition. The judge determined that the injuries sustained in the motor vehicle accident were not disabling to any degree. Based on the medical and other evidence he chose to accept, Kennedy, C.J.S.C. considered it more likely that the appellant's continuing medical problems were brought on by a work related injury that arose some months after the motor vehicle collision. He was not persuaded that the workplace incident aggravated the injuries suffered in the motor vehicle accident.

[4] The appellant attacks the trial judge's analysis and conclusions on many fronts. She asks this Court to either overturn the decision and order a new trial, or conduct our own assessment of her injuries and award the damages we consider to be appropriate compensation.

[5] For the reasons that follow I would dismiss the appeal. But first, I will briefly summarize the factual background of the case.

Background

[6] The appellant is trained as a registered nurse and at the time of her trial (5 years post-accident) was 49 years of age. She is a wife and mother of two children now in their 20's. At the time of the accident she worked full time on the gynaecology/oncology ward at the QEII Hospital in Halifax.

[7] The appellant was driving her 1990 Dodge Shadow motor vehicle, accompanied by her two children and a family friend. She was travelling on Sackville Drive in Lower Sackville and slowed to a complete stop with her left turn indicator on, intending to use an ATM machine located in a strip mall. She was waiting for traffic to clear before entering the mall parking lot when her car was struck from behind by the respondent Ward driving a 1995 Ford minivan.

[8] Just prior to the impact the appellant recalled turning around to tell her daughter to put her seatbelt on. As she was doing so she described hearing a "big bang" which caused her vehicle to be pushed into the oncoming lane of traffic. After the impact Ms. McNaughton moved her car out of harm's way. She checked for damage and saw that the back end of her car had buckled, primarily on the driver's side.

[9] None of the passengers travelling with the appellant was injured such as to require any medical treatment. An ambulance was called. The appellant was not examined by emergency personnel as she did not think it was necessary. She felt "just a little shaken and dazed." Ms. McNaughton drove her damaged car home, a short distance away.

[10] The appellant testified that later that day her neck, shoulder and back were sore and "seemed to stiffen up." Three days later she went to see her family physician, Dr. Stewart Holland. He noted "moderate neck and shoulder pain, as well as low back pain." She saw Dr. Holland again on April 12, 2000 and May 16, 2000. He continued to treat the appellant for "low back pain" and "neck and shoulder complaints."

[11] The appellant was assessed at the Bedford-Sackville Physiotherapy Clinic on May 26, 2000. Records there described that after the collision the appellant's "whole body and arms were a little sore . . . later in day neck and shoulder, arms heightened . . . she has increased lower back pain since accident."

[12] Notwithstanding her medical complaints specific to this motor vehicle accident, the appellant did not miss any scheduled work periods during the time between the collision on March 13, 2000, and May 29, 2000 when she sustained a workplace injury.

[13] The oncology ward, where the appellant worked, was said to be a “heavy ward,” a place where nurses did physically demanding tasks on a regular basis.

[14] The appellant described how, on May 29, 2000, she and two other nurses struggled to assist a large patient using the bathroom. Ms. McNaughton stood behind the toilet and the other two nurses stood on either side, finally managing to get her up. In combination they were able to get the patient back into bed. The appellant testified that as she moved to “raise the rail at the bedside, bent down to press a button and lifted the rail,” she felt a sharp stabbing type pain up through the left side of her neck, her left shoulder and down into her left arm.

[15] The appellant followed hospital policy regarding injuries in the workplace by reporting the incident. As she went to pick up the phone, there was so much pain that she couldn’t hold the receiver and it dropped from her hand. She had to use her other arm to pick up the phone and complete the call. She finished her shift despite feeling “stabby” pains in her neck throughout the day.

[16] As a result of the May 29, 2000 workplace injury, the appellant applied for workers’ compensation benefits. Dr. Holland, her family physician, completed the application forms as part of that process. Following his examination of the appellant on June 28, 2000, Dr. Holland reported to the Workers’ Compensation Board and described Ms. McNaughton’s injuries resulting from the workplace incident as “soft tissue damage manifesting as neck pain and upper back pain.”

[17] A further report to the Board by Dr. Holland, as a result of a July 12, 2000 patient visit, described the appellant’s complaint as “neck pain - arms and shoulder pain.”

[18] Dr. Holland testified, and his notes of June 28, 2000 described an “aggravated” injury. However, Dr. Holland did not explain why he would have suggested that this was an aggravating injury rather than one independent of the motor vehicle collision. He admitted, on cross-examination, that at the time he did not know the details of the motor vehicle accident.

[19] Prior to the March 13, 2000 collision the appellant had consulted with health care professionals concerning a variety of complaints that included: teeth and jaw

problems, tension headaches, acid reflux disease (hiatus hernia), a kidney stone, urosepsis, depression, situational anxiety, stress, high blood pressure, high cholesterol, and pain or myalgia from the flu which Dr. Holland had treated with morphine.

[20] Two years before the motor vehicle accident the appellant had consulted with her dentist, Dr. Furlong, to address excessive wearing of her teeth and tenderness of her facial muscles due to clenching and grinding of her teeth. Dr. Furlong prescribed a bite plate. The appellant had been fitted for that appliance, but never got one.

[21] In August 1999 Dr. Holland diagnosed the appellant with hypertension, high cholesterol and Type 2 diabetes. Those conditions were managed with medication and did not prevent the appellant from working as a nurse.

[22] Ms. McNaughton suffered from depression on account of adjustment disorders as well as anxiety, intermittently through the years. She had also experienced intermittent complaints of back pain while working as a nurse during the years prior to the accident.

[23] In January 2000 the appellant had reported to her physician a state of hypoglycemia or high blood sugar which left her fatigued and thirsty.

[24] The appellant began to receive workers' compensation benefits for her hospital injury as of June 18, 2000. This led to a claim for short term disability benefits which she received until November 7, 2000. She then began receiving employment insurance benefits. Subsequently, the appellant obtained long term disability benefits for 30 months, from January 14, 2001 until July 14, 2003. Ms. McNaughton was not able to obtain a continuation of those benefits through a failure to apply on time. She is currently in receipt of Canada Pension Plan disability benefits.

[25] At trial the appellant testified that she started a modified return to work in November, 2001, working Tuesdays and Thursdays for 3 hours a day. She said this situation lasted until February 7, 2002 when she experienced a "flare-up." She was transferred to a less strenuous surgical clinic in June 2002 where very little lifting was required, thus affording her time to sit and rest.

[26] The surgical clinic position did not work out. The appellant tried to find work elsewhere. Those efforts included working with a private nursing company which engaged her on two short term contract jobs. In 2004 and 2005 she did not work at all.

[27] Ms. McNaughton claimed to be in perpetual pain over practically every part of her body, which left her continuously exhausted and often in a "brain fog." She had resiled to the realization that she would not be able to continue working as a nurse. While she kept alive the hope that she would one day be able to find some type of part-time work, such was impossible given her present incapacity. She described the motor vehicle accident as affecting every aspect of her life. She blamed all of her present complaints on the negligence of the respondents.

[28] In support of her claim the appellant called several health care professionals to testify including: Dr. Eugene Nurse, an expert in occupational medicine; Dr. Stewart Holland, her family physician; Dr. Stacie Saunders, a dental surgeon and expert in TMD (temporal mandibular disorders) and orofacial pain; Ms. Sally Shaw, the appellant's treating physiotherapist; Dr. Richard McGillivray, the appellant's treating psychologist; Dr. Brian Seaman, her treating chiropractor; and Dr. Robert Mahar, an expert in physical medicine and rehabilitation. The appellant also called an actuary, Ms. Jessie Gmeiner, whose report and calculations presented certain scenarios pegging the appellant's past, present and future pecuniary losses (depending upon chosen assumptions and variables) at close to one million dollars, not including general damages.

[29] In resisting the appellant's claim the respondents relied significantly upon the report and testimony of Dr. John D. Heitzner, an expert in physical medicine and rehabilitation.

[30] In assessing and placing a value on the extent of the appellant's claim, Kennedy, C.J.S.C. preferred and accepted Dr. Heitzner's opinion. He did so after first making some very strong findings that the appellant's experts, whose opinions sought to link her present medical circumstances and very substantial claim for damages to the March 13, 2000 motor vehicle accident, had been compromised.

Issues

[31] Ms. McNaughton's notice of appeal filed October 25, 2006 alleges that Chief Justice Kennedy erred in law in that he:

> 1. Judicially considered low accident damages to vehicle as indicative of degree of injury without any supportive evidence: medical, engineering or otherwise;
>
> 2. Misconstrued and misapplied the considerable cogent evidence at trial of injury and, in doing so, gave inordinate weight to the impact of the work related incident and pre-existing medical history;
>
> 3. Considered documentary evidence of the Defence medical consultant without reference to his trial evidence while not judicially considering the cogent evidence of other trial witnesses including those that had all the background material prior to the preparation of their reports and those who considered all that material prior to testimony;
>
> 4. Misconstrued and misapplied the principles in **Athey v. Leonati**, [1996] 3 S.C.R. 458; and
>
> 5. Such other grounds as may appear on review of the record.

[32] Before addressing the appellant's complaints one must first consider the appropriate standard of review to be applied to each of the alleged errors.

[33] As this court recently observed in **2703203 Manitoba Inc. v. Parks**, 2007 NSCA 36:

> **Standard of Review**
>
> [25] Deciding the appropriate standard of review depends on how one characterizes the particular question that is under scrutiny.
>
> [26] In **Secunda Marine Services Ltd. v. Liberty Mutual Insurance Company**, 2006 NSCA 82 this Court said at ¶ 25:
>
> > As this Court observed in **McPhee v. Gwynne-Timothy**, (2005), 232 N.S.R. (2d) 175; 737 A.P.R. 175; 2005 NSCA 80, at ¶ 31 - 33:

[31] A trial judge's findings of fact are not to be disturbed unless it can be shown that they are the result of some palpable and overriding error. The standard of review applicable to inferences drawn from fact is no less and no different than the standard applied to the trial judge's findings of fact. Again, such inferences are immutable unless shown to be the result of palpable and overriding error. If there is no such error in establishing the facts upon which the trial judge relies in drawing the inference, then it is only when palpable and overriding error can be shown in the inference drawing process itself that an appellate court is entitled to intervene. Thus, we are to apply the same standard of review in assessing Justice Richard's findings of fact, and the inferences he drew from those facts. **H. L. v. Canada (Attorney General)**, [2005] S.C.J. No. 24; **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235; **Campbell MacIsaac v. Deveaux & Lombard**, 2004 NSCA 87.

[32] An error is said to be palpable if it is clear or obvious. An error is overriding if, in the context of the whole case, it is so serious as to be determinative when assessing the balance of probabilities with respect to that particular factual issue. Thus, invoking the "palpable and overriding error" standard recognizes that a high degree of deference is paid on appeal to findings of fact at trial. See, for example, **Housen**, supra, at ¶ 1-5 and **Delgamuukw v. British Columbia**, [1997] 3 S.C.R. 1010, at ¶ 78 and 80. Not every misapprehension of the evidence or every error of fact by the trial judge will justify appellate intervention. The error must not only be plainly seen, but ‘overriding and determinative.'

[33] On questions of law the trial judge must be right. The standard of review is one of correctness. There may be questions of mixed fact and law. Matters of mixed fact and law are said to fall along a ‘spectrum of particularity.' Such matters typically involve applying a legal standard to a set of facts.

> Mixed questions of fact and law should be reviewed according to the palpable and overriding error standard unless the alleged error can be traced to an error of law which may be isolated from the mixed question of law and fact. Where that result obtains, the extricated legal principle will attract a correctness standard. Where, on the other hand, the legal principle in issue is not readily extricable, then the issue of mixed law and fact is reviewable on the standard of palpable and overriding error. See **Housen**, supra, generally at ¶ 19-28; **Campbell MacIsaac**, supra, at ¶ 40; **Davison v. Nova Scotia Government Employees Union**, 2005 NSCA 51.

> [27] To summarize then, on questions of law the judge must be right. Such questions are tested on a standard of correctness. Matters of fact, or inferences drawn from facts are owed a high degree of deference and will not be disturbed unless they resulted from palpable and overriding error. Matters said to be mixed questions of fact and law are also tested using the palpable and overriding error standard, unless the mistake can be easily linked to a particular and extricable legal principle, which will then attract a correctness standard. Where, however, the legal principle is not readily extricable, the question of mixed law and fact will be reviewable on the standard of palpable and overriding error.

[34] While the appellant casts all of the grounds of appeal as errors "in law," the first three are, with respect, conclusions that derive from the trial judge's factual findings, assessment of the witnesses, and evaluation of the evidence. These are functions well within the jurisdiction of the trial judge, who enjoys a significant advantage in seeing and hearing the witnesses first hand. Such determinations draw a high degree of deference and will not be disturbed on appeal absent palpable and overriding error. As directed in such cases as **Housen**, supra, and **H.L. v. Canada (Attorney General)**, 2005 SCC 25, "palpable" refers to a mistake that is clear, in other words, plain to see; whereas "overriding" is an error that is shown to have affected the result. Both elements must be demonstrated. We, sitting as an appellate court, will not interfere with a trial judge's findings of fact unless we can plainly discern the imputed error, and the mistake is such that it discredits the result.

[35] As their final ground of appeal the appellant alleges that the trial judge misconstrued and misapplied the principles in **Athey v. Leonati**, supra. Questions of law are reviewed on a standard of correctness. However, and for reasons I will

explain, when one analyses the manner in which the appellant has advanced this ground of appeal, it too has a significant factual component.

Analysis

[36] I will now consider each of the appellant's submissions in the order in which they were presented. In argument, Ms. McNaughton's counsel combined grounds 2 and 4 suggesting that the trial judge's mistaken factual findings and inferences were prompted by his principal error "in asking himself the wrong question when it came to deciding causation." For the reasons that follow I reject the appellant's submissions and, for clarity, will not lump together my analysis of Ms. McNaughton's arguments, but rather will dispose of them in the same sequence in which they appeared in the notice of appeal and were addressed in counsels' facta. As well, I prefer to reword the grounds of appeal to more precisely describe the errors which the appellant says entitle her to greater damages or a new trial.

 # 1 The trial judge erred in characterizing the mishap as "not a very serious accident" and linking that conclusion to the degree of injury suffered by the appellant.

[37] At the hearing, counsel for the appellant announced that she was abandoning this first ground of appeal. However, I propose to deal with it anyway because during the course of her argument counsel harkened back to the submission that the trial judge's characterization of the "seriousness" of this accident, together with the emphasis he placed on Ms. McNaughton's workplace injury and various other health concerns, showed that he asked himself the wrong question when it came to deciding causation and, as a consequence, failed to address essential factual matters while mistakenly pursuing facts that were immaterial.

[38] As this theme is central to all of the appellant's submissions it is important that I reject that argument now despite counsel's concession that they were not pursuing this first ground of appeal.

[39] In a tersely worded but nonetheless comprehensive decision, Chief Justice Kennedy determined that while Ms. McNaughton suffered a compensable soft tissue injury in the motor vehicle collision (about which there was really no

dispute) she failed to prove that that mishap had either caused or materially contributed to her present condition.

[40] During the course of analysing the evidence and identifying the particular facts and inferences he was prepared to draw from that record, the trial judge pointed to certain features which to his mind were significant. Under the section of his decision labelled **FINDING**, the trial judge said this:

> **FINDING**
>
> [75] This was not a very serious accident. It is of significance, I find, that none of the three passengers in the McNaughton vehicle [was] injured. The plaintiff refused medical assistance at the scene and chose to drive the vehicle home. Although the vehicle was "written off" for insurance purposes. It was 10 years old at the time of collision and yet it continued to be utilized by the plaintiff's family thereafter.
>
> [76] That said, I do accept that the plaintiff received injuries in the accident which materialized within a few days. There is really no dispute about this.
>
> [77] It is of significance though that she did not miss any work post the motor vehicle accident until after the work related incident 2 ½ months later. Both Dr. Mahar and Dr. Heitzner clearly consider this relevant.

[41] It was perfectly reasonable for the trial judge to have characterized this mishap as being "not a very serious accident." This was a circumstance he was entitled - I would say expected - to consider as part of his overall analysis of the evidence. Obviously it was not dispositive of the appellant's claim. The trial judge did not make a fatal leap of logic and say, in effect, that because the collision was not one he would consider to be "very serious," therefore it followed that any injuries sustained by the appellant could not have been "very serious." It is a notorious feature of personal injury litigation that sometimes what appears to be a rather insignificant impact or fall may ultimately lead to long lasting and disabling consequences. But in the mind of the Chief Justice this case was not one of them.

[42] He was not wrong to take these circumstances into account. Based on the evidence before him, Kennedy, C.J.'s characterization of the collision as "not a very serious accident" was hardly the result of palpable and overriding error. Further and more importantly, such a conclusion was simply one of the many

factors which contributed to the judge's evaluation of Ms. McNaughton's claim and informed his assessment of the sufficiency of proof she had mustered in attempting to fix the respondents with liability. There is no merit to this ground of appeal.

 # 2 The trial judge erred in interpreting and applying the record relating to the appellant's health, thus placing too much weight on the evidence surrounding her pre-existing medical history, and her subsequent work related injury.

[43] Because this challenge to the trial judge's decision concerns his assessment of the appellant's testimony and the medical evidence related to the motor vehicle accident; her pre-existing medical history; and her work related incident; together with the differing views certain expert physicians took to that body of evidence, there will be some overlap in my comments with respect to this ground of appeal and the third ground, at ¶ 65 ff., *infra*.

[44] In his decision the trial judge presented what I consider to be a concise and accurate summary of the evidence given by the several health care professionals who testified either for the appellant or for the respondents. The trial judge understood the respective theories of the parties, and captured the essence of what each expert had to offer, by way of testimony or written report.

[45] The trial judge had a distinct advantage over those of us who sit on appeal. He was able to see and hear the experts testify under direct and cross-examination. He was then in the best position to decide whether he was prepared to accept all, some or none of what each had said. As part of that exercise, the question of what weight ought to attach to the evidence the judge was willing to accept, was his to make.

[46] At the hearing, counsel for Ms. McNaughton argued that the trial was "not really a fight between the experts." With respect, even a cursory examination of the record, the extensive pre and post trial written submissions, the plethora of professional and technical reports, the respective positions adopted by the parties, and the cross-examination of the experts would belie any such suggestion. In this litigation the parties were almost a million dollars apart in the view they took to damages. The case was all about causation and what conclusion the trier would

ultimately draw in the face of contrasting medical opinion and a concerted attack on the reliability and extent of the appellant's complaints.

[47] In very unambiguous terms Chief Justice Kennedy explained why he was not persuaded by the appellant's experts, and why he preferred the evidence and opinions offered by the respondent's expert, Dr. Heitzner. In no way was that decision the result of palpable and overriding error.

[48] The trial judge referred by name and in some detail to almost all of the health care professionals who testified on behalf of the appellant. He gave specific reasons why he thought the opinions of those experts had been compromised. Mr. Chipman, counsel for the respondents, had conducted what I would describe as a probing and very effective cross-examination. At the hearing, counsel for the appellant argued that the trial judge was wrong in concluding that any or all of their experts had been "compromised" since any "deficiencies" in their involvement or familiarity with the appellant's record were immaterial to deciding causation. I reject the appellant's submission. The vast record here covering a 12 day trial is replete with examples that would, on any reasonable reading, support the trial judge's conclusion.

[49] Without referring to each of these, I will simply offer a few illustrations.

[50] Counsel for the appellant at trial obviously tried to develop the theory that the workplace mishap either had nothing to do with her present constellation of complaints, or exacerbated or accelerated whatever injury she sustained in the motor vehicle collision. As part of that effort it is clear they attempted to emphasize that the pain following the motor vehicle accident involved her whole neck, the tops of both shoulders and down into her lower back, whereas the pain following the May 29, 2000 workplace mishap was more localized, with a sharp, stabbing type pain felt on the left side of her neck and left arm. Unfortunately for the appellant, that approach did not find support in the evidence presented by her own doctors.

[51] Dr. Stewart Holland is the appellant's family physician. In direct examination he was referred to his file entries, particularly one following his meeting with the appellant on June 28, 2000 in which he wrote, in part:

> She came with follow-up in regards to her neck pain, which was originally brought on by an MVA sometime ago, but was aggravated while working, and thus, qualifies for WCB ...
>
> [Underlining mine]

[52] On cross-examination Dr. Holland described his very busy practice, so busy in fact that he admitted having neither the time nor expertise to conduct a complete examination of the appellant's back. He admitted that he had not taken an active part in the ongoing assessment and treatment of Ms. McNaughton, preferring to leave those tasks to specialists. He described his role as being responsible for prescribing her medications for pain. He completed the claims benefits forms following the workplace incident which he described as "kind of complex." When referred to the file documentation Dr. Holland acknowledged that his description of her complaints following this episode in lifting the patient went well beyond her "left shoulder" and encompassed what he described following the appellant's visit to his office on July 12, 2000 as:

> Neck pain, upper back pain, tenderness over cervical musculature, range of motion good ... Soft tissue damage ... Patient off four weeks for therapy ...

[53] Five weeks later, in an entry dated August 17, 2000 Dr. Holland wrote:

> Neck, shoulder pain and low back pain persisting despite physio. Also pain neck radiating the right arm...Soft tissue injury, neck pain with cervical reticulopathy. Off for another two to four weeks. Referral to ortho.

Evidently Dr. Holland recommended Ms. McNaughton be seen by an orthopaedic specialist. That referral never took place.

[54] Dr. Holland admitted that quite apart from the subject motor vehicle accident, or her workplace injury, Ms. McNaughton had a number of medical problems for which she had consulted Dr. Holland over the years. This included depression on account of various adjustment disorders, and medication and treatment for flare-ups of low back pain.

[55] In his decision the trial judge made several references to Dr. Holland's testimony and then noted in particular:

> [79] Dr. Holland, the family physician, in his working notes, suggested that this work related injury "aggravated" the injuries sustained in the motor vehicle accident, but did not produce any evidence that would support this position.

A careful reading of the entire record provides ample support for the trial judge's finding.

[56] Dr. Eugene Nurse is an expert in occupational medicine. He examined the appellant at the request of a Section B insurer. Dr. Nurse opined that the injuries she sustained in the motor vehicle accident were both exacerbated and aggravated by her work related accident on May 29, 2000. On cross-examination Dr. Nurse admitted that he lacked a good deal of information when preparing his opinion. For example, he only knew about the workplace incident after seeing mention of it in a report written by another physician, Dr. Mahar. He did not obtain a workplace accident report, nor did he ever see or ask for any hospital notes describing the workplace injury. He hadn't seen the appellant's dental records. He had not administered a general pain questionnaire. He didn't know anything about her treatment and prescriptions for depression.

[57] Dr. Robert Mahar is an expert in physical medicine and rehabilitation. He was asked by the Section B insurer to assess Ms. McNaughton. He admitted on cross-examination that when he formed his opinions he did not have the files of the appellant's dentist, Dr. Furlong, or another dentist Dr. Creager, or her family physician Dr. Holland, or the hospital records, or the records from the Workers' Compensation Board relevant to the reported incident when she was injured after lifting the patient.

[58] Dr. Richard McGillivray was a psychologist who provided some treatment to the appellant after she had been referred to him by her chiropractor. Dr. McGillivray related the appellant's present problems to the motor vehicle accident, yet he admitted on cross-examination that he was not made aware of any previous treatment for depression and had never been advised that Ms. McNaughton had injured herself at the workplace. He did not have her workplace records, or her hospital records, or any records from the Workers' Compensation Board. He relied entirely on the appellant to provide him with her medical history. The appellant never told him that she suffered pre-accident depression.

[59] Dr. Stacie Saunders is a dental surgeon who thought Ms. McNaughton's present jaw problems were caused by the motor vehicle accident. However, on cross-examination, after acknowledging that bruxism (clenching and grinding of the teeth) is one of the possible causes of TMB, she admitted not being aware that the appellant had been treated by her own dentist Dr. Furlong for "clenching" of the teeth, nor had she ever been told about the workplace incident. Dr. Saunders agreed that she would have been "put on her inquiry" had such important information been disclosed to her. In fact, she specifically asked the appellant if she had any jaw problems, and was told "No."

[60] The several examples I have just described were obviously thought to be significant and troubling in the mind of the judge who went on to say this:

> [80] The plaintiff's experts routinely suggested that the plaintiff's medical circumstances that they observed were caused by the motor vehicle accident. However I agree with the defendants that these opinions were compromised.
>
> [81] Dr. Nurse attributed the plaintiff's condition to the motor vehicle accident, but acknowledged that he didn't know the details of the workplace incident. He was aware of it only because he had read references to the Workers' Compensation application.
>
> [82] Dr. Mahar agreed on cross-examination that he formed his opinions in a "vacuum" in that he did not have the files of Dr. Furlong the dentist, Dr. Holland the family doctor, or the Workers' Compensation application documentation.
>
> [83] Dr. McGillivray related the plaintiff's present problems to the motor vehicle accident, although he did not have access to her workplace records, any of the reports from other medical doctors, or any knowledge of her medical circumstances prior to the motor vehicle accident. He relied entirely on the plaintiff to provide him with her medical history.
>
> [84] Dr. Saunders believed that the plaintiff's present jaw problems were caused by the motor vehicle accident. She did not know that the plaintiff had been treated by Dr. Furlong for "clenching" of the teeth. She was not told about the workplace incident. She agreed that had she had this information, that she would have been "put on her inquiry."
>
> [85] As to the evidence of her pre-accident medical problems, I find these have relevance to some of her present complaints which she attributed to the motor vehicle accident, particularly I note that she had teeth problems, depression, stress

> tension headaches and diabetes (which causes her fatigue). It would be folly to ignore such evidence when assessing causation.

[61] A review of the transcript and in particular the cross-examination of these several experts provides ample confirmation that the reservations expressed by the trial judge, as well as his overall impression that their "opinions were compromised" are well supported in the evidence. I am not persuaded that the trial judge's characterization arose out of any palpable and overriding error.

[62] For all of these reasons it seems plain to me that the trial judge's acceptance of the evidence of the respondents' expert Dr. Heitzner, over the opinions offered by the appellant's own experts was entirely reasonable.

[63] In considering the whole of the evidence as it related to the respective theories advanced by the parties in deciding the critical issue of causation, Kennedy, C.J. was required to decide what effect - if any - both the appellant's pre-existing medical history, and her subsequent work related injury had on her present circumstances and claim for damages. Since Ms. McNaughton blamed the respondents for everything that had befallen her, the trial judge had to decide whether she had proved that the respondents' negligent conduct had caused or materially contributed to her on-going situation. This required him to look very carefully at the variety of medical problems for which she had been treated before the accident, and the injuries and treatment that arose as a consequence of the incident in hospital when lifting the patient. The weight or importance to attach to such evidence was, again, a matter for the trial judge. His conclusion was clearly stated:

> [86] I do not find that the motor vehicle accident is responsible for any of the plaintiff's present medical problems. Rather, I find that it did not materially contribute to the plaintiff's present condition.
>
> [87] Central to my conclusion is that I find Dr. Heitzner's expert evidence to be the most compelling.
>
> [88] On the basis of all of the evidence produced, I find his evidence to be the most complete and both creditable and convincing.

> [89] Of all of the experts who examined the plaintiff and considered her medical situation, he was the only one who had access to all of the relevant medical information.
>
> [90] The more complete level of information put him in the best position to provide opinion as to causation and a realistic assessment of her current medical situation.
>
> [91] Particularly, I accept his expert opinion on the following:
>
> > There is no impairment related to the soft tissue injuries that were initially diagnosed at the time of the motor vehicle accident.
> >
> > ...
> >
> > Based upon the history, review of documentation and physical examination, there are no musculoskeletal impairments secondary to the motor vehicle accident and the subsequent development of fibromyalgia following the work related accident.
>
> [92] I find that the plaintiff has now no motor vehicle related medical disability.
>
> [93] I accept Dr. Heitzner's opinion and find that the soft tissue injuries that were diagnosed post and proximate to the motor vehicle accident and before the workplace incident do not now account for any of the impairment that she discloses. I will speak to these injuries subsequently.
>
> [94] As a result I do not find, on the civil standard, that the plaintiff has shown her post motor vehicle accident medical problems were caused by the negligence of defendants.
>
> . . .
>
> [103] I have not found them to be "disabling" to any degree and although clearly "troubling" in the months subsequent to the motor vehicle accident, they cannot be tracked beyond the workplace injury.

[64] In this, it cannot be said that the trial judge's findings or conclusions were the result of palpable and overriding error. I would dismiss this ground of appeal.

 # 3 <u>The trial judge erred in preferring and accepting the evidence of the respondents' expert Dr. Heitzner, to the several healthcare professionals who treated and testified on behalf of the appellant</u>.

[65] I have already said that the trial judge did not err in understanding or applying the medical evidence, or in assigning to it the weight he did when deciding the critical issue of causation. Much of that analysis overlaps my consideration of this third ground of appeal and need not be repeated here.

[66] Rather, I will isolate the particular assertions which seem to lie at the heart of this attack on the trial judge's decision. Counsel for the appellant put it this way in their factum:

> 165. Considering the evidence presented at trial, it is respectfully submitted that the Learned Trial Judge erred in not judicially considering the cogent evidence of other trial witnesses and considered the documentary evidence of Dr. Heitzner without reference to his viva voce trial evidence.
>
> 166. The Appellant produced a total of seven qualified medical experts at trial who spoke of the Appellant's condition and their views on causation. The Respondent produced Dr. Heitzner.
>
> 167. Of the seven medical experts who testified in support of the Appellant on the causation issue, the Learned Trial Judge in his decision completely ignores all of the relevant evidence of experts Dr. Seaman and Sally Shaw. The Learned Trial Judge qualified these two medical practitioners as experts at trial. However, their presented evidence and views on causation which support the Appellant are wholly omitted from the decision.

[67] With respect, I see no merit to the appellant's submission.

[68] Simply because Kennedy, C.J. agreed to hear expert testimony from Dr. Seaman, in the area of chiropractic medicine, and from Ms. Shaw, in the area of the physical diagnosis of musculoskeletal conditions, does not mean that he was obliged to accept such expert evidence.

[69] Neither is a trial judge required to include a reference to every witness, or to every piece of evidence, in his or her decision.

[70] Dr. Seaman acknowledged that all he had to go on was what the appellant told him. He admitted under cross-examination that he did not have any documents from the Workers' Compensation file. Consequently he did not have any information regarding the diagnosis from the compensable injury she sustained in the workplace. He admitted that his opinion was qualified to the extent that he wrote in his report "in the absence of any traumas, that we were able to ascertain ... ." Besides the Workers' Compensation file, Dr. Seaman did not review the Workers' Compensation forms completed by Dr. Holland, nor did he have Dr. Holland's notes from immediately following the accident. He had never read Dr. Holland's running notes. Dr. Seaman did not have the appellant's dental records, pre-accident notes or workplace files. Neither was he aware of the various past medical problems she suffered.

[71] With respect to Ms. Shaw, at the time of trial she was completing her thesis as part of her training as an osteopath, which she acknowledged is not a recognized health profession in Canada. In assessing the appellant she had to rely on the patient to give her accurate information. Ms. Shaw admitted that she did not have any of the appellant's records. Although she mentioned the workplace mishap in her direct testimony, she was unable to identify the source of her knowledge except to say that she had only come by it "recently." She did not have any reference to the workplace incident in her notes. Neither had she the opportunity to look at the Workers' Compensation notes or Dr. Holland's running file. Similarly, she did not have the files of Drs. Furlong or Saunders. A careful reading of the transcript would suggest that this witness made assumptions about the workplace incident without any frame of reference. She did not have any documents relating to it, nor had she asked Ms. McNaughton any questions about the incident.

[72] Regardless of whether Kennedy, C.J. made specific reference to Dr. Seaman or Ms. Shaw, a fair reading of their evidence could certainly have lead the decision maker to conclude that their opinions had been compromised for the same reasons and to the same extent as had the other professionals who testified on behalf of the appellant. I am not at all persuaded that such a conclusion was the result of palpable and overriding error. Had the trial judge found the evidence of either or both Dr. Seaman and Ms. Shaw to be compelling or germane to any of his factual findings, I believe that such evidence would have been discussed. In any event such an omission in this case would hardly constitute reversible error. The

question is not whether the trial judge failed to mention certain evidence in his decision, but rather whether he missed or misunderstood persuasive and critical evidence which led to a palpable and overriding error. In my opinion he did not.

[73] The other assertion which seems to anchor this ground of appeal has two parts. First, that the sheer volume of expert evidence favours the appellant's position. Second, that the trial judge erred by "only" considering the written report of the respondent's expert Dr. Heitzner "without reference to his viva voce trial evidence."

[74] The first complaint may be dismissed summarily. The quality and degree of persuasiveness to be attached to evidence is never measured as a "numbers game." If that were so, every trial would be reduced to a quantitative contest, with victory seized by the party presenting the most witnesses. Kennedy, C.J. declined to accept the opinions offered by the appellant's team of experts on the basis that their views had been compromised for the reasons he (and I) have explained. With that proof discarded, the trial judge was then obliged to just as carefully consider the evidence offered by the respondent's expert. He did exactly that.

[75] Dr. Heitzner's report was introduced into evidence together with all of the other documents in the case as part of the written record. Kennedy, C.J. was entitled to consider Dr. Heitzner's report and rely upon the contents therein in drawing his own findings of fact and conclusions. Furthermore, Dr. Heitzner testified. The appellant had the opportunity to cross-examine Dr. Heitzner in an attempt to impugn his findings or his credibility. All of that was heard by the trial judge.

[76] In his written judgment, following his discussion of the appellant's experts, the trial judge stated:

> [59] The defendants' contrary position relies significantly on the report and testimony of Dr. John D. Heitzner. . . .
>
> (Underlining mine)

[77] A fair reading of the transcript confirms that the appellant was not successful in impugning either Dr. Heitzner's opinion or his credibility. He stood by his conclusion that any disability the appellant has is "more related to the work-related

accident as opposed to the motor vehicle accident." He emphasized that after the motor vehicle collision the appellant was able to work not just for weeks but for months at her regular duties, up until the time she was injured at the workplace. It was only after that, according to Dr. Heitzner, that Ms. McNaughton could not carry out her regular duties and went on to develop fibromyalgia.

[78] Appellant's counsel argued that there was no evidence the injuries suffered by the appellant in the motor vehicle accident had resolved. On the contrary, and as the trial judge noted, both Drs. Mahar and Heitzner considered it to be very significant that the appellant had worked not just for weeks but for months after the motor vehicle accident and that it was not until the injury she suffered during the workplace mishap that she stopped working and started drawing benefits.

[79] Dr. Heitzner also denied that the appellant was totally disabled, given her good range of motion and the absence of any neurological impairments. He did acknowledge, however, that she would be unable to return to her previous job. He testified that people with chronic pain can live productive lives and be gainfully employed. He said that in his opinion Ms. McNaughton was pain-focussed and had a high perceived level of disability, things which were not observed by Dr. Heitzner on physical examination, or by any objective measures.

[80] To conclude on this point Kennedy, C.J. made repeated and extensive reference to both Dr. Heitzner's report, and testimony, in his decision. He accepted Dr. Heitzner's opinion. He was perfectly entitled to do so. I would dismiss this ground of appeal.

 # 4 <u>The trial judge erred in law in interpreting and applying the principles in Athey v. Leonati, [1996] 3 S.C.R. 458.</u>

[81] In stating and applying the law a judge must be right. The standard is one of correctness. However, as appears in the appellant's factum, the submission under this ground of appeal is not strictly confined to an alleged error of law. The criticism of the result seems to combine the assertion that the trial judge erred in <u>both</u> interpreting and applying the principles enunciated by the Supreme Court of Canada in **Athey** (which of course would trigger a correctness standard) and in

arriving at erroneous factual findings (which draws the palpable and overriding error standard).

[82] This combined approach is apparent from the following extract in the appellant's factum:

> 271. Seven experts testified that the motor vehicle accident was the direct cause of the Appellant's ongoing injuries. . . . the Learned Trial Judge erred in dismissing their opinions on causation. He favoured the flawed conclusions of Dr. Heitzner.
>
> . . .
>
> 274. In the case at hand, the Appellant was clearly still suffering from the injuries sustained in the motor vehicle accident at the time of the workplace incident. . . . While still injured, the Appellant sustained an injury while lifting a bed rail at work. She had been a nurse her entire career, presumably having lifted a countless number of bed rails. Prior to the motor vehicle accident, she had never injured herself performing such a basic task. *Athey* recommends that common sense be applied to these facts. In doing so, it is submitted that Learned Trial Judge erred in concluding that the motor vehicle accident did not materially contribute to the Appellant's ongoing injuries.

[83] This same approach was elaborated upon during oral argument. At the hearing, counsel for the appellant urged that the facts as found by any trial judge are a function of the question he or she has asked themselves. She placed particular emphasis on a single paragraph of the trial judge's 105 paragraph decision, as evidencing legal error in the manner in which he considered and disposed of causation. The paragraph reads:

> [86] I do not find that the motor vehicle accident is responsible for any of the plaintiff's present medical problems. Rather, I find that it did not materially contribute to the plaintiff's present condition.

The appellant's counsel says that this extract reveals error in at least two ways: first, she says the two sentences are inconsistent; that the first sentence rejects a link between the motor vehicle accident and <u>any</u> of Ms. McNaughton's claim, while the second sentence properly reflects a conclusion based on the "material contribution" language of **Athey**, supra. Thus - in the appellant's submission -

while the second sentence is correct, in a legal sense, it cannot stand with the trial judge's first sentence and this "contradiction" she says demonstrates reversible error. Instead of asking himself how the workplace injury affected her claim, the trial judge ought to have asked himself the question whether the motor vehicle accident contributed materially to her injuries and resulting damages.

[84] I reject the appellant's arguments. With respect, the submission misconstrues the trial judge's reasons and, in parsing a word or two, here or there, distorts the context in which they were used. The two sentences in ¶ 86, supra, are not inconsistent. As is clear from the record, and the trial judge's reasons, Ms. McNaughton was blaming "everything" on the motor vehicle accident. The trial judge recognized that Ms. McNaughton did not have to show that the respondent's negligence was the sole cause of her injury. However, that did not lessen her burden of proving that the respondents' negligence caused or materially contributed to her loss. No defendant is liable for injuries which were not caused by his or her negligence. Given the facts and respective theories in this case, the trial judge was obliged to look at her pre-existing and ongoing health concerns; the motor vehicle accident; and the workplace injury, together with any other circumstance considered relevant to a determination of causation, in order to decide the boundaries of the respondents' liability. Was it "for everything" as she demanded, or was it something less?

[85] While conceding, it seemed to me somewhat reluctantly, that the notion of *de minimis* may be a legitimate consideration in causation cases, Ms. McNaughton's counsel urged that the trial judge erred by failing to consider *de minimis*, and in any event there was insufficient evidence to even sustain the argument that the appellant's motor vehicle accident should be so characterized.

[86] I respectfully disagree. Dr. Heitzner was vigorously cross-examined by counsel for the appellant at trial and did not resile from his opinion that the March 2000 motor vehicle accident was not a precipitating event with respect to her current condition, based on the absence of objective evidence during the physical examination and his complete review of the entire record. This expert allowed that the car accident had "a small bearing." While the words *de minimis* do not appear in the text of the trial judge's reasons, they are certainly evident in his applications of the operative provisions from **Athey**, supra, and, when one considers the whole of the trial judge's decision, reflect his conclusion that the respondents' liability

ought to be limited to the soft tissue injury their negligence brought about in the March 2000 motor vehicle accident.

[87] Chief Justice Kennedy was not saying that the motor vehicle accident had not injured the appellant. After all he awarded her $25,000 in general damages for that loss. But he was saying that the motor vehicle accident had nothing to do with her "present," "ongoing" complaints. In his mind the curtain had dropped on any lasting effect from that mishap by the time Ms. McNaughton hurt herself lifting the patient in the hospital. That was the extent of the loss which she was able to prove had been caused or materially contributed to by the respondents.

[88] Beyond that, and as is clear in ¶ 86 of his decision, supra, the respondents were not liable for <u>any</u> of Ms. McNaughton's "<u>present</u> medical problems." This is precisely the same thing he said in other portions of his reasons, for example:

- ". . . it was the work related injury that has caused the plaintiff's continuing medical problems. It was after this second injury that her life, both working and social, began to come undone." [78];

- "As to the evidence of her pre-accident medical problems, I find these have relevance to some of her present complaints which she attributed to the motor vehicle accident . . . " [85];

- "I find that the plaintiff has now no motor vehicle related medical disability." [92];

- "I am satisfied that the plaintiff has shown on the balance of probabilities that the motor vehicle accident did cause her some injury, for which the defendants bear responsibility." [98];

- "There is evidence that she suffered soft tissue injury, experienced low back pain, together with neck, back and shoulder pain. . . . " [99];

- "There is no evidence that persuades me that the workplace injury aggravated those injuries." [100]; and

- "I have not found them to be 'disabling' to any degree and although clearly 'troubling' in the months subsequent to the motor vehicle accident, they cannot be tracked beyond the workplace injury." [103].

[89] As I have already explained, it was entirely within the trial judge's purview to prefer and accept the opinion of Dr. Heitzner, as against all of the other medical evidence presented. It is clear to me that Dr. Heitzner's opinion was based on a myriad of facts. He had all of the relevant medical information, and he examined the appellant. He did not make his findings with respect to causation in a vacuum, or in the absence of pertinent, critical medical information, which the judge obviously found was in marked contrast to the experts put forward by the appellant. It would seem that the trial judge accepted Dr. Heitzner as the only expert who had all the facts. As he put it in his reasons:

> [88] On the basis of all of the evidence produced, I find his evidence to be the most complete and both creditable and convincing.
>
> [89] Of all of the experts who examined the plaintiff and considered her medical situation, he was the only one who had access to all of the relevant medical information.
>
> [90] This more complete level of information put him in the best position to provide opinion as to causation and a realistic assessment of her current medical situation.

[90] After making the strong factual findings to which I have alluded, Chief Justice Kennedy then applied the correct legal test. He set out the principles relating to causation at ¶ 67 of his decision:

> [67] Legal principles relating to causation have been set out by the Supreme Court of Canada in *Athey v. Leonati*, [1996] 3 S.C.R. 458 (at 446-467); 1996 CarswellBC 2295 (S.C.C.). Major J. writing for the court stated as follows at paragraphs 13-17:
>
> > 13 Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury: *Snell v. Farrell*, [1990] 2 S.C.R. 311; *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.).

> 14 The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant: *Horsley v. MacLaren*, [1972] S.C.R. 441.
>
> 15 The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury: *Myers v. Peel (County) Board of Education*, [1981] 2 S.C.R. 21, Bonnington Castings Ltd. v. Wardlaw, [1956] 1 All E.R. 615 (H.L.), *McGhee v. National Coal Board, supra*. A contributing factor is material if it falls outside the *de minimis* range: *Bonnington Castings, Ltd. v. Wardlaw, supra*; see also *R. v. Pinske* (1988), 30 B.C.L.R. (2d) 114 (C.A.) affirmed [1989] 2 S.C.R. 979.
>
> 16 In *Snell v. Farell*, supra, this Court recently confirmed that the plaintiff must prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision; as Lord Salmon stated in *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475 at 490 (H.L.), and as was quoted by Sopinka J. at p. 328, it is "essentially a practical question of fact which can best be answered by ordinary common sense". Although the burden of proof remains with the plaintiff, in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof.
>
> 17 It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the *sole cause* of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring.

[91] Thus, the trial judge was obviously alive to the various issues and implications that arose from his findings of fact with respect to causation. He was aware that Ms. McNaughton did not have to establish that any negligence on the part of the respondents was the sole cause of her injury. He addressed her contention that the motor vehicle accident was a material cause of her injuries and resulting disability, for which she sought very extensive damages. At the end of the day Kennedy, C.J. accepted that Ms. McNaughton did suffer some injury on account of the respondents' negligence, but that she had failed to show on a

balance of probabilities that the collision materially contributed to her current state of disability. He said:

> [78] I find that it is more likely, on the evidence, that it was the work related injury that has caused the plaintiff's continuing medical problems. It was after this second injury that her life, both working and social, began to come undone.

[92] Ultimately the trial judge found that the collision was not responsible for the appellant's *present* medical condition:

> [86] I do not find that the motor vehicle accident is responsible for any of the plaintiff's present medical problems. Rather, I find that it did not materially contribute to the plaintiff's present condition.
>
> (Underlining mine)

[93] Thus, not only did the trial judge apply the principles in **Athey** by finding that the motor vehicle accident did not "materially contribute" to Ms. McNaughton's present condition, he went further by effectively stating that the collision was not responsible for any of her present medical problems and that the appellant:

> [92] . . . has now no motor vehicle related medical disability.

[94] I have already explained my reasons for rejecting the appellant's submission that the trial judge erred in appreciating or applying the legal principles enunciated by Mr. Justice Major writing for the Court in **Athey**, supra. I would add this. To understand the directions given in that case it is important to recall the context in which they were expressed. This context is described by Major, J. at the outset in the first paragraph of his reasons:

> [1] The appellant suffered back injuries in two successive motor vehicle accidents, and soon after experienced a disc herniation during a mild stretching exercise. The herniation was caused by a combination of the injuries sustained in the two motor vehicle accidents and a pre-existing disposition. The issue in this appeal is whether the loss should be apportioned between tortious and non-tortious causes where both were necessary to create the injury.

[95] As is made clear, the loss in that case was the disc herniation suffered by the plaintiff. Contrary to the trial judge's findings, the disc herniation was, as Major, J. put it "not a cause. It was the effect. It was the injury." [¶ 39]

[96] That herniation was caused by a combination of three things: injuries in one motor vehicle accident; injuries in a second motor vehicle accident; and a pre-existing disposition. At trial all parties proceeded as if there were only one defendant and only one accident, and there was no attempt to divide fault between the respondents, or between the two accidents. Rather, the issue was whether the loss should be apportioned between the tortious, and the non-tortious causes where both were found to have brought about the disc herniation.

[97] In **Athey**, the trial judge's error was in limiting the defendants' liability to only 25% after finding that while they were not the sole cause of the claimant's loss, they had played some causative role.

[98] In other words, the only way the plaintiff could collect 100% of his damages was to prove that the defendants were the only cause of his loss. The trial judge, in effect, assigned 75% of the blame to non-tortious events and "credited" the tortfeasors with that absolution. Major, J. rejected that approach at ¶ 20 and 23:

> [20] This position is entrenched in our law and there is no reason at present to depart from it. If the law permitted apportionment between tortious causes and non-tortious causes, a plaintiff could recover 100 percent of his or her loss only when the defendant's negligence was the sole cause of the injuries. Since most events are the result of a complex set of causes, there will frequently be non-tortious causes contributing to the injury. Defendants could frequently and easily identify non-tortious contributing causes, so plaintiffs would rarely receive full compensation even after proving that the defendant caused the injury. This would be contrary to established principles and the essential purpose of tort law, which is to restore the plaintiff to the position he or she would have enjoyed but for the negligence of the defendant.
>
> . . .
>
> [23] In the present case, the suggested apportionment is between tortious and non-tortious causes. Apportionment between tortious and non-tortious causes is contrary to the principles of tort law, because the defendant would escape full liability even though he or she caused or contributed to the plaintiff's entire injuries. The plaintiff would not be adequately compensated, since the plaintiff

> would not be placed in the position he or she would have been in absent the defendant's negligence.

[99] But that is not what occurred in this case. This was a case where the injuries were, and could be seen to be distinct and separate. Such a conclusion was open to Chief Justice Kennedy in the circumstances of this case and was well within the law. As Major, J. put it:

> [24] . . . Separation of distinct and divisible injuries is not truly apportionment; it is simply making each defendant liable only for the injury he or she has caused, according to the usual rule. The respondents are correct that separation is also permitted where some of the injuries have tortious causes and some of the injuries have non-tortious causes: Fleming, *supra*, at p. 202. Again, such cases merely recognize that the defendant is not liable for injuries which were not caused by his or her negligence.

[100] Chief Justice Kennedy's decision reflects a proper understanding and appreciation of these principles.

[101] In argument at the hearing Ms. Butler for the appellant relied heavily on the decision of the Alberta Court of Appeal in **Lynne v. Taylor**, 2006 ABCA 12. She commended its application in this case for two reasons: first, because the trial judge was found to have erred in failing to ask himself the proper question which prompted him to overlook relevant evidence; and for rejecting certain expert opinion on account of alleged "deficiencies" which were not material to the purposes for which the report was prepared. With respect, I am not persuaded the decision in **Lynne**, has any application here. I am satisfied Kennedy, C.J. asked himself the proper question and conducted the correct legal analysis. I have also explained that his conclusion with respect to the appellant's experts being "compromised," was not the result of any palpable and overriding error.

Causation

[102] While deciding the issue of causation may in some cases be difficult, it is not an especially complex exercise. At the end of the day the trier must decide on the evidence before it whether the plaintiff has proved that the defendant's tortious conduct caused or materially contributed to the plaintiff's injury. The causation test should not be applied too rigidly: **Snell v. Farell**: [1990] 2 S.C.R. 311.

Causation need not be resolved with scientific precision: **Alphacell Ltd. v. Woodward**, [1972] 2 All E.R. 475. Causation is essentially a practical question of fact which can best be answered by ordinary common sense (per Sopinka, J. in **Snell**, supra, at page 328). Causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury: **Myers v. Peel County Board of Education**, [1981] 2 S.C.R. 21. A contributing factor is material if it falls outside the *de minimis* range: **Athey**, supra; **R. v. Pinske** (1998), 30 B.C.L.R. (2d) 114 (BCCA) aff'd [1989] 2 S.C.R. 979.

Conclusion

[103] Unlike the situation in **Athey**, there is here no chain of causation, and no injury that was "aggravated" by the motor vehicle accident. The trial judge specifically rejected the appellant's theory that the workplace incident had somehow exacerbated or aggravated injuries sustained earlier from the collision. He said there was no evidence that persuaded him in that regard. In very clear and strong language the trial judge explained why in his opinion the collision did not cause or materially contribute to Ms. McNaughton's current complaints. Accordingly - and applying the principles from **Athey** - he awarded the appellant $25,000.00 in general damages as compensation for the only loss caused or contributed to by the respondents' negligence.

[104] The trial judge's analysis and assessment were sound. There is no reason for us to intervene, or disturb the appellant's damage award.

[105] For all of these reasons I would dismiss the appeal and order costs to the respondents based on the usual tariff of 40% of those costs awarded at trial, plus disbursements on appeal as taxed or agreed.

Saunders, J.A.

Concurred in:

MacDonald, C.J.N.S.