**NOVA SCOTIA COURT OF APPEAL**
**Citation:** ***Awalt v. Blanchard***, 2013 NSCA 11

**Date:** 20130125
**Docket:** CA 371547
**Registry:** Halifax

**Between:**

Linda Awalt

Appellant

v.

Chris Blanchard

Respondent

| | |
|---|---|
| **Judges:** | Saunders, Farrar and Bryson, JJ.A. |
| **Appeal Heard:** | October 15, 2012, in Halifax, Nova Scotia |
| **Held:** | Appeal is dismissed with costs payable by the appellant to the respondent in the amount of $4,000, inclusive of disbursements, per reasons for judgment of Bryson, J.A.; Saunders and Farrar, JJ.A. concurring. |
| **Counsel:** | Glenn E. Jones, for the appellant<br>Michelle Kelly and Peter LeCain, for the respondent |

**Reasons for judgment**:

*Introduction:*

[1] Linda Awalt was injured on September 20, 2004, when Chris Blanchard reversed his half ton truck into her car. The accident occurred at low speed. Ms. Awalt's car sustained $1,914 in damages. Ms. Awalt immediately experienced headache and nausea. Liability was admitted. Following a seven-day trial, Justice Kevin Coady awarded Ms. Awalt $10,478 comprising $2,500 general damages, $5,000 for loss of income, and special damages of $2,978 (2011 NSSC 111). Ms. Awalt appeals, alleging that the trial judge erred:

1. in applying the law of causation when determining that the accident did not cause her shoulder injury;

2. in interpreting s. 113(b) of the *Insurance Act*, R.S.N.S. 1989, c. 231, having regard to:

    (a) the absence of sufficient reasons for the decision;

    (b) the determination that she suffered a "minor injury";

3. in assessing the medical evidence; and

4. in assessing damages for loss of valuable services.

[2] Ms. Awalt is not pursuing the other grounds of appeal set forth in her notice of appeal.

*Background:*

[3] Following the accident, Ms. Awalt attended her local healthcare centre. She was diagnosed with mild whiplash and tenderness was noted on the left side of her neck and shoulder. She was prescribed Ibuprofen. Shortly thereafter, she attended upon her family physician who recommended physiotherapy. She returned to work approximately one week after the accident.

[4] In May 2006, Ms. Awalt's family physician referred her to pain management specialist, Dr. Alexander Finlayson, because she was experiencing left shoulder pain. Dr. Finlayson examined Ms. Awalt and ordered a CT Scan of her left shoulder. The scan did not disclose a tear but did reveal the joint in a degenerative condition. Dr. Finlayson referred Ms. Awalt to Dr. Douglas Legay, an orthopaedic surgeon. In March 2007, Dr. Legay arranged a further CT Scan with dye but concluded there was no evidence of a rotator cuff tear. Ms. Awalt continued to experience left shoulder pain in her work. In his March 9, 2007 report, Dr. Legay diagnosed "...A/C joint inflammation with persistent rotator cuff tendonitis...". In June, 2008, Dr. Legay reviewed Ms. Awalt again. He reviewed an MRI which was "... possibly showing a possible articular surface tear".

[5] On January 5, 2009, Ms. Awalt underwent surgery. The inner aspect of the subscapularis was found to be torn and was repaired by Dr. Legay. He also shaved one centimetre off her clavicle. Ms. Awalt says that her subscapularis was torn in the 2004 accident.

[6] The trial judge did not accept that Ms. Awalt's 2009 shoulder surgery resulted from the 2004 accident. He decided that Ms. Awalt sustained a "minor" whiplash-type injury which capped her general damages at $2,500.

*Causation and Medical Evidence:*

[7] Although Ms. Awalt treats the assessment of the medical evidence as a discrete ground of appeal, it logically belongs to the first ground of appeal regarding causation. This is apparent from Ms. Awalt's submission in her factum where she says:

> ...These errors (regarding the medical evidence) were significant in that a proper understanding and consideration of this evidence was critical to the determination of whether or not shoulder problems were caused or contributed to by the motor vehicle accident.

Accordingly, grounds 1 and 3 will be considered together.

[8] Ms. Awalt argues that the trial judge does not explicitly state the causation test he applied in coming to his result, "we do not know if the correct legal principles were applied". Ms. Awalt complains that the trial judge did not

compare the views of the experts or indicate why he preferred one to another. Ms. Awalt "speculates" that the trial judge preferred the opinion of Dr. Stanish but does "not actually state that in the decision". This evolves into a complaint that the reasons relating to causation, "...are insufficient to allow for public accountability to explain to [Ms. Awalt] why [she] lost and to allow for meaningful appellate review."

[9] The trial judge's identification of the test for causation is reviewed on a correctness standard. However, his application of that test to a given set of facts is reviewed on a palpable and overriding standard (*MacIntyre v. Cape Breton District Health Authority*, 2011 NSCA 3, at ¶ 63; *Holland Carriers Ltd. v. MacDonald*, 2012 NSCA 47, at ¶ 14).

[10] The Supreme Court has reaffirmed the "but for" test as the standard test for causation subject to a "material contribution" test in special circumstances (*Resurface Corp. v. Hanke*, 2007 SCC 7 and *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5, and more recently: *Clements v. Clements*, 2012 SCC 32).

[11] It is important to note that Ms. Awalt is a personal care worker whose work has been physically demanding. On occasion she suffered work-related injuries. This played a role in the trial judge's assessment of the evidence and the issue of causation.

[12] In considering the question of causation, the judge carefully reviewed Ms. Awalt's work history, the medical records, the medical testimony and opinions offered. He heard from Ms. Awalt's family physician, as well as Dr. Legay, and two additional orthopaedic surgeons, Dr. Ross Leighton, and Dr. William Stanish. He concluded:

> [69] I have concluded that Ms. Awalt's initial medical contacts did not disclose symptoms that are consistent with a rotator cuff injury. The only consistent theme is whiplash. I find as a fact that the tear and fraying in Ms. Awalt's left shoulder were caused by a series of injuries incurred at work over a number of years. I also find as a fact that degenerative changes developed before and after the 2004 accident. The plaintiff has not proven on a balance of probabilities that she suffered anything other than a whiplash injury as a result of the 2004 accident.

[13] There is no obligation on a trial judge to review each and every piece of evidence and compare it with other pieces of evidence. There is no obligation to review all the evidence. There is no obligation to state in detail why some evidence is preferred to others, provided it is clear the trial judge was aware of the evidence and his conclusions can be understood from the reasons that he provides (*Van de Perre v. Edwards*, 2001 SCC 60, at ¶ 15; *Housen v. Nikolaisen*, 2002 SCC 33, at ¶ 72).

[14] Regarding uncertainty about which "causation test" the trial judge applied – the submissions of Ms. Awalt's trial counsel said nothing about the "material contribution" test. He simply argued:

> ... you either ignore Dr. Stanish, or ignore all the other witnesses .... It's an either/or ...

[15] Ms. Awalt did not plead or argue "material contribution" before Justice Coady. But in light of his findings on causation, it does not matter.

[16] The trial judge ascribed no causal connection between the accident and the rotator cuff injury (see ¶ 69 of the trial decision quoted above). There was no need for the trial judge to determine to what extent the accident contributed to Ms. Awalt's shoulder. He found that it contributed nothing to that problem.

[17] The trial judge was plainly focussed on causation when he assessed the medical evidence. For example, after reviewing Dr. Legay's first report of March 7, 2007, some two and a half years after the accident, the trial judge observed:

> [46] There is nothing in this report that links Ms. Awalt's condition to the 2004 accident. Dr. Legay obviously assumes that link but does not establish a medical link between the two.

And again, after reviewing Dr. Legay's second report:

> [48] This report left me with the clear impression that Dr. Legay accepted that Ms. Awalt's injuries, including the left shoulder, were caused by the 2004 accident. However, I could not find an opinion to support this causation in relation to the shoulder. Dr. Legay does attribute her whiplash symptoms to the accident but nothing more.

[18] The trial judge concludes:

> [53] These reports are silent on the causative link between the shoulder tear and the 2004 motor vehicle accident. Subsequent postop reports are similar.

The trial judge understood that Dr. Legay thought it was "more probable than not that the car accident is the cause (of the injury to the rotator cuff)". On the other hand, Dr. Legay acknowledged that heavy lifting, pushing, pulling and reaching could cause partial tears less commonly in the subscapular region. He agreed that lifting a water jug or catching a falling resident could cause such a tear. He conceded that he was not aware of any workplace injury suffered by Ms. Awalt, despite there being evidence of that before the Court. This weakened Dr. Legay's evidence on causation (Decision, ¶ 55).

[19] Similarly, when reviewing the evidence of Dr. Leighton, the trial judge observed:

> [58] ...I do not conclude that his evidence establishes the causal link between the shoulder injuries and the 2004 accident. I was left with the distinct impression that Dr. Leighton felt that the accident was the only known factor that could [a]ffect her shoulder. That view did not address long term degeneration caused by the demands of her employment. ...

[20] As for Dr. Finlayson, the trial judge said:

> [60] ...The entirety of Dr. Finlayson's evidence did nothing to establish the causative link between the shoulder injury and the 2004 accident.

[21] But Ms. Awalt insists that the trial judge misunderstood the medical evidence, resulting in palpable and overriding errors meriting appellate intervention.

[22] In her factum, Ms. Awalt faults the trial judge's understanding of the evidence in several respects. She lists a series of opinions that Dr. Legay expressed, all of which culminated in his opinion concerning the link between the accident and the rotator cuff injury. Nothing in the trial judge's decision indicates that he did not appreciate this evidence. Indeed it is obvious that he understood what Dr. Legay's conclusion was. He did not accept it, in part, because Dr. Legay

did not know the other possible causes of injury, including all of Ms. Awalt's work-related injuries (Decision, ¶ 55).

[23] Ms. Awalt argues that less deference should be accorded the trial judge's assessment of the testimony of Dr. Legay because he misunderstood this evidence. She cites this exchange with the trial judge:

> **THE COURT:** Yeah, I didn't - - I don't think you were here when Dr. Legay testified.
>
> **MR. MASON:** I wasn't, no.
>
> **THE COURT:** No.
>
> **MR. MASON:** Yeah.
>
> **THE COURT:** And that was almost impossible to understand.
>
> **MR. MASON:** Okay. His report speaks for itself.
>
> **THE COURT:** Well, I know, and - - -
>
> **MR. MASON:** Yeah. Yeah.
>
> **THE COURT:** - - - I've spent about - - -
>
> **MR. MASON:** Yeah.
>
> **THE COURT:** - - - five hours on his report since then, and I told him that.
>
> **MR. MASON:** Yeah.
>
> **THE COURT:** Because you know, the way - - he just wasn't - - it just - - he might as well have been speaking Spanish.

[24] With respect, this submission is not compelling because Justice Coady did not misunderstand Dr. Legay's written report and as the judge observed "...he [Dr. Legay] assured me that everything he said was in his written report...". Justice Coady spent "about five hours" on Dr. Legay's report. Ms. Awalt's counsel

acknowledged that Dr. Legay's report "speaks for itself". Dr. Legay told Justice Coady the same thing.

[25] Ms. Awalt then suggests that Dr. Legay actually disagreed with counsel's assertion during cross-examination regarding whether pain would be immediately noticed with a rotator cuff injury. She says the trial judge misunderstood this. Ms. Awalt submits:

> His Lordship makes no mention of Dr. Legay's disagreement with counsel's assertion that someone would notice immediate pain with a rotator cuff injury . . . This is very important evidence as it is in direct contrast with Dr. Stanish's evidence that there would be significant, immediate symptomology from the shoulder injury and goes to the heart of the issue of the presentation of the appellant following the accident.

[26] Ms. Awalt provides no reference in the evidence for these assertions. But during cross-examination, Dr. Legay concedes:

> **Q.** Or it would be a significant trauma that causes an immediate kind of rip?
>
> **A.** Correct. Like a -- traumatic.
>
> **Q.** And if it was significant trauma, you would expect it would be quite painful immediately?
>
> **A.** Yes.
>
> [Appeal Book, p. 868]

This evidence was confirmed in questioning by the Court (p. 869):

> **THE COURT:** Now Dr., when Ms. Kelly said with significant trauma, pain would be very -- you'd experience pain very quickly, what do you mean by "quickly"? Like immediate?
>
> **THE WITNESS:** If it was a -- yeah, if you had a traumatic injury to a tendon, you'll feel pain very quickly. I mean, it can get worse as the time -- like with any injury, the first 24-48 hours there can be swelling and pain, but you'll feel pain immediately, sure. Yeah. [*Ibid.*, p. 869]

In other words, if Ms. Awalt sustained a rotator cuff tear at the time of the accident, she would have experienced immediate pain in her shoulder. That was not her testimony nor diagnosis at that time. The foregoing discloses no material misapprehension of the evidence by the trial judge. To the contrary, the evidence would be inconsistent with a sudden tear at the time of the accident.

[27] Next, Ms. Awalt points to an alleged misunderstanding by Dr. Stanish of the mechanism of injury. Dr. Stanish is said to have understood that Ms. Awalt's tendon was not frayed or delaminated. Although the supraspinatus showed signs of delineation, the subscapularis did not.

[28] In response to this submission, Mr. Blanchard quotes from the cross-examination of Dr. Stanish:

> **Q.** Got you. So if the Subscapularis, Doctor LeGay was doing the surgery he didn't see much in the way of fraying in the Subscapularis that would suggest that the injury to the Subscapularis was not degenerative, correct?
>
> **A.** No, that's not true at all.
>
> **Q.** No. I thought you said, Doctor that you would normally see fraying, that would indicate degenerative changes in the shoulder?
>
> **A.** In the Supraspinatus and in fact the Subscapularis is different because it inserts in a certain fashion, different than a Supraspinatus. So when Dr. LeGay is there and he sees liftoff that's the weakest link in the chain.
>
> So that in fact is very much a consequence of a degenerative phenomenon in a 41 year old.
>
> [Appeal Book, p. 1054]

This evidence does not support any alleged misunderstanding by Dr. Stanish.

[29] Then Ms. Awalt complains the trial judge did not fully appreciate Dr. Leighton's evidence. She says that the trial judge failed to mention that Dr. Leighton opined that shoulder injuries present more "globally" and that often the pain is more "distracting". But this does nothing to advance the causation argument. Even if the trial judge did ignore this evidence – and his review of it

does not indicate that he did – it was not material, because it is not evidence of causation.

[30] Finally, Ms. Awalt asserts that there were important points in Dr. Stanish's evidence that the trial judge did not consider which "...all tended to weaken Dr. Stanish's opinion that the shoulder problem in the appellant's case was not accident related". But Mr. Blanchard did not have to prove anything. The fact that Dr. Stanish made reasonable concessions and acknowledgements in cross-examination clearly did not affect his opinion about causation. Moreover, impairing Dr. Stanish's evidence does not advance the appellant's case. It is Ms. Awalt who carried the burden of proof, not Mr. Blanchard.

[31] The obligation to establish causation on a balance of probabilities lies with the plaintiff (*Clements*, ¶ 8). Nevertheless, the defendant called Dr. William Stanish. It was his opinion that Ms. Awalt's shoulder injuries could not be linked to the accident: "I do not see any compelling evidence that suggests the accident in 2004 caused or exacerbated an injury to her left rotator cuff." Dr. Stanish testified among other things, that a rotator cuff injury would be immediately apparent from pain and would require significant pain management. The judge was entitled to prefer Dr. Stanish's opinion. Weighing and choosing between competing expert opinions is the business of trial judges (*Pedherney v. Jensen*, 2011 ABCA 9, ¶ 19).

[32] It is apparent from his decision that the trial judge considered the medical evidence and was not satisfied that it established causation. It is obvious that he preferred the opinion of Dr. Stanish to that of Dr. Legay. There was more than adequate evidentiary foundation for the trial judge's conclusions. He need not consider every piece of evidence which tends to a different conclusion (*Housen*, ¶ 72). It is not for this Court to re-try the case.

[33] As Justice Cromwell said in his dissenting reasons in *Leddicote v. Nova Scotia (Attorney General)*, 2002 NSCA 47, at ¶ 111:

> [111] ...Of course, not every failure to mention relevant evidence in a trial judge's reasons justifies appellate intervention. However, as pointed out by LaForest, J. in **Schwartz v. Canada**, [1996] 1 S.C.R. 254 at 280-81, it is accepted that a clear omission of evidence by a trier of fact is the kind of error that will justify a reconsideration of the evidence by an appellate court where the omission

> "...gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion.": **Van de Perre v. Edwards**, [2001] 2 S.C.R. 1014 at ¶15.

The trial judge's review of the evidence does not suggest that he ignored relevant evidence, nor does it prompt a "reasoned belief" that he forgot, ignored or misconceived the evidence so as to affect his conclusion.

[34] Justice Coady did not fail to deal with a "...cogent and uncontradicted defence argument on the issue of causation...", nor did he ignore uncontradicted evidence of negligence as in the cases cited by Ms. Awalt (*Cojocaru (Guardian ad litem of) v. British Columbia Women's Hospital and Health Center*, 2011 BCCA 192, ¶ 115; *Randall (Litigation guardian of) v. Lakeridge Health Oshawa*, 2010 ONCA 537).

[35] The trial judge did not misapply causation or misapprehend material evidence nor did he fail to appreciate material evidence not mentioned in his decision. I would dismiss grounds 1 and 3 of the appeal.

**Whether the Judge erred in misinterpreting and applying s. 113(b) of the *Insurance Act*:**

[36] Section 113(B) of the *Insurance Act* limits general damages for a "minor injury". In *Farrell v. Casavant*, 2009 NSSC 233, Associate Chief Justice Deborah K. Smith summarized the relevant legislation and regulations that would also apply here:

> [161] On November 1st, 2003 the ***Automobile Insurance Reform Act*** came into force in Nova Scotia. This ***Act*** amended the ***Insurance Act***, R.S.N.S. 1989, c.231 and, in particular, repealed sections 112 and 113 of the said **Act** and substituted therefore, *inter alia*, section 113B, the relevant portions of which are as follows:
>
> 113B (1) In this Section,
>
> (a) "minor injury" means a personal injury that
>
> (i) does not result in a permanent serious disfigurement,

> (ii) does not result in a permanent serious impairment of an important bodily function caused by a continuing injury which is physical in nature, and
>
> (iii) resolves within twelve months following the accident;
>
> (b) "serious impairment" means an impairment that causes substantial interference with a person's ability to perform their usual daily activities or their regular employment
>
> .....
>
> (4) Notwithstanding any enactment or any rule of law, but subject to subsection (6), the owner, operator or occupants of an automobile, any person present at the incident and any person who is or may be vicariously liable with respect to any of them, are only liable in an action in the Province for damages for any award for pain and suffering or any other non-monetary loss from bodily injury or death arising directly or indirectly from the use or operation of the automobile for a minor injury to the amount prescribed in the regulations.
>
> .....
>
> (8) Where no motion is made under subsection (6), the judge shall determine for the purpose of this Section whether, as a result of the use or operation of the automobile, the injured person has suffered a minor injury.

[162] The ***Automobile Insurance Tort Recovery Limitation Regulations*** expand greatly on the legislation itself and provide, *inter alia*:

> **Definitions for purposes of Section 113B of** *Insurance Act*
>
> **2 (1)** For the purposes of Section 113B of the *Insurance Act* and these regulations,
>
> .....

(c) "non-monetary loss" means any loss for which compensation would be payable, but for the *Insurance Act*, that is not an award for

(i) lost past or future income,

(ii) diminution or loss of earning capacity, and

(iii) past or future expenses incurred or that may be incurred

as a result of an incident, and for greater certainty excludes valuable services such as housekeeping services;

.....

(e) "regular employment" means the essential elements of the activities required by the person's pre-accident employment;

(f) "resolves" means

(i) does not cause or ceases to cause a serious impairment of an important bodily function which results from a continuing injury of a physical nature to produce substantial interference with the person's ability to perform their usual daily activities or their regular employment, or

(ii) causes a serious impairment which results from a continuing injury of a physical nature to produce substantial interference with a person's ability to perform their usual daily activities or their regular employment where the person has not sought and complied with all reasonable treatment recommendations of a medical practitioner trained and experienced in the assessment and treatment of the personal injury.

(g) "substantial interference" means, with respect to a person's ability to perform their regular employment, that the person is unable to perform, after reasonable accommodation by

> the person or the person's employer for the personal injury and reasonable efforts by the injured person to adjust to the accommodation, the essential elements of the activities required by the person's pre-accident employment;
>
> (h) "usual daily activities" means the essential elements of the activities that are necessary for the person's provision of their own care and are important to people who are similarly situated considering, among other things, the injured person's age.
>
> .....
>
> **Total amount recoverable for non-monetary losses**
>
> **3.** For the purpose of subsection 113B (4) of the *Insurance Act*, the total amount recoverable as damages for non-monetary losses of a plaintiff for all minor injuries suffered by the plaintiff as a result of an incident must not exceed $2,500.
>
> .....
>
> **Onus to prove injury not minor injury**
>
> **5.** On a determination of whether an injury is a minor injury under subsection 113B (6) or (8) of the Act, the onus is on the injured party to prove, based upon the evidence of one or more medical practitioners trained and experienced in the assessment and treatment of the personal injury, that the injury is not a minor injury.
>
> [163] As a result of this legislation, an individual who suffers a minor injury (as defined by the ***Act*** and the ***Regulations***) in a motor vehicle accident is limited to an award of general damages for pain and suffering or any other non-monetary loss of $2,500.00. This "cap" is for all minor injuries suffered by the Plaintiff (s. 3 of the ***Regulations***.)

[37] Here, Ms. Awalt complains that the trial judge did not provide sufficient reasons for finding that she sustained a minor whiplash injury and, secondly, that he erred in doing so, because he did not perform a *Farrel*-type analysis of the evidence.

[38] The need and rationale for reasons has been variously described. In *F.H. v. McDougall*, 2008 SCC 53, ¶ 98, the Supreme Court listed four explanations for the duty to give reasons. In *Sable Mary Seismic v. Geophysical Services Inc.*, 2012 NSCA 33 (¶ 74) and *S.R. v. Nova Scotia (Community Services)*, 2012 NSCA 46 (¶ 17) this Court lists five and eight explanations respectively. But the absence or paucity of reasons is not a free standing ground of appeal (*R. v. Walker*, 2008 SCC 34, ¶ 20; *F.H.*, ¶ 99). Reasons must be assessed in the context of the active issues at trial. Do the reasons fail to disclose an intelligible basis for the result; do they allow meaningful appellate review? (*R. v. R.E.M.*, 2008 SCC 51, ¶ 53.)

[39] Ms. Awalt urges that the trial judge's decision cannot be meaningfully reviewed. The trial judge said:

> [72] I have interpreted these provisions in the same way Associate Chief Justice Smith interpreted and applied them in *Farrell v. Casavant* 2009 NSSC 233. My conclusion is that the injuries caused by the accident are minor and that Ms. Awalt's damages are capped at $2,500.

[40] She cites this Court's endorsement of *Farrell* in *Gillis v. MacKeigan*, 2010 NSCA 101 and refers us to ¶ 23 of *Gillis*:

> [23] Associate Chief Justice Smith in **Farrell v. Casavant**, 2009 NSSC 233 sets out a useful approach to be taken in determining whether an injury is to be excluded from the definition of a minor injury. At ¶167 she sets out the questions which informs the analysis:
>
> 1. Did the Plaintiff suffer a "personal injury"?
>
> 2. If so, did the personal injury result in a permanent serious disfigurement?
>
> 3. Did the personal injury result in permanent serious impairment of an important bodily function caused by a continuing injury which is physical in nature?
>
> 4. Did the personal injury resolve within twelve months following the accident?

[41] But the question is not whether Justice Coady provided a detailed *Farrell*-type analysis, but whether he applied that law. It is apparent from his own endorsement of *Farrell* that he did.

[42] Ms. Awalt's concern about the trial judge's s. 113B analysis would have some merit and could enjoy success had he not already carefully reviewed the medical evidence and drawn his conclusions about causation and Ms. Awalt's soft tissue injury.

[43] Justice Coady's consideration of this issue must be assessed in light of his whole decision. He had already decided that Ms. Awalt's torn rotator cuff was not caused by the accident. He was left with a diagnosis of a soft tissue injury:

> [70] Ms. Awalt attended at Dr. Langley's office within days of the 2004 accident. She testified that the diagnosis at that time was soft tissue injuries, mild to moderate severity. Dr. Langley testified that on September 22, 2004 Ms. Awalt had a sore and stiff neck. She then diagnosed a mild to moderate whiplash. That diagnosis has not been displaced by any of the other medical evidence. Dr. Leighton, in 2006 assessed a whiplash type injury involving her neck and some left shoulder discomfort.

[44] Having decided that the rotator cuff injury was not caused by the accident, the evidence was limited to a soft tissue whiplash injury described as "mild to moderate" by Ms. Awalt's own physician (letter of February 13, 2005 to plaintiff's counsel).

[45] Looking at the *Farrell* criteria,

1. There was an admitted personal injury.

2. There was no issue about a permanent personal disfigurement.

3. There was no evidence of "... a permanent serious impairment of an important bodily function caused by a continuing injury which is physical in nature". Ms. Awalt returned to work about a week after the accident. However one characterizes Ms. Awalt's difficulties thereafter, they do not bring her within this definition.

4. In view of the extended definition of resolution of a personal injury in the Regulations of the *Act* (see ¶ 162 of *Farrell*), it is clear that the trial judge did not think that Ms. Awalt was "seriously impaired" in either her usual daily activities or her regular employment. The evidence sustains his conclusion.

[46] While it can be disappointing for counsel when a judge does not address all his arguments, that does not automatically become "inadequacy of reasons". The evidence supports the trial judge's conclusion, even though that conclusion could have been more articulate. But he committed no error of law or fact in arriving at his conclusion.

**Loss of Valuable Services**:

[47] Loss of valuable services can only be recovered if direct economic loss can be proved:

> [50] The question becomes to what extent, if at all, have the injuries impaired the claimant's ability to fulfill homemaking duties in the future? Thus, in order to sustain a claim for lost housekeeping services one must offer evidence capable of persuading the trier of fact that the claimant has suffered a direct economic loss, in that his or her ability or capacity to perform pre-accident duties and functions around the home has been impaired. Only upon proper proof that this capital asset, that is the person's physical capacity to perform such functions, has been diminished will damages be awarded to compensate for such impairment. For an excellent and comprehensive analysis of this subject see the paper presented by W. Augustus Richardson to the Nova Scotia CLE Society in January, 2001.
>
> [*Leddicote*, ¶ 50]

[48] It is not necessary that expenditure be incurred, provided there is an impairment of one's physical capacity to perform pre-accident services and functions.

[49] Ms. Awalt sought $30,000.00 for loss of valuable services. Such a sum warrants a sound evidentiary foundation. The trial judge was unpersuaded. Certainly the evidence was very modest.

[50] The trial judge referred to Ms. Awalt's evidence that since the accident "...She has had to rely on family and friends to carry out the heavy aspects of her household duties". He then cited appropriate legal authority echoing *Leddicote*'s admonition that economic loss must be proved. He concluded:

> [79] Given that authority, I cannot conclude that the shoulder injury was a limiting factor in performing Ms. Awalt's household functions. The evidence does not establish that the whiplash injury resulted in a loss of valuable services.

[51] One can agree with Ms. Awalt that the shoulder injury should be irrelevant in light of the judge's causation determination. But in fairness to the trial judge, counsel's questions to Ms. Awalt at trial regarding her level of function, did not distinguish between her shoulder and whiplash injuries. Perhaps this was not possible. But at the end of the day, Ms. Awalt said she only needed help with cleaning the Jacuzzi and washing windows – jobs her son and husband helped with.

[52] The trial judge does make a clear finding that Ms. Awalt's whiplash injury did not result in a loss of valuable services.

[53] Assessment of damages is the province of the trial judge. Courts of appeal do not interfere unless a wrong principle of law is applied or there is a palpable and overriding error (*Woelk v. Halvorson*, [1980] 2 S.C.R. 430; *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, ¶ 80; *L.M.M. v. Nova Scotia (Attorney General)*, 2011 NSCA 48, ¶ 37; *Morash v. Purdy*, 2011 NSCA 123, ¶ 13).

[54] In this case Justice Coady was not persuaded that Ms. Awalt's post accident housekeeping was impaired to the degree that she sustained an economic loss. That was Justice Coady's call to make. There was evidence on which he could make it. I would dismiss this ground of appeal.

*Conclusion:*

[55] Apparently as a result of an offer to settle, the respondent was entitled to costs following trial. The parties agreed on costs in the amount of damages awarded – $10,478 – so nothing would be payable by either party to the other following trial.

[56] On appeal, the respondent requested costs of approximately $9,100, arguing that this was a more appropriate estimate of 40 percent of what trial costs should have been. The appellant simply seeks $4,000, representing about 40 percent of the agreed trial costs. I agree that $4,000 is a proper sum.

[57] The appeal should be dismissed with costs of $4,000, inclusive of disbursements payable by the appellant to the respondent.

Bryson, J.A.

Concurred in:

Saunders, J.A.

Farrar, J.A.