NOVA SCOTIA COURT OF APPEAL

Citation: *MacVicar Estate v. MacDonald*, 2019 NSCA 90

Date: 20191120
Docket: CA 482120
Registry: Halifax

Between:

The Estate of Ralph MacVicar as represented by his Executrix Dorothy Baldoni

Appellant

v.

Kim MacDonald

Respondent

Judge:	The Honourable Justice Jamie W.S. Saunders The Honourable Justice David P.S. Farrar
Heard:	September 30, 2019, in Halifax, Nova Scotia
Subject:	**Motor Vehicle Accident. Causation. Liability. Mitigation. Total Disability. Actuarial evidence. Damages. Standard of Review. Contingency Fee Agreements. Loss of Future Income on a Gross versus Net Basis. Pre-Judgment Interest. Fixing the "Amount Involved". Lump Sum Costs.** ***Insurance Act,*** R.S.N.S. 1989, c. 231. **Automobile Tort Recovery Limitation Regulations.** ***Civil Procedure Rule*** **77.**
Summary:	After finding that the plaintiff was totally disabled from her injuries in a motor vehicle collision, a trial judge awarded her substantial damages. The estate of the late defendant appealed, alleging a host of factual and legal errors in the judge's assessment of causation, liability and damages.

Held: Appeal allowed, in part.

The trial judge did not err in his understanding of the evidence regarding the "mechanics" of the collision nor in finding that the plaintiff had proven causation by establishing that but for the accident, she would not have suffered her injuries. The judge's findings that the plaintiff was totally disabled, and that the defendant had not established any failure to mitigate, were amply supported in the record.

The judge found the plaintiff to be a credible and reliable witness. His assessment of her credibility and preference for her explanation of the collision and its impact upon her life was unassailable. So too his clear explanation as to why he preferred the evidence of the plaintiff's medical experts over that of the defendant's.

In calculating the plaintiff's damages the judge did not err in relying upon both the projections prepared by her actuary as well as a "global approach". The judge recognized that choosing one over the other need not be an "either/or" proposition and that determining a just and reasonable amount for damages will depend upon the nature and quality of the evidence available during the assessment.

While the judge was correct in his conclusion that the plaintiff's damages for loss of future income should be awarded on a gross and not a net basis, he arrived at that result, for the wrong reasons. The Court explained why a proper interpretation of s. 113BA(1) of the *Insurance Act* was materially different than this Court's earlier decision in *Sparks v. Holland*, 2019 NSCA 3 which had interpreted s. 113A of the *Insurance Act*. *Sparks* dealt with the question of whether CPP disability benefits were deductible in accordance with s. 113A of the *Insurance Act*, whereas s. 113BA(1)(a) and (b) deals specifically with "income loss" and "loss of earning capacity". Section 113BA(1) is not designed to eliminate double recovery. Awarding future income loss or future loss of earning capacity on a gross basis does not amount to double recovery.

There is no conflict between s. 113BA(1) of the *Act* and s. 2(1) of the Automobile Insurance Tort Recovery Limitation Regulations.

Although the judge deducted 15% for contingencies from the award for future loss of income, the Court was not prepared to reduce the damages he awarded for pension loss by the same 15%, because the respondent had not cross-appealed on that point, it was not fully argued on appeal, and the record did not permit the Court to confidently infer what the judge intended.

The judge did not err in including pre-judgment interest in the "amount involved" when awarding costs.

The judge did err in granting the plaintiff lump sum costs over and above the party and party costs he awarded her under the Tariff. Such an approach is expressly prohibited by *CPR* 77.08. A Tariff award of costs and a lump sum award of costs are mutually exclusive. The two costs orders are not to be used to supplement one another. Accordingly, the $15,000 "Lump sum over and above the Tariff" award is set aside.

The Court also questioned the judge's apparent rationale for basing the "Lump sum award" on what he imagined the plaintiff's exposure to legal fees and disbursements would be pursuant to a contingency fee agreement (CFA), when there was no evidence presented to prove time charges actually incurred and when, as here, no consideration was given to whether in fact a "contingency" even arose. Liability had been admitted prior to trial and so the "risk of losing" was never a possibility.

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Appellant

v.

Kim MacDonald

Respondent

Judges:	Wood, C.J.N.S.; Saunders and Farrar, JJ.A.
Appeal Heard:	September 30, 2019, in Halifax, Nova Scotia
Held:	Appeal allowed, in part per reasons for judgment of Saunders and Farrar, JJ.A.; Wood, C.J.N.S. concurring
Counsel:	Lisa Richards and Timothy Roberts, for the appellant Duncan MacEachern and Hugh McLeod, for the respondent

Reasons for judgment (Saunders and Farrar, JJ.A.):

[1] The respondent, Ms. Kim MacDonald, claimed to have been totally disabled by the injuries she sustained in a motor vehicle collision that ended her career in nursing. A trial judge agreed and awarded her substantial damages.

[2] The estate of the late defendant now appeals, alleging a host of factual and legal errors in the judge's assessment of causation, liability and damages.

[3] For the reasons that follow we would allow the appeal, in part.

[4] We will begin by providing a brief summary of the background, adding such further detail as may be required during our consideration of the issues on appeal.

[5] For clarity, depending upon the context, we may refer to the respondent, variously, as "Ms. MacDonald" or "the plaintiff" and the appellant as "Mr. MacVicar" or "the defendant".

Background

[6] On September 4, 2012, Ms. MacDonald was a front seat passenger in a vehicle driven by her mother-in-law, Ms. Sarah MacDonald, when it was hit from behind while stopped to make a left-hand turn. The driver of the second vehicle, Mr. Ralph MacVicar, is now deceased.

[7] The respondent was wearing her seatbelt at the time of the collision. She claimed that she was jolted twice by the force of the impact. Based on his acceptance of the respondent's evidence, the trial judge concluded that the car in which she was a passenger moved ahead "about 4 to 5 feet" and that the collision felt as though she had been "slammed into a fence and knocked flat". Her immediate concern was for the welfare of her young son who was seated in the back. She said she felt excruciating pain in her neck. Emergency personnel had difficulty removing her from the vehicle. They placed her on a longboard before taking her to hospital by ambulance.

[8] Ralph MacVicar was 81 years of age at the time of the collision. He died before trial. His version of events came in the form of a statement given to an insurance adjuster two weeks after the accident, and admitted as a business record under the *Evidence Act*, R.S.N.S. 1989, c. 154, as amended. In his statement, Mr. MacVicar confirmed he had his seatbelt on. He described what happened:

> … I just didn't notice the car ahead of me had stopped. When I did realize the car ahead of me had come to a stop, I applied my brakes, but it was too late, ….

[9] In Mr. MacVicar's view, the "force" of the impact was minimal. He said:

> It was just a light hit. I don't believe I even pushed the car ahead.

He was not injured. He got out of his car and checked for damage. He said he:

> …couldn't see any damage to the other vehicle … [and] … there is no damage to mine.

[10] Ms. Sarah MacDonald, the respondent's mother-in-law, gave evidence. She felt two impacts. She testified they:

> … got jolted, slammed from behind and I got caught in my seatbelt, and then a second hit, just seconds later …

She said the vehicle she was driving "jumped" three to four feet ahead after the first impact. She said the second hit was:

> … a second or less than a second afterward, it was very quick, not as severe as the first. But there was a second impact.

[11] After getting out of the vehicle Ms. Sarah MacDonald said she did notice "a crumple and chips of paint or whatever" damage to the front of Mr. MacVicar's car, and also confirmed damage to the back bumper of her vehicle.

[12] The case was heard by Nova Scotia Supreme Court Justice Patrick J. Murray. After a 10-day trial, in separate decisions now reported at 2018 NSSC 271 and 2018 NSSC 272, Justice Murray awarded damages to the respondent totalling $760,933.00. In a further Supplemental Decision now reported at 2019 NSSC 108, Murray, J. awarded Ms. MacDonald costs and disbursements of $151,724.12.

[13] The appellant says the trial judge "made palpable and overriding errors in assessing the mechanics of the motor vehicle collision" and that his understanding of what happened "is based on findings of fact lacking an evidentiary basis". In the appellant's submissions, these errors informed "his conclusions regarding causation, the Respondent's degree of disability and her resulting damages". Besides misunderstanding the mechanics of the collision, the appellant says the trial judge failed to grasp "key details of the Respondent's pre and post-MVC

symptomology, leading to significant errors in considering causation … significantly inflating the Respondent's damages to an unreasonable level."

[14] The appellant asks us to quash the trial judge's order and substitute our own award of damages, with costs.

[15] Of the 16 grounds listed in the appellant's Notice of Appeal, four have been abandoned "due to space constraints" such that the appellant has "concentrated its efforts on the errors most significant to the decision …".

Issues

[16] Having abandoned Grounds #2, #3, #11 and #12, the appellant's remaining grounds of appeal are:

> 1. The learned judge made palpable and overriding errors regarding the mechanics of the motor vehicle accident by:
>
> (a) making findings in the complete absence of evidence;
>
> (b) making findings in conflict with accepted evidence;
>
> (c) making findings based on misapprehension of evidence;
>
> (d) making findings of fact drawn from the primary facts which were the result of speculation rather than inference.
>
> 4. The learned judge erred in law in determining a November 9, 2010 x-ray image was not in evidence and in failing to consider the November 9, 2010 x-ray image;
>
> 5. The learned judge committed reviewable error by simultaneously relying on conflicting expert opinions in reaching conclusions on the Plaintiff's medical condition and causation.
>
> 6. The learned judge committed reviewable error by incorrectly interpreting expert evidence to conclude the motor vehicle accident caused total disability, without concluding what injury or injuries the motor vehicle accident caused.
>
> 7. The learned judge committed reviewable error by rejecting, without explanation, the opinion of the most qualified medical expert with respect to the Plaintiff's injuries.
>
> 8. The learned judge erred in law by concluding the Plaintiff met the evidentiary burden for proving "total disability."
>
> 9. The learned judge committed reviewable error in finding there was non-existent evidence of failure to mitigate.
>
> 10. The learned judge committed reviewable error in relying on actuarial evidence without sufficient evidentiary basis for doing so.

> 13. The learned judge erred in law by misinterpreting section 113BA(1) of the Insurance Act RSNS c 231, as amended.
>
> 14. The learned judge erred in law by misinterpreting sections 2(1)(a) of the Automobile Insurance Tort Recovery Limitation Regulations NS Reg 182/2003.
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> 15. The learned judge erred in law in reaching a decision on costs, in his calculation of the "amount involved," in his application of the tariffs under Rule 77 of the Civil Procedure Rules and in his application of an additional lump sum.

[17] In our respectful view, the appellant's several arguments can be more effectively addressed by separating those that relate to causation from damages and then moving on to consider the appellant's specific complaints by answering a list of discrete questions.

[18] Accordingly, we have reframed the issues to be addressed on appeal as follows:

Causation & Mitigation

(i) Did the trial judge err in his understanding of the evidence regarding the "mechanics" of the collision?

(ii) Did the trial judge err in finding that the respondent had proven causation by establishing, on a balance of probabilities, that but for the accident, she would not have suffered these injuries?

(iii) Did the trial judge err in finding that the respondent was totally disabled by the injuries she suffered in the accident?

(iv) Did the trial judge err in finding there was virtually no evidence to support the appellant's assertion that the respondent had failed to mitigate her own damages?

Damages

[19] Based upon the appellant's written and oral submissions, it would appear that while the appellant does challenge Murray, J.'s specific monetary awards under the various heads of damages, its principal argument is that the judge was wrong to characterize the respondent as being totally disabled, which "error" led to a grossly inflated award. Satisfied as we are that Justice Murray did not err in finding the respondent to be totally disabled and that the appellant was entirely at fault for causing her injuries and damages, we need now only address quantum by

referring to the appellant's more specific complaints as they relate to the trial judge's:

- treatment of the implications surrounding awarding loss of future income on a net versus gross basis;
- decision to include prejudgment interest when fixing the "amount involved" in awarding reasonable party and party costs; and
- decision to add "lump sum" costs to the costs award he had already granted under the Tariff.

To these we will add another point that arose during oral argument at the appeal hearing which relates to the trial judge's decision not to reduce the damages he awarded for pension loss by 15 percent for contingencies. Accordingly, we will address the following additional issues:

(v) Did the trial judge err in relying upon the respondent's actuarial evidence and in finding that the respondent's damages for loss of future income should be awarded on a gross, and not net, basis?

(vi) Did the trial judge err in failing to reduce the damages he awarded for pension loss by the same 15 percent for contingencies he deducted from the award for future loss of income, and if he did, should we intervene?

(vii) Did the trial judge err in including pre-judgment interest in the "amount involved" when awarding costs?

(viii) Did the trial judge err in granting the respondent a lump sum over and above the party and party costs he awarded under the Tariff?

Standard of Review

[20] The legal principles are well-established. As this Court observed in *Laframboise v. Millington*, 2019 NSCA 43:

> [14] The standards of appellate review in cases such as this are so well-known as to hardly require elaboration. Questions of law are reviewed on a standard of correctness. When interpreting and applying the law the judge must be right. On questions of fact, or inferences based on accepted facts, or questions of mixed law and fact where the legal point is not readily extricable, a trial judge's factual

> findings will only be disturbed if they evince palpable and overriding error. "Palpable" means obvious. "Overriding" means dispositive; a mistake so serious as to have likely influenced the outcome. In appeals from a trial judge's exercise of discretion, deference is owed. We will only intervene if we are satisfied that in the exercise of that discretion the judge erred in law or the outcome is patently unjust. Unless an appellant can persuade us that the trial judge either erred in law, or erred in fact, or erred in the exercise of discretion in the ways I have just described, the appeal will fail. See generally, *Housen v. Nikolaisen*, 2002 SCC 33 at ¶8 *ff.*; *Gwynne-Timothy v. McPhee*, 2005 NSCA 80 at ¶31-34; *Laushway v. Messervey*, 2014 NSCA 7 at ¶27-29; *Homburg v. Stichting Autoriteit Financiële Markten*, 2016 NSCA 38 at ¶18-19; and *McPherson v. Campbell*, 2019 NSCA 23 at ¶17-20.

[21] On appeals involving the assessment of damages, a trial judge's award of damages will not be disturbed unless it can be demonstrated that the judge applied a wrong principle of law or has set an amount so inordinately high or low as to be a wholly erroneous estimate. See for example, *Nance v. B.C. Electric Railway Company Ltd.*, [1951] A.C. 601; *Toneguzzo-Norvell et al v. Savein et al*, [1994] 1 S.C.R. 114; *Campbell MacIsaac v. Deveaux & Lombard*, 2004 NSCA 87 at ¶ 41; *Couse v. Goodyear Canada Inc.*, 2005 NSCA 46; *Ken Murphy Enterprises Ltd. v. Commercial Union Assurance Co. of Canada*, 2005 NSCA 53; and *Gwynne-Timothy v. McPhee*, 2005 NSCA 80 at ¶34.

[22] A special standard of review is triggered whenever a costs award becomes the subject of appeal. Fundamentally, trial judges have a broad discretion when deciding whether or not to award costs, and in determining their amount. Great deference is owed to a trial judge's exercise of that discretion. We will not intervene unless we are satisfied that the judge erred in principle or the amount of the costs award is manifestly unjust. See for example, *D.C. v. Children's Aid Society of Cape Breton-Victoria*, 2004 NSCA 146 at ¶5; *Westminer Canada Ltd. v. Fraser*, 2005 NSCA 27 at ¶19; *Casavechia v. Noseworthy*, 2015 NSCA 56 at ¶42-43; and *Morrissey v. Morrissey Estate*, 2018 NSCA 96 at ¶11.

[23] We will turn now to a consideration of the eight specific questions identified, with a brief description of the standard of review that applies to each.

Analysis

(i) Did the trial judge err in his understanding of the evidence regarding the "mechanics" of the collision?

[24] At trial the respondent advanced the position that the "force" of the collision was so inconsequential that neither vehicle sustained any real damage and that the plaintiff could not possibly have been injured to the extent alleged from such a minor mishap. On the other hand, Ms. MacDonald and her mother gave far different accounts.

[25] Justice Murray was obliged to consider all of the evidence and from that body of evidence make factual findings and draw inferences from which responsibility for the collision could be established. In this, he was clearly performing a function for which trial judges are uniquely well-placed, with the advantage of hearing and seeing the witnesses first-hand. The appellant has failed to demonstrate any palpable and overriding error in the judge's factual assessment.

[26] More specifically, we see no merit in the appellant's complaint that Murray, J. misunderstood the "mechanics" of the mishap or that this "mistake" led to errors in his analysis of causation as well as his assessment of disability and damages.

[27] On the contrary, we are satisfied that Murray, J. carefully reviewed the evidence and that his factual findings and conclusions find full support in the record.

[28] In this Court, counsel for the appellant took particular umbrage with the trial judge's description of the defendant's vehicle as being "large", or his reference to an "anonymous gas-vs-brakes statement in the police report … [to] .. explain why the first impact was more severe than the second, despite there being no objective evidence there were actually two impacts". In the appellant's submission these were critical errors made "in the complete absence of any evidentiary basis" and showed a pattern of factual mistakes which the appellant says undermine all of the trial judge's conclusions regarding causation, the degree of the respondent's disability and her resulting damages. We respectfully disagree.

[29] There was no dispute that Mr. MacVicar was driving his Grand Marquis. One does not require expert evidence to know that this was a "large" car. Both the respondent and her mother-in-law testified to there having been two impacts, one being more severe than the other. The decision whether to accept such evidence as well as the weight to be given to it was a matter for the trial judge to decide.

[30] Murray, J. preferred the plaintiff's evidence regarding the manner in which the collision occurred and chose to give little weight to the statement the defendant had provided to an insurance adjuster. The trial judge explained:

> [48] …, I find little weight can be given to the MacVicar statement. On the other hand, I find the evidence of Sarah MacDonald to be credible. She said her vehicle was moved ahead several feet or more.
>
> [49] The police report in evidence as Exhibit 25 contains details of the accident. It states "the driver of the second vehicle attempted to hit the brakes to come to a stop, however he hit the gas pedal". While I am cautious about placing weight on this report, that statement of "hitting the gas instead of the brakes" would explain the reason for the first hit being more severe than the second.
>
> [50] As little weight is attributed to the Defendant's statement, this leaves the evidence of Sarah MacDonald (and Kim MacDonald) largely uncontradicted as to the number of impacts. The speed is unknown but the Defendant's vehicle was large and had been unable to stop. I am satisfied the vehicle likely moved ahead and that the collision was more than a light hit, especially the first impact. Although the damage estimate was not extensive, the MacDonald vehicle required a new bumper.
>
> [51] In the circumstances, it is more likely than not that the MacDonald vehicle was struck twice by the Defendant vehicle.
>
> [52] I am also satisfied that the Defendant was entirely at fault for the accident. As the driver of the Defendant's vehicle, Mr. MacVicar owed a duty of care to the Plaintiff, to operate his vehicle in a careful and prudent manner. He breached that standard of care.

[31] There is a sound evidentiary basis for the judge's findings. Nothing here would warrant our intervention.

[32] Our answer to this question disposes of the appellant's first ground of appeal.

(ii) Did the trial judge err in finding that the respondent had proven causation by establishing, on a balance of probabilities, that but for the accident, she would not have suffered these injuries?

[33] As one would expect, much of the trial was taken up with the evidence of medical experts called by both the plaintiff and the defendant. Each was a senior and highly regarded specialist in their respective fields of medicine. The plaintiff's two experts were Dr. Gerald Reardon and Dr. David King. Dr. Reardon is an orthopaedic surgeon and Dr. King is a neurologist. Both Dr. Reardon and Dr. King formed the opinion that Ms. MacDonald was totally disabled and that the accident on September 4, 2012 was the cause. The defendant called Dr. David Alexander, an orthopaedic surgeon who, during the course of his career, specialized in spinal surgery. Dr. Alexander formed the opinion that Ms. MacDonald was not totally

disabled, that the motor vehicle collision was not the cause of her neck pain and related injuries, and that she had pre-existing pain and neck problems prior to the accident. In his opinion Ms. MacDonald would have eventually experienced these problems even if the accident had not occurred.

[34] Accordingly, each side presented starkly different "theories" at trial regarding the cause and extent of Ms. MacDonald's injuries, her current status and her future prospects. Those very different positions were clearly described by Murray, J. early on in his reasons:

> [7] KMD maintains that since the accident she has suffered from, among other things, right side neck pain and upper limb pain. Further, that these symptoms warranted major surgery, a spinal fusion at the C 4-5, C 5-6, and C 6-7 levels.
>
> [8] At issue in this case is causation. The Defendant maintains that KMD had ongoing neck problems prior to the accident. These pre-existing degenerative changes, says the Defendant, would have resulted in the difficulties being experienced by KMD in any event.
>
> [9] Another major issue is whether Ms. MacDonald is totally disabled. She maintains that the motor vehicle accident changed her life, irrevocably, and that she is totally disabled.
>
> [10] Three medical experts, specialists in their fields, have given opinion evidence. Two have been qualified as experts in the field of orthopaedic surgery. A third has been qualified as an expert in the field of neurology. The opinions differ as to whether the accident caused the injuries suffered by the Plaintiff.
>
> [11] The Defendant strenuously maintains that KMD is not disabled. The Defendant says the medical evidence points to the accident worsening the symptoms that already existed, but is not the cause of her difficulties.
>
> [12] The Defendant maintains that the injuries claimed are exaggerated and have not been proven, and that the Plaintiff is not totally disabled as claimed.
>
> [13] In addition, there are differing versions of the accident as between the parties. The Defendant says the impact was minor, with little damage to the Plaintiff's vehicle. There was almost no damage to the Defendant's vehicle, only a scraped bumper. The Defendant refers to the EHS report and the photographs to support its position.
>
> [14] Further, the Defendant says there was no violent jolt, and argues that this is critical in assessing the damages that are alleged to have arisen from the accident.
>
> [15] Mr. Reardon and Dr. King are both of the opinion that Kim MacDonald's current medical difficulties were caused by the accident. Dr. David Alexander is of the opinion that Kim MacDonald's condition was not caused by the accident, but that the accident contributed to a worsening of her medical condition.

> [16] The evidence of these medical experts is central to this case and will be reviewed in more detail.
>
> [17] The Defendant says the opinions of the Plaintiff's experts are based on "self-reported" symptoms described by KMD, and not on objective evidence.
>
> [18] Credibility, and in particular, the credibility of the Plaintiff is a key issue. The Defence maintains that KMD's evidence is neither credible nor reliable.
>
> …
>
> [20] KMD maintains that her physical abilities have been severely restricted. She claims what had once been an active life, participating in outdoor activities has been reduced to watching television, making a sandwich, and picking things off the floor. She is medicated throughout the day to deal with the pain. Marital relations have been affected. Her husband is left to perform the household tasks while operating his business.
>
> [21] The damages claimed by KMD as a result of the accident are significant. The largest component of the damages claimed is for loss of income, both past and future. The Plaintiff had planned to retire at age 65.
>
> [22] The Defendant maintains that there is a psychological component to Ms. MacDonald's condition. They maintain this has a negative impact on her recovery as does the fact that this is a "third party liability" situation.

[35] Obviously, a trial judge must be correct in choosing and applying proper legal principles when deciding whether any claimant has met the requisite burden and standard of proof. This function obliged Murray, J. to correctly apply the law to the facts as he found them.

[36] Having carefully reviewed the record we are not persuaded he erred in either applying the law or in assessing and weighing the facts leading him to ultimately conclude that Ms. MacDonald had met her burden by proving, on a balance of probabilities, that but for the accident, she would not have suffered her injuries.

[37] The trial judge’s decision provides a thorough review of the medical evidence as well as a clear explanation of why he came to prefer the evidence of Ms. MacDonald’s experts (Drs. Reardon and King) over that of the appellant’s expert (Dr. Alexander). Justice Murray explained:

> [178] The Plaintiff has the burden of proving, on a balance of probabilities that her injuries were caused by the motor vehicle accident.
>
> [179] Two qualified experts have both said that the Plaintiff's injuries and her current medical condition, would not have occurred but for the motor vehicle accident. A third expert, Dr. Alexander, has said the motor vehicle accident has merely worsened her current symptoms.

…

[185] Regarding the Defendant's assertion that KMD had a pre-existing condition, the evidence focussed mostly on the pain she experienced in June, 2012 during ER visits of June 5 and 6, as well as an x-ray taken on June 25, 2012. Ms. MacDonald's evidence confirms that her complaint on June 5 and 6 was for back pain and shoulder pain that had spread to her neck. The reports themselves bear that out. The pain was "left scapula" and "left arm" on June 6. On June 5 the summary described neck pain, muscle strains, muscle relaxants, stating "dilaudid did not improve back pain". The June 5 report also mentioned "sensation in C6-C7". There was some restriction of movement of the neck due to the pain. There was normal strength and normal reflexes. The diagnosis was "wry neck". The June 25 x-ray showed "some disc degeneration".

[186] Dr. King's report is instructive in several aspects. He points out that in medicine, not all findings are 100%. His finding very clearly was that the Plaintiff had "right arm dysfunction emanating in the lower neck". He described this as "a C-8, T-1 problem", stating those are "the two lowest nerve roots that pass through the thoracic outlet".

[187] Dr. Alexander's diagnosis is focussed on the Plaintiff's pre-existing condition. In cross-examination he defined "longstanding" as meaning a period of five to ten years.

[188] I concur with Dr. Reardon that the documentation does not support the proposition that the Plaintiff had a longstanding disc degenerative problem leading up to the accident. Even allowing that there was an issue of acute neck pain on June 14, 2012, the time frame is still three months prior to the accident, and nothing approaching five to ten years.

…

[195] Dr. Reardon expressed his opinion in a very confident manner. Following a thorough cross examination, his evidence remained virtually intact. He explained the difference between chronic pain and chronic pain syndrome. He said the Plaintiff does not have chronic pain syndrome, because the source of her pain can be determined. There is an anatomical basis for her pain, he said. In the result both he and Dr. King agreed that the Plaintiff suffers from chronic pain.

[196] Returning to Dr. Alexander's opinion, I cannot accept his evidence that there is a strong psychological component involved in the presentation by the Plaintiff. The references in the MSI history were made based on his documentary review. When he did meet with her to examine her and discuss her case, she was quite tearful and crying. I referred earlier to her evidence on this point. She gave a credible explanation for her situation. In my view, it would not be unusual for someone in this situation to display some emotion.

[197] Dr. Reardon and Dr. King are from different fields of medicine. They agree that the September 4, 2012, accident caused the Plaintiff's injuries. I accept

> the opinion of Dr. Reardon on this issue, which is shared by Dr. King, albeit for different reasons.
>
> [198] Dr. King's opinion is based on there being two collisions, the second occurring after the Plaintiff had "straightened". The evidence of Ms. MacDonald was that "there was something slammed into the back of us and I was jolted forward even further so that even though I was leaning a little bit forward I came very close to the dash". I am satisfied and find as a fact KMD was leaning forward and looking left and that there were two impacts. Whether KMD had straightened before the second one is less clear from the evidence.
>
> [199] Dr. Reardon's evidence was most compelling and in particular the following opinion contained in his rebuttal report dated October 12, 2017:
>
> > The degenerative findings at C6 - 7 evident on x-ray were mild. One absolutely could not extrapolate from the information available at that time, that Ms. MacDonald, had the accident not intervened, would have required surgery for her cervical spine degenerative changes.
>
> …
>
> [201] I have earlier referred to the evidence of Ms. MacDonald and found that except for a few instances her evidence was consistent. In short, I found her to be credible in reporting her symptoms.
>
> [202] In terms of the medical evidence, Dr. Reardon explained the basis of his opinion, which he based on radiographical findings. There was an anatomical basis he said, for his opinion. His view was that there was no support in the documentation for the opinion of Dr. Alexander.
>
> [203] Based on all of the evidence, I am satisfied that it is more likely than not that, but for the motor vehicle accident, the Plaintiff would not have suffered these injuries. Accordingly, for all of these reasons, I find and accept that causation is established. I turn next to discuss whether KMD is totally disabled.

[38] We see no error in Justice Murray's analysis. His factual findings and conclusions are clearly articulated and find full support in the evidence.

[39] The appellant argues that the opinions of Dr. King and Dr. Reardon rely on the self-reported symptoms of Ms. MacDonald and, for this reason, should not be preferred over the opinion of Dr. Alexander. The problem with this position is that Murray, J. found Ms. MacDonald to be credible and accepted as accurate her testimony about the impact of the accident upon her health. Such an assessment of credibility is for the trial judge to make and should not be disturbed on appeal.

[40] The appellant says the position advanced by the plaintiff at trial was "very strange" in that she presented two medical experts who expressed "conflicting" opinions and that the trial judge's "failure" to recognize what the appellant insists

are "mutually exclusive opinions" reflects the trial judge's "total confusion" in appreciating its impact and "coloured" his understanding of causation and the extent of the plaintiff's disability and damages. We respectfully disagree.

[41] Any fair reading of Justice Murray's decision makes it obvious that he was alive to the different points of view taken by Dr. Reardon and by Dr. King. He said so explicitly:

> **Dr. Gerald Reardon – called by the Plaintiff**
>
> [58] Pursuant to Civil Procedure Rule 55.09, Dr. Gerald Reardon was qualified as an expert in the field of orthopaedic surgery capable of giving opinion evidence in that field, including evidence as to how any injury that KMD suffered would create a disability, limitation, or lack of function for her.
>
> [59] It is Dr. Gerald Reardon's opinion that but for the accident, the Plaintiff would not be experiencing the symptoms she now has, which are disabling. Prior to the accident she had "normal, mild disc degeneration, but nothing of the extent so as to require the kind of surgery recommended for her, a fusion at three levels of the cervical spine".
>
> [60] There are areas of contention among the experts. For example, Dr. Reardon describes the degenerative changes as mild, while Dr. David Alexander is of the opinion that the degenerative changes were extensive and long-standing.
>
> **Dr. David King – called by the Plaintiff**
>
> [63] Dr. David King is an experienced neurologist. In his thorough report he provided a pain diagram and extensive literature to support his conclusion that KMD's difficulties are not spine related. Instead, says Dr. King, the proper diagnosis is Thoracic Outlet Syndrome (TOS). He says that the diagnosis of TOS is consistent with her pain and other symptoms. Essentially, the pain is caused by stretching of the scalene muscles in the neck and shoulders extending to the occipital ridge at base of the skull.
>
> [64] Dr. King's opinion is that the Plaintiff is totally disabled and that the accident of September 4, 2012, is the cause. According to him, TOS is a diagnosis often missed. Her condition is not advanced and therefore would not present as a classic case of TOS in terms of her symptoms. He indicates that diagnosis would normally be made by a neurologist or thoracic surgeon, not by an orthopaedic specialist.

[42] Whatever might be the "proper diagnosis" as to the source of the plaintiff's difficulties, Drs. Reardon and King were both clearly of the view that Ms. MacDonald was totally disabled and that the September 2012 motor vehicle collision was the sole cause of her pain and disability.

[43] Murray, J. understood that choosing which opinion he preferred and what weight to attach to the views expressed by the medical specialists was his responsibility. He properly observed:

> [181] All three experts were qualified to give evidence on the injuries suffered by the Plaintiff in relation to the accident. The Court is not bound to accept any of these expert opinions. As with any witness the Court may accept all, part or none of the evidence of these experts. The areas of contention among the experts include whether the degenerative changes were mild or extensive prior to the accident, and whether the pain was moderate or severe. The location of the pain is also an important factor, before and after the accident.
>
> …
>
> [184] On the basis of all the evidence in this case, I have been persuaded that I should accept the medical opinion of Dr. Gerald Reardon and his conclusions.

[44] As to the appellant's specific complaint that the judge erred in finding that a November 9, 2010 x-ray image was not in evidence, or in failing to consider that x-ray image, we are not persuaded he erred, or that if he did, that the error was material to his reasoning and conclusions.

[45] All hospital records and x-rays were put into evidence by consent. Justice Murray accepted the record of the radiologist in regard to the 2010 x-ray, as well as Dr. Reardon's testimony on this issue, that Ms. MacDonald's spine was "normal" at that point in time. The judge chose not to accept Dr. Alexander's evidence that the 2010 x-ray showed longstanding degenerative disc disease. Dr. Alexander is not a radiologist. He testified to having viewed the x-ray and formed the opinion that it showed "quite significant degenerative disc disease". From Dr. Alexander's perspective, the attending radiologist was wrong to describe the 2010 x-ray results as being "normal". If the defendant thought the interpretation of that single x-ray was determinative, there was nothing to prevent him from calling a radiologist to offer expert opinion evidence on the point. At the end of the day, the judge thoroughly and fairly reviewed all of the medical evidence and carefully described his reasons for preferring certain evidence over other evidence. That was clearly his "call" to make. There is nothing here which would warrant our intervention.

[46] Our answer to this question disposes of the appellant's fourth, fifth, sixth and seventh grounds of appeal.

(iii) Did the trial judge err in finding that the respondent was totally disabled by the injuries she suffered in the accident?

[47] Our answer to the last question bleeds into our response to this one.

[48] Here again we are satisfied the trial judge understood and properly applied the law to the facts as he found them. The trial judge asked himself:

> **Is Plaintiff totally disabled?**
>
> [204] The evidentiary burden is on the Plaintiff to prove on a balance of probabilities that she is totally and permanently disabled. The issue is, upon consideration of all the evidence, has KMD discharged that burden?

[49] To answer that question, the trial judge referred at length to the opinions of the medical experts and explained in detail his reasons for rejecting the appellant's assertions that Ms. MacDonald's evidence should be discredited because: they were nothing more than self-reported symptoms; she was not totally disabled; her complaints were exaggerated; and many of her complaints were "psychological" in nature. In reaching his conclusions the trial judge quoted extensively from the testimony of Dr. Reardon. For example:

> [223] Dr. Reardon provided additional opinions on Ms. MacDonald's disability, as well as her prospects for a return to work in the future as follows:
>
> > She has always worked in nursing, but it is my opinion that it is not likely that she will be able to return to her nursing profession in the future. She now receives Canada Pension Plan disability benefits in view of her total disability.
> >
> > The prognosis for the future is poor. It is highly unlikely that she will be able to return to the workforce.
> >
> > As a result of the accident in question, Ms. MacDonald has serious and permanent impairment that is substantially interfering with her ability to perform her usual daily activities and the duties of her regular employment. It is more likely than not that Ms. MacDonald will not be able to return to work in the future.
>
> [224] Dr. Reardon stated that KMD "has chronic pain like anybody who has pain for three years straight".
>
> [225] The Defendant argues that the Plaintiff's claim of total disability is based entirely on self-reported symptomology. According to Dr. Reardon, who remained consistent throughout his testimony, the physical findings in the neck supported his opinion that the Plaintiff's claim can be explained. There was therefore, an etiology for the pain being experienced by this patient.

[50] The trial judge rejected the appellant's assertion that Ms. MacDonald should return to work and seek psychological help, or that her complaints should be

treated with skepticism because she had not been aggressive in seeking modified work arrangements. He said:

> [241] KMD's testimony was given in a clear and reasonable manner. She contacted her employer and was advised she would need to be cleared for a return. She testified that most jobs do not allow you to work a day and then be off to recover. Within the nursing profession there are no jobs that do not have a requirement to use both hands, to stand, and to reach overhead. She acknowledged that some have lesser duties, such as a clinical setting or nursing home manager. It has been a mutual discussion with her doctors, she said. In short, she says her symptoms are preventing her from returning to work. The pain is not under control, and she did not see how she could manage it. Her doctors agree. I found KMD's evidence to be credible in this regard.

[51] Similarly, the trial judge was unimpressed with the appellant's suggestion that the strength of Dr. Reardon's opinion regarding Ms. MacDonald's future prospects was somehow weakened by the fact that a functional capacity evaluation had not been conducted. On this point, the trial judge quoted Dr. Reardon's own dismissal of such a suggestion:

> [245] Dr. Reardon expressed a further opinion with respect to functional capacity evaluations.
>
> > ... Functional capacity evaluation you ask a patient to lift 10 lbs and they say oh I can't do it, well how do you know they can't do it. Its based so much on the subjectivity of the patient, so we do not put, I don't put much importance to a functional capacity evaluation. I don't need a functional capacity evaluation for me to arrive at an opinion as to whether a patient can go back to work or not. That's what I do for a living, I do it every day twenty times.

[52] In concluding this part of his reasons, Murray, J. said:

> [254] In the present case three experienced physicians have all indicated that the Plaintiff suffers from chronic pain and that the surgery intended to relieve that pain for all intents and purposes, was unsuccessful. This was not unexpected.
>
> [255] I have discussed and referred to objective findings in the evidence of Dr. Reardon and Dr. King. Both are of the opinion that not only did the motor vehicle accident cause the injuries suffered but that those injuries have left KMD with a serious and permanent impairment that is substantially interfering with her ability to perform her usual daily activities and duties of her employment.
>
> [256] In terms of the caselaw and what constitutes a total disability, I find that Rogers J. described the relevant inquiry in *MacEachern v. Co-Operative Fire and*

Casualty Co, (1986), 75 N.S.R. (2d) 271, and affirmed at (1978), 79 NSR (2d) 127:

> 63.When we apply the principles enunciated in the foregoing authorities, then, we must determine whether Sharon MacEachern was, because of her debilitating pain, (acknowledged by all of the medical experts) substantially unable to perform her own or any other occupation for an income and with a status which bears some reasonable relationship to the job she was performing as a clerk/stenographer at the Credit Union.

[257] For the foregoing reasons, I am satisfied the Plaintiff has met the evidentiary burden upon her to prove on a balance of probabilities that she is totally and permanently disabled. Upon consideration of all of the evidence I am satisfied, on a balance of probabilities, that the Plaintiff, because of debilitating pain, is substantially unable to perform her own or any other occupation for an income and with a status which bears some reasonable relationship to the job she was performing as a registered nurse.

[258] For the above reasons, I am also satisfied that the Plaintiff has met the burden upon her that her impairment is permanent and is supported by the objective findings of Dr. Reardon, Dr. King and also Dr. Malik.

[53] In arriving at that conclusion, the trial judge neither erred in law nor in his evaluation of the material facts, each of which was carefully explained and fully supported in the evidence.

[54] Our answer to this question disposes of the eighth ground of appeal.

(iv) Did the trial judge err in finding that there was virtually no evidence to support the appellant's assertion that the respondent had failed to mitigate her own damages?

[55] Here again we see no reason to intervene. Justice Murray correctly recognized that the burden was upon the defendant to establish a failure on the part of the plaintiff, Ms. MacDonald to mitigate her damages. The judge said:

> **Mitigation**
>
> [268] A Plaintiff's unwillingness to aid in her own recovery goes to the issue of mitigation. Was the Plaintiff less than an active participant in her own recovery? I find the evidence for the claim that the Plaintiff contributed to her outcome by failing to actively support any treatment programs recommended to her to be almost non-existent. (See *Hollett v Yeagher*, 2014 NSSC 207)
>
> [269] Dr. King only touched on the possibility that Ms. MacDonald's symptoms were psychosomatic, referring to pain sensitization and third party liability as "potentially" impeding recovery.

[270] The Defendant's assertion mainly comes from Dr. Alexander. On the issue of psychological symptomology and Ms. MacDonald convincing herself, Dr. Alexander was qualified as an expert in "spinal health and the degree to which the Plaintiff's spinal health issues arose from the September 4, 2012 accident." There was no expert evidence given in respect to the psychological health of the Plaintiff. The explanations she offered for the few references to anxiety and depression are essentially uncontradicted.

…

[276] Dr. Alexander says there is no medical basis or explanation for her current presentation, even though he agrees Ms. MacDonald has chronic pain. I reject his evidence that there is no explanation for the chronic pain.

[277] I find there are physical manifestations, in the case of Ms. MacDonald that account for the full extent of her ongoing disability. I have found as a fact that the operation was not successful in relieving her chronic pain.

[278] While the structural formation of the surgery may be sound, the plate in her neck and the manufactured discs resulting from the surgery are evidence in themselves of the severe problems she has experienced subsequent to the accident. I turn now to discuss the specific heads of damage.

…

[289] This is not a case where a soft tissue whiplash injury did not heal within an expected time. In this case the Plaintiff had major surgery in an attempt to alleviate her neck pain and other symptoms. Had the surgery been successful as hoped then the amount of pain and suffering she experiences would likely be substantially less.

[290] The fact is the surgery did not provide the relief sought. Even though the results were not unexpected, the Plaintiff continues to experience pain, which is severe at times, and debilitating so as to severely restrict her activities.

[291] The Defendant argues that the Plaintiff has been able to travel to Montreal, to PEI and to the cottage in Ingonish. This, they say, suggests she is not experiencing the type of chronic pain which she claims.

[292] Similarly, a Facebook post showing the Plaintiff sitting in front of a birthday cake where she claims to have made the icing, is not the type of evidence that satisfies me that the Plaintiff can lead an active and pain free life, or that her chronic pain is less debilitating than she reports.

[293] I am satisfied that the Plaintiff takes medication to cope daily and relies upon the assistance of her husband to perform the normal activities of daily life, including the raising of their son. She testified that she is able to sit and stand only for limited periods, and, while she may be present, she now takes a passive role in these activities. She was cross-examined on this evidence. I accept her evidence because it is consistent with the medical evidence that I have accepted, and also because I have found her to be credible.

> [294] On this basis, I conclude that the *Smith v. Stubbert* range for non-pecuniary damages is not applicable to Ms. MacDonald's claim because the collision burdened her with disabilities which have precluded employment and substantially curtailed other aspects of her life.
>
> [295] In determining her compensation for pain and suffering, I have reviewed *Marinelli v. Keigan*, (1999), 173 N.S.R. (2d) 56 (C.A.), decision as well as others such as *Dillon, White v. Slawter*, (1996), 149 N.S.R. (2d) 321 (C.A.), and *Smith*. I conclude that an appropriate award for non-pecuniary damages to be $75,000.

[56] From this it is obvious the trial judge subjected the evidence to very careful scrutiny before deciding that any suggestion Ms. MacDonald had failed to mitigate her damages found no support in the evidence.

[57] Our answer to this question disposes of the appellant's ninth ground of appeal.

(v) Did the trial judge err in relying upon the respondent's actuarial evidence, and in finding that the respondent's damages for loss of future income should be awarded on a gross, and not net, basis?

[58] At trial Ms. MacDonald sought to prove, with the help of actuarial evidence, that she was entitled to damages for future loss of earnings. As part of her damage award, Murray, J. was required to consider, as he put it, "an appropriate award for future loss of income without the Plaintiff having any residual earning capacity."

[59] Relying on various assumptions including projected annual salary as a nurse and potential date of retirement, the plaintiff's expert produced actuarial projections for future loss of earnings (if Ms. MacDonald retired at age 59) of $335,514.00 after deduction for future CPP disability benefits.

[60] For its part, the defendant said the actuary's assumptions were flawed as they did not properly reflect Ms. MacDonald's past employment history or actual earnings. If anything were to be awarded under this head of damage "something less than $100,000.00 … for future income loss is appropriate".

[61] The defendant also argued that Murray, J. was wrong to base his assumptions upon actuarial evidence, that there were "too many uncertainties" in the plaintiff's future, and that he ought to have taken a "global" approach in assessing the merits of her future loss of income claim.

[62] We respectfully disagree. Murray, J. recognized that choosing an actuarial versus global approach need not be an "either/or" proposition. He said:

> [371] … The most important approach is the one that arrives at the fairest and most just result. As such, a judge is not constrained by expert reports and should be given liberty to determine an appropriate amount. Although not a Nova Scotia case, *Briffett v. Gander and District Hospital*, (1996), 137 Nfld. and P.E.I.R. 271, [1996] N.J. No. 34 (Nfld. C.A.), is instructive. In *Briffett*, Marshall, J.A. said, for the court:
>
> > 197. Moreover, it should be underscored that resort to one method does not foreclose the utility of the other. Thus, even where sound actuarial evidence affords sufficient basis to frame an award, a judge may still make a global assessment to further test the fairness of the award. If the initial actuarial projection appears out of line, a revisiting of the postulates on which the calculations are made may be in order before arriving at final decisions. On the other hand, where actuarial evidence is insufficient, recourse may well be had to reliable proportions of the statistical evidence in framing the global award. Moreover, reference to the structure provided by the actuarial method may assist in giving a measure of assurance that all relevant factors and contingencies legitimately bearing on the award were addressed. Chief Justice Goodridge, in his decision of the components contained in the actuarial formula in *Dobbin v. Alexander Enterprises Limited* (1987) 63 Nfld. & P.I.E.R. 1 at pp. 9 – 12, outlines a compendium of these relevant elements**. For the foregoing reasons, therefore, neither method should be treated as mutually exclusive, but as complimentary, one to the other.**
> >
> > 198. ... **The method that should have been used depends upon the nature and quality of the evidence available to the assessing judge.** [Emphasis added by Murray, J.]
>
> [372] I find this is not a case where the only option available to this Court is to select an award on a global basis. In my view, there is merit in using aspects of the actuarial report that assist in determining a just and reasonable amount for loss of future income for the Plaintiff. In my view it would not be prudent to ignore the figures contained therein. Indeed it is an exercise in speculation to some degree. …

[63] The judge then explained why he chose a lower annual salary and earlier retirement date than those proposed by the plaintiff:

> [372] … I think the earlier retirement age is reasonable given that history, notwithstanding her desire to work until age 65.

> [373] … I find it most likely that Ms. MacDonald would have made an average salary of between $55,000. and $60,000. and that she would have retired at or around the age of 59 years.

[64] The judge was then required to decide whether Ms. MacDonald's damages for loss of future income should be awarded on a gross, as opposed to a net, basis. That determination required a proper interpretation and application of the law, thus triggering a correctness standard for appellate review.

Gross versus Net Future Income Loss

[65] In his main decision on the merits (2018 NSSC 271), Murray, J. offered a brief explanation for concluding that Ms. MacDonald's damages for loss of future income should be awarded on a gross and not net basis. He said that the initial explanation would be augmented later in a supplemental decision:

> [374] This still leaves the question of whether those amounts should be gross as contained in Schedule IV of the June 28 report or net as contained in the letter of November 2, 2017 at page 2. The figures in the November 2 letter are said to be mistaken by the actuary herself. The main point of the letters was to inform the Court of the net figures if it decided the award should be net and not gross.
>
> [375] As stated, it is disputed whether or not section 113BA of the *Insurance Act* and the tort regulation that accompanies it requires these figures to be gross or net of income tax, CPP, and the other deductions.
>
> [376] I have carefully reviewed these provisions and have decided that a proper interpretation of the statute is that the award for future income loss should be granted without deduction for income tax, CPP, and the other deductions referred to therein. It is my considered ruling that the award should be stated gross and not be subject to the deductions set out in these provisions. In short, gross and not net.
>
> [377] I shall be providing detailed reasons for this conclusion in a supplemental decision. For now my reasons are summarized in the following three paragraphs:
>
> [378] Section 113BA(1) clearly limits damages for income loss or loss of earning capacity suffered "before the trial of the action" to the net income loss or net loss of earning capacity "suffered during that period". There is no mention of damages for future lost income or future loss of earning capacity. Section 113BA(1) indicates that "net income loss" and "net loss of earning capacity" are "as determined by regulation". The Regulation, however, seeks to expand the reach of these definitions beyond the words of the legislation itself, which limits them to losses suffered "before the trial of the action".
>
> [379] There appears to be a conflict between s. 113BA(1) of the *Insurance Act*, and s. 2(1) of the *Automobile Insurance Tort Recovery Limitation Regulations*. Section 113BA(1) refers only to damages for income loss or loss of earning

> capacity suffered before the trial of the action. It has no application to damages for future income loss or future loss of earning capacity, as contemplated by the regulation. The scope of the section cannot be enlarged by subordinate legislation. As a result, the common law would apply to any award for future lost income or diminished earning capacity.
>
> [380] Section 113BA(1), should not be construed as interfering with a Plaintiff's common law right to damages for future lost income based on gross before-tax earnings without clear and unambiguous language.

[66] As noted in ¶12 above, Justice Murray's supplemental reasons for awarding those damages on a gross basis are reported as 2018 NSSC 272.

[67] The appellant argues the trial judge made his decision without the benefit of *Sparks v. Holland*, 2019 NSCA 3 which would have impacted the result. In that case, this Court determined that pursuant to s. 113A of the *Insurance Act*, all CPP disability benefits (past and future) that are available in respect of an incident must be deducted from the plaintiff's damages for income loss or loss of earning capacity (¶85). In the appellant's factum they say:

> 22. While *Sparks* addresses s 113A of the *Insurance Act* and not s 113BA(1) as is presently in question, the Appellant submits the reasoning employed in *Sparks* is equally applicable to the present circumstances. Section 113A addresses the deductibility of benefits from damages for past and future income loss. Section 113BA(1) addresses the calculation of past and future income loss.

[68] We respectfully disagree that the reasoning used by this Court in *Sparks* applies equally to the interpretation of s. 113BA(1) of the *Insurance Act*. The analysis required for s. 113A differs from s. 113 BA(1) based on the differences in the language used in the respective sections and the differences in the nature of the subject payment under dispute.

[69] Though the wording of the passages is similar, they are different in the context of their respective sections of the *Insurance Act*. Section113A of the *Insurance Act* reads:

> 113A In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, the damages to which a plaintiff is entitled for income loss and loss of earning capacity shall be reduced by all payments in respect of the incident that the plaintiff has received or that were **available before the trial of the action** for income loss or loss of earning capacity under the law of any jurisdiction…
>
> [Emphasis added]

[70] In *Sparks* the word “available”, was significant in the interpretive analysis of s.113A of the *Insurance Act*. In *Sparks*, this Court wrote “the word "available" has a broad meaning, and refers to payments that a person is entitled to, but has not yet received” (¶61). After determining that the word “available” is capable of different shades of meaning, The Court concluded:

> 63 The words "available before the trial of the action" simply require that the Court be able to determine entitlement to any proposed source of deductions at the time of trial.
>
> 64 This interpretation of "available" is consistent with the meaning of the word "available" in relation to the deduction of "Section B" no-fault benefits under the Act as found by this Court.

[71] The word “available” is not present in the s.113BA(1) of the *Insurance Act*. Section 113BA(1) of the *Insurance Act* reads:

> (a) damages for income loss suffered **before the trial of the action** in excess of the net income loss, as determined by regulation, **suffered during that period**.
>
> (b) damages for loss of earning capacity suffered after the incident and **before the trial of the action** in excess of the net loss of earning capacity, as determined by regulation, **suffered during that period**.
>
> [Emphasis added]

[72] The approach used in interpreting s.113A cannot simply be applied to s.113BA(1).

[73] In *Sparks*, this Court made four main findings on why the interpretation of s.113A of the *Insurance Act*, conducted by the motions judge, amounted to an error in law:

1. the purpose of the legislation was to reduce damage awards, which would then reduce automobile insurance premiums. The consequences of the interpretation had the effect of frustrating the intent of the legislature (¶79);
2. the motions judge’s interpretation of s.113A would permit double recovery, which would also frustrate the intent of the legislature (¶80);
3. CPP disability payments being deductible before the trial but not after seemed to be an arbitrary distinction. The Court found:

> It would be little more than a token gesture for the Legislature to eliminate double recovery to the date of trial, and to permit double recovery thereafter." (¶81)
>
> This also would have the effect of frustrating the legislature's intent on eliminating or reducing double recovery; and,

4. the motions judge's interpretation was found to be contrary to the objective of the *Civil Procedure Rules* - the just, speedy and inexpensive determination of every proceeding (Rule 1.01). The Defendants motivation to settle claims would be reduced because the CPP payments pre-trial would be deductible from the award amount (¶82).

[74] The situation here differs from *Sparks,* in that the award that is the subject of the dispute is different in nature. The *Sparks* case dealt with the question of whether CPP disability payments were deductible in accordance with s.113A of the *Insurance Act*. Section 113BA(1)(a) and (b) deal specifically with "income loss" and "loss of earning capacity".

[75] CPP disability benefits are payments received by the Plaintiff and are meant to compensate for lost income. A plaintiff can receive these payments until they reach the age of 65. Therefore, if a plaintiff receives CPP disability payments and is awarded damages for future income loss, this would amount to double recovery.

[76] Conversely, s.113BA(1)(a) and (b) deal specifically with "income loss" and "loss of earning capacity". These are heads of damages that are not payments "made/received". Therefore, receipt of these damages cannot be said to amount to double recovery.

[77] Section 113BA(1) is not designed to eliminate double recovery. Awarding future income loss or future loss of earning capacity on a gross basis would not amount to double recovery.

[78] The legislature's intention to "reduce double recovery" would not be affected if s.113BA(1) were to be interpreted in a way that calculated future loss of income and loss of earning capacity on a gross basis.

[79] Admittedly, the interpretation that future loss of income and earning capacity be determined on a gross basis does not advance the goal of the legislation to reduce damage awards to the extent that calculating both these heads of damages

on a net basis would. However, the segmenting of the heads of damages on a net basis before trial and gross basis after, would still reduce damage awards paid by insurers, although not to the extent the appellant urges upon us. The interpretation taken by the trial judge of s.113BA(1) does not frustrate or defeat that legislative purpose.

[80] If it were the intention of the Legislature to have damage awards calculated on a net basis both before and after trial, it is not borne out by the wording of the legislation. The wording of s. 113BA(1)(a) and (b) is clear. Income loss suffered during the period before the trial of the action, whether it be loss of earnings or loss of earnings capacity, is to be calculated on a net basis. There is nothing in the section that would oust the common law right to damages for future lost income based on gross before tax earnings. As indicated by the trial judge, that would require clear language (¶380).

[81] There is, however, one aspect of the trial judge's decision on the interpretation of the *Insurance Act* and the Regulations with which we disagree.

[82] In his Supplemental Reasons, Murray J. determined that there was a conflict between s.113BA(1) of the *Insurance Act* and s.2(1) of the *Automobile Insurance Tort Recovery Limitation Regulations*. He concluded that due to the conflict the statute prevails over the subordinate regulations.

[83] In his reasons, Murray J. turned his mind to the presumption that statutes and regulations should work together:

> [8] It is the presumption of statutory interpretation that statutes and regulations are meant to work together as internally consistent parts of a functioning whole. Put another way, there is a presumption against conflict between a statute and subordinate legislation…

[84] In concluding that the statute and regulation were in conflict the trial judge failed to property apply this presumption of statutory interpretation. We would respectfully disagree that s.113BA(1) of the *Insurance Act* and s.2(1) of the *Regulations* are in conflict. Both the statute and subordinate legislation can be read and interpreted in a way that avoids conflict.

[85] For convenience, we repeat s.113BA(1) of the *Insurance Act*:

> (a) damages for income loss suffered before the trial of the action in excess of the **net income loss**, **as determined by regulation**, suffered during that period.

> (b) damages for loss of earning capacity suffered after the incident and before the trial of the action in excess of the **net loss of earning capacity**, **as determined by regulation**, suffered during that period.
>
> [Emphasis added]

[86] Section 2(1) of the *Regulations* provides:

> Definitions for the purposes of Section 113BA of Insurance Act
>
> 2(1) Definitions for purposes of Section 113BA of the Insurance Act and these regulations,
>
> (a) "net loss of earning capacity" means total loss of earning capacity or loss of future income less that portion of probable future income that would be paid by a plaintiff in
>
> (i) income and payroll taxes,
>
> (ii) employment insurance or similar costs,
>
> (iii) union or professional dues, and
>
> (iv) pension contributions, including Canada Pension Plan contributions;
>
> (b) "net income loss" means total income lost less that part of total income that would have been paid by a plaintiff in
>
> (i) income and payroll taxes,
>
> (ii) employment insurance or similar costs,
>
> (iii) union or professional dues, and
>
> (iv) pension contributions, including Canada Pension Plan contributions.

[87] The terms defined in s.2(1) of the *Regulations* do not conflict with the language used in s.113BA(1) of the *Insurance Act*. The terms "net loss of earning capacity" and "net income loss" refer to the scope of the particular head of damage and do not expand the language of the statute; rather they simply define the damages which are recoverable. The time period when these heads of damages are to be calculated is found in the clear language of the legislation and not within the *Regulations*. The definitions provided by s.2(1) of the *Regulations* do not change the meaning of the *Act*.

[88] The language of s.113BA of the *Insurance Act* is clear in setting the parameters of when the net amount is to be used in calculating the head of damage. The fact that the regulations do not define a time period is inconsequential because the time period is found in the legislation. The terms "before the trial of the action" and "suffered during that period" are clear in their meaning and define the portion of time when the heads of damage are to be determined on a net basis.

[89] Furthermore, s. 2(1) (b) of the *Regulations* uses the term "lost" in its definition of "net income loss". The *Regulations* state, ""net income loss" means total income **lost** less that part of total income that would have been paid by a plaintiff in…". The language used in this section would indicate that the income loss has already taken place. This interpretation would be consistent with the idea that the "net income loss" is to be applied before the trial of the action, and not to a future award.

[90] In finding the Regulations and the *Act* were in conflict the trial judge erred. However, the error does not effect the ultimate result. We are satisfied that the trial judge did not err in his finding that future loss of income and future loss of earning capacity are to be determined on a gross basis.

[91] Our answer to this question disposes of the appellant's tenth, thirteenth and fourteenth grounds of appeal.

(vi) Did the trial judge err in failing to reduce the damages he awarded for pension loss by the same 15 percent for contingencies he deducted from the award for future loss of income, and if he did, should we intervene?

[92] While neither party addressed this point in their written submissions, it did arise at the hearing during the Panel's questioning of the respondent's counsel. Mr. MacEachern appeared to concede that because Murray, J. had seen fit to reduce the damages he awarded for future loss of income by 15 percent for contingencies, there was no logical reason why the same 15 percent reduction would not also apply to the damages he awarded for pension loss, since that award was directly related to the amount and duration of Ms. MacDonald's future salary. Despite that apparent concession, because the respondent has not cross-appealed or challenged Murray, J.'s reduction for contingencies, and we have not had the benefit of full argument on the point, and the record does not permit us to confidently conclude what the trial judge intended, we are not prepared to direct that the sum of $174,390.00 awarded for "Pension Loss" be further reduced by 15

percent to account for the same negative contingencies which the judge applied to lost future income.

[93] Quite apart from the 15 percent reduction, appellant's counsel complained at the hearing that there was not enough evidence to support *any* award for loss of pension. We respectfully disagree. Based upon the assumptions she took into account, the plaintiff's actuary prepared calculations establishing the sum of $174,390.00 as the total amount of Ms. MacDonald's lost pension. Murray, J. accepted the actuary's figures saying:

> [402] I am satisfied it has been established that at some time in the future the Plaintiff will suffer pecuniary loss in the form of lost pension benefits. As set out in the foregoing reasons, I hereby set the amount of that pension loss at the sum of $174,390., on the basis that the Plaintiff would have retired at age 59 having accrued 15.25 years of pensionable service.

[vii] Did the trial judge err in including pre-judgment interest in the "amount involved" when awarding costs?

[94] The appellant's factum says:

> 176. … The Learned Trial Judge erred in law by including pre-judgment interest in the "amount involved" despite being presented with evidence regarding the Respondent's failure to mitigate. The general rule should apply and pre-judgment interest should not form part of the amount involved.

[95] Respectfully, we are not persuaded by the appellant's submission. We have already said there was no error on Justice Murray's part in finding that the evidence did not establish a failure to mitigate on the part of the plaintiff.

[96] In any event, the decision whether or not to include pre-judgment interest in the "amount involved" when fixing party-and-party costs, falls well within a trial judge's broad discretion in awarding costs. Obviously, the decision must not be arbitrary. It should be arrived at on a principled basis, with sufficient detail that the judge's reasoning will be apparent.

[97] And that is precisely what Murray, J. did in this case. He said:

> **Pre-judgment Interest – Amount Involved**
>
> [191] There was scarcely any evidence at trial of a lack of mitigation or delay and there is no evidence of a commercial lending. These are factors which would suggest an exception to the general rule that pre-judgment interest ought not to be

> included in the "amount involved". There is also the length of time the litigation took, a factor considered by Warner, J. in *Wadden v. BMO Nesbitt Burns*, 2014 NSSC 11, where he included pre-judgment interest, but adjusted it by 50%. Even if such an adjustment were made here, the amount allowed would be within $5,000. of the next level of $750,001 - 1,000,000. In these circumstances, I am going to include pre-judgment interest in the amount involved. Additional reasons for this decision are appended hereto.

Justice Murray then attached an Appendix "A" to his decision, which appears to be a 2-page memorandum on the subject. While the authorship of this memorandum remains a mystery, it at least provides further insight into the judge's decision that it was appropriate to include pre-judgment interest in the "amount involved" because Ms. MacDonald had not failed to mitigate her damages.

[98] Finally, we need not address what some trial judges have apparently labelled a "general rule" that pre-judgment interest ought not to be included in the "amount involved". Whether that particular view is sound is not an issue in this appeal.

[99] The judge did not err. There is no reason to intervene. Our answer to this question disposes of the appellant's fifteenth ground of appeal.

(viii) Did the trial judge err in granting the respondent a lump sum over and above the party and party costs he awarded under the Tariff?

[100] As a preliminary matter we accept the respondent's position that Murray, J. did not err in deciding the complexity of the case justified an application of Scale 3. The respondent makes the point very well in her factum:

> 132. … To read the Appellant's counsel's submissions it would appear the case was a minor whiplash case, under the cap, and simple, without any pre-trial motion. This was a complex case involving contested evidence, and competing medical reports and expert evidence in respect to whether or not the Appellant was totally disabled.
>
> 133. There were three orthopedic surgeons, two neurologists and also a number of motions in the trial.
>
> 134. The Learned Trial Judge completely rejected the argument that this case was not complex.

[101] Neither are we persuaded that the judge imposed a "double hardship" upon the appellant by factoring in "complexity" when choosing both the appropriate scale and in fixing the "amount involved".

[102] Where we do think Murray, J. erred was in deciding to award Ms. MacDonald Scale 3 Tariff costs and then, *on top of that*, give her an additional lump sum award.

[103] Let us say at the outset, there is nothing wrong in a trial judge using the Tariff to fix party-and-party costs and then deciding to adjust that figure upwards or downwards applying factors such as the ones listed in *CPR* 77.07(2).

[104] Such an approach on a principled basis is precisely what the *CPR* 77 contemplates. It begins:

> **Increasing or decreasing tariff amount**
>
> 77.07 (1) A judge who fixes costs may add an amount to, or subtract an amount from, tariff costs.

[105] In *Armoyan v. Armoyan*, 2013 NSCA 136, Justice Fichaud, writing for this Court, provided a very helpful analysis explaining the long-settled approach to awarding costs in this province in general, and the application of *CPR* 77 in particular. Fichaud, J.A. specifically discussed when a lump sum should be used in place of the Tariff amount:

> [14] Rule 77.08 permits the court to award lump sum costs. The *Rule* does not specify the circumstances when the Court should depart from tariff costs for a lump sum. (Erratum issued October 31, 2019)
>
> **Tariff or Lump Sum?**
>
> [15] The tariffs are the norm, and there must be a reason to consider a lump sum.
>
> …
>
> [17] The tariffs deliver the benefit of predictability by limiting the use of subjective discretion. This works well in a conventional case whose circumstances conform generally to the parameters assumed by the tariffs. The remaining discretion is a mechanism for constructive adjustment that tailors the tariffs' model to the features of the case.
>
> [18] … When this subjectivity exceeds a critical level, the tariff may be more distracting than useful. Then it is more realistic to circumvent the tariffs, and channel that discretion directly to the principled calculation of a lump sum. A principled calculation should turn on the objective criteria that are accepted by the *Rules* or case law.
>
> [Underlining ours]

[106] In *Armoyan*, this Court determined that the Tariff amount was not the right approach to take in the circumstances of that case if one were to satisfy the "substantial contribution" test first established in Nova Scotia in the case of *Landymore v.* Hardy, [1992] N.S.J. 79, 112 N.S.R. (2d) 410 (S.C.T.D.) and later approved by this Court in *Williamson v. Williams*, 1998 NSCA 195. Rather, to provide Ms. Arymoyan with a "substantial contribution" towards her legal fees and disbursements required a departure from the Tariff amounts, such that a lump sum award was appropriate.

[107] A proper application of the Rule at the trial level can be seen in the decision of Wood, J. (as he then was) in *Homburg v. Stichting Autoriteit Financiële Markten*, 2017 NSSC 52. There, Justice Wood referenced both our decision in *Armoyan* as well as other authorities when describing situations which might "…[justify] awarding a lump sum rather than tariff costs" (¶6) and be "… sufficient to move outside the tariff and consider awarding a lump sum" (¶16). Justice Wood observed:

> [4] Costs are dealt with under *Civil Procedure Rule 77*, which makes it clear that costs of a motion must be addressed under Tariff C unless a judge otherwise orders (*Rule 77.05* and *77.06(3)*). The court may make any order with respect to costs that would "do justice between the parties" (*Rule 77.02(1)*). In applying the tariff the court is given discretion to add an amount to or subtract an amount from tariff costs (*Rule 77.07(1)*). *Rule 77.07(2)* gives examples of some of the factors which may be relevant in assessing whether to do so. It provides:
>
> > 77.07 (2) The following are examples of factors that may be relevant on a request that tariff costs be increased or decreased after the trial of an action, or hearing of an application:
> >
> > (a) the amount claimed in relation to the amount recovered;
> >
> > (b) a written offer of settlement, whether made formally under Rule 10 - Settlement or otherwise, that is not accepted;
> >
> > (c) an offer of contribution;
> >
> > (d) a payment into court;
> >
> > (e) conduct of a party affecting the speed or expense of the proceeding;
> >
> > (f) a step in the proceeding that is taken improperly, abusively, through excessive caution, by neglect or mistake, or unnecessarily;
> >
> > (g) a step in the proceeding a party was required to take because the other party unreasonably withheld consent;
> >
> > (h) a failure to admit something that should have been admitted.

> [5] *Rule 77.08* permits the court to depart from the tariff calculation and award a lump sum. On its face the rule does not provide any guidance as to when this would be appropriate, however the jurisprudence does. The Nova Scotia Court of Appeal in **Armoyan v. Armoyan**, 2013 NSCA 136, considered the circumstances when a lump sum cost award might be considered. The recommended approach is found in the following passage from the decision:
>
> > 15 The tariffs are the norm, and there must be a reason to consider a lump sum.
> >
> > 16 The basic principle is that a costs award should afford substantial contribution to the party's reasonable fees and expenses. In Williamson, while discussing the 1989 tariffs, Justice Freeman adopted Justice Saunders' statement from **Landymore v. Hardy** (1992), 112 N.S.R. (2d) 410:
> >
> > The underlying principle by which costs ought to be measured was expressed by the Statutory Costs and Fees Committee in these words:
> >
> > > "... the recovery of costs should represent a substantial contribution towards the parties' reasonable expenses in presenting or defending the proceeding, but should not amount to a complete indemnity."
> >
> > Justice Freeman continued:
> >
> > > In my view a reasonable interpretation of this language suggests that a "substantial contribution" not amounting to a complete indemnity must initially have been intended to mean more than fifty and less than one hundred per cent of a lawyer's reasonable bill for the services involved. A range for party and party costs between two-thirds and three-quarters of solicitor and client costs, objectively determined, might have seemed reasonable. There has been considerable slippage since 1989 because of escalating legal fees, and costs awards representing a much lower proportion of legal fees actually paid appear to have become standard and accepted practice in cases not involving misconduct or other special circumstances.
> >
> > …

[108] Had Justice Murray seen fit, on a principled basis, to depart from the "norm" in calculating costs using the Tariff, and instead award Ms. MacDonald a lump sum, he was certainly free to do so in the exercise of his broad discretion.

[109] But that is not what happened here. Rather, Murray, J. decided to award both party-and-party costs under the Tariff, *plus* a further lump sum award.

[110] In doing so he erred. Our *CPR*s do not permit it. Indeed, such an approach is expressly prohibited by *CPR* 77.08 which provides:

> **Lump sum amount instead of tariff**
>
> 77.08 A judge may award lump sum costs instead of tariff costs.
>
> [Underlining ours]

[111] At the hearing, counsel for the respondent was not able to provide any authority to support what the trial judge did in this case. Neither are we aware of any.

[112] To conclude on this point, a Tariff award of costs and a lump sum award of costs are mutually exclusive. These two costs awards are not to be used to supplement one another.

[113] Accordingly, we would set aside the $15,000 "Lump sum over and above the Tariff" award included in the "Plaintiff's final costs award" in ¶199 of the trial judge's decision on costs.

[114] Before leaving this subject, we would, respectfully, question Justice Murray's apparent rationale for thinking an extra additional lump sum award was appropriate, in any event.

[115] He did so in an attempt to narrow the gap, as it were, between the sum of approximately $97,000 awarded as party-and-party costs on Scale 3 and what he *estimated* her legal costs to be, based entirely upon the contingency fee agreement (CFA) her trial lawyer had arranged.

[116] Yet, as acknowledged by Ms. MacDonald's counsel on appeal, there was no evidence at all presented to Justice Murray to prove, let alone justify, hours spent, hourly rates or time charges actually incurred on the file. This meant that the trial judge had no facts before him to make any accurate comparison between Ms. MacDonald's exposure to legal fees and disbursements based on the CFA, and the amount of party-and-party costs she would receive under the Tariff.

[117] Murray, J. seemed to recognize the inherent flaws in the approach he was taking when he said:

> **Contingency Fee Agreement**

> [111] In her supplemental brief the Plaintiff draws the Court's attention to the contingency fee arrangement between her and her counsel. She asks the Court to consider her obligation to pay 35% of the damage award plus disbursements. As such she seeks an (sic) lump sum over and above the tariff, to allow her to receive what would amount to a substantial contribution to her legal costs of $266,326.
>
> [112] The Defendant submits that the contingency fee agreement is of no assistance to the Court as is not indicative of actual legal costs billed to the client. As required in ***Landymore***, counsel "will be expected to outline the amount of time spent on the file, and the total fees charged to the client."
>
> [113] That has not been done here says the Defendant. Thus, the figure of $266,326. as the Plaintiff's legal costs is a fiction.

[118] Despite these misgivings, the judge was prepared to order an extra lump sum award. He offered this explanation:

> [196] Earlier I had estimated what the Plaintiff's fees might be in terms of the range. I do not feel that such an estimate is secure enough on an evidentiary basis to be relied upon. I think it is fair to say that the Plaintiff's reasonable legal costs would be substantially more than the cost amount contained in Table A, even applying Scale 3. I am therefore inclined to allow, with some restraint, some amount over and above the tariff, in a lump sum. That amount shall be $15,000.
>
> …
>
> [198] This was not a "run of the mill case". Extra legal work was involved as well as a question of law that required a ruling. To that end, there was a public interest component.

[119] Quite apart from the lack of <u>any</u> evidentiary basis to support the judge's approach, we are also troubled by the fact that no consideration appears to have been given to the "contingency" component of this agreement. It is trite to observe that the very essence of a CFA between a lawyer and a client is the "risk" associated with achieving a successful outcome. Lawyers who are prepared to represent clients in pursuing litigation that may not, ultimately, result in a damage award are, by their representation, performing an important public service. Were it not for their efforts many clients would be unable to pursue litigation in order to have their case decided on its merits. CFAs are a mechanism which provide an incentive for members of the Bar to undertake cases for clients who may not be able to otherwise afford the services of a lawyer. In such cases, CFAs are seen as a laudable arrangement whereby the client will not be exposed to legal fees and/or disbursements unless or until a successful result is achieved, at which point the lawyer's fees and assumed risk will be compensated based upon a percentage of

the award as stipulated in the contract, which of course, is always subject to review and approval by a supervising court.

[120] Lawyers who use CFAs take on a certain level of risk. In the event the lawyer is unsuccessful, he or she is left without recourse to recover any fees for their professional services. The risk of losing is balanced against the potential reward in winning. The *Civil Procedure Rules* speak to this risk. *CPR* 77.14 provides:

> 77.14 (1) A client may make an agreement with a lawyer under which payment for all or part of the lawyer's services or disbursements in a proceeding is conditional on success.
>
> (2) A contingency fee agreement may provide for payment of a reasonable amount to compensate for services and the risk taken by the lawyer, and the amount may be based on a gross sum, a percentage of the amount recovered, or any other reasonable means of calculation.

[Underlining ours]

[121] What is particularly troubling is that any concern Ms. MacDonald's trial counsel would receive nothing for their efforts, did not arise. The question in this case was never "Will we win?" but rather "How much money will we get?". Liability for the collision on September 4, 2012, was admitted in the defendant's trial brief dated November 2, 2017, which read, in part:

> [5] … The Defendant has admitted via responses to interrogatories that the MacVicar vehicle struck the rear portion of the Plaintiff's vehicle on the day in question, although the degree of the impact is very much in issue.
>
> …
>
> [14] The Defendant does not deny Mr. MacVicar rear-ended the vehicle in which MacDonald sat.

[Underlining ours]

[122] Thus, while the degree of Ms. MacDonald's disability and the extent of her damages both short and long term was obviously in dispute, liability for the collision was not. Had this been a case where the trial judge thought it appropriate to depart from Tariff costs and award lump sum costs instead because of exposure to heightened fees under the CFA, one would expect trial counsel to have produced evidence of actual time charges and hourly rates in order for the judge to both assess their reasonableness and make a meaningful comparison between those

actual charges and the fees which the percentage stipulated in the CFA would generate, duly informed by a proper consideration of the actual risk associated with all aspects of the proceeding.

[123] Another option would be to simply apply for a taxation of the bill for fees and disbursements by an adjudicator pursuant to *CPR* 77.16.

[124] Our answer to this question disposes of the appellant's fifteenth ground of appeal.

Conclusion

[125] For all of these reason, we would allow the appeal, in part. As the respondent was successful in almost every aspect of the appeal we would award her costs of $25,000 inclusive of disbursements.

Saunders, J.A.

Farrar, J.A.

Concurred in:

Wood, C.J.N.S.