NOVA SCOTIA COURT OF APPEAL
Citation: *Kern v. Steele*, 2003 NSCA 147

Date: 20031223
Docket: CA189894
Registry: Halifax

Between:

Lisa Anne Meredith Kern

Appellant
Cross-Respondent

v.

Darrell J. Steele and Theresa W. Steele

Respondents
Cross-Appellants

Judges:	Bateman, Cromwell, Oland, JJ.A.
Appeal Heard:	May 27 and 28, 2003, in Halifax, Nova Scotia
Held:	Appeal allowed in part; cross-appeal dismissed as per reasons for judgment of Oland, J.A.; Bateman, J.A. concurring; and Cromwell, J.A. dissenting in part by separate reasons.
Counsel:	R. Malcolm Macleod, Q.C., and Robert K. Dickson, for the appellant and cross-respondent Philip M. Chapman, W. Augustus Richardson and Margot J. Ferguson, for the respondents and cross-appellants

Reasons for judgment:

Introduction

[1] The appellant was injured in a motor vehicle accident on July 2, 1994. The car in which she was a passenger had stopped at temporary traffic lights on the highway when the respondents' vehicle struck it from behind at 100 kilometres an hour. Three years earlier, the appellant had graduated from an offset printing course and in early 1994 she had completed a more advanced course. At the time of the accident, she was not employed in any printing-related capacity.

[2] Following a 15 day trial, Justice Gerald R. P. Moir of the Nova Scotia Supreme Court found that the negligence of the respondent, Darrell J. Steele, had caused the collision and that both respondents were liable for injuries caused to the appellant, including chronic myofascial pain and fibromyalgia. He awarded the appellant non-pecuniary damages, and damages for past loss of income, loss of earning capacity, cost of future care, and loss of housekeeping capacity. His decision is reported as [2002] N.S.J. 341.

[3] The appellant seeks increases in the award for non-pecuniary damages and in the final award for loss of earning capacity. The respondents do not challenge the finding of liability. In their cross-appeal, they submit that the appellant's fibromyalgia was neither caused by nor contributed to by the accident. They also appeal the awards for non-pecuniary loss, past and future loss of income, and loss of housekeeping capacity.

Background

[4] In many of the appeals before us, the appellant takes issue with findings of fact or inferences made by the trial judge. The appellant here does not do so. Rather, she submits that the damages awarded, in particular the calculation of the loss of future earnings, have the effect of undoing those findings and are contrary to law. The respondents accept many of the findings of fact, but in their cross-appeal say that the trial judge decided against the weight of the evidence in determining that the appellant's fibromyalgia was caused by the accident. In these circumstances, it is not necessary that I recount the facts and the medical evidence in extensive detail.

[5] The appellant had decided to work in the printing trade while still in high school. She completed the basic offset printing course at Kingstec Community College in the spring of 1991, placing sixth in a class of 14.

[6] During those studies, the appellant worked full evening shifts helping in the bindery department at Kentville Publishing on a contract to produce the Nova Scotia tour guide. When she finished that Kingstec course, she was employed in the bindery department at Speedy Print for some six months, collating, cutting, gluing, and binding. She worked briefly at Earl Whynot Printing and then at Babcock's Office Products, the latter as a general labourer in the bindery. Commencing in January 1992, she again worked for several months as a helper in the bindery department at Kentville Publishing producing the tour guide.

[7] In September 1992 the appellant returned to Kingstec for an advanced offset printing course which focussed on a particular piece of equipment, the Heidelberg GT0 52 four colour process press. Her studies were interrupted by surgery followed by complications. Afterwards she worked at cleaning jobs for several employers. In September 1993 the appellant went back to Kingstec and completed the Heidleberg course early the next year, graduating with an average of 97.5%.

[8] As this course was coming to an end, the appellant prepared a resume stating that her objective was to obtain a position as the operator of a Heidelberg GTO 52 single colour offset press, that she was in excellent health, and that she was willing to relocate. Kingstec supplied a list of printing firms and departments in Atlantic Canada and, in late February 1994, Heidelberg provided her with a list of all of its customers in Canada who had GTO single and two colour presses.

[9] The resumes the appellant sent brought no response. She was caring for an autistic child and had a part-time job cleaning private homes when she was injured in the motor vehicle accident that July. The appellant was then 23 years old and in a relationship with Scott Carey.

[10] Since the accident the appellant has been seen by several medical experts. At trial medical records were introduced under an agreement whereby the recording of a fact would go to the fact but, unless the author testified, that of an opinion would be ignored. In his lengthy decision the trial judge recounted the appellant's medical treatments and set out portions of various medical reports. Under separate headings he reviewed the opinions of the medical experts who

testified for the appellant and those for the respondents. I will refer to the more significant aspects of the medical evidence.

[11] A few days after the accident in early July 1994, the appellant reported that she was stiff all over and suffering from headaches. She showed a full range of motion in all her limbs and her neck. Her family physician referred her to physiotherapy and to Dr. Terrie Logue, a periodontist, for pain associated with her temporomandibular joint. While a teenager the appellant had been diagnosed with TMJ disorder. Dr. Logue opined that with the car accident, her bruxism or teeth grinding habit had increased. He prescribed a bite plate which over time alleviated many of the TMJ pain episodes.

[12] In September 1994 the appellant and Mr. Carey relocated to Halifax and moved in together. Her new family physician, Dr. Susan Malloy, first saw her the following month. Dr. Malloy observed increased trigger points over the appellant's neck and between her shoulders, and referred her to physiotherapy and to Dr. Garnet Colwell, a specialist in physical medicine. In his report that December, Dr. Colwell noted that the patient had some painful limitations of lumbar spine movements, but no severe stiffness. The appellant complained of pain and tenderness in her shoulders and neck and could only rotate her neck about two-thirds the normal range. He felt that spraining injuries such as would be produced by the accident had become complicated by development of myofascial pain syndrome and concluded that "it looks like her further recovery is going to be slow."

[13] The physiotherapy reports indicated continuing, gradual progress until mid-February 1995. In subsequent weeks the appellant complained of more severe headaches, an aching back, and a sore jaw. That spring, after reporting abrupt and violent episodes of rage, she was referred to Dr. Charles Hayes, a clinical psychologist. During the remainder of that year she complained of anxiety, unprovoked crying, pain, difficulties with concentration and memory, and hallucinations.

[14] The appellant's relationship with Mr. Carey ended in the spring of 1995. That June she started trying to work part-time as a motel chambermaid but was unsuccessful. She required substantial monitoring and her work was unreliable.

[15] In early September 1995 Dr. Malloy noted that the appellant had regressed. She was exhibiting very limited mobility in her neck and back and tender trigger points, and reported non-restorative sleep. Dr. Malloy diagnosed fibromyalgia/chronic myofascial pain and sought a second opinion. Following his examination of her that month, Dr. Colwell concluded that the appellant had fibromyalgia and commented that in her present condition she does not appear fit for any occupation on a full time basis. He also noted that she was having psychological symptoms that did not seem typical of fibromyalgia.

[16] The appellant stopped seeing Dr. Malloy in the fall of the following year. At their last meeting on September 9, 1996, she had sought her family physician's assistance in qualifying for a home care worker. Dr. Malloy told the appellant that this was not necessary and wrote in her notes that "she needs to get on with it." The appellant came under the care of another family physician shortly thereafter.

[17] Dr. Mary Lynch, a physician and psychiatrist involved in research and pain treatment at the Pain Management Unit at the Victoria General Hospital, examined the appellant in October 1996. Her diagnosis included post-traumatic fibromyalgia, regional myofascial pain at the thoracic and lumbar spine, TMJ syndrome, and post-traumatic stress disorder. The appellant joined a fibromyalgia treatment group, took exercise sessions, and acquired information about fibromyalgia.

[18] In March 1997 the appellant saw Dr. Thomas Loane, a physical medicine and rehabilitation specialist. He observed a visible enlargement in the region of her thyroid and recommended that other possible mimics of fibromyalgia should be ruled out. The appellant, who has an extreme fear of needles, did not get the blood work done that was necessary to exclude a thyroid disorder as a diagnostic alternative.

[19] That July the appellant started seeing Dr. Patricia Beresford, a family physician whose patients include a number with fibromyalgia and others with environmental sensitivities. She advised the appellant on diet and food supplements and assisted her in getting some home care.

[20] Dr. Lynch's initial diagnosis in 1996 of post-traumatic fibromyalgia, myofascial pain, and TMJ joint pain remained unchanged following reassessments

in late 1997 and in April 1998. Her prognosis was continued pain. It was unlikely that the appellant would ever return to wage-earning work.

[21] In September 1998 Dr. Colwell examined the appellant whom he had not seen for three years and saw no improvement. Various of her symptoms were, in his view, very suggestive of fibromyalgia. He stated that she did not appear fit for any type of gainful employment and that the prognosis for further recovery was poor.

[22] The appellant married at the beginning of August 1998. The relationship was an unhappy one. When the couple met with Dr. Hayes later that month, he noted that the appellant broke down crying and starting biting her own arms. The marriage ended within a couple of months after which she moved back to her parents' home in Springfield.

[23] During her year in Springfield, the appellant was attentive to her diet and, in spite of pain, pushed herself to exercise. She lost weight and was more energetic and able to sleep. Although she still had flare-ups of fibromyalgia, she felt better and reported that she had a better tolerance for pain.

[24] During her reassessment by Dr. Lynch in July 1999, the appellant described a constant aching pain involving most of her body, with the level of pain flaring spontaneously or in response to activity. Dr. Lynch's diagnosis remained post-traumatic fibromyalgia with some myofascial pain involving the upper body, although the myofascial component was somewhat better than previously. Her prognosis stayed as "continued pain with continued compromise of level of function." She concluded that "the probability is that the patient will remain disabled from returning to any form of regular wage-earning work."

[25] The appellant returned to Halifax from Springfield in late 1999. Within a few months, Dr. Beresford, Dr. Hayes, and Dr. Colwell all noted deterioration in her health. The appellant gained weight, was exercising less, and found sleep difficult. Her pain increased and she was fatigued and irritable. In Dr. Colwell's opinion, she was "still not fit for any type of gainful improvement." According to Dr. Beresford, in 2001 the appellant's condition slid backwards quite a lot. She was suffering greater pain, fatigued, and showed increased sensitivities.

[26] The medical experts who testified on behalf of the respondents disagreed with the diagnosis of fibromyalgia and the prognosis that the appellant was not likely to return to work. Dr. Rosenberg reviewed documentation and medical reports regarding the appellant before meeting with her in February 2001. This expert on the treatment of chronic pain disorders and psychiatric disorders was of the opinion that the appellant exhibited pain disorder associated with psychological factors, histrionic personality disorder, and features of the narcissistic personality. In his view, the appellant could return to work after a period of therapy and consultation with a rehabilitation counsellor, and if she undertook graduated physical activity or exercise under the direction of a personal trainer away from a medical setting.

[27] Dr. Maryniak, the second of the respondents' medical witnesses, examined the appellant in April 2001. In the opinion of this expert in physical medicine and rehabilitation, she did not have enough active tender points in a sufficiently symmetrical pattern to support a diagnosis of fibromyalgia. He concluded that she suffered from chronic pain syndrome and, based largely on her psychological symptoms, post-traumatic syndrome. He was of the view that prolonged counselling such as that the appellant had received was incorrect, that she was not then disabled, and that by gradually increasing activity, she would be able to return to work.

[28] The trial was heard over 15 days in June and July 2001. Twenty-seven witnesses testified. They included the appellant, Mr. Carey, Doctors Colwell, Hayes, Lynch, Logue, Beresford, Rosenberg and Maryniak, former employers of the appellant, persons involved in the printing trade, and Brian Burnell, an actuary.

The Trial Decision

[29] After setting out the circumstances of the accident and finding the respondents liable for the injuries the appellant suffered in the motor vehicle collision, the trial judge considered the appellant as a witness. In assessing her credibility he took into account her difficulties with memory and her negativity. He described her as an honest witness.

[30] The trial judge then assessed the appellant's situation before, and then after, the accident. He accepted Dr. Lynch's opinions that the appellant suffers from "post-traumatic fibromyalgia with an added component of regional myofascial pain

at the cervical level" and that it was unlikely that she would improve to the point where she could work. However, he rejected Dr. Lynch's evidence that only 3% of chronic pain sufferers who are disabled return to work.

[31] The trial judge also rejected Dr. Rosenberg's suggestions of pain disorder and personality disorders. He accepted Dr. Hayes' description of her present psychology and his opinions that the appellant continued to demonstrate depressive symptoms, dissociative reactions, pain, chronic fatigue, and negativity problems. He found that the appellant's cognitive problems, especially with memory and concentration, had gradually improved and noted that hallucinations, self-mutilation, and panics were no longer evident.

[32] The trial judge determined that but for the accident, the myofascial pain and fibromyalgia would not have resulted. He was satisfied on a balance of probabilities that the accident was a substantive cause of the appellant's extreme cognitive or psychological problems. The respondents conceded that the accident had aggravated her TMJ disorder.

[33] The trial judge assessed $60,000 for "fully mitigated pain, suffering and loss of amenities." He was satisfied that the appellant would eventually have become a presswoman and, utilizing actuarial evidence, awarded $121,409 less Section B benefits for loss of income before trial, $15,000 for loss of housekeeping capacity, and $7,800 for cost of future care.

[34] In calculating loss of future income, the trial judge found that the evidence supported a claim for future yearly income of $45,000 starting in 2005. He accepted that the capitalized present value of an income remaining at that level until projected retirement in 2034 was $979,812. He then adjusted the capital amount by percentages reflecting negative contingencies that would affect the income stream as follows:

(a) 35% for the possibility the appellant would not have become a presswoman;
(b) 25% for the possibility of a return to work; and
(c) 25% for failure to mitigate.

When these negative contingencies were taken into account, the initial future loss award of $979,812 was cut to $318,440.

Issues

[35] The multiple grounds set out in the notices of appeal and cross-appeal can be summarized as follows:

(1) whether the trial judge erred on the evidence in finding that the accident caused or contributed to the appellant's fibromyalgia;

(2) whether in assessing her non-pecuniary loss:

(a) the trial judge's assessment was so inordinately low as to be a wholly erroneous assessment of damages; or

(b) he failed to take into account her failure to mitigate;

(3) whether in assessing loss of future income, the trial judge erred by:

(a) using a mathematical rather than a global approach;

(b) imposing the contingency deductions he did on the award for lost earning capacity;

(c) deciding upon evidence that was speculative; and

(d) failing to properly assess her failure to mitigate and her residual earnings capacity;

(4) whether the trial judge erred on the evidence and in law in making any award for loss of housekeeping capacity (and consequent award for gross-up).

[36] I have not included the appellant's ground that the trial judge erred in deducting 100% of the capitalized value of the Section B benefits from the lost future income award. At the hearing of the appeal, the parties agreed to hold future

Section B payments in trust for the appellant, as was done in *Binder v. Mardon Construction Ltd.* (1994), 129 N.S.R. (2d) 64 (T.D.) at ¶ 5 to 27.

[37] I see no reason to disturb the trial judge's finding that the accident caused the appellant's fibromyalgia. Nor am I persuaded that he erred in assessing her non-pecuniary loss, in making any award or the award he did for loss of housekeeping capacity, in choosing to use a mathematical rather than a global approach in assessing loss of future income, or by reducing that award by 35% for the possibility that the appellant would have remained in a low-paying job and by 25% for the chance she would return to work. However, I am of the view that the trial judge erred in law in imposing a negative contingency for failure to mitigate.

Causation

[38] The respondents accept that the appellant's myofascial pain was caused by the accident, but submit that the fibromyalgia was not. In their cross-appeal, they urge that there was insufficient evidence to support the trial judge's findings in this regard and point to evidence that fibromyalgia can be triggered by causes other than physical trauma, such as surgery, frustrated career aspirations, psychological trauma, and other stressful events. They also emphasize the evidence that it is not typical to see a patient improve physically prior to the development of fibromyalgia, as this appellant had.

[39] The cross-appellants' submissions on this ground were so extensive as to approach being a rehearing rather than an appeal. Their argument included a lengthy and detailed review of the evidence on this issue. They raised the same arguments on their cross-appeal as they had made at trial. The trial judge had addressed these as follows:

> [52] . . . both the outlook for Ms. Kern's recovery and her psychological state deteriorated after March 1995. On behalf of the defendants, I am urged to find that the apparent changes in prognosis, the finding of fibromyalgia and the psychological problems turned on events or attitudes near April 1995 rather than the July 1994 collision. These include the break-up with Scott Carey, the expectations that Ms. Kern would gradually return to full-time work, an operation she underwent and financial worries. It is suggested that the psychological and physical symptoms came on suddenly, as if out of the blue. And, as has been alluded to before, the defendants' submissions are cast on premises of an abnormal background and a disturbed personality. I am not of the opinion that the

> downturns were a sudden break from past experience. Psychological problems appeared for the first time after the accident and gradually got worse. Myofascial pain arose not long after the accident, it persisted longer than usual and became worse. During 1994, she began to experience pain in diffuse areas not apparently injured as, for instance, the earliest notes of MacAuley Physiotherapy show. Nor am I of the opinion that Ms. Kern was happy to be out of work and living on social assistance at the end of 1995. I find that she genuinely tried to return to work.
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> ...
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> [142] ... In the case of Ms. Kern, the violent collision and her objectively indicated myofascial pain stand out as the cause of her fibromyalgia. The medical evidence is clear that the accident is the cause of her conditions. Although her financial stress, stress from relationships, minor operations, etc. are within the realm of possible causes of her fibromyalgia, such suggestions for cause are so overshadowed by the physical trauma she endured as to be entirely speculative.

[40] There was evidence before the trial judge to support his finding that the accident caused or contributed to the appellant's fibromyalgia. As he noted in ¶ 134 of his decision, both Dr. Lynch and Dr. Colwell felt that the physical trauma of the accident was the cause of her fibromyalgia. Each of those physicians had examined the appellant several times over a five year period.

[41] I cannot accept that the trial judge disregarded material evidence, failed to give weight or sufficient weight to any relevant evidence, or that his determination regarding fibromyalgia is wholly erroneous. In ¶ 91, 96 and 97 of his decision he specifically noted the evidence of Dr. Colwell and Dr. Lynch that the etiology of fibromyalgia is unknown and that emotional stress can be a cause. While he did not list or detail various difficult events that had occurred in the appellant's life, it is obvious from his ¶ 52 and 142 that he took these into account. In addition, the trial judge reviewed the basis of Dr. Maryniak's opinions that fibromyalgia was not indicated and that the appellant suffers from chronic pain syndrome. In my view, the trial judge fully considered the evidence and argument raised by both parties in determining that the appellant's fibromyalgia was caused by the accident.

[42] Finally, I am not persuaded that the trial judge erred in principle. The cross-appellants submit that by failing to take into account independent intervening events which arose after the accident, he placed the appellant in a better position than the one she would have found herself in the absence of negligence on their

part, contrary to *Athey v. Leonati*, [1996] 3 S.C.R. 458. The trial judge found that while such other stresses or events may have contributed to the development of chronic myofascial pain and the fibromyalgia, but for the accident these conditions would not have arisen. I see no basis to interfere with this conclusion.

Standard of Review

[43] A court of appeal is not to alter a damage award made at trial unless it concludes that there was no evidence upon which the trial judge could have reached the conclusion he did, or he proceeded upon a mistaken or wrong principle, or where the result at trial was wholly erroneous: *Woelk v. Halvorson* (1980), 114 D.L.R. (3d) 385 (S.C.C.) at p. 388.

Non-Pecuniary Loss

[44] Both parties appeal the trial judge's award of $60,000 for "fully mitigated" pain and suffering. The appellant submits that his assessment was so inordinately low as to be a wholly erroneous assessment of damages. The cross-appellants argue that the award should have been no higher than $45,000, the upper boundary of awards for "persistently but not totally disabling injury" as established in *Smith v. Stubbert* (1992), 117 N.S.R. (2nd) 118 (C.A.).

[45] In his decision, the trial judge reviewed each of the cases in addition to *Smith v. Stubbert*, supra, which had been cited to him by counsel, namely: *Hendsbee v. Chiasson* (1994), 132 N.S.R. (2d) 241 (S.C.) affd. [1995] N.S.J. No. 124 (C.A.); *Binder v. Mardo Construction Limited* (1994), 136 N.S.R. (2d) 20 (C.A.); *Woods v. Hubley* (1995), 146 N.S.R. (2d) 97 (C.A.); *White v. Slawter* (1996), 149 N.S.R. (2d) 321 (C.A.), *Dillon v. Kelly* (1996), 150 N.S.R. (2d) 102 (C.A.); *Elliott v. Nicholson*, [1998] N.S.J. 516 (S.C.); *Marinelli v. Keigan*, [1999] N.S.J. No. 23 (C.A.) and *W.E.D. v. Rice*, [1999] N.S.J. 254 (S.C.) affd. [2000] N.S.J. No. 14. He explained briefly the similarities and differences with the facts in the case before him. In considering decisions from British Columbia and Manitoba where fibromyalgia was prominent and awards in the order of $100,000 had been made, he stated at ¶ 142:

> . . . Courts in Nova Scotia have seldom gone so high in the more severe cases of debilitating pain, whether it involved chronic pain syndrome or fibromyalgia. . . .

[46] The trial judge described the appellant's pain as moderate to severe (between five and ten on a scale of ten), as totally debilitating on the unpredictable bad days when it flares, and as fluctuating but constant discomfort on good days. He noted her problems with TMJ disorder, concentration, memory and emotions, poor sleep and fatigue, and the psychological difficulties she experienced particularly between 1995 and 1998. He stated at ¶ 145 and 146:

> . . . The days of flare-ups are totally debilitating. Otherwise, her base pain does not preclude work or other activities. . . . on her good days she is able to do many things . . . I am satisfied that Ms. Kern's conditions have precluded her from working in the printing trade and it cannot reasonably be projected that she could ever take up that work. She chose a career when in her teens, she implemented her choice by completing courses of studies after high school, and she worked diligently at some printing establishments. The prospect of becoming a presswoman excited her and it is reasonable to project that she would have followed that path. The defendants have taken from her the opportunity of a chosen career. This is an important factor in the present assessment.
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> Ms. Kern's situation is factually distinct from *Smith v. Stubbert*. She has days of total debilitation. Further abatement in her pain and better coping with pain are reasonably possible but it is probable that her conditions are permanent. In my assessment the appropriate award for fully mitigated pain, suffering and loss of amenities is $60,000. I believe this would provide Ms. Kern with discretionary purchasing power commensurate with her loss so that she might acquire things that bring her pleasure or have the pleasure of making gifts and so that these pleasures would approximately balance her pain, suffering and loss of amenities.

[47] Courts in this province have made awards in the order of $100,000 for chronic pain syndrome or fibromyalgia. See for example *Dillon*, supra and *Woods*, supra. However, I cannot agree that in stating that courts here have seldom gone so high in such cases in ¶ 142 of his decision, the judge made an error warranting intervention by this court. It is to be noted that he did not state that there were no such cases or indicate that he was precluded from making an award of that magnitude.

[48] Nor am I persuaded that the trial judge's assessment of non-pecuniary damages at $60,000 was so inordinately low as to be wholly erroneous or that he erred by departing from the *Smith v. Stubbert*, supra range. In my view, no manifest flaw in his analysis comparing the jurisprudence cited to him to the case before him has been made out. Earlier in this decision I indicated that the trial

judge did not err in his finding on causation of the fibromyalgia. Consequently the submission by the cross-appellants that the general damages should have been lower because of matters not attributable to them, namely the fibromyalgia, fails.

[49] For reasons which follow later in this decision, I am of the view that the trial judge erred in finding that the appellant had failed to mitigate. That determination requires an examination as to whether the trial judge's award of $60,000. for "fully mitigated pain and suffering" ought to be increased to some degree. Following a close review of his decision, I am not persuaded that such an adjustment would be warranted.

[50] In assessing non-pecuniary damages, the trial judge described the various matters taken into account. He spoke of the pain endured by the appellant, her TMJ disorder, her problems with concentration, memory and emotions, her poor sleep and fatigue, her extreme experiences and behaviours during a certain period and her continuing problems thereafter. In doing so, he made mention of mitigation. Paragraph 144 reads in part:

> Ms. Kern is entitled to compensation for her experience of pain and for the pain she will experience in the future, probably without resolution. Her injuries also caused the TMJ disorder to return and she is entitled to compensation on that account to the extent that the problem would not have resurfaced until later in life. However, the symptoms are easily controlled and the significance of this for compensation is not great. The accident also caused the problems I have described with concentration, memory and emotions. Ms. Kern is entitled to have the severity of these problems in the period between 1995 and 1998 taken into account for the present head of damages. Since 1998 such problems have been milder and, as will be seen when I discuss mitigation, reasonable measures could lead to further improvement. The present and, properly mitigated, future state of these problems is a lesser factor in my assessment of damages for loss of amenities. The challenge to proper sleep and Ms. Kern's fatigue in the past, present and future must also be taken into account. These will persist but, as will be seen, I believe Ms. Kern's poor sleep and fatigue might have been mitigated somewhat and the award should take account of the properly mitigated state of these problems in future. Finally, I am bearing in mind the extreme experiences and behaviours in the period between 1995 and 1998 and the persisting indications of dissociative responses and impaired self-reference but this is not nearly as significant as the pain and other cognitive or emotional problems. (Emphasis added)

[51] After also taking into account her loss of amenities and limitations as a consequence of the pain the appellant experiences, the trial judge spoke of her loss of the opportunity of her chosen career which was described as an important factor in his assessment of damages under this head. He then continued in ¶ 146:

> Ms. Kern's situation is factually distinct from *Smith v. Stubbert*. She has days of total debilitation. Further abatement in her pain and better coping with pain are reasonably possible but it is probable that her conditions are permanent. In my assessment the appropriate award for fully mitigated pain, suffering and loss of amenities is $60,000. (Emphasis added)

[52] While the trial judge referred to mitigation in ¶ 144, it is not clear to me that he reduced his award of $60,000 for a failure to mitigate. He did not address mitigation in relation to pain or the cognitive or emotional problems, which he identified as significant factors. Indeed later in his ¶ 163 he specifically stated that there was nothing the appellant could have done to avoid developing chronic pain and fibromyalgia and that the focus is upon her better dealing with her pain. While he does speak of mitigation in the context of her difficulties with concentration, memory and emotion in ¶ 144, his comments are directed to possible improvements in the future. He estimated that her poor sleep and fatigue "might have been mitigated somewhat." However, according to the trial judge, those problems did not figure as importantly as pain, loss of amenities, and cognitive and emotional problems in his assessment of non-pecuniary damages.

[53] The trial judge wrote a reasoned, detailed decision reflective of his careful analysis and weighing of the considerable evidence placed before him at trial. While his award is for "fully mitigated pain, suffering, and loss of amenities", on the record before me I am unable to conclude that he reduced his award for failure to mitigate or that he did so to the extent of the negative contingency of 25% he applied to loss of earning capacity for such failure or to any other extent.

[54] In summary, I see no reason to disturb the trial judge's award for non-pecuniary damages.

Loss of Earning Capacity

[55] The trial judge's imposition of certain contingency deductions on the award for lost earning capacity reduced that award by over 67%, from $979,812 to

$318,440. The appellant submits that the percentages are too high and that the trial judge also erred by deciding on evidence that was speculative or not supportive of his conclusions. The cross-appellants argue that his findings on future income loss were based on a misapprehension of the evidence, a misapplication of the law, or both. They say that he erred by using a future income figure that was speculative, by using the high end of a range, by relying on a flawed actuarial opinion, and by not using a global approach.

[56] It would be helpful to begin my analysis by reviewing how a court is to assess damages for future loss. *Halsbury's Laws of England*, vol. 12, 4th ed. (London: Butterworths, 1975) at p. 437 reads:

> **1137. Possibilities, probabilities and chances.** Whilst issues of fact relating to liability must be decided on the balance of probability, the law of damages is concerned with evaluating, in terms of money, future possibilities and chances. In assessing damages which depend on the court's view as to what will happen in the future, or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will happen or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards. (Emphasis added)

This passage is founded upon the well-known statements of Lord Diplock in *Mallett v. McOnagle*, [1970] A.C. 166 at p. 176 which was explicitly approved by the Supreme Court of Canada in *Naylor Group Inc. v. Ellis-Don Construction*, [2001] 2 S.C.R. 943. It has been cited with approval by this court in decisions such as *MacKay v. Rovers.* (1987), 79 N.S.R. (2d) 237.

[57] The evidence upon which the court is to estimate the chance that something will happen or would have happened must be cogent evidence and not evidence which is speculative. In *Schrump et al. v. Koot et al.* (1977), 82 D.L.R. (3d) 553 (Ont. C.A.), after citing the excerpt from *Halsbury* quoted above, Lacourciere, J.A. for the court stated at p. 556:

> Speculative and fanciful possibilities unsupported by expert or other cogent evidence can be removed from the consideration of the trier of fact and should be ignored, whereas substantial possibilities based on such expert or cogent evidence must be considered in the assessment of damages for personal injuries in civil litigation. This principle applies regardless of the percentage of possibility, as long as it is a substantial one, and regardless of whether the possibility is

> favourable or unfavourable. Thus, future contingencies which are less than probable are regarded as factors to be considered, provided they are shown to be substantial and not speculative: they may tend to increase or reduce the award in a proper case. (Emphasis added)

[58] Other authorities use similar wording to describe the quality of evidence necessary to support an allowance for a contingency. In *Graham v. Rourke* (1990), 75 O.R. (2d) 622 (C.A.) at p. 636, Doherty, J.A. stated that:

> ... the evidence must be capable of supporting the conclusion that the occurrence of the contingency is a realistic as opposed to a speculative possibility ... (Emphasis added)

Halsbury's Laws of England, supra p. 483-4, in dealing with the required proof of damage of future loss, states:

> ... the plaintiff need only establish that he has a reasonable, as distinct from a speculative, chance of suffering such loss or damage, and the court must then assess the value of that chance. (Emphasis added)

[59] Contingencies may be positive ones which increase an award or negative ones which reduce an award. As the appellant points out, there is case law which appears to support the proposition that contingencies should be modest. In *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 the court considered a contingency deduction for future lost earning capacity. Dickson J. stated at p. 253:

> It is a general practice to take account of contingencies which might have affected future earnings, such as unemployment, illness, accidents and business depression. ... Clearly, the percentage deduction which is proper will depend on the facts of the individual case, particularly the nature of the plaintiff's occupation, but generally it will be small.... (Emphasis added)

Moreover, Cooper-Stephenson, *Personal Injury Damages in Canada*, 2nd ed. (Toronto: Carswell, 1996) in discussing contingencies states at p. 378 that "... the days of an unrealistic scaling down for contingencies may be over."

[60] It is necessary to distinguish between general contingencies and specific contingencies. This distinction was explained by Doherty, J.A. in *Graham v. Rourke,* supra at p. 636:

> . . . contingencies can be placed into two categories: general contingencies which as a matter of human experience are likely to be the common future of all of us, *e.g.*, promotions or sickness; and "specific" contingencies, which are peculiar to a particular plaintiff, *e.g.*, a particularly marketable skill or a poor work record. The former type of contingency is not readily susceptible to evidentiary proof and may be considered in the absence of such evidence. However, where a trial judge directs his or her mind to the existence of these general contingencies, the trial judge must remember that everyone's life has "ups" as well as "downs". A trial judge may, not must, adjust an award for future pecuniary loss to give effect to general contingencies but where the adjustment is premised only on general contingencies, it should be modest.
>
> If a plaintiff or defendant relies on a specific contingency, positive or negative, that party must be able to point to evidence which supports an allowance for that contingency. ... (Emphasis added)

[61] The current approach to contingencies is described by Professor Cooper-Stephenson at p. 379 as follows:

> The practice now is for a much more careful treatment of the issue, with attention paid to statistics, and a requirement that there be proper evidence of specific contingencies which indicate that the plaintiff's case represents a departure from the norm.

[62] The negative contingencies the trial judge applied in the case under appeal pertained to the likelihood of the appellant advancing to the position of printer, of her returning to work, and the effect of any failure on her part to mitigate. These are not matters applicable to the population as a whole or ones which, as Doherty, J.A. put it in *Graham*, supra, are "likely to be the common future of us all." Accordingly they do not fall within the category of general contingencies which are usually modest in their scope; rather, they are contingencies specific to this particular individual.

[63] Generally whether or not a specific contingency in a particular case is appropriate will not be determined by its magnitude alone. As set out in the passage from *Halsbury's* quoted earlier, in assessing damages for future loss the court is to estimate the chances that a particular thing will happen and to reflect those chances in the damages it awards. Those chances could be small but they might be sizable.

[64] It is apparent from the case law that an initial award may be reduced by a substantial amount. See, for example, *Haines v. Bellissimo* (1971), 82 D.L.R. (3d) 215 (Ontario High Court of Justice). In assessing damages in an action for damages for wrongful death, the judge in that case determined that the value of the loss to the deceased's wife and children was more than $100,000. He then included a very substantial negative contingency for the deceased's mental disorder and the risk of suicide to reach a final award of $50,000.

[65] Another illustration of a sizable reduction for a specific contingency is found in *Naylor Group Inc. v. Ellis-Don Construction*, supra which, while a tendering case, also dealt with contingencies and proof of uncertain losses. The Ontario Court of Appeal in allowing an appeal from the trial judge had based its award on the profit that would have been earned by Naylor Group, had that electrical sub-contractor's bid to Ellis-Don been successful. The Supreme Court of Canada upheld the appellate court's assessment which had included a reduction of the award by 50% for job site contingencies.

[66] Finally, in assessing damages and considering contingencies, a judge is not to lose sight of the fairness of the final result. In *Keizer v. Hanna*, [1978] 2 S.C.R. 342 at p. 351, Dickson, J. put it this way:

> It is, of course, true that a trial judge must consider contingencies tending to reduce the ultimate award and give those contingencies more or less weight. It is equally true there are contingencies tending to increase the award to which a judge must give due weight. <u>At the end of the day the only question of importance is whether, in all the circumstances, the final award is fair and adequate.</u> Past experience should make one realize that if there is to be error in the amount of an award it is likely to be one of inadequacy. (Emphasis added)

[67] Having reviewed some of the principles in assessing loss of future income and the application of contingencies, I will now consider the award made by the trial judge for loss of earning capacity.

[68] I begin with the submission in the cross-appeal that he should not have taken the mathematical approach he did which included the use of material contained in an actuarial report prepared by Brian Burnell. The cross-appellants argue that, in doing so, the trial judge erred for the following reasons:

1. the circumstances of this case are such that the trial judge should have made a global award; and
2. even if an actuarial approach was appropriate, the actuarial report was unreliable because some of the assumptions on which it was based were incorrect.

They also say that he erred by using a future income figure that was entirely speculative or by using the high end of a range rather than a figure somewhere between the high and low ends.

[69] I am unable to agree that the trial judge was obliged to take a global approach to damages in this particular case. The cross-appellants themselves acknowledge that the case law does not establish that global awards are always preferable in chronic pain cases, only that such an approach may be appropriate in certain circumstances. However, they point to *Gaudet (Guardian of) v. Doucet* (1991), 101 N.S.R. (2d) 309 (T.D.) wherein Davison, J. identified actuarial evidence as helpful where there is evidence of a pre-accident employment history and subsequent limitations on employment. He then continued at ¶ 99:

> In many cases, the plaintiff will not be able to show, on the balance of probabilities, the extent of his loss and this is particularly true of young victims who have not had the opportunity to develop an employment history or plans for a future career. Similar difficulties will be encountered where the injuries do not represent a total disability and it is impossible to determine with any arithmetic precision the extent of the loss. In these circumstances, it is my opinion, that the loss should be considered as the loss of an asset - a diminution in capacity to earn income in the future.

The cross-appellants also refer to *White v. Slawter,* supra wherein Freeman, J.A. commented at ¶ 129:

> It is common practice in assessing general damages for lost future income in chronic pain cases to make a global award without attempting to link it directly to an arithmetical calculation of annual income times the number of years until the conventional retirement age of sixty-five.

[70] It is significant that in *Gaudet,* supra the plaintiff was a grade 10 student when he was seriously injured in an accident. While he testified that he had

intended to join the Armed Forces after high school, he had taken no steps in that regard. That situation is far different from that on this appeal where the appellant had successfully completed two courses of post-secondary education towards her goal of becoming a printer, had been employed in printing establishments, and had applied for work in that field.

[71] The facts in *White*, supra were very unusual and the passage quoted from it and the cases cited therein do not support the proposition that only global awards are to be made in chronic pain cases. The situation before us does not appear to be one of those where, as Justice Freeman stated in ¶ 137 of *White*, supra, resort should be had to a global approach because there is little possibility of arriving at a realistic assessment by any meaningful arithmetic calculation. For example, this is not a circumstance like that in *Miller v. Folkertsma Farms Ltd.* [2001] NSJ No. 350 (NSCA) where no actuarial evidence had been presented at trial.

[72] If critical assumptions made in the actuarial report had not been established in the evidence or had been clearly rejected by the trial judge, it might be that the trial judge would have erred by using the report. However, I do not agree that the report lacked a reasonable foundation for these reasons.

[73] The assumptions set out in the actuarial report included the following:

> 3. Ms. Kern graduated from the Kingstec Campus of the Nova Scotia Community College in 1994 and was actively seeking employment as operator of a Heidelberg Single Color Offset Press at the time of the motor vehicle accident.
>
> 4. . . . as a result of injuries sustained in the accident Ms. Kern is totally disabled and therefore will not be able to obtain employment either in her chosen field or some other field for which she is qualified by reason of experience and training.

Mr. Burnell, the actuary, testified that he was asked to use wage rates pertaining to western Canada or Ontario and not that pertaining to the Maritimes or Nova Scotia.

[74] The cross-appellants maintain that the appellant was not actively seeking employment when she was injured. Some months had passed between the period during which she sent out her resumes and the accident, and the trial judge heard evidence that generally a press operator position is attained after extensive

experience in the printing field. They also say that the judge did not find that the appellant was totally disabled and that she failed to establish that she was looking for work outside the Atlantic Provinces.

[75] Having reviewed the record, I am unable to accept these submissions. At ¶ 147 the trial judge stated that because of her longstanding goal of working in print graphics and her strong interest in becoming a presswoman, he was satisfied that after years in the business in minimum wage positions and as an apprentice, the probability is that the appellant would eventually have realized her goal of becoming a presswoman. The evidence supports the trial judge's characterization of the appellant as determined and highly motivated to become a printer. In view of his assessment, the fact that she had not figured out how next to proceed to reach that goal nor taken steps to do so in the short interval between waiting for responses to her applications sent in December 1993 and after obtaining the Heidleberg list in late February 1994 and being injured in the accident at the beginning of July 1994 does not necessarily mean that she had given up looking for work in that field.

[76] As to the argument that it was unlikely, if not impossible, that the appellant would have obtained an entry position as an operator of a Heidleberg press, the actuarial report did not include any assumption that she would. The assumption as stated was only that she was seeking such employment at the time of the accident.

[77] The cross-appellants' submissions that the appellant was not willing to move from this region were largely based on the evidence of the notations she had made or not made on the Kingstec list of printing firms in the Atlantic Provinces and on the Heidleberg list of its customers in Canada with GTO single and two-colour presses and her testimony and that of Mr. Carey in that regard. At ¶ 24 of his decision, the trial judge reviewed those markings. After considering the evidence regarding her efforts and plans, he made the following findings at ¶ 31:

> ... I am satisfied Ms. Kern sent out resumes to numerous printing operations in Atlantic Canada during December 1993. I am satisfied that in the late winter of 1994 she investigated at least a few Heidelberg customers in the areas of Toronto, Vancouver or Winnipeg. I find that Ms. Kern and Mr. Carey were naive to have been baffled that she received no response to the resumes she sent in December 1993 and the efforts she made in late winter 1994. ... it does not appear that she considered doing more than sending out applications during the months in question. This does not detract from my appraisal of her motivation. It goes to

> her effectiveness at the time. As for motivation, I find that Ms. Kern wanted to work as a printer and she was prepared to take other employment only as an interim measure. ... I am satisfied that both the relationship and the secondary jobs somewhat distracted Ms. Kern's interest in advancing her career. I find that her intention to establish herself as a presswoman remained and that she was open to moving west but Nova Scotia was her intended residence. (Emphasis added)

He also determined in ¶ 151 that it was "more probable" she would have stayed in the Halifax area but a move to Ontario was a real rather than a merely speculative possibility. As a consequence I cannot agree that the appellant had failed to satisfy the trial judge that she was looking for work outside the Atlantic Provinces or that the evidence failed to provide a basis for his determination as to her mobility, such as to preclude reliance on the actuarial report.

[78] Nor can I agree that the assumption of total disability was not in accordance with the trial judge's findings. In considering loss of earning capacity, he dealt with this argument clearly at ¶ 151:

> Counsel for the defendants submit that Mr. Burnell's calculations are not apropos because total and permanent disability have not been established on a balance of probabilities. I, however, have reached opposite conclusions. (Emphasis added)

The trial judge's subsequent imposition of a negative contingency for the possibility of recovery to the point where she is able to work would permit an argument that he did not find the appellant totally disabled in the sense that she is unable to work at all. It is significant that his decision described how she has days of total debilitation and indicated that her conditions are permanent. More importantly, as a result of his firm dismissal of the argument that he could not rely on the actuarial assumption of total and permanent disability it cannot be said that the assumption was one rejected by him and thus cannot be relied upon.

[79] I am unable to accept the cross-appellants' submissions that the trial judge's determination that by 2005 the appellant would have been earning some $45,000. annually was not supported by the evidence. The trial judge indicated that the range of income was from slightly lower than $40,000. to up to $50,000. for unionized shops according to the testimony before him in 2001. The evidence at trial for establishing a range was that presented by a representative of Heidleberg Canada, a union representative from Toronto, a commercial printer in Ottawa, Mr.

Greencorn of Kentville Publishing, and Mr. White of Repracorp (formerly Babcock's Office Products). The last testified that full time press operators at its non-union firm in Nova Scotia made $16. an hour and that the union rate was up to $25. an hour in 2001. Using the same assumptions as in the actuarial report, that is, 37.5 hours a week times 52 weeks a year, according to Mr. White the 2001 range would be $31,200. to $48,750. a year. I cannot agree that the trial judge's assessment of $45,000. in 2005, four years later and after factoring in the possibilities of a relocation to Ontario and a unionized position, was speculative or should be criticized for falling at an extreme of the range. In this regard I would also observe that his capitalized value assuming $45,000. annually does not allow for the possibility that salaries would rise over her lifetime or that she might work overtime.

[80] In summary, I am not persuaded that in the circumstances of this case the trial judge was obliged to use the global approach in assessing loss of future income or that the actuarial evidence upon which he relied in making his initial calculation was either not established in the evidence or was based on evidence which he had rejected.

[81] I will now consider the appellant's argument that the trial judge erred in applying negative contingencies of 35%, 25%, and 25% which had the effect of reducing the award for loss of future income from $979,812 to $318,440.

(a) 35 % Negative Contingency for the Possibility the Appellant Would Have Remained in a Low-Paying Job

[82] The trial judge concluded at ¶ 152:

> Significant negative contingencies appear. There is no certainty that Ms. Kern would have advanced to presswoman had she successfully entered a path to that position. She might well have remained in a position that paid less than half what an operator appears to make in Nova Scotia. Further, it is not certain that Ms. Kern would have succeeded in entering the printing trade at all. .... While, for the reasons discussed in reference to past income loss, it is more probable Ms. Kern would have secured a position in the printing business and would, eventually, have become a presswoman, there was a real possibility she would have remained in a low-paying job. I have concluded that a 35% negative

> contingency appropriately accounts for these factors. This reduces the appropriate fund to $636,878.

[83] The appellant argues that a negative contingency of 35% is excessive. However this contingency is specific to the appellant. As discussed earlier, specific contingencies are generally not as constrained in their scope as general contingencies and the fact that a contingency is substantial does not automatically mean that the trial judge erred in estimating the chances that a particular thing would happen or would have happened.

[84] I cannot accept the appellant's submissions that any negative contingency for the possibility she would have remained in a low-paying job should have been closer to zero and that by deducting 35%, the trial judge must have used the test of probability, rather than possibility, in making his assessment. His decision makes it very clear that the trial judge was impressed with the appellant's willingness to work and her strong motivation to become a printer. However, he also heard evidence regarding openings within the industry, the usual entry-level positions, and the progress through the ranks to printer, if ever. That evidence indicated that entry into and advancement within that industry is far from a certainty.

[85] I am unable to conclude that there was no evidence upon which the trial judge could have reached the conclusion he did, or that he proceeded upon a mistaken or wrong principle, or that the result was wholly erroneous. I would not disturb his imposition of this negative contingency nor its magnitude.

(b) 25% Negative Contingency for Possible Return to Work

[86] The trial judge further reduced the appellant's future loss award by 25% or approximately $159,000 for the possibility of her return to work. He stated at ¶ 153:

> There must be a negative contingency for the possibility Ms. Kern will recover to the point where she returns to work or will learn to cope with her condition sufficiently to be able to do so. Dr. Colwell emphasized Ms. Kern's failed attempt to work as a chambermaid when he was questioned about his opinions that Ms. Kern is not fit for employment and her prognosis is poor. Dr. Lynch emphasized the disruption Ms. Kern's flare-ups would cause in employment and the need for a well-planned day. However, the main reason Ms. Kern was let go from her chambermaid job in 1995 was related to her psychological problems. Work hardening has not been considered

> since Ms. Kern's psychological problems improved so remarkably. Although I have found that it is probable that her condition is permanent and the probability is that she will not return to work, my assessment of the evidence as a whole and of the differing opinions on prognosis is that there is a real possibility beyond the purely speculative of Ms. Kern becoming able to return to work. For the reasons discussed in reference to mitigation, one has less confidence because of Ms. Kern's attitude when she is pushed and because of her strong preference for her own beliefs. The negative contingency will reflect the possibility that Ms. Kern will earn income bearing in mind the reduced likelihood in light of the subjects discussed under "Mitigation". The negative contingency should also reflect the fact that any income would be less than Ms. Kern would otherwise have earned even with the 35% adjustment and it should reflect the fact that full-time employment is not more likely than part-time employment. An additional reduction of 25% applied to the $636,878 balance would appropriately account for these factors. (Emphasis added)

[87] The appellant submits that imposing this negative contingency, the trial judge erred in three ways: by misunderstanding the evidence of Dr. Lynch and Dr. Maryniak, by speculating on the evidence and improperly taking judicial notice of expert matters, and by duplicating the deduction for the alleged failure to mitigate.

[88] I will begin by summarizing the evidence of Doctors Lynch and Maryniak on the likelihood of the appellant returning to work. Dr. Lynch testified that it was improbable that the appellant would get back to the wage-earning work force. Under cross-examination, she responded when asked for a percentage that it was highly improbable, less than 3% based on follow-up studies and literature. While she indicated that she could provide that material, she was not asked to do so and none was produced to the court.

[89] Dr. Maryniak's assessment was different. Under cross-examination, he testified that everyone with chronic pain should be able to get back to work with the appropriate treatment. The transcript of his evidence continues:

> Q. ... You agree that the research says that less than 25 percent of them get back to work. Do you agree with that?
>
> A. Well, I know I said that off the top of my head at the examination of discovery....
>
> A. ... But since then I did a very extensive search on the Medline for results of chronic pain treatment.

> And out of over 1000 of articles – first of all, there's a very big paucity of hard data. Out of 1000 articles, I saw perhaps half a dozen. And these were all over the map when it comes to rate of recovery, of return to work, from 11 percent to 40 percent to 89 percent. And what I can say is that there are no good statistics to tell us how many. So my statement that less than 25 percent was just flying by the seat of my pants kind of response. (Emphasis added)

[90] The trial judge reviewed Dr. Maryniak's evidence in his decision. At the end of his summary, he stated at ¶ 112:

> ... In cross-examination, Dr. Maryniak said that some chronic pain patients have so much pain that work is not practical but he believes that theoretically all can work. Everyone with chronic pain should be able to get back to work. Although he said on discovery that 25% do not return to work, he had looked at the studies afterwards and concluded that research is insufficient to state a percentage. (Emphasis added)

[91] After considering the evidence on the issue of the appellant's possible return to work, the trial judge concluded as follows at ¶ 132:

> *Prognosis*. I accept the opinion of Dr. Lynch that it is unlikely that Ms. Kern's condition or her management of pain will improve to the point where she can work. However I do not accept that the chances are as low as Dr. Lynch seems to suggest. Specifically, I do not find much guidance in the statistic suggesting only 3% of chronic pain sufferers who are disabled return to work. It appears that research does not exist as would tell us what the percentage could be for young women in the position of Ms. Kern. The 97% may include retirees, those on the verge of retirement and those, who, unlike Ms Kern, have no record of strong motivation to work or to advance a career. Common sense tells us that the sub-set into which young women like Ms. Kern falls should fare much better than average. I am inclined to take guidance from both the opinions of Dr. Maryniak, on the one hand, and those of Dr. Colwell and Dr. Lynch, on the other, treating the latter as the pessimistic prognosis and the former as the optimistic. In the case of Dr. Maryniak, I think his prognosis of a quick return to full employment is far too optimistic in the case of Ms. Kern. I would give greater weight to Dr. Maryniak's opinion if I had confidence Ms. Kern will undertake a program of work hardening, a subject for discussion under mitigation. (Emphasis added)

[92] The trial judge did not set out Dr. Maryniak's evidence correctly. While that specialist had testified on discovery that less than 25% of people with chronic pain return to work, he stated that the doctor's evidence had been that 25% do not return to work.

[93] The appellant submits that the trial judge erred in fact and that his mistaken recounting of the evidence amounts to a palpable and overriding error which would permit appellate court intervention according to *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235. I am unable to agree. An examination of ¶ 112 shows that trial judge correctly determined that Dr. Maryniak had concluded that the research he reviewed was not sufficiently cohesive for him to give a percentage for those who could return to work. It is apparent that he understood the import of that medical expert's evidence that rates of recovery were "all over the map." Even if it could be said that he made an error, an error is not overriding unless, in the context of the case as a whole, it is sufficiently serious as to be determinative in the assessment of the balance of probabilities with respect to that factual issue. See *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010 at ¶ 78 and 80. This misstatement of the testimony is not of that character.

[94] The remaining grounds of appeal on the 25% negative contingency imposed for possible return to work all focus on the trial judge's rejection of Dr. Lynch's testimony that only 3% of chronic pain sufferers who are disabled return to work, after accepting her diagnosis and her opinion that the appellant was unlikely to improve to the point where she could get back to work. She argues that his statements in ¶ 132 of his decision, including his reference to "common sense", demonstrate that the trial judge speculated about the statistical assumptions and methodology of the studies relied upon by Dr. Lynch, improperly took notice of expert matters, usurped the evidence of an expert witness, and departed from the adversarial process.

[95] A trial judge is not bound, once he has accepted one portion of a witness' evidence, to accept any or all of the remainder of that person's evidence. Furthermore, the weight to be accorded to evidence, particularly *viva voce* evidence, is within the purview of the trial judge.

[96] The trial judge commented as to the composition of the 97% of chronic pain sufferers who are disabled and do not return to work, according to the studies on which Dr. Lynch founded her opinion. Whether a sub-set of motivated young

women would fare better than the average in getting back to work is not a matter of judicial notice. A trial judge cannot take judicial notice of a fact unless the matter is so notorious as not to be the subject of dispute among reasonable men, or the matter is capable of immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy. See *R. v. MacDonald (R.A.)* (1988), 83 N.S.R. (2d) 293; which was quoted with approval in *Angelucci v. Dartmouth Cable T.V. Ltd.* (1996), 155 N.S.R. (2d) 81 (C.A.) and in *Dean v. Brown*, [2002] N.S.J. No. 439 (C.A.)

[97] Nor, in my view, could the trial judge's statements be accepted as an inference reached after considering factual evidence. The studies behind Dr. Lynch's opinion were not entered into evidence. As a consequence the record does not disclose any factual foundation from which the trial judge could have drawn an inference as to the content of those studies.

[98] Two of the leading cases on the difference between inference and speculation or conjecture are *Jones v. Great Western Railway Co.* (1930), 47 T.L.R. 39 (H.L.) and in *Caswell v. Powell Duffryn Associated Collieries, Limited*, [1940] A.C. 152. In the former, Lord Macmillan stated at p. 45:

> The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof.

In the latter, Lord Wright stated at p. 169-170:

> Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.

Jones, supra and *Caswell*, supra are often cited in the case law. See for example *R. v. German* (1979), 33 N.S.R. (2d) 565 (C.A.), *Parlee v. McFarlane* (1999), 210 N.B.R. (2d) 284 (C.A.) and *Lee v. Jacobson* (1994), 53 B.C.A.C. 75 (C.A.).

[99] In ¶ 132 of his decision, the trial judge rejected Dr. Lynch's opinion that only 3% of chronic pain suffers who are disabled return to work, stating that young women like the appellant should fare much better. His statement was not a finding of fact, nor was its subject a matter of judicial notice, nor could it be an inference drawn from proven facts. With respect, his statement was entirely speculative and constitutes an error of law.

[100] The question then becomes whether the trial judge's determination on this point affected his assessment of a 25% negative contingency for the possibility that the appellant would return to work. After careful consideration I conclude that it did not. The trial judge stated in ¶ 132 that he was guided by the opinion of Dr. Maryniak as the optimistic prognosis and by that of Drs. Colwell and Lynch as the pessimistic prognosis. That he relied upon the differing opinions as he understood them was also made apparent in ¶ 153 of his decision which I repeat for convenience:

> Although I have found that it is probable that her condition is permanent and the probability is that she will not return to work, my assessment of the evidence as a whole and of the differing opinions on prognosis is that there is a real possibility beyond the purely speculative of Ms. Kern becoming able to work. (Emphasis added)

He substantially discounted Dr. Maryniak's prognosis of a quick return to work as "far too optimistic" and speculated that Dr. Lynch's prognosis was too low. The trial judge must have used a figure higher than less than 3% for the pessimistic prognosis but there is no indication what that figure was. It could have been 5%, 10% , or 20%. Whatever higher figure was used in substitution for Dr. Lynch's opinion would have the effect of skewing or narrowing the range under consideration for this negative contingency towards the more optimistic viewpoint.

[101] However, the differing prognoses were not the only factor the trial judge took into consideration in imposing this contingency nor were they identified as determinative in this regard. He stated that he based his assessment on the evidence as a whole. In addition to the opinions of medical experts, the evidence before him included the testimony of the appellant and of witnesses who knew her before and/or after the accident. He had the advantage of observing all the witnesses under direct and cross-examination and of having all of the evidence

available for his review. In these circumstances, although he speculated as to the studies on which Dr. Lynch's prognosis was based, I do not find that there was no evidence upon which he could have reached the conclusion that he did or that the result was wholly erroneous.

[102] For the reasons which follow, I reject the argument that this contingency duplicated the deduction for failure to mitigate.

(c) 25% Negative Contingency for Failure to Mitigate

[103] For the reasons which follow, it is my respectful view that the trial judge erred in imposing any negative contingency for failure to mitigate.

[104] It is well established in law that the defendant carries the burden of proving a failure to mitigate: *Janiak v. Ippolito* (1985), 16 D.L.R. (4th) 1 (S.C.C.) at p. 14, citing *Michaels v. Red Deer College,* [1976] 2 S.C.R. 324 at p. 334.

[105] The law is also clear that if there are conflicting medical opinions, a plaintiff will not be faulted for following one over the other. As long as a plaintiff follows one of several courses of treatment recommended by the medical advisors consulted, he is not considered as having acted unreasonably: *Janiak*, supra at p. 14.

[106] In considering the issue of mitigation, it appears that the trial judge faulted the appellant for what he described as a stubborn attitude, her dismissal of Dr. Malloy, and her failure to take an aggressive approach to work hardening. He wrote:

> [161] Ms. Kern can be a stubborn person who occasionally does not comply with sound medical advice. The juncture at which this attitude caused some avoidable loss was when Ms. Kern discharged Dr. Malloy in September 1996. She shut out an expert voice telling her to toughen her stance and did not hear similar advice until Dr. Maryniak and Dr. Rosenberg rendered their opinions shortly before trial.
>
> ...
>
> [163] As discussed in reviewing awards for loss of amenities, Ms. Kern's case is much different than Mr. Slawter's [the plaintiff in *White* v. *Slawter*]. In addition

> to other differences earlier noted, there was nothing Ms. Kern could have done to avoid developing chronic pain and fibromyalgia. The focus is upon her better dealing with her pain, as was the case with Ms. Dillon. Unlike the situation in *Dillon* v. *Kelly*, Dr. Malloy's advice was not specific and it is not certain when, if Ms. Kern had maintained a physician willing to push her towards work hardening, it would have been appropriate to recommend a specific program.
>
> [164] . . . Dr. Malloy was merely pushing her patient to toughen up and she was not proposing a program of work hardening or any other such therapy when she was discharged. However, a point was reached where a physician taking a more aggressive approach would have advised for another attempt at returning to work. A general practitioner following the patient closely and adopting the kind of approach Ms. Kern rejected would have urged this sometime after 1998 because of two things: the remarkable improvement in Ms. Kern's psychological state and what happened in Springfield. In Springfield, Ms. Kern, without the assistance of a trainer or a therapist, followed a regime like that now proposed by Dr. Maryniak, only she probably imposed upon herself more strenuously than the designed time- limited exercises would do. She did not limit her exercising according to her level of pain. On the contrary, she exercised until she cried with pain and still she kept going. I refer to my discussion of that period for the remarkable gains Ms. Kern realized. Just as remarkable in demonstrating the need for something along the lines of Dr. Maryniak's suggestion is the deterioration which has occurred since Ms. Kern returned to Halifax and a plan to "maintain exercise as tolerated". The defendants have established that Ms. Kern acted unreasonably in dismissing Dr. Malloy. The attitude of which I have written and the dismissal of Dr. Malloy preclude an aggressive approach to work hardening. The defendants have established that that preclusion is causing avoidable loss. The defendants do not have to prove the extent of that loss. It is enough that they have established likelihood of improvement in Ms. Kern's enjoyment of life and in her physical and emotional fitness and in her ability to do work. . . . (Emphasis added)

[107] The record establishes that the appellant followed the advice of Dr. Lynch and Dr. Beresford on the issue of rehabilitation. Dr. Lynch of the Pain Management Unit, who had treated her since 1996, testified that the appellant was doing all recommended treatments, pursued a good exercise program even in the face of pain, and continued to take active approaches to pain management. Dr. Beresford, her general practitioner since 1997, testified that the appellant was working hard to improve her health status by pursuing everything that might help her. That family physician's plan was for her to maintain exercise as tolerated.

[108] The advice that the trial judge identified in ¶ 161 of his decision as having been ignored was that to "get on with it" given by Dr. Malloy to the appellant when they last met. In his following paragraph, the trial judge correctly placed the onus upon the defendant to show that a plaintiff failed to mitigate. He also noted the reference in *Dillon*, supra to *Janiak*, supra as discussed in *White*, supra by Freeman, J.A. who remarked that where medical evidence exists that substantial improvement could have been expected if the plaintiff had followed medical advice which he failed to heed, he will be deprived of damages even though the recommended treatment was not certain to succeed.

[109] However, as the trial judge himself noted in ¶ 163 and 164 of his decision, Dr. Malloy's advice to "get on with it" was not specific. She did not propose work hardening and the appellant did not refuse any such suggestion. Moreover, the trial judge acknowledged in ¶ 163 that even if the appellant had had a physician who would push her in that direction, it was not certain when work hardening would have been appropriate. In ¶ 68 he had observed that Dr. Lynch had reported in 1997 that it was improbable that the appellant would be able to return to her previous work or to any physical labouring type of work and that her capacity for sedentary work requiring concentration was significantly compromised. He determined that the appellant had received no medical opinion to the contrary until she was examined on behalf of the respondents in 2001 and reiterated in ¶ 161 that the appellant had never been advised to take a more aggressive approach until Drs. Maryniak and Rosenberg rendered their opinions shortly before trial.

[110] With respect, the reasoning in the trial decision on the issue of mitigation is flawed. The trial judge stated that Dr. Malloy had not proposed a program of work hardening when she was dismissed. The appellant had conscientiously followed the advice of Drs. Lynch and Beresford. In essence he faulted the appellant for having refused to follow advice that her advisors had never given her.

[111] Moreover, the trial judge's statement that a general practitioner following the appellant closely would have recommended another attempt at work hardening is contrary to the evidence. Neither Dr. Beresford, her general practitioner through the relevant period, nor Dr. Lynch recommended the course of treatment suggested by Dr. Maryniak. Both cautioned the appellant against an aggressive approach towards rehabilitation and the appellant took their advice. According to *Janiak*, supra having followed a course of treatment recommended by her physicians, the appellant cannot be said to have acted unreasonably.

[112] In my respectful view, the trial judge erred in law in assessing and applying any negative contingency for failure to mitigate.

Loss of Housekeeping Capacity

[113] In their cross-appeal, the respondents submit that the $15,000 the trial judge assessed for loss of housekeeping capacity was not supported by the evidence. In *Leddicote v. Nova Scotia (Attorney General)* (2002), 203 N.S.R. (2d) 271, this court stated:

> [i]t should be remembered that with a claim for what has come to be described as "lost housekeeping services", one is not compensating for physical injury or resulting pain and suffering. Rather, the inquiry is focused on the repercussions of such injury, that is to say whether their effect has impaired the claimant's ability to complete the tasks and fulfill the responsibilities undertaken around the home before the accident.
>
> ...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. ...

[114] I am satisfied from a review of the record, including the testimony of Rebecca Longard, Scott Carey, Dr. Lynch and Dr. Beresford that there was sufficient evidence at trial to support the trial judge's award of $15,000 for loss of housekeeping capacity. The cross-appellants not having made any submission attacking the basis on which the gross-up on this award was calculated, I would leave the gross-up undisturbed.

Conclusion

[115] I would allow the appeal only to the extent of removing the negative contingency for failure to mitigate in the calculation of loss of future income. The adjustment to remove this contingency deduction would result in damages for loss of earning capacity of $477,659. I would dismiss the cross-appeal. Where the

appellant has succeeded only in part and the cross-appellants have not succeeded in any respect, I would order the respondents to pay the appellant costs of $2,500. inclusive of disbursements.

Oland, J.A.

Concurred in:

Bateman, J.A.

Dissenting Reasons for Judgment: (Cromwell, J.A.)

[116] I have had the privilege and advantage of reading in draft Oland, J.A.'s comprehensive reasons. I agree with them and with her proposed disposition of the appeal with only one exception – the award for non-pecuniary loss. In my opinion, and with great respect, the judge gave a lower award than he otherwise would have for this head of damage because of his erroneous finding that Ms. Kern failed to mitigate. Correction of his award to undo the effect of that error therefore requires that the non-pecuniary damages be increased.

[117] If there is a question as to whether the judge took this erroneous finding about failure to mitigate into account in assessing the non-pecuniary damages, his reasons demonstrate that he did so.

[118] For example, at para. 141 of his reasons, the judge said: "I am satisfied that Ms. Kern has failed in her duty of mitigation to some extent but my findings in that regard, which will be set out when I discuss mitigation, go to her coping with pain. ... I will bear mitigation in mind in assessing damages for loss of amenities and will arrive at an amount which assumes full mitigation." At para. 144, the judge turned to discuss the various elements of Ms. Kern's non-pecuniary loss. He referred to her problems with concentration, memory and emotions and, while noting that these were a lesser factor in [his] assessment for loss of amenities, observed that "..as will be seen when I discuss mitigation, reasonable measures could lead to further improvement." He went on to discuss her problems with getting proper sleep and resulting fatigue and stated "... I believe Ms. Kern's poor sleep and fatigue might have been mitigated somewhat and the award should take account of the properly mitigated state of these problems in future."

[119] In arriving at his $60,000 award, the judge stated at para. 146 of his reasons that "... [f]urther abatement in her pain and better coping with pain are reasonably possible ... In my assessment the appropriate award for fully mitigated pain, suffering and loss of amenities is $60,000."

[120] At para. 164 of his reasons, in finding that Ms. Kern had failed to mitigate, the judge stated that the defendants (respondents) had established the likelihood

that the mitigating steps would lead to improvement in Ms. Kern's enjoyment of life as well as in her physical and emotional fitness and in her ability to do work. In the next paragraph (165) he said again that he had "... already assessed Ms. Kern's non-pecuniary damages bearing in mind the chance her conditions or her coping with pain would improve further had she been reasonably aggressive and had she kept herself under more challenging care."

[121] My reading of the judge's reasons is supported by the decision of the respondents (appellants by cross-appeal) to abandon one aspect of their cross-appeal during oral argument. They had cross-appealed on the basis (among others) that the judge had erred by ignoring the plaintiff's failure to mitigate in assessing her non-pecuniary loss damages. (Cross-appellant's factum para. 102) During oral argument, respondent's counsel abandoned this point which is tantamount to a concession that the judge did indeed take his finding of a failure to mitigate, which we have concluded was in error, into account in assessing the non-pecuniary award.

[122] I would conclude that the judge did take his erroneous finding that the appellant failed to mitigate into account in his assessment of her non-pecuniary loss damages. Given our unanimous conclusion that the judge erred in law in finding any failure on the appellant's part to mitigate, he equally erred in taking this into account in his assessment of the non-pecuniary damages.

[123] The more subtle question is what is a proper award for non-pecuniary loss on the assumption that there was no failure to mitigate. The judge's comprehensive reasons do not provide a definitive answer because he does not indicate an amount or percentage reduction applied to this head of damages for failure to mitigate. However, his many clear findings do, in my view, provide helpful guidance.

[124] The simple approach to this question would have been to decrease the award by the same 25% factor for failure to mitigate which the judge applied to the loss of earning capacity award. But the judge did not take that course and a careful reading of his reasons shows why. He did not think that the mitigating steps he

found should be taken would reduce the appellant's non-pecuniary loss by as large a factor as they would reduce her loss of earning capacity.

[125] An award for non-pecuniary loss (in a case like this one in which there is no evidence of loss of expectation of life) is to provide a measure of solace for the victim's loss of amenities, sometimes referred to as the loss of enjoyment of life and the experience of pain and suffering: see for example, **Lindal v. Lindal**, [1981] 2 S.C.R. 629. The judge's basic finding concerning mitigation was that Ms. Kern, taking the steps the judge thought she ought to take, would improve her ability to cope with pain and to do work: see paras. 163 and 164. As the judge put it, "[t]he focus is upon her better dealing with her pain ..." (para. 163). While these mitigatory steps would not reduce her pain, it would, in the judge's view, lead to improvement in her enjoyment of life and her emotional fitness: para. 164.

[126] It follows from this that the mitigatory steps the judge thought ought to be taken would not affect whatever component of his award was directed to Ms. Kern's pain and suffering. But they would lead to improvement of her enjoyment of life and, therefore, serve to reduce that component of the award.

[127] The judge was helpful in addressing the various aspects of his award for loss of amenities and for pain and suffering. He referred to her pain (which he found to be moderate to severe; para. 144), her cognitive and emotional reactions (which he found could be improved with mitigation and would be a " lesser factor" in his assessment; para. 144), the fact that she had been deprived of following her chosen career path (which he found to be an important factor in his assessment: paras. 132 and 145), her TMJ disorder (which he found not to be greatly significant for the purposes of this head of damages), her problems with sleep and fatigue (which he found could be improved by mitigation; para. 144) and to her problems of dissociative responses and impaired self-reference (which he found to be not nearly as significant as the pain and the other cognitive or emotional problems; para. 144).

[128] From his reasons, I would conclude that the most significant factors shaping the award for non-pecuniary loss were Ms. Kern's ongoing pain, the loss of her chosen career, her loss of sleep and fatigue, her general loss of enjoyment of life and her cognitive and emotional reactions. His finding concerning her failure to

mitigate did not much affect his award for pain or for the loss of her chosen career because the mitigatory steps would do little for these. His finding that she failed to take these steps, however, had impact on his conclusions respecting sleep and fatigue, her general enjoyment of life, and her cognitive and emotional reactions, all of which he found would improve if those steps were taken.

[129] Taking these findings into account, I would conclude that the award should be increased, but not by the full 25% reduction which the judge applied to the loss of earning capacity award. I would increase the non-pecuniary award by $10,000 for an award of $70,000.

Cromwell, J.A.