SUPREME COURT OF NOVA SCOTIA
Citation: *Bezanson v. Sun Life Assurance Company*, 2015 NSSC 1

Date: 20150107
Docket: Hfx No. 322859
Registry: Halifax

Between:

Colleen Dawn Bezanson

Plaintiff

v.

Sun Life Assurance Company of Canada

Defendant

Judge:	The Honourable Justice Denise M. Boudreau
Heard:	April 7, 8, 9, 14, 15, 16, June 27, August 18, 19, 20, 21, 2014 in Halifax, Nova Scotia
Final Written Submissions:	September 19, 26, October 3, 2014
Decision:	January 7, 2015
Counsel:	Peter Landry, for the Plaintiff C. Patricia Mitchell, for the Defendant

By the Court:

[1] Colleen Bezanson (hereinafter "the Plaintiff") seeks a declaration that she is totally disabled from her employment, and has been since December 2009 (the date of the Defendant's termination of LTD benefits to her). She further seeks payment of arrears of benefits payable to her from that time forward.

[2] The Plaintiff commenced employment with Staples Business Depot, in their local call centre, in April 2000. Staples provides its employees with a group benefits policy through Sun Life Assurance (hereinafter "the Defendant"), including disability benefits. An employee receives benefits through that policy when he/she is "totally disabled" as defined in the Policy, on a continuous basis. The Policy defines "totally disabled and total disability" as follows:

> Totally disabled and total disability means that, during the qualifying period and the 24 month period immediately following it, the member has a medical impairment due to injury or disease which prevents him from performing, in any setting, the essential duties of the occupation in which he participated just before the total disability started.
>
> After the 24 month period, totally disabled and total disability mean that the member is unable, because of the medical impairment, to perform, in any setting, the essential duties of any occupation for which he has at least the minimum qualifications.
>
> The medical impairment must be supported by objective medical evidence.

> The availability of work for the member does not affect the determination of totally disabled or total disability.

[3] On the morning of August 6, 2007, the Plaintiff awoke with severe back pain. There was no precipitating event to this pain. The Plaintiff has not returned to work with Staples since that time, and has not worked outside her home, in any capacity, since that time.

[4] The Plaintiff applied for and was approved for short term disability benefits by the Defendant on the basis of existing medical information. She was further granted long term disability benefits in the fall of 2007, continuing through 2008 and 2009. In the summer of 2009 the Defendant discontinued benefits as, in their view, the evidence no longer supported their continued payment. Benefits were reinstated as a result of a request from the Plaintiff's family doctor for a functional capacity assessment ("FCE"), done in September 2009.

[5] In late September 2009, the Defendant hired an investigative firm to conduct surveillance of the Plaintiff. Surveillance took place over the course of the next few years, for several days each time, commencing in October 2009. These investigations showed the Plaintiff performing activities which she was not reporting to the Defendant.

[6] Benefits to the Plaintiff were again discontinued effective December 2009. It is to be noted that this date coincides with the change in definition of "total disability" in the policy, (after the 24 month period). However, this is coincidental and was not the reason for the decision.

[7] The Plaintiff seeks a declaration that she was and continued to be totally disabled, as defined by the policy, from December 2009, through to the present time, along with retroactive payment of the unpaid benefits to date, and into the future.

[8] The Court heard evidence over the course of 11 days. I have considered all of the evidence in making my decision. I note the following which, in my view, is the most important and relevant evidence before me.

Medical Evidence

[9] Dr. Brian Stacey testified that he has been the Plaintiff's family doctor since August 2007. Dr. Stacey described for the Court the various specialists that he has arranged to see the Plaintiff, as well as the medications that he has prescribed her.

[10] Before I discuss Dr. Stacey's evidence, a related evidentiary issue must first be addressed. The Plaintiff presented the Court with a copy of Dr. Stacey's entire file; it was marked as Exhibit 1 and entitled "**Plaintiff's Exhibit Book No. 1 – Dr.**

C. Brian Stacey's (Family Physician) Clinical file and Defendant's forms completed by Dr. Stacey". The Exhibit contained medical and insurance documents authored by many different persons, including but not limited to Dr. Stacey. The Plaintiff argued that these documents were business records, and therefore admissible for their truth by way of the exception in *Ares v. Venner,* [1970] S.C.R. 608, i.e., without the need for the author of each document to testify.

[11] The Defendant objected to a number of documents contained in this Exhibit, in particular, reports containing opinions from other physicians and health professionals, (where those persons were not being called as witnesses). The volume also contained diagnostic testing results, including MRI and CT scan reports. Again, the doctors authoring these reports were not being called to testify. The Defendant objected to the documents being introduced for the truth of their contents. The ultimate question of their admissibility was left with the Court. I will start by addressing this issue.

[12] Documentary evidence is not *viva voce* evidence. A litigant cannot simply produce a document for the Court, have it marked, and call it a day. Any document that is tendered to a court must be tendered by way of some process that makes it admissible (unless entered by consent). Documents are often tendered by witnesses, a process that often depends on the nature of the document and the

reason for its introduction. For example, where a person wishes to introduce a document that they merely received, as proof that they received it; that is perhaps not a complicated matter. Where, on the other hand, a document is being introduced for the truth of its contents, its admissibility must be carefully considered.

[13] In the present case, to put it most succinctly, the difficulty arises specifically because the affected documents contain opinion. Opinion evidence is subject to its own special rules, the most basic of which involve the author of the opinion needing to be properly qualified, to introduce his opinion, and to be available for cross-examination. These rules relate to admissibility as well as to weight.

[14] The issue of medical or hospital records was specifically addressed in *Ares v. Venner (supra)*. The question posed was whether nurses' notes were admissible for their truth in a malpractice proceeding against a physician, without the calling of each particular nurse (to introduce her own notes). The Court concluded that such were "business records" and *prima facie* admissible:

> Hospital records, including nurses' notes, made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or records should be received in evidence as *prima facie* proof of the facts stated therein. This should, in no way, preclude a party wishing to challenge the accuracy of the records or entries from doing so. Had the respondent here wanted to challenge the accuracy of the nurses' notes, the nurses were

> present in court and available to be called as witnesses if the respondent had so wished. (page 626)

[15] The Nova Scotia Court of Appeal considered the *Ares* case in *R. v. Wilcox* (2001), 192 N.S.R. (2d) 159. That case dealt with a ledger maintained by an employee of a fisheries company. The Court endorsed the following statement of the common law rule, set out in *R. v. Monkhouse* (1987), 83 AR 62 (C.A.):

> [23] In his useful book, *Documentary Evidence in Canada* (Carswell Co. 1984) Mr. J.D. Ewart summarizes the common law rule after the decision in *Ares v. Venner* as follows at page 54:
>
> > The modern rule can be said to make admissible a record containing (i) an original entry (ii) made contemporaneously (iii) in the routine (iv) of business (v) by a recorder with personal knowledge of the thing recorded as a result of having done or observed or formulated it (vi) who had a duty to make the record and (vii) who had no motive to misrepresent. Read in this way, the rule after Ares does reflect a more modern, realistic approach for the common law to take towards business duty records.
>
> [24] To this summary, I would respectfully make one modification. The "original entry" need not have been made personally by a recorder with knowledge of the thing recorded…[I]t is sufficient if the recorder is functioning in the usual and ordinary course of a system in effect for the preparation of business records…

[16] Most jurisdictions have now adopted legislation which formalizes the common law rule described in *Ares* in relation to business records. In Nova Scotia, Section 23 of our provincial *Evidence Act* RSNS 1989 c. 154 provides as follows:

> 23(1) In this Section,
>
> (a) "business" includes any kind of business, profession, occupation, calling, operation of institutions, and any and every kind of regular organized activity, whether carried on for profit or not;

> (b)“ record” includes any information that is recorded or stored by means of any device.
>
> (2) Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of any such act, transaction, occurrence or event if made in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.
>
> …
>
> (4) The circumstances of the keeping of any records, including the lack of personal knowledge of the witness testifying as to such records, may be shown to affect the weight of any evidence tendered pursuant to this Section, but such circumstances do not affect its admissibility.

[17] Having said this, the common law rule as set out in *Ares* survives. In *The Law of Evidence in Canada*, authors Sopinka, Lederman and Bryant note:

> …unlike the statutory business records provisions, the common law exception applies to oral as well as written statements, does not require the giving of notice and clearly allows for statements of opinion and subjective impressions. (at 6.199, 4th ed, Markham Ont:LexisNexis 2014)

[18] And further in that same volume:

> The subjective opinions of doctors and nurses contained in hospital records are inadmissible under the business record legislation, according to the *Bremner* case, but admissible at common law according to the *Ares* case. Thus, notwithstanding the existence of business record statutes in Canada, the decision in *Ares v. Venner* is of considerable practical importance.
>
> …As noted , the provincial business records provisions permit records of “any act, transaction, occurrence or event”. There are no words of limitation so as to restrict the nature of the record, yet the courts have done so. Moreover, this narrow interpretation by the courts is not in keeping with the Supreme Court of Canada’s expression of the common law exception which clearly encompassed statements of opinion. It is illogical to maintain a restrictive interpretation in respect of business records legislation. (6.229-6.230)

[19] The distinction between fact and opinion in medical records was addressed in the very recent case of *Gaudet v. Grewal,* 2014 ONSC 3542. In that case, the Plaintiff sought to introduce the written opinion of a doctor who had died prior to trial.

[20] The Court noted that a medical diagnosis is an "opinion", whereas data contained in doctors' notes and records is merely factual information. Therefore, the factual information contained in the document was admissible pursuant to the principled exception to the hearsay rule (and would also have been admissible as a business record under the Ontario *Evidence Act*). However, the diagnosis and opinions of the doctor were not admissible as business records. They were, in fact, partly admitted by way of waiver of the strict requirements of the expert evidence rules, <u>but not for their truth</u>.

[21] In *Tingley v. Wellington Insurance* (2008), NSSC 317, the Plaintiff sought to admit medical records prepared by physicians, without requiring the physicians to attend the trial and testify. The trial judge considered both *Ares* and *Wilcox*. He was satisfied that the physicians had:

> …a duty to record, not only their findings, but any statements by the plaintiffs, their observations of their condition, and any circumstances they recited concerning their condition and how it may have occurred. Having recorded the plaintiff's various statements, including their version of statements made to them by other physicians and persons with whom they had related, it was for the doctor,

> in preparing his opinion to assess the weight and reliance he/she placed on these statements. (para. 11)

[22] In relation to opinions expressed, the Court went on to say:

> [23] Here the opinions involve a large degree of subjectivity and are central to the ultimate issue. They are also challenged not only as to the opinions but as to the accuracy of the information relied on by the doctors, as appears from their reports, as well as their notes and charts, outlining the information that they were provided, and presumably may have considered in formulating their opinions. The challenge to the accuracy of the information they recorded is made by one of the plaintiffs during her testimony at trial. Without knowing the doctors positions on the notes and records they created, and whether, and, if so, to what extent they relied on what may have been inaccurate information, or at least misunderstandings, it can be said that the "prejudicial effect may outstrip the probative value".

[23] The Court in Tingley concluded:

> [38] There is a distinction to be made between physician's file materials, which are admissible in the manner described in *Ares v. Venner* and the Nova Scotia *Evidence Act*, and the physicians' opinions and expert reports, which require the witnesses to be available for cross-examination.
>
> [39] To the extent that the materials sought to be admitted are in the nature of records "made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record", they are, except to the extent challenged by the parties, admissible as *prima facie* proof of the facts stated in the records. While the phrasing differs somewhat, I am satisfied that such records are admissible under the hearsay exception described in *Ares* and under the *Evidence Act* provision for business records. Such records are subject to challenge as to their accuracy. This conclusion accords with the principles stated in Seaman, supra. As to opinions, I also follow Seaman in concluding that any opinions contained in the clinical records are not admissible for their truth. The opinions are admissible only for the fact that they were made at the time.
>
> [40] As a result, the physicians files are admissible pursuant to the hearsay exception and pursuant to the *Evidence Act* to the extent that they state facts,

> subject to challenge as to accuracy. The weight of such records, however, will have to await all of the evidence, including an assessment of the extent their accuracy and reliability are challenged by the witnesses and the remaining evidence. **However, no opinions or diagnoses by the physicians are admissible for their truth. They may be admitted for the bare fact that they were made, and were available to other physicians with whom the plaintiffs consulted or were treated, but for no purpose beyond that.** (emphasis is mine)

[24] The Court in *R. v. West*, [2001] OJ No. 3413 made the following point:

> [63] There is of course a continuum of subjective opinionism with observations positioned at one end and conclusions clearly steeped in expert skills at the other. In some instances, observations of the expert declarant, while informed by a measure of special knowledge or expertise, are arguably little more than the expression of opinion permitted by a lay witness (*Ares v. Venner*, supra (skin color and relative temperature of skin); *H.(S.)*, supra (emotional condition of patient); *Regina v. Skrzydlewski*, supra (observations of patient behaviour); *Conley v. Conley*, supra (physical movements of subjects and opportunity for togetherness). On the other hand, some opinion statements are almost wholly the product of application of specialized skill and experience as in the hard science of forensic pathology: *Regina v. Larsen*, supra (cause of death as asphyxia)…
>
> .

[25] In *Egli v. Egli*, 2003 BCSC 1716, the Court acknowledged that *Ares* had been interpreted to permit admission of "records containing clinical diagnoses for the truth of their contents" (para. 12). However, the Court repeated the "continuum of opinion" analysis as described in *West*, hereinabove:

> [a]t one end are opinions like those of the nurses in *Ares v. Venner*, and at the other are expert opinions that may not be admissible insofar as their prejudicial effect may outweigh their probative value. (para. 14)

[26] Further, the Court in *Egli* makes the point that the expertise and qualifications of the record keeper, as well as the nature of the opinions at issue, are significant factors:

> [16] Douglas Ewart in *Documentary Evidence in Canada* (Agincourt Ont: Carswell 1984) described the nurse's records admitted in *Ares v. Venner* as follows:
>
> > To some extent these could be said to be opinions, since they dealt with observations of color and temperature. However, it should first be noted that the "opinions" were far from scientific or technical; indeed they seem much better characterized as observations rather than opinions…indeed the Supreme Court of Canada in *Davie Shipbuilding Ltd. v. Cargill Grain Ltd.* [1977] 1 S.C.R. 659, seems to have interpreted the notes in Ares as dealing with observations rather than opinions. Further, and more significantly, the Court in *Davie Shipbuilding* excluded a document because it consisted of unsubstantiated conclusions, rather than facts. It would seem to be inescapable that opinions are in the same class as conclusions, and are therefore not admissible under this exception to the hearsay rule.

[27] The Court in *Egli* concluded:

> [26] In the case at bar the opinions sought to be admitted for the purpose of proving the truth of the opinions are not straightforward or mechanical observation. The opinions are psychiatric in nature. They are steeped in the expert skills of a geriatric mental health worker. They are not akin to observations such as "blue toes" in *Ares v. Venner*. The opinions as to Hans Egli's "global assessment of functioning" his scores on the various mini mental status exams, and the diagnoses of his cognitive functioning are subjective opinions, requiring review of information, interviews, and deliberation of the author of the opinions. I have heard no evidence concerning the qualifications of the individuals who made the diagnoses and cannot therefore assess the degree of reliability that should be ascribed to the opinions. The diagnoses and opinions are central to the very issues upon which this case will be decided. The opinions which the plaintiff wishes to rely upon are not so numerous that they ought to be admitted for practical and necessary reasons. Furthermore the diagnoses made in the records, such as the diagnostic criteria from the psychiatric manual DSM IV, contain technical language that requires explanation…

[28] In other words, there is a clear distinction between the subjective observations admitted in *Ares v. Venner,* and opinions that are of a scientific or technical nature (see also: *Greenwood v. Syncrude Canada Ltd.* (1998), 235 A.R.

141; *Spectra Architectural Group Ltd. v. St. Michael's Extended Care Centre Society,* [2001] A.J. No. 1417).

[29] The case of *Seaman v. Crook*, 2003 BCSC 464 provides a good resume:

> [14] The cases…and s. 42(2) which provides: "In proceedings in which direct oral evidence of a fact would be admissible, a statement of a fact in a document is admissible as evidence of the fact if…", when taken together, stand for the following:
>
> > (1) That the observations by the doctor are facts and admissible as such without further proof thereof;
> >
> > (2) That the treatments prescribed by the doctor are facts and admissible as such without further proof thereof;
> >
> > (3) That the statements made by the patient are admissible for the fact that they were made but not for their truth;
> >
> > (4) That the diagnoses made by the doctor are admissible for the fact that they were made but not for their truth;
> >
> > (5) That the diagnoses made by a person to whom the doctor has referred the patient are admissible for the fact that they were made but not for their truth;
> >
> > (6) That any statement by the patient or any third party that is not within the observation of the doctor or person who has a duty to record such observations in the ordinary course of business is not admissible for any purpose and will be ignored by the trier of fact. It is not necessary to expunge the statements from the clinical records as this is a judge alone trial.
>
> [15] Therefore any, and I emphasize the word "any", opinions contained in the clinical records are not admissible for their truth. The opinions are admissible only for the fact that they were made at the time.

[30] I accept and adopt the clear statement of the law on this issue as can be found in the cases of *Tingley, Seaman, Egli,* and others. Where a person with specialized knowledge in an area, having reviewed and analysed information, has

arrived at his/her own subjective conclusion, and gives an opinion, such opinion is subject to special rules of evidence. It cannot be introduced to a court for its truth, without respect for those rules.

[31] *Ares v. Venner* continues to stand for the proposition, in my view, that some simple observational opinions might be permitted to stand in business records. It should be noted that even lay persons are often permitted to opine in areas of common human experience (such as a person's temperature ("warm to touch"), color ("flushed"), mood ("angry"), and so on). But a true opinion, given by a person within their area of special expertise, is not and could never be a business record. In particular, where the medical opinions are crucial and of utmost importance to the case, as they would be here, the Court needs to be assured of their reliability. Such opinions must be brought forward to the Court by their authors, defended, and properly tested by cross-examination.

[32] I should note that the Defendant's exhibits also contain, within them, some medical opinion from persons who did not testify. They are subject to the same rules.

[33] To conclude: Any medical record, tendered by either party in this case, is admitted as a business records insofar as the <u>factual information</u> provided therein,

or in respect of opinions that are merely observational in nature. Medical opinions, given by medical professionals within their area of expertise, are admitted only for the fact that the opinions were given. They are not admitted for their truth, unless the author of that opinion was called before the Court and properly qualified.

[34] This conclusion is inclusive of the MRIs and CT scans. These tests are performed and interpreted by highly qualified medical professionals. In my view, these reports do not represent a "mere reporting of benign observations". They are reports which express opinions by way of an examination of complex data, within the expertise of the author; moreover, the opinions they express go to the very heart of the issues to be determined by this Court.

[35] In fact, these reports were not always consistent with each other, and were the subject of comment by doctors who testified, either to agree or disagree with them. For example, Dr. Alex Findlayson noted, during his testimony, that in reviewing the Plaintiff's file, he had read a recent CT scan report which described osteoarthritic changes in the Plaintiff's lower spine, as well as "disc space narrowing with central disc prolapse contacting the S1 root". Dr. Findlayson disagreed with that latter conclusion. He described the Plaintiff's difficulty as "mechanical" back pain, with osteoarthritic changes. He did not see any evidence of nerve compression in his work with the Plaintiff.

[36] This example demonstrates the reality of these reports. They are opinions, not business records. The opinions expressed in these documents are not admitted for their truth in this case, since their authors have not been properly qualified.

[37] Returning to the evidence of Dr. Stacey: he testified that the Plaintiff first demonstrated "tenderness with extension in her back", along with arthritis in the sacroiliac joint. He provided various medications, including anti-inflammatories.

[38] Dr. Stacey further testified that, based on the reports he received from specialists, he understood that the Plaintiff was at first a candidate for surgery, then she was not. This was due to the different findings in the MRI and CT scans. For example, an early MRI appeared to show "impingement on a nerve root", but a later MRI did not.

[39] Dr. Stacey referred the Plaintiff to Dr. Findlayson, whose diagnosis (according to Dr. Stacey) was of disc irritation at the sacroiliac joint, involving inflammation, but no neurological damage.

[40] Dr. Stacey noted that the Plaintiff's treatments have involved, among others, medications, anti-inflammatories, physiotherapy, and injections. Dr. Stacey has prescribed various medications for the Plaintiff, including Naproxin (an anti-inflammatory); Tylenol 3 (for pain, a narcotic); Cymbalta (an anti-depressant);

and Oxycodone (for pain, another narcotic). Dr. Stacey testified that the Plaintiff's pain is variable but is never gone (by her reporting). The medications also upset her stomach; the Plaintiff has lost weight due to stress and nausea.

[41] Dr. Stacey is of the view that the Plaintiff experiences a high degree of pain and/or disability and that it has increased over the years. Dr. Stacey agreed, however, that all pain he records, is simply self-reported by Plaintiff, therefore very hard to measure. Dr. Stacey has, over the years, provided information to the Defendant by way of forms that were required. He agreed that, at times, he did not fully complete the reports and/or did no testing prior to completing the forms. He never recommended a return to work or discussed any modification of the Plaintiff's work space.

[42] In the opinion of Dr. Stacey, the Plaintiff is unable to work full time, due to her subjective experience of severe pain, although she shows no hard/fast neurological deficit. He described the Plaintiff's pain as intermittent, with good and bad days; he opined that she could perhaps do a half day of work, if she was having a good day.

[43] Assuming the Plaintiff to have degenerative disc disease (which is suggested in some of the reports), Dr. Stacey agrees that such a diagnosis is not always

disabling. However, Dr. Stacey was of the view that the Plaintiff's comfort level would be the issue with any activity, due to pain.

[44] The Court also heard from Plaintiff's witness Dr. Alex Findlayson. He was recognized as an expert in anesthesiology and chronic pain. The Plaintiff first saw him in February 2008; in his report dated February 5, 2008, he noted:

> Clinically there is some tenderness in the mid line over the lumbosacral junction. She is acutely tender over the right SI joint. She is slightly tender over the left. Stressing the right side causes increased pain. Stressing the left does not.
>
> She has pain on hyperextension on the right side at L5-S1.
>
> Straight leg raising is normal. Neurological examination is normal.
>
> This lady appears to have bilateral sacroilitis and possibly facet joint dysfunction on the right side at L5-S1.
>
> We discussed the options. What I suggested was we do a right SI joint injection initially to see what that does and then follow it up with whatever is necessary.

[45] In his second report dated July 20, 2009, he noted:

> …no significant tenderness on palpation over the lower lumbrosacral spine. She has no significant paraspinal tenderness. She is acutely tender over her right Si joint. Stressing that joint does cause a significant increase in her pain. She also has a trigger point in her right buttock area, which is acutely tender to touch and has a trigger point in her right thigh, which is not quite as tender.
>
> On the left side she is slightly tender over the left SI joint but stressing that joint really does not cause any increase in pain.

> On hyperextension she is tender over L4-5 area on the right side but not on the left side. Straight leg raising is normal. Neurologic examination is normal.
>
> Certainly on today's examination a lot of her pain is being caused from inflammation of her sacroiliac joint. We discussed SI joint injections and today I did an easy SI joint, injecting Marcaine and 20 of triamcinolone.

[46] Dr. Findlayson performed anesthetic and steroid injections on the Plaintiff, on a few occasions, as described in his reports. In October 2009, Dr. Findlayson wrote (Exhibit 2, Tab 3):

> I believe that Ms. Bezanson has a chronic condition that is not amenable to long term resolution and, at this time, not correctable by surgery. Control of symptoms are related to minimizing activity that causes pain, maintaining as good a level of physical fitness as possible, the use of medication and joint injections on an intermittent, as required, basis.

[47] By April 2010, Dr. Findlayson notes that the Plaintiff had:

> …no significant tenderness in the midline. She was acutely tender to palpation over the right SI joint and slightly tender on the left. She had trigger point tenderness posterosuperior iliac spine on both sides.

[48] His May 4, 2010, report appeared to note some changes:

> ..no SI joint tenderness on either side. She was tender near the gluteal bursa on the right side and she had trigger points in the posterior – superior iliac spine on the left.
>
> Also tender in hypertension at L5-SI. Appears to have facet joint problem in the area. Did a gluteal bursa injection and trigger points. Booked for a facet block at L5-SI.

[49] Then, in July 2010:

> No help from facet block. Tender over the ischial and gluteal bursas, but not tender over the sacroiliac joint. Still tender over the L4-L5 area. Did right gluteal bursal injections and trigger point in paraspinal area.

[50] On March 14, 2011, Dr. Findlayson notes in his report :"[Plaintiff] is miserable with pain". She was then reporting pain across her back, tenderness over the left SI joints over the right ischial bursa with trigger points in the paraspinal area on the left. Dr. Findlayson did right and left SI ischial bursa injection and trigger points.

[51] Dr. Findlayson testified that the Plaintiff tolerated the injections well, but got very little relief, and only from the local anaesthetic, for a short time. Dr. Findlayson eventually stopped doing the injections, explaining there are risks, and where they have no benefit they are discontinued. Dr. Findlayson noted that some people can get relief with injections for periods from three months up to a full year. He last saw the Plaintiff in October 2011, and has no new information since that time.

[52] Dr. Findlayson agreed that descriptions of pain are subjective, and cannot be measured objectively; he is therefore, to some extent, dependent on the patients to be truthful. He further agreed that exaggeration would affect his assessment, but that he looks out for exaggeration; for example, where he sees no change, that "might" signal an exaggeration.

[53] Dr. Findlayson treats many people with pain, including many with degenerative disc disease. He agreed that many of those people can still work, with/without the assistance of narcotics; it depends on an individual's reaction, some can function, while some are disabled. He was of the opinion that the Plaintiff was hampered in her work possibilities, due to her pain.

[54] It should be noted that both Dr. Stacey and Dr. Findlayson have seen the surveillance DVDs, and both told the Court that their opinion was unchanged by those videos. It was their view that the amount of time where the Plaintiff was active in the DVDs, was not enough to show that employment was possible.

[55] The Defendant called one medical expert witness, Dr. William Stanish. He was qualified as an expert in orthopaedic medicine and orthopaedic surgery. Dr. Stanish examined Ms. Bezanson, at the request of the Defendant, in March 2012, and reviewed her documentary file. He then prepared two reports as to his findings, which were presented to the Court (the second being an updated report after having watched the surveillance videos). Dr. Stanish was made aware for these purposes that the Plaintiff had been previously working in a call centre, at a sedentary-type job.

[56] Dr. Stanish testified that it was obvious to him, upon starting his exam, that the Plaintiff was very uncomfortable, she was grimacing, etc. He testified that he was afraid to hurt her, and so he did not do his normal 15 minute exam; he decided it was futile and risky to proceed further. His short exam noted limited front flexion and limited right/left bend to side. His reflex testing showed no neurological impairment.

[57] Dr. Stanish's conclusions, therefore, were primarily based on his review of her file. He stated at page 9 of his report (emphasis is mine):

> **In terms of her diagnosis, Ms. Bezanson suffers with degenerative disc disease at L4-5 and L5-S1**….on my physical examination, I find no objective evidence of worrisome musculoskeletal or neuromuscular disease.
>
> On review of her imaging, specifically her MRI and CT scans, there is evidence of disc degeneration at L4-5 and L5-S1 which is an extremely common finding in adult Canadians – whereas upwards of 80% to 85% of our adult population suffers with an element of low back discomfort secondary to disc degeneration.

[58] Dr. Stanish testified that since the Plaintiff had never suffered any "triggering event" or trauma, her case was difficult to frame. He also noted that many treatments had been tried here, with no relief, which was unusual and significant in his view. The sheer number of treatments and testing in the file suggested to Dr. Stanish that the experts were "fishing" for a cause.

[59] Dr. Stanish further noted that, in his view, the very strong medications prescribed to the Plaintiff were a huge concern. He testified that these types of medications are usually prescribed post-operatively, especially oxycontin and fentanyl. In Dr. Stanish's view, where a person requires this level of medication with no originating trauma, a red flag is raised.

[60] Dr. Stanish noted that he saw a "disconnect" between Ms. Bezanson's presentation, and the objective evidence in her file. For example, he looked at the FCE, and found it very unusual that the Plaintiff would describe her pain as "a 9 out of 10". Dr. Stanish noted "that is cancer pain". It is not explained by the objective medical findings. This makes the Plaintiff's case unusual, he notes: the "disconnect" between the objective evidence, and her subjective complaints of completely debilitating and disabling pain. In the view of Dr. Stanish, it is not reasonable, in light of the objective evidence, for the Plaintiff to completely disrupt her life.

[61] Dr. Stanish also watched the surveillance videos. In his view, the Plaintiff appears therein as a normal, active woman. They are all in stark contrast to his observations of her, and others' observations, as noted in her files. His report further notes (at page 10):

> Clearly, all people are different in terms of their ability to cope/manage pain and that is to be appreciated. However, I remain convinced that there must be a realistic match between the patient's complaints – relative to their disability – and the evidence of damage/disease.
>
> …
>
> Currently she is living the disability with the tragic fallout being that of the impact it is having on her husband and children. For her to carry on as she is – out of the workplace with a disordered family life – for the next thirty years does not fit. There is not sufficient objective evidence of pathology (disorder/disease) to curtail one's life as we see with Ms. Bezanson.

[62] Dr. Stanish noted that, in his experience, most people continue to work and live with disc degeneration. He described the Plaintiff's situation as having "momentum", in that she has now been off work for many years. This, combined with the strong pain pills and factors associated with depression, has resulted in a "pattern of pain behaviours" which is unhealthy. In the view of Dr. Stanish, the Plaintiff needs to get back into the workforce; reduce her use of drugs; and seek out psychological help and support.

Evidence of Colleen Bezanson

[63] The Plaintiff testified that she is 36 years of age. She is married with two children, aged 15 and 8. She has a high school diploma plus a few years of community college. She first worked as a housekeeper at a hotel for one year, then started her employment at the Staples call centre in April 2000.

[64] Her job at Staples involved making and/or receiving calls as a telemarketer, while sitting at a computer. She was given a script to follow, and she was to be punctual and pleasant. The Plaintiff testified that she was good at, and liked, her job. The workplace was an open concept, with cubicles which could be adjusted or decorated as the employee wished. The job involved no lifting (expect perhaps catalogues, which the Plaintiff agreed she could handle). During a shift, the calls would come automatically, but could be put on hold. Employees could stand or sit, or take a break to stretch, or go to the bathroom (although there are scheduled breaks as well).

[65] The Plaintiff ceased working in August 2007, when she awoke with pain. The Plaintiff described her present difficulties as nausea (from medications), tiredness, forgetting things, she is "not herself". In terms of physical pain, she testified that she experiences it in the sciatic nerve, the upper and lower back and hips.

[66] On a typical day, the Plaintiff helps her children get ready for school. She might drive them to school "if there is no other option". She then returns to bed, unless she has appointments. She uses a "fentanyl patch" narcotic, replaced every 72 hours, and also takes an anti-inflammatory three times per day. She stated that she used to take oxycontin and Tylenol 3, but she now requires heavier narcotics.

She described seeing a multitude of physicians over the years, including Drs. Stacey, Shaw, Holness, Alexander, as well as physiotherapy. During the Plaintiff's direct evidence to this point, I noted that she looked quite alert and relatively comfortable.

[67] In relation to her activity levels over the past number of years, the Plaintiff told the Court that her life activities are now "completely" impaired. She stated that she engages in practically no activities, and (at times) requires help with personal care. She is able to stand for one hour at most. She is in bed "all the time", but there is no comfortable position. She can still climb stairs, and drive a car, but not for long. She described herself as a "hermit"; her only socialization is through her son's hockey. She has obtained special equipment such as a new mattress, chair pads, a TENS machine, and an OBUS form. She no longer does any exercise. She can do a bit of housework, but that continues to decrease.

[68] The Plaintiff acknowledged, however, that she has continued to participate in some family activities since 2007. She went on a family vacation to Cuba, a number of years ago, and another family vacation to Jamaica in the spring of 2013. The Plaintiff has also attended family camping trips to PEI over the years (although not in 2013). She attended family fishing trips in 2008 and 2010,

requiring her to stay in a tent, and sleep on an air mattress. In 2009 or 2010, the Plaintiff also flew to Ottawa for a weekend event.

[69] The Plaintiff was asked about her participation in her children's activities. She recalled that in past years she has attended her younger son's basketball (once or twice a week), track meets, and swimming. Her elder son Tyler takes up the bulk of her time; he plays at the highest level of hockey for his age, and plays all winter, plus six weeks in the spring. She identified Exhibit 11, Tyler's most recent hockey schedule (2013-2014).

[70] A review of Exhibit 11 shows the extraordinary amount of time and effort required from Tyler, and his family, for his hockey activities. The period October 2013 to April 2014 shows 65 practices plus 64 games; approximately half the games took place out of his home community. Some were weekend tournaments held away from home, involving two to three day trips to Cape Breton, PEI, Pictou County, and Bridgewater, and even a weekend tournament in Boston.

[71] The Plaintiff has always attended Tyler's hockey activities regularly. She testified that she used to go to all games and practices, but now attends 85 to 90% of them, including the out-of-town tournaments. She explained that she is able to attend these activities by doing a number of things: she does not drive herself; she

takes frequent breaks; and she takes extra medications for any trip. The Plaintiff is committed to her children's activities; she assists the team by holding a clipboard to keep stats.

[72] The Plaintiff advised that she attended the Boston tournament in both 2013 and 2014 (by plane), although she missed one game this year due to nausea. During the 2014 Boston trip, the Plaintiff also took part in shopping events.

[73] The Plaintiff stated that while she is able to be active for those days, she cannot sustain that activity; she must then take a break for a few days. She agreed that she can be relied upon, however, to drive her son to his games, on time, on a regular basis, due to her commitment to him. She also can drive her children to school, and in the past, has sometimes done it two or three days in a row.

[74] It would appear that the Plaintiff did not tell the Defendant about many of these extra-curricular activities over the years. For example, on November 5, 2009, the Plaintiff completed a Defendant's form wherein she was asked "Describe your current hobbies, social and other recreational activities and the frequency that you are able to participate in them." The space for response is blank. This was pointed out to the Plaintiff during her testimony; she could not explain why she did not disclose the camping, vacation, and extensive hockey activities. In fact, in relation

to the latter, the Plaintiff acknowledges never telling the Defendant about those, until the surveillance videos came to light.

[75] An issue was raised in relation to babysitting activities, as the Defendant alleged that the Plaintiff had been babysitting children during 2008/2009, and thereby earning unreported income.

[76] The Plaintiff testified that she has a friend (Stephanie Shute). As a favour, the Plaintiff watched Ms. Shute's children after their school day for a few hours, from January 2008 to the end of 2009. This occurred a few days per week. The Plaintiff noted that the Shute children simply came to her house, they needed no extra care. The Plaintiff wanted no money, but Ms. Shute wanted to contribute. The Plaintiff acknowledged that she did not tell the Defendant about this, as she did not consider this a relevant concern. The Plaintiff noted her house is "kids central" for the neighbourhood, so other kids are always there.

[77] The Plaintiff stated that she had no intention of misleading anyone, either by her responses or her failure to report any of these activities. She denied "hiding" anything. She acknowledged that her answers might nonetheless be "misleading".

[78] As her direct testimony continued, the Plaintiff started alternatively standing and sitting, with the permission of the Court, in order to be more comfortable. This

continued throughout her entire testimony. However, I noted that during cross-examination, the Plaintiff's demeanor changed. She became much less patient with questions, irritable, and her complaints of pain and nausea greatly increased. This may be due to her continued discomfort, but in my view, was at least partly due to her displeasure with the questions she was being asked.

[79] The Plaintiff was asked about her sit and/or stand tolerances, both at present and over the past years. This was an issue which has been difficult for the Plaintiff to pin down.

[80] In August 2007, in response to a questionnaire, the Plaintiff had written "unable to sit or lie down for long periods of time"; the Plaintiff testified before me that this meant one hour. In September 2007, she had indicated to the Defendant that she had to move "every half hour"; the Plaintiff testified that this was in reference to that day only. In October 2007, she indicated to the Defendant a sitting tolerance from 30 minutes to one and a half hours. In early 2008, she described a 20-30 minute tolerance. At the FCE (in September 2009), she estimated ten to 20 minutes sitting and/or standing.

[81] The Plaintiff explained that whenever she is asked questions about tolerance, she responds with her feelings on that particular day. She could not recall any of

those answers specifically. At one point, the Plaintiff stated "I can't even remember last week".

[82] The Plaintiff agreed that, at present, she is able to sit and stand, with greater tolerance for sitting than standing. It was difficult for her to pinpoint any present tolerances, she stated "on a bad day it could be anything". She estimated sitting for one and a half hours was a good day, a half to one hour was a bad day. She acknowledged that in 2007, she had agreed to discuss a return to work when she could sit 45 minutes.

[83] The Plaintiff was cross-examined about the surveillance DVDs. For example, the Plaintiff agreed that she sometimes needed assistance to sit and stand, depending on the day. The DVDs, however, show the Plaintiff standing and sitting without assistance.

[84] At the FCE in September 2009, the Plaintiff had refused to attempt a full crouch, due to pain; but the DVDs show her crouching, to put down a coffee, or pick one up. On many occasions in the videos, the Plaintiff is standing and/or sitting for very long periods of time. She is shown cheering and clapping, raising her arms above her head. She is repeatedly shown going up and down stairs. One DVD shows her dragging her son's large wheeled hockey bag behind her.

[85] The Plaintiff attributes her abilities in the videos to a number of factors: the adrenaline of the games, along with the extra medications she takes to endure. The Plaintiff told the Court that she is a proud person, and she does not like to ask for help. She further stated that she is still experiencing pain on the videos, even though she is not showing it. She also explained that the videos must be showing "good days". The Plaintiff exhibited much frustration during this questioning, and was argumentative and defensive.

[86] There was a further disconnect in the Plaintiff's evidence regarding medications. The Court was provided with a full prescription history. It did not seem to correspond with the Plaintiff's evidence regarding dosages of some medications.

[87] The Plaintiff testified that, in 2009, she sometimes took three or four Naproxen per day. In 2007, she took Tylenol 3 "as needed", perhaps twice a week, but took more as the years progressed; she estimated taking one a day by January 2010. Oxycontin was prescribed "as needed" in 2007, she estimated taking perhaps one a week, although she was unsure. This also increased; by 2008 she was possibly taking one to two per week, and possibly one a day in 2010, as the pain increased. Indomethacin was started in March 2013, and the Plaintiff described her dosage as always three times a day, to the present.

[88] The prescription records did not correspond with these amounts; rather they showed much less. For example, in relation to Naproxen, if in 2009 she was taking three or four a day, that would equal 90 to 120 pills per month. The records only show two refills of Naproxen in all of 2009, for a total of 120 pills per year. The records show no prescription for Tylenol 3 in 2009 at all. Oxycocet is not filled in 2007; once in each of 2008, 2009, and 2010 for a total of 160 pills/three years. Indomethacin is filled four times in 2013, for a total of 360 pills/year.

[89] The Plaintiff could not explain these discrepancies. She confirmed that she takes the medications as she had testified. She stated: "You couldn't survive on the medicine I take".

[90] I noted, again, that during this exchange the Plaintiff was very frustrated and short-tempered in her answers. She repeatedly sighed. She repeatedly asked to be able to leave or to take a break during the questioning.

[91] The Plaintiff agreed that she participated in discussions about returning to work in 2008. However, she never felt she could go back, and never tried, even on a gradual basis. She stated that Staples had offered her an at-home job, but she turned it down, she "didn't want to", since even at home she would need to be up doing the job. She acknowledged that she could take breaks and lie down, she

could use her OBUS forme, or maybe even modify her work station; her answer was no.

[92] The Plaintiff testified that since she is in pain, she can't be pleasant, or reliable. This is the main reason why she never tried going back to work, with or without modifications. She has not sought continued psychiatric assistance, although she experiences feelings of depression. Nothing has helped with the pain. Physiotherapy gave her core exercises which she stopped doing in 2010 when she "hit a plateau"; this may have caused a deterioration. She has now started them again, but they are not helping. The injections from Dr. Findlayson only helped for a day.

[93] The Plaintiff's evidence leaves me with serious concerns. In support of her claim that she is completely disabled from working, she testified to her subjective experience of serious and debilitating pain. The Court must assess her credibility in making these claims. On many occasions the Plaintiff has not been completely forthcoming. She clearly did not provide complete information to the Defendant about her activity levels over the years. Her activity level over the past number of years has, in fact, been significant. Her description of medicine dosages was clearly not borne out by the prescription history.

[94] Further, I do not accept her explanations about her abilities as shown in the DVDs. I find her credibility to have significant shortcomings.

[95] The Court also heard evidence from Michael Bezanson, the spouse of the Plaintiff. Mr. Bezanson confirmed his wife's sudden onset of pain in 2007. He testified that, at present, his wife cannot sleep well, she cannot lie still, she cannot walk for long. He described, with a great deal of emotion, how his younger son has never been picked up by his mother. Mr. Bezanson explained that he now does 99% of the household chores; however, she used to do more. Mr. Bezanson is of the view that the Plaintiff cannot work, as "she can barely get out of bed and dress herself".

[96] On the other hand, Mr. Bezanson acknowledged that the Plaintiff has continued with many activities. He confirmed the family's extensive commitment to son Tyler's hockey activities. Tyler's numerous practices and games take up the majority of the family's social activities and weekends. A game practice normally takes one and a half to two hours, and while Mr. Bezanson normally takes Tyler, the Plaintiff also helps. He notes that the Plaintiff used to go to all hockey activities but now attends about 85 to 90%.

[97] Mr. Bezanson described the family's Cape Breton hockey trip, occurring in 2007 or 2008. He stated that they made many stops, and the Plaintiff took "lots of medicine". Such a tournament has multiple games (of one hour each); Mr. Bezanson noted that after the games the Plaintiff would lie down and take medication. He is not sure if she went to all games; he also confirmed that she might attend some social activities, to try and participate, to show a "brave face". Mr. Bezanson also confirmed the Plaintiff's recent attendance at tournaments in Bridgewater and PEI.

[98] Mr. Bezanson confirmed that very recently (in March of 2014) the Plaintiff had attended a hockey tournament in Boston. The Plaintiff went by plane. Mr. Bezanson could not recall if the Plaintiff missed any games, but confirmed her attendance at shopping events during the weekend. This was the Plaintiff's second attendance at this tournament in recent years.

[99] Mr. Bezanson confirmed that Tyler was in "Provincials" in late March 2014, and the Plaintiff went to all these games. In fact, the very weekend prior to starting this trial, there was a tournament and the Plaintiff only missed two games. Mr. Bezanson acknowledged Exhibit 11, the season calendar for 2013-2014.

[100] He further confirmed that his family has gone on annual summer camping trips to PEI; only in 2013 did the Plaintiff not go. The family went to Cuba, six or seven years ago, and to Jamaica, in May of 2013. When asked how it was that the Plaintiff could endure trips out of town, and attending hockey games for an entire weekend, Mr. Bezanson expressed the view that the Plaintiff would be in a "medical numbness" due to medications.

[101] Mr. Bezanson testified that, at this point, the Plaintiff has not done any housework in quite some time. She still helps with drives to hockey, when necessary. He doubts that she could do anything two to three days in a row. However, Mr. Bezanson noted "she is not dead"; explaining that she is able to do certain things, and tries to help out.

[102] Mr. Bezanson agreed that he sometimes helps the Plaintiff get out of chairs; in fact, he stated, he "does this every day". However, it was pointed out to him that this is not shown on any of the surveillance videos. Mr. Bezanson responded that the Plaintiff can do it without his help, and can also do stairs "sometimes". Mr. Bezanson explained that the Plaintiff is "very proud", and does not like to seek help. He also believes she increases her medicine dosage for the games. He further stated that while the videos show bending forward, and crouching, these are movements that she can no longer do.

[103] Mr. Bezanson testified in a fairly defensive manner, and seemed determined to describe his wife as disabled, despite acknowledging all of the things she is still able to do. I did not find his evidence all that helpful, except to confirm the Plaintiff's activities.

[104] The Court also heard evidence from Stephanie Shute as to the babysitting issue. Essentially Ms. Shute confirmed that the Plaintiff cared for her children during some limited times in 2008/2009, after school, and that some money was given in exchange. Ms. Shute could not recall any occasion of the Plaintiff cancelling.

[105] In relation to the babysitting arrangement, I conclude that it was a favour being done for a friend. It is, on the other hand, another activity that the Plaintiff chose to commit to, and was completely reliable in performing.

Defence Evidence

[106] Jann Sperling (previously Kaminska), testified on behalf of the Defendant. She is an employee of the Defendant, and was the case manager responsible for the Plaintiff's file from July 2008 to its conclusion.

[107] Ms. Sperling described how the Plaintiff's short term disability was approved from August until December 2007 (the 17 week maximum), on the basis of ongoing medical information and updates. Subsequently the Plaintiff was approved for long term disability, for successive short periods of time; her first period was to last until March 2008 (based on medical evidence from December 2007). This was extended through 2008 and into 2009, as symptoms were continuing and the possibility of surgery was being discussed. By the summer of 2009, surgery had been ruled out and the medical evidence no longer supported the Plaintiff's claim. Benefits were terminated.

[108] Ms. Sperling testified that the Plaintiff appealed this decision, and a FCE was then suggested by Dr. Stacey. The Defendant agreed and benefits were temporarily reinstated pending that assessment, scheduled for September 2009.

[109] On or about September 30, 2009, an anonymous letter was sent to the Defendant, advising that all was not as it seemed with the Plaintiff's claim. The letter's introductory paragraph stated as follows:

> Colleen claims her back pain makes it impossible to earn an income. However, she is living a very active life for someone who is suppose (sic) to be in so much pain and she is also earning an income.

[110] Following receipt of this letter, Ms. Sperling hired a surveillance firm in order to attempt to obtain objective evidence of the Plaintiff's movements and

activities. The results of that surveillance were many hours of DVD evidence from 2009 to 2013, along with notes from the investigators about their observations during more hours of surveillance (not all included in the videos).

[111] It should be noted that this surveillance evidence was the subject of a pre-trial motion on behalf of the Plaintiff, to exclude this evidence, which I denied. I have viewed each of the DVDs and also reviewed the reports.

[112] The first period of surveillance took place on October 20 to 23, 2009. Those periods show the Plaintiff standing outside her property, and driving her children to and/or from school.

[113] The second period took place on December 3 to 6, 2009. On December 4, the entire Bezanson family undertook a car trip to Sydney, NS to attend a hockey tournament. The family left Lower Sackville at approximately 10:00 a.m., stopped for lunch in Port Hawkesbury, and arrived at their hotel in Sydney at about 3:20 p.m. They watched a game at the arena from 4:45 p.m. until 7:30 p.m., then returned to their hotel. On December 5, they left the hotel at approximately 10:00 a.m., and were, with a few breaks, at the arena all day, returning to the hotel at 7:00 p.m. On the 6th of December, they attended a game from 11:00 a.m. to 1:00 p.m. and then returned home.

[114] Further surveillance was undertaken on March 31 and April 1 to 5, 2011. These days (with the exception of April 5) all involved the Plaintiff attending hockey games within the area of Halifax-Dartmouth. On some days, she attended one game, on others two games (not consecutively).

[115] Further surveillance took place on March 16 to 19, 2012; the Plaintiff was seen attending further hockey games on the 16th and 18th, one or two games per day. From October 11 to 13, 2013, the family attended a hockey event in Bridgewater, NS. The Plaintiff arrived at the Bridgewater arena at 12:30 p.m. The family went out for lunch, and then to a private residence. They returned to the arena from 3:20 p.m. until 5:00 p.m. The following day the Plaintiff attended another game from 10:30 a.m. to 12:00 p.m.

[116] Further surveillance was done in late October, 2013. On October 28, the Plaintiff was away from home during the lunch hour, and was later seen picking up and dropping off her children. On October 29, she attended another hockey game. On November 6, 2013, the Plaintiff did errands for a few hours, dropped off and/or picked up children, and attended an evening hockey game.

[117] Much of the DVDs show the Plaintiff in arenas. It would appear that the camera itself was on the other side of the arena, facing the Plaintiff. I cannot see

her facial expressions with any distinction; however, I can clearly see her movements and interactions with others.

[118] It must be said that the Plaintiff shows remarkable physical endurance in this footage. She stands for hours at a time; she also sits for hours at a time. She cheers by lifting her arms and shouting, and bending backwards slightly. She does not use arm rests, or railings on stairs; at times she climbs bleachers (which are steeper and more difficult) rather than use the stairs. She walks normally; she crouches normally; she interacts with others around her in a normal fashion. She does not appear to be moving more slowly or more quickly than others. In all of the footage, there is only one occasion where she can be seen limping, while entering an arena.

[119] Obviously these videos are merely snippets of time in the Plaintiff's life, over the span of four years. However, given that they represent periods of time when the Plaintiff was acting in a completely unguarded fashion, they are quite remarkable; and stand in stark contrast with the Plaintiff's presentation before health professionals, as well as this Court.

Functional Capacity Assessment ("FCE")

[120] The two day FCE was done in September 2009, by physiotherapist Carolyn Roosen and occupational therapist Hilary Rose. Their co-authored report was provided to the Court, and both testified.

[121] Ms. Roosen did a musculoskeletal assessment of the Plaintiff: she could demonstrate only 25% "flexion" (bending forward): she could show no "extension" (bending backwards), she could only show 25% of both "rotation" (twist at the waist) and "side bending" (hand to knee level). Ms. Roosen described the Plaintiff's walk as "antalgic", meaning it showed pain, was effected with a painful gait, grimacing, tense body, etc.

[122] The Plaintiff was also unable to do other tests, due to her reports of pain: both the L2 "resist hip flexion" test (lying down, knee to chest, hold and resist), and the L3 test (lying down, hand under knee, subject asked to resist). These tests are therefore deemed invalid due to subjective "pain limitations".

[123] The Plaintiff was asked to crouch. Ms. Roosen confirmed that a normal 100% crouch would be "bum to ground". The Plaintiff could only do a 50% crouch, and could not pick something up off the ground.

[124] Other tests presented no difficulty for the Plaintiff. On key muscle testing, a nerve root test showed the S1/S2 intact. She was also able to rise on toes and walk on her heels. Her sensation to light touch was intact left/right. Her "sitting straight leg raise", where the assessor moves the leg parallel to floor was normal, while her "supine lifting of leg" done by assessor, was 30 degrees on both sides (just off table).

[125] On day two, the Plaintiff returned and was re-evaluated. She attended the office in a bent forward position, described increased pain, and showed minimal movement in all directions, less than on day one.

[126] Ms. Roosen has seen all the surveillance videos, and confirmed that the Plaintiff does not appear as she did during the FCE. It is to be noted that the early videos were created very shortly after Ms. Roosen would have observed the Plaintiff, within a few months. The videos show even, fluid gait in walking, and normal weight bearing. The Plaintiff is seen going up and down stairs; she shows forward flexion to a range of 50 to 75%; she shows a full crouching position; she shows weight shifting left-right (typical in all people who stand); she is even seen hopping. No pain is being exhibited in the videos.

[127] Ms. Rose also testified, and she stated that her purpose was to engage return to work options. She was aware that the Plaintiff's previous job was mainly sedentary, and involved sitting, hand dexterity, reaching (computer), as a call centre sales representative. Ms. Rose confirmed that she often recommends possible "ease back" plans, to be effected in liason with the employer and insurance; various possibilities are often explored, such as reduction of hours, different shifts, modifications or accommodations. Ms. Rose recalled some suggestion, in the Plaintiff's case, of a gradual return to work (perhaps three to four hours, at a time).

[128] Ms. Rose discussed her assessment of "effort" from the client: this means "attempt", and is highly relevant to the validity of the testing. The client is told to use maximum effort. The testing seeks to test the ability to replicate effort on the two days, by using both formal testing and casual observations.

[129] On certain occasions in the Plaintiff's FCE, the report notes "minimal biomechanical changes"; this is a reference to heart rate, which would increase during exertion. In Ms. Rose's view, the Plaintiff was not showing full or maximum effort on those occasions.

[130] The Plaintiff could not do floor to knuckle reaching due to reported pain. The Plaintiff was asked to crouch (with a modified posture); the Plaintiff attempted but did not complete this. The "Static push/pull" test was accomplished with a light weight (ten to 20 lbs). During the six minute walking test, the Plaintiff walked slowly, for only165 meters (the normal result being 550 meters); she favoured her right leg, limped noticeably, and was guarded and conscious during the walk.

[131] During the stairs testing, the Plaintiff was told to "use the handrail if needed". The Plaintiff did use the handrail, and employed "2 step stepping" (i.e., both feet on each step). On forward bend, the Plaintiff maintained five minutes; on kneeling, she maintained 45 seconds (they ask for ten minutes). The Plaintiff had reported to the assessors that she could sit for ten to 20 minutes, and stand for up to ten minutes; but, in fact, could only sit or stand for eight minutes (on both formal and casual observance); Ms. Rose remarked that this was a "rare" tolerance level in her experience.

[132] On day one of the FCE, the Plaintiff rated her pain as a 9/10, for both "average" daily pain, and "that day's" pain. On day two, the Plaintiff called her pain "unrateable", a 10/10. Ms. Rose agreed that pain is subjective, but in her view, a 10/10 would engender a hospital request.

[133] Ms. Rose was of the opinion that, while she saw co-operation from the Plaintiff, in her view she was not giving maximum effort during some of the testing. Her heart rate showed little change/effort. During various tests she showed jerky/overt behaviours of pain, posture issues, grimacing, and rubbing of area. Her report concluded that the Plaintiff was not showing workday tolerance (three hours); however, she pointed out that those results would be invalid where a person was not giving full effort.

[134] Ms. Rose also looked at the surveillance videos; again, some taken a few months after Ms. Rose assessed the Plaintiff. The Plaintiff is shown in the DVDs, on some occasions, sitting for periods of 50 to 55 minutes, and standing for long periods of time. No arm rest or hand rail use is seen, and no pain behaviours are observed. The Plaintiff's walk is fluid, with no limp.

[135] For example, the DVD from October 22, 2009, (about three weeks after the FCE), shows the Plaintiff walking with smooth gait, swiftly, with her hands in her pockets, or with a coffee in hand. Ms. Rose noted that both indicate a distinct comfort with walking, i.e., no fear of falling.

[136] Ms. Rose acknowledged the one DVD that shows the Plaintiff, on one occasion, walking with uneven gait (a limp). On the other hand, she noted, there

are numerous occasions of the Plaintiff cheering, looking comfortable and unguarded, showing no pain. The Plaintiff can be seen crouching and bending forward, without impairment or pain; she is seen going up stairs and even bleachers, with no support needed. She is seen "reciprocal stepping". In short, the Plaintiff looks normal in videos, and in good cheer. This is significantly different than was shown to Ms. Rose during her testing.

Staples Employees

[137] The Court heard evidence from Linda Kays and Keith Barker, both employees with the Staples call centre. Ms. Kays works in human resources and Mr. Barker is a manager. They both described the many possible modifications that Staples would be prepared to consider in the case of the Plaintiff, including (but not limited to) a modified work station, working from home, part-time work, and so on. It is clear to me that they are prepared to be quite flexible in facilitating the Plaintiff's return.

Law and Conclusion

[138] The Plaintiff has the burden of showing, to the civil standard of balance of probabilities, that she meets the test for total disability as defined in the contract for the relevant period of time (i.e., that she is disabled from "any occupation" for

which she is reasonably suited). The fact that the insurer paid benefits throughout 2007 to 2009 (the first period of eligibility) does not shift this burden to the insurer (see: *Porter v. Met Life* (1984), 64 NSR (2d) 293; also *Walsh v. Unum Provident*, 2012 NSSC 86).

[139] In the *Porter* case, the Court described the test to be met. It is a similar test in both "own occupation" and "any occupation" analyses:

> [102]…whether the insured can perform 'substantially all of the duties' of his occupation.
>
> [103] The law with respect to the interpretation of the disability clauses that insure a man, who by reason of disability, is prevented from preforming "any occupation" for which the insured is *reasonably fitted* is similar…

[140] These words are to be interpreted reasonably. In David Norwood, *Life Insurance Law in Canada* (1977) at page 289:

> A person is considered not to be totally disabled from engaging in "any" occupation if his condition would enable him to enter into an occupation reasonably comparable to his old occupation in status and reward, and reasonably suitable in work activity in light of his education, training, and experience.

[141] Author Norwood goes on to say (pp. 378-379):

> In law, the policy term "total disability" does not mean **absolute** disability in fact, in the sense that the insured has to be absolutely and unequivocally helpless and unable to do any work task.
>
> Total disability on the legal sense does not require that the insured be incapable of all work activity, only that the disabled person's medical condition is such that ordinary and reasonable prudence would dictate that the person is not fit enough to carry out the main duties of a job or occupation.

[142] The *Walsh* case (supra) also provided an explanation of the concept of "total disability":

> [88] It is not disputed that an insured is totally disabled when a reasonable person would recognize that he should refrain from certain activities, such as when medical advice or common prudence require him to desist from any occupation for which he is reasonably fitted in order to effect a cure or prolong his life*: Sucharov v. Paul Revere Life Insurance Co.* [1983] 2 S.C.R. 541 (SCC). The test is objective and objective medical evidence of disability will usually be required.

[143] In *Butler v. Blaylock* (1981), BCJ No. 31 (BCSC), the Court cautioned:

> Courts should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.

[144] The Plaintiff's employment, at the time of her withdrawal from the workplace, was as a telephone salesperson in a call centre. Based on the evidence before me, this is a sedentary job, requiring very little in terms of physical abilities. That is an occupation for which the Plaintiff is reasonably suited by education, training, or experience. It requires sitting, (or standing, in the alternative), using a computer, and talking on the phone.

[145] This case is remarkably similar to that of *Brennand v. Sun Life,* [2012] BCSC 972. Mr. Brennand was also a call centre employee, and also sought LTD benefits. In 1997, while attending a hockey game, he had felt a "pop" in his back. This caused him back pain that day, and from that day forward. He testified that

both standing and sitting exacerbated the condition, and that given the level of pain he regularly endured, he was unable to concentrate or get restful sleep.

[146] In 2010 and 2011 Sun Life arranged for surveillance of the Plaintiff Brennand. Seventeen days of footage were provided from May 2010 to June 2011. During those times Mr. Brennand was shown to be engaging in various activities: riding his motorcycle, (including mounting and dismounting the bike); walking and standing for an hour; sitting for one and a half hours, "interacting in a happy manner" with others during walks; grocery shopping, and so on. The Plaintiff also took various trips over those years, involving plane rides of up to three and a half hours in duration.

[147] The objective medical evidence of Mr. Brennand's disability was not determinative. Medical professionals agreed that his pain was out of proportion to his actual injuries, but did not rule out a finding of disability from work. The Court found that the "Plaintiff's assertion of total disability is based upon subjectively experienced chronic pain." (at para. 120)

[148] The Court further stated:

> [121] …I also find it significant that the issues in this case do not merely concern whether the Plaintiff experiences that pain or has that condition. The issue that I must decide is whether that pain or condition is totally disabling such that the Plaintiff cannot perform the duties of employment or any other job for which he

> has minimum qualifications. Evidence concerning what the Plaintiff is actually capable of doing is surely able to objectively support whether any condition the Plaintiff may have physically disables him from his employment…
>
> [122] In context, then, I find that, as argued by the Defendant, limited weight can be attributed to the medical opinions relied upon by the Plaintiff to establish that the Plaintiff experiences chronic pain as a mental condition that in fact disables him from working. The opinions are undermined by the evidence at trial, which, when viewed in totality, is inconsistent with physical limitations, isolation, confinement to residence, and bleakness arising from pain that the Plaintiff reported to his physicians and others…

[149] One interesting point is made by the Court which has application here:

> [162] Moreover. Mr. Brennand is an experienced call centre worker having had many years working with customers first in collections and then as a CSR. He had a good handle on the job. As a result, the submission of Ms. Hayman does not, in my view, explain sufficiently how it is that Mr. Brennand can do the things he does outside of work but says he is totally disabled from performing in any setting the sedentary work of a CSR and performing in any setting any occupation for which he has minimum qualifications.

[150] The Court further noted that Mr. Brennand had not sought out any modified work stations, ergonomic equipment, accommodation, or work from home arrangement. It was held that the Plaintiff was not totally disabled from either his own occupation or from any occupation for which he had minimum qualifications.

[151] Another case involving similar facts, and result, is *Chaplin v. Sun Life* (2001), BCSC 310. The Court found (at para. 41) that the "Plaintiff's inability to continue her work is based entirely on her self-reported pain and fatigue". However, surveillance showed her accomplishing tasks that she claimed to have difficulty with. Her claim for disability benefits was dismissed.

[152] In the case at bar, a number of things are clear to me from the evidence, and I so find. Over the course of the past seven years, the Plaintiff has experienced pain. She has attended numerous medical doctors and specialists, in an effort to discover the root cause of that pain and in search of treatment. She has also undergone many treatments during that time, including very strong medications, steroid injections, physiotherapy, TENS machine, etc. The medical professionals do not know how to proceed further to help the Plaintiff with her symptoms.

[153] Based on the medical evidence before me, I find that the Plaintiff suffers from a degenerative disc condition. I further accept that this is a relatively common condition in adult Canadians, but can be disabling.

[154] Pain is a subjective experience. We cannot be in the body of the Plaintiff to experience what she does. Even if we could, would we experience it in the same way? However, a disability assessment requires a measure of objectivity. The Court must be able to correlate her description of the pain, with her objective abilities, and her medical diagnosis.

[155] Despite the pain she experiences, the Plaintiff is able to participate in certain aspects of life; perhaps those she finds most appealing or worthwhile. She has travelled to vacation destinations, involving air travel of multiple hours. She has

cared for children in her home, at scheduled times, never missing any period of time for which she was responsible. She routinely attends hockey events for her children, multiple times per week, involving hours of standing and sitting in hockey arenas. She travels for some of those events as well, enduring multiple hours of car and/or air travel, and even overnight stays. These activities have not significantly been curtailed.

[156] The surveillance videos only represent small periods of time. Drs. Stacey and Findlayson were both of the view that the periods of activity shown in the videos were not prolonged, and that every video might simply represent a "good day". Furthermore, they both believed that the Plaintiff remained unemployable, even if she could do one hour plus of activity at a time, even for a few days in a row.

[157] I cannot accept this conclusion, in light of the whole of the evidence before me. I do not accept that every video is showing, by coincidence, a "good day". In addition to the videos, the written reports of the investigators show more hours of activity. Similar to the Court's findings in *Brennand (supra),* I find that the evidence in relation to disability is seriously inconsistent with the evidence at trial: she and her doctors discuss physical limitations which are not borne out by the evidence.

[158] Let there be no doubt: the Plaintiff is a very involved and committed parent. The priority she places in attending her children's activities is commendable. However, there is a marked and pronounced difference between her objective presentation in these videos and notes, and her presentation in front of every witness who testified before me.

[159] Counsel for the Plaintiff submits that anyone's presentation would be different at their child's sporting event versus an appointment with a medical professional. While that may be true in some cases, and while I have no doubt that the games are more enjoyable for the Plaintiff than the appointments, I do not accept that explanation here. The contrast is simply too great.

[160] There is also a marked difference between the person shown in the videos and the person who testified before me. The Plaintiff described, and showed, a great deal of discomfort during her testimony. She repeatedly complained of pain and nausea. She stood and sat for various periods of time during her testimony and requested repeated breaks, particularly during her cross-examination. She exhibited irritation and unpleasantness.

[161] In contrast, in the surveillance videos, it must be said that the Plaintiff looks to be enjoying herself. She does not look in pain, nor does she look "medicated".

She looks alert, happy, interacting with others, moving freely and unconsciously. She does not behave like the person I observed in court.

[162] I am persuaded that the Plaintiff has some degree of pain. However, I also find that she is able to function fairly well, despite that pain, where the activity is one that she is interested in or committed to.

[163] The physical activities she does participate in are, to some extent, similar (or even less onerous) than the activities she would need to do at her employment as a sedentary worker. She would need to sit and/or stand, at work, for periods of time, for numerous days. She is able to do that, as evidenced by the DVDs.

[164] The DVDs are not the only evidence to that effect. The Plaintiff's ability to consistently attend the bulk of her son's onerous hockey activities is also demonstrative of her abilities. She is committed to an activity level which, frankly, would be remarkable even for a person without limitations. She attends the activities numerous times per week, sitting and standing for hours, sitting in bleachers, on hard benches without back support, or plastic chairs. She is able to travel long distances to these events, out of province, and out of Canada, involving hours of car and plane travel.

[165] The Plaintiff testified that she cannot return to her employment because she would be unable to be "pleasant" for a work shift, which she needs to be. Again, the DVDs show a different reality. The DVDs do not have sound, so I cannot determine what the Plaintiff is saying, if anything. However, her demeanor on these videos is clearly very pleasant. She seems to be enjoying herself, relaxed, chatting with her husband or others.

[166] The Plaintiff and her husband have suggested to this Court that the Plaintiff's activities, and comfort level during the activities, are explained by increases in medication. I have considered that explanation. The DVDs do not show any sluggishness or affect which might be expected where heavy dosages were involved. The Plaintiff's pharmacy records, as I have already noted, do not seem to show any increase in dosages.

[167] On the other hand, if I accept that explanation, it begs the question: could medication similarly help her comfort level during a work shift? That question has not been answered. Dr. Stacey testified that the Plaintiff's comfort level is the issue with any activity. But her comfort level is clearly not a fixed entity; it is, in fact, enormously variable. The evidence before me shows that when the activity is something she is committed to, the Plaintiff is able and willing to attend, even for

long periods of time. But clearly she is not prepared to show the same effort or tolerance towards other activities.

[168] The Plaintiff has the burden of showing that she is totally disabled from any employment for which she is reasonably suited. I have reviewed the authorities which outline the test to be applied in such a case. I am not able to conclude, on the evidence before me, that she is so disabled. I dismiss her claim.

[169] If the parties are unable to resolve costs I am prepared to accept written submissions.

Boudreau, J.