IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Monk v. Duffy, 2008 NSSC 359

Date: 20081128
Docket: SH 209103
Registry: Halifax

Between:

Anita Monk

Plaintiff

and

Wayne Duffy

Defendant

Judge:	The Honourable Justice Arthur J. LeBlanc
Heard:	May 27, May 28, May 29, 2008, in Halifax, Nova Scotia
Counsel:	Ronan Holland, Esq., for the plaintiff David Farrar, Q.C., and Chris Madill, Esq., for the defendant

By the Court:

[1] This proceeding arises out of a motor vehicle accident. The plaintiff seeks damages for negligence arising out of a motor vehicle collision. The plaintiff says the defendant is liable in negligence. The defendant's position, as stated in the Defence, is that the collision was a minor one, and was insufficient to cause injury. The defendant does not dispute fault for the accident, but denies that the plaintiff was injured in the collision, and says that any injury did not arise from the collision; in the alternative, the defendant says the plaintiff has failed to mitigate any damages she did suffer.

EVIDENCE

The October 2001 collision

[2] On October 19, 2001, the plaintiff's vehicle was stopped at a stop sign at the intersection of Nantucket Avenue and Victoria Road in Dartmouth, NS, waiting for a vehicle to pass through the intersection before she turned right. The plaintiff was employed as an account representative at World Wide Source, a call centre in Dartmouth. She was on her way back to work after lunch, with one passenger, a

co-worker, Geraldine Highfield. The plaintiff testified that she had her hands on the wheel and was looking to the left, with her foot on the brake, when she felt a bang from behind, caused by the rear-end impact of the defendant's vehicle. Her vehicle moved about two-and-a-half feet forward. The plaintiff's seatbelt locked against her throat and she was thrown back, with her back hitting the seat and her head hitting the headrest.

[3] The plaintiff pulled the car around the corner and parked. While exchanging insurance information with the defendant, she did not leave her vehicle, due to pain in her neck. Ms. Highfield's evidence was that she exited and spoke to the defendant, while the plaintiff remained in the car.

[4] The plaintiff testified that her seatbelt locked in front of her neck over her collarbone, causing some pain. The left side of her neck and shoulder was sore. Emergency vehicles arrive within 15 minutes. She drove to a nearby police station and completed an accident report, indicating to the police that she was experiencing pain across her neck and shoulder. She then went home and lay down.

[5] The defendant, Wayne Duffy, testified that he was going between five and ten miles per hour when the collision occurred. He confirmed that the plaintiff did not get out of her car, although he saw her lean over to the glove compartment. There was minimal damage to either vehicle, and no attendance at the scene by emergency services.

Medical history

[6] The plaintiff, who was 32 years old at the time of the accident and 39 years old at the time of trial, had previously suffered from lumbago and sciatica (both forms of back pain), and had been involved in a motor vehicle accident in November 1999. In May 2001 she attended at her family physician with numbness in her left arm, tightness over the left breast and blurred vision. The doctor's note indicated that the plaintiff had a pinched nerve between the shoulder and neck, which had been present for five or six years and for which she was taking medication. Later the same month the plaintiff slipped and fell in a Loblaw's grocery store, resulting in lower back pain, right sciatica and calf numbness. She was subsequently off work until August 29, 2001. The resulting claim was settled for $15,000.00. During the months after the slip-and-fall, the plaintiff experienced

low back and right leg pain and some numbness in the feet, as well as neck pain and headaches. She had physiotherapy treatment during this time. By September the physician's and physiotherapist's notes indicate that the plaintiff's back pain was improving, although still present. She was able to return to work part-time.

[7] The plaintiff attended at the family physician's office on the day of the October 19, 2001, collision. She was experiencing neck pain, headaches and numbness in the left hand. On October 23, the doctor's note reported soft tissue contusions in the neck and occipital neuralgia. The plaintiff returned to work several days later, and experienced a headache and pain on the left side of her neck. The headaches became more severe, impairing her ability to work. On December 17, 2001, still suffering from headaches, she was put off work for two weeks. During early 2002, the plaintiff continued to suffer from headaches, occipital neuralgia, neck pain and left shoulder pain. After receiving injections of Depomedrol and Xylocine around the occipital nerve from Dr. Anna Wong in April 2002, the plaintiff reported improvement. By May she was no longer complaining of headaches, although there remained some low back pain and buttock pain. The plaintiff's physiotherapist, Simon Oakey, wrote, in a report dated June 14, 2002, that the plaintiff was reporting only minimal symptoms in the

lower back, and that her range of motion had improved. The plaintiff was discharged from physiotherapy on June 17, 2002.

[8] The plaintiff was off work between December 2001 and April 2002. When she returned to work in May 2002 the headaches were gone but she still had neck and shoulder pain. In September 2002, there was a recurrence of right-side lower back pain, with increasing pain over the right SI joint. She did not remain with her employer very long. She complained of sciatica because of long periods of sitting. In addition, she said, she had objections to the manner in which they conducted business. The plaintiff subsequently worked at several jobs for short periods, and opened a seasonal café in April 2003.

Other incidents and complaints

[9] The plaintiff slipped and fell in a grocery store in May 2001. She had physiotherapy treatments for the SI joint between May and October of that year, finishing shortly before the automobile collision. The pain was to the lower right hip area. She received $12,900.00 in the settlement; she was unable to recall the gross amount of the settlement paid by the insurer.

[10] Simon Oakey was qualified to give expert evidence in the area of physiotherapy. He is a graduate of the Department of Physiotherapy at Dalhousie University and was admitted to the Nova Scotia College of Physiotherapists in 2000. Mr. Oakey reported that the plaintiff had been referred to him due to injuries she sustained in the slip-and-fall accident in May 2001, after which she reported lower back pain and right sacroiliac dysfunction. She had been doing well with her return to work, and active physiotherapy was discontinued one week prior to the October 2001 accident.

[11] Mr. Oakey reviewed his records of the plaintiff's post-injury consultations. He saw the plaintiff on October 24, 2001, in order to assess her cervical spine and to determine her range of motion and the level of pain and tenderness. He said there was pain in the cervical spine, with a soft tissue injury. On October 26, she was reporting better subjective conditions and there was a better range of motion. On November 2, she reported soreness, but he noted increasing range of motion. On November 9, she had pain in the left side more than the right. There was fluctuation, but he observed that she had nearly full range of motion of the cervical spine. On November 27, the plaintiff reported tension-like headaches. In

December the headaches persisted, she was tight in the survival spine, and had restrictions in the upper part of her neck. Mr. Oakey referred her for acupuncture. In a report dated December 14, 2001, he stated that the plaintiff was being treated for spine dysfunction with ultrasound, moist heat, inferential current and manual therapy. She was also performing home exercises. Her pain relief was brief due to persistent headaches. He noted some gradual improvement, which was interfered with by sub-occipital headaches. On February 14, 2002, Mr. Oakey reported that the plaintiff was still suffering from headaches, and recommended that she be seen by a neurologist. He noted that she was experiencing a reduction from full normal movement. He did not see her after this date.

[12] On February 17, 2002, the plaintiff was discharged from physiotherapy, although her file was kept “on hold”. She was to continue with her home exercise program. The pain symptoms at this time were in a different location from the symptoms arising from the “slip-and-fall,” which were in the lumbar region.

The December 2002 collision

[13] In December 2002, about a year after the collision with which gave rise to this proceeding, the plaintiff was again injured when the vehicle she was in was rear-ended. She stated that before the second accident she still had left-side pain in her shoulder and down her arm, and tingling in her left hand. As a result of the December 2002 accident, she said, she had whiplash and pain in both shoulders and the right elbow. In a November 2005 "without prejudice" letter to the adjuster, Margie Morash, the plaintiff's counsel referred to a medical report by Dr. P.D. Muirhead, on the basis of which he described the plaintiff's condition as follows:

> ... Ms. Monk sustained neck and shoulder injuries and an injury to the right elbow. Tenderness was noted over the right medial epicondyle. She was also found to have tenderness over the left trapezius and the left cervical spine muscles. Rotation of the cervical spine was diminished. Over the following months, she continued to complain of neck pain and pain in her shoulder as well as elbow pain. She was prescribed medication and sent for physiotherapy. However, in March 2003 she continued to present with complaints of the previously mentioned injuries. On that [date] it was noted that there was a slight decrease in strength of the left arm.
>
> The medical records from Musquodoboit Harbour Medical Clinic disclose that as of September and October 2004, this lady was continuing to suffer from left sided neck pain.
>
> Although there was a previous slip and fall accident in May 2001 and a previous motor vehicle accident in October 2001, it does not seem as if those accidents have much of a bearing on the [present] injuries sustained in the present accident.

> I believe there is ongoing neck symptomology and I think it can fairly be stated that at least some of that neck symptomology can be attributed to the present accident.

[14] The claim settled for $31,500.00, all inclusive, in January 2006.

[15] In 2003, the plaintiff was still experiencing left-side neck, shoulder and back pain as well as pain into her arm. She could not raise her left arm over her head. Her partner did the physical work while she handled the business side. She had further physiotherapy treatments. In February 2003, her massage therapist reported that the plaintiff's left upper back, shoulder and neck areas were tense and sore, limiting her movement due to pain and tension. The therapist reported that the plaintiff told had said she was looking to her right at the time of the collision, and noted that this was the cause of the tension on the left side. On February 11, 2003, the massage therapist noted that the left upper shoulder had a lump the size of a golf ball, which reduced in size in the following weeks. The therapist's notes also record that the plaintiff was complaining of headaches.

[16] In September 2003 the plaintiff was kicked in the temple while working as a bus monitor for special needs students. In 2004 and 2005 she was still

experiencing the same issues, but was still operating the café. She was also reporting pain and tingling in her left arm, ringing and popping in her right ear.

Dr. Bethune's treatment

[17] The plaintiff was referred to Dr. Drew Bethune in October 2005. Dr. Bethune is an orthopedic surgeon and head of thoracic surgery at the Capital Health District. He was qualified to give expert opinion evidence in the field of thoracic surgery. He diagnosed her with Thoracic Outlet Syndrome (TOS), based on her history, symptoms and physical examination. Among the symptoms Dr. Bethune noted were numbness in the left arm and hand; pain from her neck down her arm, with radiation to her fingers; and difficulty elevating her arm and inability to hold her arm above her head.

[18] In March 2006, the plaintiff went to Dr. John Sapp for nerve conduction studies. Dr. Sapp's testing revealed a mild right "tardy" ulnar nerve but otherwise was negative for peripheral nerve entrapments. Dr. Sapp regarded the findings as consistent with chronic or intermittent lower brachial plexus irritation or compromise, or TOS.

[19] Dr. Bethune performed thoracic outlet surgery to remove one of the plaintiff's ribs, and two muscles, in August 2006. Following surgery the plaintiff experienced improvement in the left side of her neck and shoulder. The heavy feeling was no longer present, and there was relief from the aching, with some residual pain. The notes indicate that the plaintiff had been symptomatic for four years prior to the surgery. On October 12, 2006, Dr. Bethune reported that the plaintiff had an excellent response and full use of her arm.

[20] In July 2007, the plaintiff again reported to her family doctor that she was experiencing pain in the left arm and numbness in the finger. Dr. Bethune saw the plaintiff again on September 6. He noted that she had done well until Christmas of 2006, but that the left arm swelling and pain had become progressively worse. Although she was in better condition than she had been pre-surgery, she was experiencing pain and numbness radiating down her left arm, and headaches that were different than those she had pre-surgery, involving the frontal area mostly, but sometimes to the left side of the head. Her reflexes were normal and she was able to elevate her arm satisfactorily. In other words, she had pain when he

touched her nerve, but she was able to function. Dr. Bethune was reluctant to recommend further surgery. He intended to treat her conservatively.

[21] Dr. Bethune saw the plaintiff again on February 11, 2008. She reported "transient episodes of muscle spasm and neck pain radiating to the left side of her face and neck, which occurs briefly, probably just lasting a few seconds every second day." There was some limitation of use of her left arm. She reported that driving for long periods was a problem. She also reported discomfort in the upper arm. She could sleep restfully as long as she was not on her left side. Dr. Bethune noted that the plaintiff had been evaluated in November 2007 by Dr. Thomas Loane, who did nerve conduction studies that suggested entrapment at her cubital fossa in the elbow, but no axonal injury and no motor neuron damage. Dr. Bethune did not believe that further surgery was called for. He suggested massage therapy for the shoulder girdle muscle.

[22] Dr. Bethune said the mechanics of the October 2001 accident are typical for the induction of Thoracic Outlet Syndrome. The plaintiff had a seat belt on and was looking to the left. The impact from behind induced a flexion/extension type of injury, where the two muscles that he removed form a triangle with the first rib,

and were producing pain on flexion and extension. In his opinion, the symptoms were caused by the October 2001 accident. The seatbelt may have contributed to the damage to the muscle due to the way she had turned her neck to look to the left. He stated that some symptoms do not manifest themselves until later, although he agreed that most of the symptoms would do so within a couple weeks from the accident. Nevertheless, her symptoms and history, as well as the early response to surgery followed by a relapse, left him with little doubt that the plaintiff had TOS.

[23] In cross examination, Dr. Bethune agreed that at the time of the initial examination he did not ask the plaintiff about the 2002 motor vehicle accident. It appears that what the plaintiff told Dr. Bethune was different from the information found in Dr. Muirhead's report, which Dr. Bethune did not have at the time. She reported to Dr. Muirhead on December 9, 2002 – shortly after the accident on December 6 – that she was experiencing neck, shoulder and right elbow pain, with tenderness over the left trapezius and the left cervical spine muscles and there was diminished rotation of the cervical spine. She was also tender over the right medial epincondyle. On December 23 she complained of worsening neck pain. On January 16, 2003, she presented with continuing left-side neck pain, and tenderness of the left trapezius and left occipital muscle. On March 25 she presented with

pain in the jaw, neck, hips and elbow. She reported that physiotherapy was helping with neck pain. At that time the plaintiff expressed the view that the left-side neck pain was due to the motor vehicle accident in December 2002. Dr. Muirhead concluded in his report – dated May 18, 2004 – that he had not seen the plaintiff for these problems again, and that he was "unable to establish any relationship between the injuries sustained in this accident and her previous accidents...."

[24] Dr. Bethune could not express an opinion as to whether the plaintiff's current problems resulted from the December 2002 accident or the October 2001 accident. He agreed that when she saw him, she attributed her main complaints to the 2001 accident. She did not tell him that the second accident had caused more vehicle damage than the first. Dr. Bethune stated, however, that TOS cannot occur in accidents occurring at low velocity. With respect to the 2002 accident, he believed that he inquired as to the speed of the vehicles.

[25] When Dr. Bethune saw the plaintiff he was not privy to the report of the massage therapist indicating that she was looking to the right at the time of the 2002 collision, which he said would have been useful information in determining the source of her problems. He was unsure if he had been aware of the 2004 fall,

in which the plaintiff struck her head, prior to preparing his report, although he said this would probably not have terribly significant in relation left-side neck, shoulder and arm pain, of which she complained several weeks later, because the left-side pain pre-dated 2004. He was unaware that she had been kicked in the head. Nor was Dr. Bethune aware that the plaintiff had reported numbness in her left arm and fingers on her left hand two days prior to the 2001 collision, and that she informed Dr. Thomas Loane, in a consultation on November 20, 2007, that she had experienced "problems with arm numbness probably seventeen years ago...," which symptoms "worsened dramatically after a motor vehicle accident six years ago."

[26] In reviewing the medical notes relating to the various prior incidents of which he had not been aware when he made his report, Dr. Bethune agreed that this information could have affected his opinion, and agreed with defence counsel's suggestion that "it certainly appears that prior to this motor vehicle accident, she was having problems in the area that we're talking about here today...".

The plaintiff's present condition

[27] After recuperating the plaintiff worked at an ICT call centre in late 2006 and 2007. She underwent additional physiotherapy. Her physical state improved. At trial the plaintiff said she still has occasional pain and stiffness in the left side of her neck, left shoulder and left collarbone. At times it gets worse, involving her arm and right shoulder. Occasionally the muscles will bulk up and stick out. While giving evidence she said she was having pain due to tension. She said she still has a "rubber" feeling in her ring and pinky fingers and her thumb. Her left elbow prevents her from lifting heavy objects or carrying a purse on her left shoulder. She has flare-ups with her back occasionally, depending on her sleeping position or the level of physical activity. Her medications include Tylenol and medication for anxiety and stress. On Dr. Bethune's recommendation, she had massage therapy three or four times per month, at a cost of $46 to $64 per treatment. Her mother suffers from alcoholism, which causes stress, and her employer is undergoing changes. She indicated that she would be going back to work shortly.

[28] Prior to the accident the plaintiff's son, who was eleven years old in 2001, was living with her. She did the chores and housekeeping, including laundry, cooking, yard work and taking care of animals. After the accident she was mostly

incapable of doing anything, and her mother did a good deal of the work that she had previously done herself. She found the medication debilitating until April 2002. She did not have money to hire outside help, although she paid for snow removal several times. Prior to the accident her boyfriend cleared the snow off the driveway. After the accident her friends, family and son would help do this work. She said she is unable to push or pull and unable to do ceilings, walls and windows above her shoulders, and cannot mow the lawn.

Settlements

[29] In cross-examination the plaintiff acknowledged that she settled claims relating to the slip and fall and the 2002 motor vehicle accident. She maintained that the 2002 accident caused whiplash, which was also present in 2001. She asserted that the left-sided pain was caused by the 2001 accident and was exacerbated by the 2002 accident. She agreed, however, that the letter to her insurance company regarding the 2002 accident included complaints arising from the 2001 accident.

[30] According to the correspondence between Ms. Morash and the plaintiff's counsel, the insurer offered to pay $23,000.00 in general damages for pain and suffering because the plaintiff was still suffering from the symptoms of her previous accidents (e.g. left-sided neck pain and headaches) when the second accident occurred. Ms. Morash wrote that the insurer's view was that the plaintiff was a "crumbling skull" claimant, although it is not clear whether the plaintiff accepted this characterization.

[31] On cross-examination the plaintiff agreed that in October 1998, she had been punched in the face and thrown across a table, and at that time had complained of a sore neck. She also agreed that she was kicked in the head in September 2003 by a student coming out of a school bus. At that time she complained of soreness in the left temple. She fell down on August 22, 2004, and struck the left side of her head, requiring her to attend at the emergency department, suffering bruises to the left side of her face. She acknowledged that she did not tell Dr. Bethune of these incidents, other than the 2001 slip-and-fall and the December 2002 accident. She said she had told Dr. Muirhead of all of the incidents.

[32] The plaintiff claims that the 2002 accident only exacerbated the complaints and symptoms arising from the 2001 accident. She settled the 2002 collision claim in 2006. When she met with Dr. Bethune, the claim for the 2001 accident was the only matter outstanding.

Vehicle damage

[33] After the collision the plaintiff checked her vehicle for damage with the police at the police station. She was unsure of the cost of repairs. Neither could she recall the extent of repairs required to repair the vehicle after the December 2002 accident. However, she testified on discovery as to the extent of the damage.

Section B claims

[34] Suzanne Gammon, a claims adjuster with Wawanesa, dealt with the October 2001 and the December 2002 claims, each of which gave rise to a Section B Claim.

The plaintiff received $2744.00 for weekly indemnity or wage replacement, and $1099.94 for medical expenses, on account of the 2001 collision claim. In determining the amount for wage replacement, she stated that she estimated the plaintiff's wages over the period of November 3, 2000 to November 2, 2001, to be $253.71. Ms. Gammon said there were no claims for housekeeping expenses. With respect to the plaintiff's purchase of an exercise machine, she said the insurer would pay for it if it was prescribed by a doctor.

FINDINGS OF FACT

[35] I make the following findings of fact:

> 1. The plaintiff was involved in a motor vehicle collision in Dartmouth, NS, on October 19, 2001. Her vehicle was rear-ended by a vehicle driven by the defendant. Both vehicles sustained little or no damage.
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> 2. Prior to the accident the plaintiff was earning $377.00 per week in salary and commissions. As a result of injuries arising from the October 2001 collision, the plaintiff missed approximately six months' work. During this time she received Section B indemnity payments in the total amount of $2744.00, covering the periods October 22-October 31, 2001 and December 17, 2001-

April 19, 2002, at a rate of $140.00 per week for 19 weeks plus three days.

3. The plaintiff attended physiotherapy for a period of four months and was discharged, without any need for further treatment, in April 2002. She was almost entirely free of symptoms.

4. The plaintiff returned to work in May 2002.

5. Prior to the October 2001 collision, the plaintiff had a slip-and-fall accident in a supermarket in May 2001, which resulted in lower back and sciatic pain. She received in hand $12,900.00 as part of a settlement of this claim.

6. The plaintiff was involved in another motor-vehicle collision in December 2002, as a passenger in a vehicle that sustained significant damage. As a result of this collision, the plaintiff complained of a number of injuries, including neck and shoulder injuries, an injury to the right elbow, tenderness over the right medial epicondyle, tenderness of the left trapezius and left cervical spine muscles, and diminished rotation of the cervical spine. She settled the resulting claim in 2006 for $31,500.00.

7. Dr. Drew Bethune diagnosed the plaintiff with Thoracic Outlet Syndrome (TOS). This diagnosis was confirmed by Dr. Sapp after further testing was done.

8. The plaintiff did not advise Dr. Bethune of the severity of the December 2002 motor vehicle accident, nor did she advise him about the 2001 slip-and-fall.

9. The plaintiff is capable of only light or sedentary work.

10. The plaintiff has not established on a balance of probabilities that the TOS is entirely attributable to the October 2001 motor vehicle accident.

ARGUMENTS

The law of causation

[36] The legal issue in this case involves the question of causation as it relates to the plaintiff's various complaints since the October 2001 collision. The general

principles of causation are set out in several decisions of the Supreme Court of Canada. In *Athey v. Leonati*, [1996] 3 S.C.R. 458, Major J., for the court, described the "but for" and "material contribution" tests applicable to issues of causation (citations omitted):

> 13 Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury....
>
> 14 The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant....
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> 15 The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury.... A contributing factor is material if it falls outside the *de minimis* range....

[37] Major J. went on to warn against an excessively rigid approach to causation:

> 16 In *Snell v. Farrell*, [1990] 2 S.C.R. 311], this Court recently confirmed that the plaintiff must prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision; as Lord Salmon stated in *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475, at p. 490, and as was quoted by Sopinka J. at p. 328, it is "essentially a practical question of fact which can best be answered by ordinary common sense". Although the burden of proof remains with the plaintiff, in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof.

> 17 It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring.... As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence....

[38] Major J. concluded that "[t]he law does not excuse a defendant from liability merely because other causal factors for which he is not responsible also helped produce the harm.... It is sufficient if the defendant's negligence was a cause of the harm..." (para. 19). He emphasized that there is no apportionment between tortious and non-tortious causes:

> 20 This position is entrenched in our law and there is no reason at present to depart from it. If the law permitted apportionment between tortious causes and non-tortious causes, a plaintiff could recover 100 percent of his or her loss only when the defendant's negligence was the sole cause of the injuries. Since most events are the result of a complex set of causes, there will frequently be non-tortious causes contributing to the injury. Defendants could frequently and easily identify non-tortious contributing causes, so plaintiffs would rarely receive full compensation even after proving that the defendant caused the injury. This would be contrary to established principles and the essential purpose of tort law, which is to restore the plaintiff to the position he or she would have enjoyed but for the negligence of the defendant.

[39] The court further discussed the "but for" test in *Resurfice Corp. v. Hanke*, [2007] 1 S.C.R. 333, 2007 SCC 7. McLachlin C.J.C. writing for the court, addressed the appellant's submission that the Court of Appeal had erred by

(allegedly) "suggesting that 'comparative blameworthiness' is a necessary component of the causation analysis. The suggestion attributed to the Court of Appeal," the Chief Justice wrote, "is that a court must approach causation not simply by asking whether the defendant's negligent act caused the loss, but by looking globally at all possible causes" (para. 16). She emphasized the continued primacy of the "but for" test:

> 19 The Court of Appeal erred in suggesting that, where there is more than one potential cause of an injury, the "material contribution" test must be used. To accept this conclusion is to do away with the "but for" test altogether, given that there is more than one potential cause in virtually all litigated cases of negligence. If the Court of Appeal's reasons in this regard are endorsed, the only conclusion that could be drawn is that the default test for cause-in-fact is now the material contribution test....
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> ...
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> 21 [T]he basic test for determining causation remains the "but for" test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory negligence may be apportioned, as permitted by statute.
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> 22 This fundamental rule has never been displaced and remains the primary test for causation in negligence actions. As stated in *Athey v. Leonati*, at para. 14, per Major J., "[t]he general, but not conclusive, test for causation is the 'but for' test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant". Similarly, as I noted in *Blackwater v. Plint*, at para. 78, "[t]he rules of causation consider generally whether 'but for' the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities."

> 23 The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and the defendant's conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone": *Snell v. Farrell*, at p. 327, per Sopinka J.

[40] The Chief Justice went on to discuss the proper circumstances for application of the "material contribution" test as an exception to the "but for" test:

> 24 However, in special circumstances, the law has recognized exceptions to the basic "but for" test, and applied a "material contribution" test. Broadly speaking, the cases in which the "material contribution" test is properly applied involve two requirements.
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> 25 First, it must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test. The impossibility must be due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. In other words, the plaintiff's injury must fall within the ambit of the risk created by the defendant's breach. In those exceptional cases where these two requirements are satisfied, liability may be imposed, even though the "but for" test is not satisfied, because it would offend basic notions of fairness and justice to deny liability by applying a "but for" approach.
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> 26 These two requirements are helpful in defining the situations in which an exception to the "but for" approach ought to be permitted. Without dealing exhaustively with the jurisprudence, a few examples may assist in demonstrating the twin principles just asserted.
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> 27 One situation requiring an exception to the "but for" test is the situation where it is impossible to say which of two tortious sources caused the injury, as where two shots are carelessly fired at the victim, but it is impossible to say which shot injured him: *Cook v. Lewis*, 1951 CanLII 1 (S.C.C.), [1951] S.C.R. 830.

> Provided that it is established that each of the defendants carelessly or negligently created an unreasonable risk of that type of injury that the plaintiff in fact suffered (i.e. carelessly or negligently fired a shot that could have caused the injury), a material contribution test may be appropriately applied.
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> 28 A second situation requiring an exception to the "but for" test may be where it is impossible to prove what a particular person in the causal chain would have done had the defendant not committed a negligent act or omission, thus breaking the "but for" chain of causation.... Once again, the impossibility of establishing causation and the element of injury-related risk created by the defendant are central.

[41] The defendant submits that *McNaughton v. Ward*, 2006 NSSC 162, resembles the present case on its facts. In *McNaughton* the plaintiff was injured when her car was rear-ended by the defendants' vehicle. The appellant sought damages for chronic pain, which she said left her permanently disabled and incapable of earning income. Kennedy C.J.S.C. held that the appellant suffered a soft tissue injury in the collision, but that the collision did not cause or materially contribute to her ongoing condition, which he concluded was more likely caused by a work-related injury that occurred after the motor vehicle collision. He made the following comments about the expert evidence offered by the plaintiff:

> 80 The plaintiff's experts routinely suggested that the plaintiff's medical circumstances that they observed were caused by the motor vehicle accident. However I agree with the defendants that these opinions were compromised.

> 81 Dr. Nurse attributed the plaintiff's condition to the motor vehicle accident, but acknowledged that he didn't know the details of the workplace incident. He was aware of it only because he had read references to the Workers' Compensation application.
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> 82 Dr. Mahar agreed on cross-examination that he formed his opinions in a "vacuum" in that he did not have the files of Dr. Furlong the dentist, Dr. Holland the family doctor, or the Workers' Compensation application documentation.
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> 83 Dr. McGillvray related the plaintiff's present problems to the motor vehicle accident, although he did not have access to her workplace records, any of the reports from other medical doctors, or any knowledge of her medical circumstances prior to the motor vehicle accident. He relied entirely on the plaintiff to provide him with her medical history.
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> 84 Dr. Saunders believed that the plaintiff's present jaw problems were caused by the motor vehicle accident. She did not know that the plaintiff had been treated by Dr. Furlong for "clenching" of the teeth. She was not told about the workplace incident. She agreed that had she had this information, that she would have been "put on her inquiry."

[42] He was not satisfied that the motor vehicle accident was responsible for any of the plaintiff's ongoing medical problems, holding that it did not materially contribute to her present condition. The Court of Appeal held, at 2007 NSCA 81, that the trial judge correctly applied *Athey v. Leonati*, finding that the record supported his view that the respondents' experts' opinions should be preferred to those offered by the appellant's experts. Saunders J.A., for the court, said:

> 103 Unlike the situation in *Athey*, there is here no chain of causation, and no injury that was "aggravated" by the motor vehicle accident. The trial judge specifically rejected the appellant's theory that the workplace incident had

> somehow exacerbated or aggravated injuries sustained earlier from the collision. He said there was no evidence that persuaded him in that regard. In very clear and strong language the trial judge explained why in his opinion the collision did not cause or materially contribute to Ms. McNaughton's current complaints. Accordingly - and applying the principles from *Athey* - he awarded the appellant $25,000.00 in general damages as compensation for the only loss caused or contributed to by the respondents' negligence.

[43] An application for leave to appeal to the Supreme Court of Canada was dismissed with costs: [2007] S.C.C.A. No. 488.

Argument on damages

[44] The defendant’s position is that the plaintiff had fully recovered from any injuries arising from the October 2001 accident by the time of the December 2002 accident, and that the latter accident was the proximate cause of the injuries for which she seeks compensation in this proceeding. The defendant notes that by June 2002 the plaintiff was discharged from physiotherapy as “fully functional,” with only minimal ongoing lower back symptoms and no ongoing cervical pain. According to the defendant, the cervical pain or discomfort did not arise again until after the December 2002 collision.

[45] With respect to the delay in symptoms of Thoracic Outlet Syndrome, the plaintiff refers to *Dembowski v. Streliev*, 1998 CanLII 4599; 1998 CarswellBC 1563 (B.C.S.C.), where Williamson J. noted, at para. 25, that "the evidence is that thoracic outlet syndrome brought on by trauma is often not evident for a considerable period of time following the insult." The plaintiff submits that thoracic outlet syndrome entitles her to damages above the *Smith v. Stubbert* range, for an injury that is "persistently troubling but not totally disabling": *Smith v. Stubbert* (1992), 117 N.S.R. (2d) 118; 1992 CarswellNS 250 (C.A.), at para. 33. The plaintiff relies upon *Thompson v. Compton* (1983), 59 N.S.R. (2d) 79; 1983 CarswellNS 185 (S.C.T.D.); *Stewart v. Nickerson* (1986), 73 N.S.R. (2d) 175; 1986 CarswellNS 355 (S.C.T.D.); *Haley v. Air Canada* (1998) 171 N.S.R. (2d) 289, 1998 CarswellNS 383; 1998 CanLII 1140 (S.C.); affirmed at 177 N.S.R. (2d) 400, 1999 CarswellNS 164 (C.A.). She also refers to the British Columbia decisions in *Dembowski* and *Mowat v. Orza,* 2003 CarswellBC 573 (B.C.S.C.).

[46] The plaintiff submits that her TOS is more severe than those in the B.C. cases, where surgery was not required. She says her injuries are more consistent with those in *Haley*, where surgery was required, and general damages were assessed in the amount of $85,000.00. The plaintiff says the *Smith v. Stubbert*

range would be between $24,000.00 and $54,000.00 in current dollars. Collectively, she says she has suffered injuries referable to the accident up to the date of trial, including neck pain, headaches, pain radiating to the left shoulder with tingling and numbness in the left hand, restriction of movement and TOS. She seeks general damages of $75,000.00.

[47] The defendant says there is a disagreement as to how the accident occurred. He submits that there is no suggestion in the medical reports that the plaintiff was looking to the left when the collision occurred, as her evidence indicates she was doing. The defendant suggests that such a mechanism may have been suggested to the plaintiff in order to provide a basis for the injuries she complains of. The defendant has not made out the allegation that the plaintiff deliberately made up evidence on this point.

Timing of the plaintiff's symptoms

[48] On May 3, 2001, the plaintiff complained of a pinched nerve in her neck. She had been complaining about this for five or six years prior to the accident. This is the same area that Dr. Bethune looked at later. The plaintiff later described this

incident as a panic attack, not a pinched nerve. When she saw Dr. Loane, however, she acknowledged that her complaints had been present for some 17 years, which she never told Dr. Bethune or other health care professionals.

[49] Following the October 2001 collision, the plaintiff reported tingling in her fingers. However, she had complained of tingling in her fingers prior to the accident. Two days before the accident she reported the same symptoms. She had cervical spine problems and restriction and the range of motion and numbness in her arm and fingers, as noted in the physiotherapy notes. She never reported this to Dr. Bethune. After the accident she complained of right-side cervical pain, not left-side, as she now claims. According to the defendant, then, the arm and finger numbness, tingling and pain were present prior to the accident. The defendant also submits that there is no evidence that the plaintiff's headaches developed as a result of the accident, or that the mechanism of the injury would have caused headaches. In fact, the plaintiff had a history of headaches prior to this accident. Therefore, the defendant submits, no substantial connection has been established between the headaches and the accident.

[50] By April 30, 2002, the plaintiff reported that she was feeling much better and that her headaches were gone. By May 1 the physiotherapy reports indicate good progress and no ongoing headaches. On June 19, 2002, she was discharged from physiotherapy. The notes indicate that she had full function, noting only minimal symptoms in her lower back. There are no further complaints in any medical records about her neck, shoulder or arm until after the accident of December 2002, some six months later.

[51] Between October 2001 and June 2003 there is no mention of problems in the plaintiff's left hand. She reported recurring pain in her left shoulder on June 2, 2003. She was slightly tender over the mid-left trapezius and had numbness in her left arm when she tried to blow dry her hair. In a report dated July 8, 2005, Dr. Muirhead stated that there had been no further mention of accident sequelae since July 2003. In his report of may 18, 2004, Dr. Muirhead indicated that he was unable to establish a relationship between the injury sustained in this accident and the other accidents.

[52] According to the defendant, by the time the plaintiff settled the 2002 accident claim in 2006, all of the injuries arising from the 2001 accident had

resolved. The 2001 injury had not recurred and therefore there is no causal connection between the 2001 accident and her current complaints, which only appeared five or six years later; this is particularly the case with the TOS. According to the defendant, the plaintiff's claim that the TOS was caused by the 2001 accident is neither credible or supported by the medical evidence. She has not proven a substantial connection or indeed the lesser standard of material contribution.

[53] The plaintiff says that immediately after the 2001 collision she complained of symptoms which continue to the present, including pain in the right side of the neck, soreness in the throat, headaches and numbness in the left hand. After the accident on October 19, 2001, she says, she was in virtually constant pain for six-and-a-half months. On October 23, 2001, four days after the accident, she experienced occipital tenderness and occipital neurology (i.e. headaches). The plaintiff says the headaches came on quickly and became more severe, causing her to be sent to a neurologist. Her headaches were such that she was absent from work for about 20 weeks. In the plaintiff's view, the incidents other than the October 2001 collision have no significance to her claim. Her previous migraines were different in nature than the headaches she suffered after the collision. The

kick in the head caused no injury. A fall on the sidewalk, hitting her head, was of no consequence. In response to the suggestion that certain of the current problems were mentioned in the letter settling the 2002 claim, counsel for the plaintiff stated that the right elbow injury resulted from the 2002 accident, but the remainder of the complaints relate partly to the 2001 accident and partly to the 2002 accident. The letter did not indicate that any symptoms related to the first accident or to the slip-and-fall.

[54] The timing of the development of the plaintiffs Thoracic Outlet Syndrome has not been fully explored. It was only around the time of the settlement of the 2002 accident claim (late 2005 and early 2006) that Dr. Bethune assessed and diagnosed the plaintiff with TOS. The plaintiff maintains, however, that TOS was not an element in the settlement of the 2002 accident. It was not mentioned in the settlement or demand letter, although this omission does not eliminate the concern that it ought to have been mentioned.

[55] As to the plaintiff's neck complaints, which existed prior to the 2001 accident, Dr. Bethune did not have a complete medical chart before preparing his report. He knew the details of the 2001 accident and had sketchy details of the

2002 accident. It is doubtful that he had any further knowledge of the plaintiff's medical history.

[56] According to the plaintiff, it is necessary to consider the difficulties she experienced after the 2001 accident, even if the TOS element is removed; she experienced constant headaches, and varying levels of neck, arm and pain, for at least six months. Further, TOS, it is submitted, cannot simply be removed from consideration simply because it had not been diagnosed. The cumulative injuries, the plaintiff submits, would still be in the *Smith v. Stubbert* range.

[57] The defendant says, referring to the physiotherapy notes, that the first reference to headaches is on November 30, 2001, when the plaintiff reported having had a headache for nine days. There is also a reference to the plaintiff having reported headaches in the family physician's notes on November 6, 2001.

[58] As to the claim by the plaintiff that TOS is directly related to the October 2001 accident, the defendant says there is insufficient medical evidence to support this conclusion. The burden is on the plaintiff on a balance of probabilities. The correct test is the "but for" test. The evidence suggests that it was a medical

possibility that the TOS arose from the 2001 accident. According to the defendant, that is not sufficient.

[59] Dr. Bethune relied on the plaintiff when she told him that the December 2002 accident had little impact on her condition. He noted that it merely exacerbated a previous condition. He agreed that he would like to have known of the other events prior to preparing his report. Therefore, the defendant submits, Dr. Bethune's report must be weighed carefully, because he did not have the full background of the plaintiff's medical condition. The physiotherapy notes indicate that many of the complaints she raised to Dr. Bethune existed prior to the 2001 accident, and there were no complaints after the middle of 2002, when many of her problems had apparently resolved, prior to the 2002 accident.

[60] I am satisfied that the application of the "but for" test, as set out in *Athey* and *Resurfice*, results in some liability attributable to the defendant. The plaintiff experienced headaches, and varying levels of neck, arm and pain, for at least six months. I am satisfied on a balance of probabilities that the injuries she experienced would not have occurred to the degree that they did but for the October 2001 collision. I am not, however, satisfied that the plaintiff has proven on

a balance of probabilities that the Thoracic Outlet Syndrome would not have occurred but for the 2001 collision. The medical evidence is too uncertain, given the shortage of information about the plaintiff's medical history and about the two collisions (as well as other past incidents) that was available to Dr. Bethune when he was treating the plaintiff. In view of all the evidence I am satisfied that $30,000.00 is an appropriate award on account of the plaintiff's pain and suffering.

Loss of income

[61] The plaintiff was off work between December 2001 and May 2002, for approximately 20 weeks. She missed an additional eight weeks in 2006, recuperating from the TOS surgery.

[62] At the time of the October 2001 accident the plaintiff's earnings statement indicates gross earnings of $377.75 for the pay period. She received Section B indemnity payments for the period between October 2001 to April 2002, in the amount of $2744.00, covering a total of 19 weeks and three days. Assuming her total gross earnings over the 20 weeks (rounded up from 19 weeks plus three days) would have been $7555.00 (20 weeks times $377.75), she is entitled to recover that amount, less the Section B payments, for a total of $4811.00.

Loss of valuable services

[63] In addition to general damages, the plaintiff seeks damages on account of the impact of her injuries upon her domestic activities. She claims for loss of valuable services in accordance with *Carter v. Anderson*, [1998] N.S.J. No. 183 (C.A.). She seeks $10,000.00 under this head of damages. In order to establish such a claim, the plaintiff "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": *Leddicote v. Nova Scotia (Attorney General)*, 2002 NSCA 47; [2002] N.S.J. No. 160, at para. 50. The defendant says there is no indication that the plaintiff is required to pay for housekeeping work that she would otherwise be doing herself but for the accident, nor is there persuasive evidence that she will be unable to perform these tasks in the future.

[64] The defendant says there is no basis to find a distinct economic loss attributable to loss of housekeeping ability. I agree. In light of the evidence, I am not satisfied that the plaintiff has proven this aspect of her claim on a balance of probabilities. To the extent that loss of valuable services is considered in this case, it goes only to general damages.

CONCLUSION

[65] I award the plaintiff general damages in the amount of $30,000.00 on account of pain and suffering arising from the injuries she sustained in the October 2001 motor vehicle accident. On account of lost income she is entitled to collect

$7555.00 (20 weeks times $377.75), less Section B payments of $2744.00, for a total of $4811.00.

[66] If the parties are unable to agree on costs, I will accept written submissions within 30 days of the release of this decision.

J.