SUPREME COURT OF NOVA SCOTIA
Citation: *Gibson v. Julian*, 2016 NSSC 15

Date: 2016-01-12
Docket: Hfx No. 425438
Registry: Halifax

Between:

Debra Gibson

Plaintiff

v.

Mary R. Julian

Defendant

Judge: The Honourable Justice James L. Chipman

Heard: December 1 and 2, 2015, in Halifax, Nova Scotia

Counsel: Glenn E. Jones, for the Plaintiff
Donald V. Keenan, for the Defendant

By the Court:

Introduction

[1] This action arises from a motor vehicle accident which took place on March 9, 2012. The parties were the sole occupants/drivers of their respective vans involved in a low speed accident in an intersection in Dartmouth, Nova Scotia. Liability and damages are in issue.

[2] The lawsuit was filed on March 17, 2014, and the Defence was filed on May 13, 2014. On December 17, 2014, the plaintiff amended her Notice of Action to plead that it is within Rule 57. Accordingly, Ms. Gibson's claim is restricted to a maximum of $99,999.99 plus interest and costs (Rule 57.04(3)).

[3] At the outset of trial, the parties confirmed their agreement on special damages of $2,275.03. They also confirmed agreement on pre-judgment interest to be calculated at a rate of 2.5% on non-pecuniary damages and 4% on special damages. Finally, the parties agreed that in the event the minor injury cap applies, having regard to the date of the accident, the general damages amount is $7,956.

[4] The Court heard evidence from the parties and the plaintiff's mother. Further, six exhibits went in by consent; the first five consisting of photographs and maps and the sixth being a joint exhibit book comprised of these items:

1. Dr. Thomas D. Loane's *curriculum vitae* and September 15, 2014 report;
2. Reports and chart notes from Dr. Carla A. MacDonald;
3. The Physio Clinic file and printouts;
4. Natural Path Wellness Centre file, printouts and correspondence;
5. Lawton's prescription printouts;
6. Medavie/Blue Cross summary of benefits;
7. plaintiff's employment documents; and
8. plaintiff's vehicle damage appraisal documents.

Liability

<u>Debra Gibson</u>

[5] Ms. Gibson stated the March 9, 2012, accident took place at close to 1:00 p.m. on a Friday, while she was en route to work. She recalled that the weather was "a little cloudy" and that the roads were fine. With the assistance of exhibits

1-5, Ms. Gibson reviewed the circumstances of the accident. She was the seat-belted driver of her 2000 Toyota Sienna van. Nothing untoward occurred during the drive from her home until she reached the intersection of Tacoma Drive and Hartlen Street. While driving along Tacoma, as the plaintiff approached the intersection, she brought her van to a complete stop on the stop line (painted on the street), just before the four way stop sign. As she brought her vehicle to a stop on Tacoma, Hartlen Street was on her left and a mall parking lot was to her right.

[6] Once Ms. Gibson brought her vehicle to a stop, she made sure there were no pedestrians in her vicinity, looked in all directions, discerned it was safe to go forward, and accelerated. As she started off, she initially saw no other vehicles proceeding, but she said she "realized a car was coming when she was almost in front of my van". This other vehicle was coming from Hartlen Street. When Ms. Gibson realized it was in front of her, she put her foot on her brake; however, it was too late and the vehicles collided. On cross-examination, Ms. Gibson acknowledged she did not see the other vehicle go through the stop sign.

[7] Ms. Gibson said the accident occurred without warning. On impact, she recalled, her head moved backwards and then forwards. She said there was a "horrible sound" of her front bumper getting torn off. At the time of the collision, Ms. Gibson had her hands on the wheel. She said her seatbelt prevented her from hitting the windshield. The damage appraisal documentation confirms $2,775.89 damage to her Toyota Sienna van.

[8] The plaintiff was not sure of her speed as she entered the intersection; however, she said that she had just put her foot on the van's accelerator. In terms of distance travelled before the collision, the plaintiff had a precise estimate of 26 feet. In this regard, on the weekend before the trial, the plaintiff actually measured the distance between the stop line and the point in the intersection where she believes the accident occurred.

[9] On cross-examination, Ms. Gibson acknowledged that when she gave her statement to an adjuster shortly after the accident she said she thought she went forward a few inches before the collision occurred. Asked about the discrepancy, Ms. Gibson said, "I clearly misspoke [back] at the time".

[10] With the aid of exhibit 5 (depicting the defendant's damaged van), Ms. Gibson explained that the front of her Sienna hit the Dodge Caravan in the area of the passenger side door and sliding door.

[11] Immediately after the accident, the plaintiff pulled over to the side of the road, got out and picked up some debris from her van off the street. She then walked over to the mall parking lot where the other van had stopped. Upon meeting Ms. Julian, Ms. Gibson said she seemed confused. Ms. Gibson asked her why she had not stopped and received no reply. She recalled Ms. Julian saying she was very confused as she had been looking for a Fabricville store. Ms. Gibson noted that this store was nowhere in the vicinity of where the accident occurred. When the drivers exchanged vehicle information, Ms. Gibson said that the defendant initially could not produce her papers; however, she then found them in a puddle by the van.

[12] After the parties exchanged information, Ms. Gibson continued on her way to work. Upon seeing her damaged vehicle, Ms. Gibson recalled, co-workers asked what happened. She explained the situation to her supervisor and co-workers and called her mother.

[13] Ms. Gibson said she left work slightly early that day and thinks she was still in shock when she left. Once home, the plaintiff stated she felt somewhat tender and sore. On her mother's urging, Ms. Gibson filed a police report on the evening of the accident.

Mary Julian

[14] Ms. Julian resides in Indian Brook, Hants County. Nearing her mid-sixties, she works as a language teacher at the Indian Brook School.

[15] Ms. Julian has been a licensed driver for approximately forty years. On the day of the accident, she was the seat-belted driver of her 2006 Dodge Caravan.

[16] On the day of the accident, Ms. Julian had been at a meeting at the Dartmouth Ramada Inn. She left over the noon hour to go to Atlantic Fabrics to pick up some material. While taking her planned route she was forced by heavy traffic conditions to take a different exit and ended up in an unfamiliar area. On cross-examination, the defendant acknowledged that she went off on the wrong exit.

[17] While driving along Hartlen Street, she came upon a four-way stop, intersecting with Tacoma Drive. Ms. Julian said she brought her van to a stop and then the car across the street from her went through the intersection. Next, the car to her left went through the intersection, turning right onto Hartlen Street. At this

point, Ms. Julian stated, "I figured the car on my right would go across… it didn't move, so I left". She said that she waited "a minute or two" for Ms. Gibson's van (which she acknowledged was at the stop sign first) to move before she decided to drive through the intersection. Ms. Julian said she did not see the other vehicle move and the next thing she knew she was hit. She said that on account of the collision her van turned sideways.

[18] On cross-examination, she conceded that she "maybe waited two minutes" and then decided to go. Ms. Julian said that at the time she proceeded she was, "looking forward and didn't turn my head to the right to look where she was." On cross-examination it emerged that the defendant's peripheral vision is compromised. Indeed, Ms. Julian acknowledged that prior to the impact she did not see Ms. Gibson's van. Further, on cross-examination, Ms. Julian allowed that she saw the plaintiff move forward, "a little bit" and then stop again.

[19] Post-accident, the defendant recalls looking for her insurance card, which she ultimately found and provided to Ms. Gibson.

Law

[20] The *Motor Vehicle Act*, R.S.N.S. 1989, c. 293 (the *MV Act*) contains provisions relevant to the liability issue. The *MV Act* contains a general requirement to drive carefully:

> **Duty to drive carefully**
>
> 100(1) Every person driving or operating a motor vehicle on a highway or any place ordinarily accessible to the public shall drive or operate the same in a careful and prudent manner having regard to all the circumstances.

[21] The *MV Act* also requires drivers to obey stop signs:

> **Direction of peace officer or traffic sign or signal**
>
> 83(1) It shall be an offence for any person to refuse or fail to comply with any order, signal or direction of any peace officer.
>
> (2) It shall be an offence for the driver of any vehicle or for the motorman of any street car to disobey the instructions of any official traffic sign or signal placed in accordance with this Act, unless otherwise directed by a peace officer.

[22] Further, the *MV Act* sets out the statutory right-of-way for vehicles at an intersection:

> **Right of way or left turn at intersection**
>
> 122(1) The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection, and when two vehicles enter an intersection at approximately the same time, the driver of the vehicle on the left shall yield to the driver on the right.
>
> (2) The driver of a vehicle who has stopped as required by law at the entrance to a through highway shall yield to other vehicles within the intersection or approaching so closely on the through highway as to constitute an immediate hazard, but said driver having so yielded may proceed, and other vehicles approaching the intersection on the through highway shall yield to the vehicle so proceeding into or across the through highway

Analysis

[23] Both parties were attempting to drive straight through the intersection when the accident occurred. This was a "T-bone" collision as the front of the plaintiff's vehicle struck the passenger side of the defendant's vehicle. In assessing fault, I am mindful of the above cited *MV Act* provisions along with the totality of the evidence.

[24] Since there were no witnesses to the accident, I am left to determine liability on the basis of the physical evidence (photographs, maps and damage appraisals) together with the *viva voce* evidence of the parties. When I compare the evidence of Ms. Julian and Ms. Gibson on liability, I am left with the emphatic conclusion that Ms. Gibson was the more reliable and credible witness. For example, Ms. Gibson gave her evidence concerning the accident in a straightforward, confident manner. She was not shaken on cross-examination. Conversely, Ms. Julian was quite confused and her cross-examination served to underscore the uncertainty of her evidence.

[25] Ms. Julian admits that Ms. Gibson reached the intersection before she did. This fact, along with the fact that Ms. Gibson was to the right (and therefore in the dominant position) tilts the balance in her favour.

[26] At the time of the collision, I find that the defendant was disoriented and confused. She had missed her intended exit and found herself at an unfamiliar

intersection. Ms. Julian did not even appreciate that what was ahead of her was a mall parking lot, as she thought it was an extension of the street she was on.

[27] I do not accept Ms. Julian's evidence that she could have waited on Ms. Gibson for up to two minutes before she decided to proceed. Rather, I have determined that Ms. Julian (who I find had compromised peripheral vision) drove through the intersection, without regard to her stop sign or the Gibson van. I find the Gibson van arrived at the intersection first and that Ms. Gibson was slowly beginning to drive through the intersection when the collision occurred.

[28] I find that Ms. Julian proceeded through the intersection without properly checking to her right (where Ms. Gibson was situated). Her compromised peripheral vision let her down and she was struck by Ms. Gibson, whom I find had come to a proper stop at her sign on Tacoma Drive and was slowly beginning to drive through the intersection when the accident happened. In the result, I find the defendant 100% liable for the accident with Debra Gibson on March 9, 2012.

Damages

[29] The plaintiff (DOB October 2, 1969) is a high school graduate and received a Bachelor of Commerce degree in 1993. While at St. Mary's University, Ms. Gibson played on the varsity field hockey team and worked part-time at The Tower fitness facility. Upon graduation, she became a full-time employee at The Tower and then worked in the Employment and Cooperative Education Departments of S.M.U.

[30] Following 15 years of employment at S.M.U., Ms. Gibson became a part-time employee with the Halifax Public Libraries, where she has worked for just over eight years. The plaintiff works as a library assistant 3 at the Woodlawn Public Library.

[31] As library assistant 3, the plaintiff works in the circulation department of the library. Her job involves customer relations as well as some lifting and moving of bins. The plaintiff explained the bins measure approximately 1.5 feet x 3 feet and are used to hold books, DVDs and CDs. She testified the heaviest of these bins would be in the range of 30-40lbs. Overall, she described her job as "quite physically demanding", albeit acknowledging that there is ample staff to assist with lifting the bins. On cross-examination, Ms. Gibson agreed assistance with lifting is no issue with her employer. Indeed, she allowed, "everybody helps everybody".

[32] During her eight years with the library, the plaintiff has worked a steady schedule of three- or four-hour shifts on Mondays, Wednesdays and Fridays. Further, every second weekend she works a seven-hour shift from 9:00 a.m. to 5:00 p.m.

[33] Over the years, the plaintiff has also done some filling in, taking shifts involving children's programming at the library. She explained that she has received training and is now qualified to do the library assistant 6 job. This position involves less physical activity and I formed the impression that Ms. Gibson aspires for such a position. Having said this, she readily acknowledged that prospects for full-time positions within the system are bleak. On cross-examination, Ms. Gibson agreed there are many more employees in the system with greater seniority than her. In any event, given her accident-related injuries, the plaintiff says she cannot contemplate full-time work because she needs recovery time.

[34] Ms. Gibson explained that sick days accumulate at her job at a rate of 1.25 days per month. Since she does not receive health benefits, the plaintiff relies on her Blue Cross plan, which she has had for about five years.

[35] Ms. Gibson was married in 2000, separated in 2009 and divorced in 2013. She is the primary caregiver for her two sons, ages twelve and nine. Both boys have learning challenges and I formed the impression Ms. Gibson has been a very committed and loving mother.

[36] The plaintiff and her sons reside in a flat in a 55-year-old home in the Penhorn area. Ms. Gibson's mother lives in the lower level and is closely involved with her daughter and grandchildren.

[37] Ms. Gibson was asked about her medical history. She acknowledged high blood pressure, occasional headaches, right knee difficulty, and a period of extreme stress in 2011. She elaborated that the stress was caused by issues with her (now) former husband and this resulted in an increase of stress-related headaches. Other than during this period of time, the plaintiff stated her headaches were infrequent and they did not prevent her from carrying out daily activities. Further, she explained that four sessions of massage therapy helped to resolve the headaches. She added that, prior to the accident, she essentially only saw her doctor for yearly check-ups.

[38] On cross-examination, Ms. Gibson was taken to various entries in Dr. MacDonald's chart, which served to refute the above statements. When she was shown entries predating the stressful period of 2011, the plaintiff acknowledged that her marital breakdown caused a lot of stress and extended beyond one year.

[39] On cross-examination, she was also taken to entries demonstrating pre-accident Prozac and Trazodone prescriptions. She also acknowledged that the stressful period stretched into 2012. Further, the plaintiff agreed an ongoing major stressor in her life is on account of her younger son's learning and other issues.

[40] With respect to the headaches and causation, on cross-examination the plaintiff was stepped through various notes. It emerged that the duty doctor did not record anything about headaches during the initial post-accident visit of March 10, 2012. Ms. Gibson was next seen by her family on March 20; however, once again, there is no mention of headaches. Headaches are mentioned for the first time during her next visit with Dr. MacDonald on April 3, 2012. Further, the next note (dated July 5, 2012) records, "having lots of headaches that start at the back of her head and radiate forward". Notwithstanding this notation, the plaintiff denied on cross-examination that the accident related headaches extend forward. She maintained that the headaches are in the area of a "bandwidth" at the back of her neck.

[41] On cross-examination, the plaintiff was also directed to her last visit with Dr. MacDonald in advance of the accident, which occurred on February 1, 2012. She agreed that this visit concerned pain she was having in both of her knees bilaterally and that it felt like they might give out at times. She acknowledged she has an arthritis condition in her knees and that she has tried Celebrex. Ms. Gibson agreed that during this appointment she was prescribed physiotherapy for her knees. Further, the plaintiff was referred to a 2015 note referring to "severe knee pain", and acknowledged that at times when walking up stairs her knees give out.

[42] Ms. Gibson said that prior to the accident she looked after all of the housework. In addition to routine daily activities, she recalled repairing and replacing her back deck and portions of a fence, and laying flooring in the lower level of her house.

[43] In terms of pre-accident activities, the plaintiff recalled golfing, bowling, walking and generally participating in activities with her boys. On cross-examination, she acknowledged that golfing and bowling stopped many years prior to the accident.

[44] The day after the accident, Ms. Gibson recalled waking up with excruciating pain in the back of her head, by her back hairline. She said this made her feel nauseated, and that she was also experiencing tingling in her face and arm (she did not specify which arm). The Saturday in question was a day when she was supposed to go to work; instead, she went to see the duty doctor at the Woodlawn Medical Clinic. She recalled being prescribed a muscle relaxant and being told she had experienced whiplash. The doctor told her to stay off work and follow up with her regular family physician. Ms. Gibson then went back home and laid on her couch, allowing, "that's how I was for quite some time". In this regard, she described her pain as "debilitating, excruciating". Ms. Gibson added that she had never experienced this type of pain before and that it continues when she has flare-ups.

[45] Immediately following the accident, Ms. Gibson missed six weeks from work. During this time, she had appointments with Dr. MacDonald and referrals to massage and physiotherapy along with prescription medication. She saw a naturopath doctor two times and on one occasion had an injection of a natural substance to the back of her head. Ms. Gibson recalled no further injections until this past June when Dr. MacDonald gave her a steroid injection to the back of her head. On cross-examination, the plaintiff said that this shot was, "helpful" and the benefit has only recently started to wear off.

[46] In terms of current treatments, the plaintiff no longer relies on therapy or prescriptions. She periodically takes Tylenol and uses a heating pad. Given the cost, Ms. Gibson only occasionally receives massage therapy. Following her appointment with Dr. Loane (at the behest of her Section B insurer), the insurance company ceased paying for massage therapy.

[47] Asked to elaborate about her symptoms shortly after the accident, Ms. Gibson described pain between her shoulder blades which she likened to a "knife going in my back". She reiterated that she experienced "excruciating pain" in the back of her head along with nausea and numbness. Questioned about these headaches as compared to her pre-accident headaches, Ms. Gibson said there was no comparison. In this respect, she likened the former headaches to tension-type headaches in the temples, whereas the latter she described as completely debilitating. She said the headache pain has, "impacted basically every facet of my life… when it is at its worst, I can't do anything".

[48] During the time the plaintiff was off work, she said, her mother took over the housework and looking after her sons.

[49] When Ms. Gibson returned to work, she described the pain between her shoulder blades as better. She added that the massage therapy, exercise, a Magic Bag and medication were beneficial.

[50] Although she returned to work after six weeks, Ms. Gibson said she "honestly didn't feel ready". She said she went back to work because she was afraid that if she took more time off, her job might be in jeopardy. The plaintiff testified that she had no relief from ongoing headache pain and accordingly, has not returned to the pre-accident household routine.

[51] Upon returning to work, Ms. Gibson said she was incapable of lifting the heavier bins. She asked her co-workers for assistance and they were "very good" about chipping in. Over the years since the accident, Ms. Gibson said there were "a handful of times" when she could not get herself in to work and called in sick. She added that on the days she went to work, it was all she could do and that her mother took over and did everything on the home front.

[52] Over the years, the plaintiff says that her main complaint is the headaches at the back of her head. Ms. Gibson maintains that she has flare-ups approximately two times a week. On these occasions, she must lie on the couch, take Tylenol and, "try to work through it". She says that the flare-ups may last between two hours and a day. During the time she is in flare-up, the plaintiff relies on her mother to get things done around the house. Having said this, Ms. Gibson acknowledges her children are getting older and that especially her older son is taking on more responsibility and helping out with chores. Further, she has a neighbour who, on snow days, helps by clearing the end of her driveway.

Marlene Gibson

[53] The plaintiff's mother, Mrs. Gibson, is retired from her position with the Metro Community Housing Association. Now in her early seventies, Mrs. Gibson resides in the lower level of the house she co-owns with her daughter.

[54] Mrs. Gibson was asked about her daughter prior to the accident whom she described as, "super independent" and a "typical type-A personality"; Mrs. Gibson said Debra took on "all kinds of projects" and did everything with, "no problems".

[55] After the accident, Mrs. Gibson described her daughter as incapable of doing anything. She said this period of time lasted for four or five weeks. She added although her daughter can now do a fair amount of duties, the way she does these activities is, "entirely different".

[56] Mrs. Gibson said that her grandchildren have medical issues but that her daughter is, "tremendous… they are coming along very, very well."

[57] Mrs. Gibson said her own life has changed dramatically since the accident because she has taken on many more responsibilities. She pointed out her daughter cannot do the laundry (it is located on the lower level where Mrs. Gibson resides) and that she does all of the cooking, adding, "I've taken over a lot of the mothering role."

Medical Evidence

[58] Once again, the physicians did not give oral evidence. Furthermore, their reports were not in compliance with Civil Procedure Rule 55, which governs the procedure about expert opinion: Rule 55.01(1). It requires, *inter alia*, "experts to make written representations to the Court about the independence of the expert and the expert's participation in the proceeding": Rule 55.01(1)(c). An expert's report must be filed in accordance with Rule 55: Rule 55.02. The requirements respecting the content of experts' reports are found at Rule 55:04, which states:

> **Content of expert's report**
>
> 55.04 (1) An expert's report must be signed by the expert and state all of the following as representations by the expert to the court:
>
> > (a) the expert is providing an objective opinion for the assistance of the court, even if the expert is retained by a party;
> >
> > (b) the witness is prepared to testify at the trial or hearing, comply with directions of the court, and apply independent judgment when assisting the court;
> >
> > (c) the report includes everything the expert regards as relevant to the expressed opinion and it draws attention to anything that could reasonably lead to a different conclusion;
> >
> > (d) the expert will answer written questions put by parties as soon as possible after the questions are delivered to the expert;

(e) the expert will notify each party in writing of a change in the opinion, or of a material fact that was not considered when the report was prepared and could reasonably affect the opinion, as soon as possible after arriving at the changed opinion or becoming aware of the material fact.

(2) The report must give a concise statement of each of the expert's opinions and contain all of the following information in support of each opinion:

(a) details of the steps taken by the expert in formulating or confirming the opinion;

(b) a full explanation of the reasons for the opinion including the material facts assumed to be true, material facts found by the expert, theoretical bases for the opinion, theoretical explanations excluded, relevant theory the expert rejects, and issues outside the expertise of the expert and the name of the person the expert relies on for determination of those issues;

(c) the degree of certainty with which the expert holds the opinion;

(d) a qualification the expert puts on the opinion because of the need for further investigation, the expert's deference to the expertise of others, or any other reason.

(3) The report must contain information needed for assessing the weight to be given to each opinion, including all of the following information:

(a) the expert's relevant qualifications, which may be provided in an attached resumé;

(b) reference to all the literature and other authoritative material consulted by the expert to arrive at and prepare the opinion, which may be provided in an attached list;

(c) reference to all publications of the expert on the subject of the opinion;

(d) information on a test or experiment performed to formulate or confirm the opinion, which information may be provided by attaching a statement of test results that includes sufficient information on the identity and qualification of another person if the test or experiment is not performed by the expert;

(e) a statement of the documents, electronic information, and other things provided to, or acquired by, the expert to prepare the opinion

[59] When I examine the doctors' reports in this case, I am particularly concerned about the opinions proffered by the plaintiff's family physician, Dr. MacDonald. Dr. MacDonald's three reports (dated June 13, 2013, April 16, 2014, and (fax dated) July 4, 2014), are very brief. For example, her most recent report, reads in its entirety:

> Dear Mr. Jones,
>
> I am writing to you on behalf of my patient, Debra Gibson regarding an update on her condition. Ms. Gibson continues to suffer from daily cervicogenic headache most certainly related to her accident. Her occipital nerve has been irritated by her whiplash injury and has been slow to recover. It does improve with massage and has been responding somewhat to the nortriptyline 20mg at bedtime. I would recommend she continue on the nortriptyline and attend massage therapy as needed. She continues to have flares when she overdoes things and at times needs increased frequency of visits to the massage therapist. If you require any further information, feel free to contact me.
>
> Sincerely,
>
> Carla MacDonald, MC, CCFP

[60] For reasons that will be more fully developed below, I do not have great confidence in this expression of opinion. I say this in the context of the entire body of the evidence. When I review the totality, I am left with the conclusion that Dr. MacDonald's opinion is built on a shaky foundation. Indeed, I am left to wonder (I did not have the benefit of cross-examination) whether the doctor was more of an advocate for her patient than a true expert as defined by Rule 55. Accordingly, in deciding this case I have chosen to give Dr. MacDonald's opinion less weight than the opinion evidence of Dr. Loane.

[61] Dr. Loane is a physical medicine and rehabilitation specialist. His *curriculum vitae* was in evidence. His September 15, 2014 report, entitled "Independent Medical Examination", is very detailed and comprises ten pages. The reader is provided with a complete background and understanding of the author's opinion. I find the report, while not a strict Rule 55 expert report, nevertheless offers a detailed account and balanced perspective. This is perhaps not surprising given Dr. Loane's longstanding excellent reputation before the Court.

[63] In his report, Dr. Loane gave these diagnoses on account of the accident:

1. Flexion cervical sprain – WAD II with residual flexion range of motion restriction
2. Chronic daily headache post MVA

[64] Dr. Loane goes on to note as follows at p.7:

> Ms. Gibson describes a relatively low impact frontal collision two and one half years ago. Her initial symptoms are consistent with the flexion cervical sprain affecting the neck and shoulder girdle. Her symptoms of arm paraesthesia are not uncommon in cervical sprain injuries and appear to have resolved within six weeks. I think it unlikely that she had any neurologic injury resulting from the flexion sprain of the cervical spine.
>
> She has, however, had persistent daily headaches which are occipital in origin and travel to the front of the head. Although these have some of the characteristics of an occipital neuralgia (burning pain, soreness and sensitivity over the scalp), she does not have clinical findings that would help localize the origin of her headaches.
>
> The calcification seen on x-ray at the base of the skull was described by the radiologist as being likely developmental or congenital. There are no prior x-rays for review to confirm the radiologist's impression. I cannot determine whether the CT scan from 2007 actually images this area. There is a possibility that calcification in this ligament, which is in the area of her headache pain, could be post traumatic and could fit with her mechanism of injury. However, this is not a clinical scenario that I have seen during my years of practice and I cannot necessarily relate this radiologic finding to her current symptoms of chronic daily occipital headaches.
>
> Fortunately, her other symptoms of cervical sprain have resolved and she does not have other clinical findings apart from her restricted neck in flexion.
>
> There does appear to be a pre-accident history of headaches and insomnia. This occurred at a time of marital stress during her marriage break up and responsibilities for raising two young boys. The history of headaches and the need for medication for both headaches and situational stress (Prozac and Elavil) was not disclosed during the history taking but, if it was solely related to the marital break up, may not represent a long standing pattern of depression, anxiety or headache.

[65] Earlier in Dr. Loane's report, at p. 2, he sets out the materials he reviewed in preparation of his report. Whereas he was provided with Dr. MacDonald's file

dating back to 2009, Dr. Loane was not given the chart notes from the time of the accident to the present (which were provided to the Court in Exhibit 6). When I examine the complete medical file in the context of Dr. Loane's report and the plaintiff's testimony, I am left with concerns regarding the plaintiff's credibility and reliability. For example, at p. 3, Dr. Loane states:

> However, the following morning, she woke up with a severe headache and a feeling of tingling in her head, face and arms. She saw the duty doctor and was prescribed cyclobenzaprine and naproxen.
>
> The physician's records regarding her post accident visits and injuries were not on file. She was apparently seen by Dr. Reid initially and then followed with her family doctor. The accident statement form completed by Ms. Gibson indicates that she was prescribed Robaxisal C1/2.

[66] Later, as was pointed out in cross-examination, at p. 6, Dr. Loane states:

> When asked about any past history of depression, anxiety or stress related issues, she denied having any such problems and could not recall taking any medication in the past for this.

[67] Firstly, the physicians' records disclose that neither Dr. Reid or Dr. MacDonald recorded anything about headaches after the accident until the visit of April 3, 2012. Secondly, the medical chart is replete with pre-accident notes concerning stress-related issues and Ms. Gibson was prescribed medication on account of these difficulties.

General Damages

[68] In late April, 2010, the Legislature introduced a minor injury cap on pain and suffering awards to replace the earlier $2,500 cap (effective between November 1, 2003, and April 27, 2010) (the "*Old Cap*"). The Office of the Superintendent of Insurance's website has this to say about the current minor injury cap:

> In response to concerns about fairness, the government of Nova Scotia conducted a review of the automobile insurance minor injury cap in 2010. The purpose of the review was to develop and analyze alternatives to the cap and assess the fairness of compensation while ensuring that premiums remain affordable.

> To inform the process, public input was sought through a discussion paper. The Office of the Superintendent of Insurance received and analyzed 220 responses that provided important information on which to base decisions regarding the cap.
>
> [Summary of discussion paper responses provided]
>
> An actuarial study, commissioned as part of the cap review, also helped inform decision making on this issue.
>
> [Actuarial study final report provided]
>
> Legislative amendments and accompanying regulatory changes flowing from the cap review were introduced on April 28, 2010 and applied to accidents occurring on or after that date. The amendments and regulatory changes came into force on July 1, 2010.
>
> The legislative amendments and the related regulatory changes reformed the cap by:
>
> a) amending the definition of "minor injury" to mean strains, sprains, and whiplash-associated disorders, mirroring the definition already in place in Alberta;
>
> b) increasing the pain and suffering award limit to $7,500;
>
> c) indexing the limit to inflation; and
>
> d) enabling the introduction of an optional full tort product at a later date.

[69] Having regard to indexing, the parties agree, and I find, that the minor injury cap was $7,956 at the time of this accident.

[70] The plaintiff submits that her injuries are not subject to the cap limit and that they warrant general damages of $40,000. By contrast it is the defendant's position that Ms. Gibson suffered a "minor injury". Section 113E of the *Insurance Act*, R.S.N.S. 1989, c. 231 (the "*New Cap*") applies to accidents that occurred on or after April 28, 2010. It provides, in part:

> 113E (1) In this Section,
>
> (a) "accident" means an accident or other incident arising directly or indirectly from the use or operation of an automobile;

> (b) "accident claim" means a claim for loss or damages for bodily injury or death arising from an accident;
>
> (c) "claimant" means a person injured as a result of an accident;
>
> (d) "minor injury", with respect to an accident, means
>
> (i) a sprain,
>
> (ii) a strain, or
>
> (iii) a whiplash-associated disorder injury,
>
> caused by that accident that does not result in a serious impairment.

[71] Subsection 113E(3) of the *Insurance Act* provides that in an accident claim, "the amount recoverable as damages for non-monetary loss of the claimant for a minor injury must be calculated or otherwise determined in accordance with the regulations." The scope of the regulation-making power is set out at s. 113E(7), which states:

> (7) The Governor in Council may make regulations
>
> (a) providing for the classification of, or categories of, minor injuries;
>
> (b) providing for the assessment of injuries including, without limiting the generality of the foregoing, regulations establishing or adopting guidelines, best practices or other methods for assessing whether an injury is or is not a minor injury;
>
> (c) governing damages, including the amounts of or limits on damages, for non-monetary loss for minor injuries;
>
> (d) providing for or otherwise setting out circumstances under which a minor injury to which this Section would otherwise apply is exempt from the application of this Section;
>
> (e) governing the application of this Section in respect of injuries arising out of an accident if the injuries consist of a combination of minor injuries to which this Section applies and injuries to which this Section does not apply;
>
> (f) providing for or otherwise setting out circumstances under which an injury that results in a serious impairment is a minor injury;

(g) respecting the onus of proof relating to minor injuries;

(h) respecting any matter or thing that the Governor in Council considers necessary or advisable to carry out effectively the intent and purpose of this Section.

(8) A regulation made pursuant to subsection (7) may be made retroactive in its effect to a day not earlier than the day that this Section has effect.

(9) The exercise by the Governor in Council of the authority contained in subsection (7) is regulations within the meaning of the Regulations Act.

[72] The applicable regulation is the *Automobile Accident Minor Injury Regulations*, NS. Reg 94/2010, (the *Applicable Regulations*) which provide, in part:

8. Definitions for Section 113E of the Act and this Part

8 (1) In this Part, "minor injury amount" means the total amount recoverable under Section 13 as damages for non-monetary loss for all minor injuries suffered by a claimant as a result of an accident.

(2) In Section 113E of the Act and this Part,

"serious impairment", in respect of a claimant, means an impairment of a physical or cognitive function that meets all of the following:

(i) the impairment results in a substantial inability to perform any or all of the following:

(A) the essential tasks of the claimant's regular employment, occupation or profession, despite reasonable efforts to accommodate the claimant's impairment and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's employment, occupation or profession,

(B) the essential tasks of the claimant's training or education in a program or course that the claimant was enrolled in or had been accepted for enrolment in at the time of the accident, despite reasonable efforts to accommodate the claimant's impairment and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's training or education,

(C) the normal activities of the claimant's daily living,

(ii) the impairment has been ongoing since the accident, and

(iii) the impairment is expected not to improve substantially,

"sprain" means an injury to one or more tendons, to one or more ligaments, or to both tendons and ligaments;

"strain" means an injury to one or more muscles;

"whiplash-associated disorder injury" means a whiplash-associated disorder other than one that exhibits one or all of the following:

(i) neurological signs that are objective, demonstrable, definable and clinically relevant,

(ii) a fracture to the spine or a dislocation of the spine.

9. Injuries must be assessed separately

9 If a claimant suffers more than one injury as a result of an accident, each injury must be assessed separately to determine whether the injury is or is not a minor injury.

10. Injury must be primary contributing factor

10 For a sprain, strain or whiplash-associated disorder injury to be considered to have resulted in a serious impairment, the sprain, strain or whiplash-associated disorder injury must be the primary factor contributing to the impairment.

[73] The *Applicable Regulations* go on to deal with minor injuries in greater detail, and to address the determination of damages:

11. Determination of minor injury

11 (1) The determination as to whether an injury suffered by a claimant as a result of an accident is or is not a minor injury must be based on the following:

(a) a determination as to whether the injury is a sprain, strain or whiplash-associated disorder injury; and

(b) if the injury is determined to be a sprain, strain or whiplash-associated disorder injury, a determination as to whether the sprain, strain or whiplash-associated disorder injury results in a serious impairment.

(2) For the purpose of clause (1)(b), the determination as to whether a sprain, strain or whiplash associated disorder injury results in a serious impairment must take all of the following into account

(a) the claimant's pre-existing medical history;

(b) the matters referred to in subclause (i) of the definition of "serious impairment" in subsection 8(2) that relate to the claimant.

12. Treatment not followed

12 (1) If

(a) a claimant suffers a sprain, strain or whiplash-associated disorder injury as a result of an accident;

(b) the claimant has, without reasonable excuse, not sought and complied with all reasonable treatment recommendations of a medical practitioner trained and experienced in the assessment and treatment of the personal injuries; and

(c) the sprain, strain or whiplash-associated disorder injury results in a serious impairment, the sprain, strain or whiplash-associated disorder injury is a minor injury unless the claimant establishes that the sprain, strain or whiplash-associated disorder injury would have resulted in a serious impairment even if the claimant had sought and complied with reasonable treatment recommendations of a medical practitioner trained and experienced in the assessment and treatment of the personal injuries.

(2) Subsection (1) does not apply to a claimant who is a person described in provision (3) under the heading "Subsection 3 - Special Provisions, Definitions and Exclusions of this Section" in the Automobile Insurance Contract Mandatory Conditions Regulations made under the Act.

13. Damages recoverable for non-monetary loss for minor injuries

13 (1) Except as provided in this Section and clause 14(2)(a), for the purposes of subsection 113E(3) of the Act, the total amount recoverable as damages for non-monetary loss for all minor injuries suffered by a claimant as a result of an accident is $7,500.

(2) Subject to subsection (3), for 2011 and subsequent calendar years, the minor injury amount is increased annually, effective on and after January 1, by the annual average percentage change for the all-items Consumer Price Index for

Nova Scotia, not seasonally adjusted, published by Statistics Canada, for the previous calendar year.

(3) If the annual average percentage change referred to in subsection (2) is a negative number, there is no change in the minor injury amount.

(4) The minor injury amount for a calendar year applies only in respect of accidents that occur during that calendar year.

(5) For 2011 and subsequent years, the Superintendent must publish the minor injury amount for the calendar year by January 31 in a form and manner that ensures that the information is accessible to the public.

14. Damages recoverable for non-monetary loss for minor and non-minor injuries

14 (1) In this Section, "non-minor injury" means an injury other than a minor injury.

(2) If a claimant suffers one or more minor injuries and one or more non-minor injuries as a result of an accident, the assessment of damages for non-monetary loss for all injuries suffered by the claimant is subject to the following rules:

> (a) if the non-minor injury or injuries, when assessed separately from the minor injury or injuries, would result in an award for non-monetary loss of not more than the minor injury amount, the total amount recoverable as damages for non-monetary loss for all injuries suffered by the claimant must not exceed the minor injury amount;
>
> (b) if the non-minor injury or injuries, when assessed separately from the minor injury or injuries, would result in an award for non-monetary loss of more than the minor injury amount, the total amount recoverable as damages for non-monetary loss for all injuries suffered by the claimant must be calculated as the total of all of the following:
>
> > (i) the amount of damages assessed for non-monetary loss for the non-minor injury or injuries,
> >
> > (ii) subject to Section 13, the amount of damages assessed for non-monetary loss for the minor injury or injuries.

Comparison of the *Old Cap* to the *New Cap*

[74] When I examine the legislation, I note the most significant changes between the *Old Cap* and *New Cap* as follows:

1. An increase in general damages for "minor" injuries to $7,500 (with indexing this amount is currently $8352);

2. The presumption that an injury is "minor" has been removed;

3. The definition of "minor injury" has been narrowed to only include sprains, strains, or whiplash-associated disorder injuries caused by the accident, that do not result in "a serious impairment"; and

4. Serious impairment is now defined as an impairment of a physical or cognitive function, ongoing since the accident and not expected to improve substantially, resulting in the substantial inability to perform any or all of the following:

    a. the essential tasks of one's regular employment, occupation, or profession, despite reasonable attempts at accommodation;

    b. training or education (either enrolled or accepted) despite reasonable attempts at accommodation; or,

    c. the normal activities of the claimant's daily living.

[75] In the case at Bar, there was no motion made before the trial under s. 113E(4) and (5) of the *Insurance* Act as to whether Ms. Gibson suffered a minor injury. Accordingly, having regard to s.113E(6), the Court shall determine whether the plaintiff has suffered a minor injury.

Onus

[76] It is perhaps trite to state that my findings in this civil lawsuit are based on a balance of probabilities and it is the plaintiff who has the onus of proving her case on this standard of proof. Nevertheless, I feel compelled to make mention of this because in her counsel's brief and in his oral submissions, Mr. Jones argued for a

reverse onus to apply in respect of the *New Cap*. For example at p.12 of the plaintiff's brief it is submitted:

> The Regulations have also removed from the Plaintiff the onus of establishing that the injury was not minor. Under the old cap scheme, the Regulations (s.6) placed the burden of proving the injuries were not minor squarely on the Plaintiff. The new scheme has no such provision. Under the new cap regime, it is submitted that it is clearly the Defendant who must prove that the cap applies to limit the Plaintiffs general damages. The Defendant must show that the Plaintiff has suffered a sprain, a strain or a whiplash injury which does not result in a serious impairment. These terms (sprain, strain, whiplash-associated disorder, serious impairment) are all further defined in the Regulations above and the Defendant must prove the injury falls within the definition. So for example, the Plaintiff may have been diagnosed with a whiplash injury, but in order to be a minor injury, the Defendant must prove that the whiplash does not involve a fracture or dislocation of the spine, nor any neurological signs that are objective, demonstrable, definable and clinically relevant (Regulation 8(2)).

[77] Whereas it is correct that the *Old Cap* overtly states that the plaintiff bears the onus (Regulation 6) and the *New Cap* has no such language, I do not accept it therefore follows that the defendant must prove whether a plaintiff has sustained a minor injury. Indeed, the *New Cap* states that the Governor-in-Council may make regulations respecting the onus of proof relating to minor injuries (s.113E(7)(g)); no such regulation has been made.

[78] Absent specific reverse onus wording from the Legislature, I am not prepared to accept that it is for a defendant to marshal evidence to, in effect, prove a negative. Rather, it is my determination that when it comes to the *New Cap* the standard remains the same. That is to say, she who asserts must prove (on a balance of probabilities).

Analysis

[79] Having regard to the totality of the evidence, I find that Ms. Gibson suffered a whiplash injury and cervical sprain as a result of the March 9, 2012, accident. Further, I find she was off work for six weeks on account of her accident-related injuries. In the time since she returned to work (May 2012 until the present), I find that the plaintiff has significantly recovered from her accident related injuries.

[80] Without question, Ms. Gibson continues to experience flare-ups of headaches. When I review the evidence inclusive of the totality of the medical documentation (especially Dr. MacDonald's pre- and post-accident chart entries), I

conclude that the chronic headaches suffered by the plaintiff are not related to the motor vehicle accident but rather, arise from stress related-issues.

[81] To elaborate on this point with an example, the plaintiff's evidence concerning the timing, frequency, duration and type of headaches is not borne out by the chart notes. With respect to the timing, Ms. Gibson denied any pre-accident headaches of consequence. This evidence is refuted by the pre March 9, 2012, chart notes referring to ongoing headaches requiring medication. On frequency and duration, Ms. Gibson insisted she has in the vicinity of two flare-ups a week, lasting anywhere from two hours to the entire day. There are no physician or employer notes to support this claim. Indeed, we have Ms. Gibson's evidence that she has only missed "a handful" of days at work. As for the type of headache, I am not persuaded by the plaintiff's attempt to characterize her post-accident headaches as different (a bandwidth across the back of her neck) from before. I say this because when I scrutinize Dr. MacDonald's chart I find numerous pre-accident notes, as well as notes from April 3, 2012, and forward, documenting the same type of headache, most often characterized as stress-induced. It is for these reasons that I must call into question Ms. Gibson's credibility and reliability.

[82] Having said this, I find the plaintiff to be credible and reliable in other areas of her evidence; namely, concerning liability and regarding her description of the home and workplace environments.

[83] In all of the circumstances, I find this case amounts to a "crumbling skull" situation, best described by Cromwell J.A. (as he then was) in *Nova Scotia (Attorney General) v. B.M.G.*, 2007 NSCA 120, at para.162:

> The judge found that B.M.G. was a "classic crumbling skull situation": reasons para. 156. This is a shorthand reference to two principles of causation as it relates to damages. The first, the so-called 'thin skull rule', is that wrong-doers take their victims as they find them. Even though the injury from the wrongful act is greater because of the pre-existing injury, the wrong-doer is nonetheless responsible for the loss. The second, the 'crumbling skull' rule, is that a wrong-doer need not compensate for damage that would have occurred without the wrongful act. I refer again to *Plint*:
>
> > 79 ... the defendant takes his victim as he finds him - the thin skull rule. Here the victim suffered trauma before [the assaults]. The question then becomes: what was the effect of the sexual assaults on him, in his already damaged condition? The damages are damages caused by the sexual assaults, not the prior condition. However, it is necessary to consider the prior condition to determine what loss was caused by the assaults.

> Therefore, to the extent that the evidence shows that the effect of the sexual assaults would have been greater because of his pre-existing injury, that pre-existing condition can be taken into account in assessing damages.
>
> 80 Where a second wrongful act or contributory negligence of the plaintiff occurs after or along with the first wrongful act, yet another scenario, sometimes called the "crumbling skull" scenario, may arise. Each tortfeasor is entitled to have the consequences of the acts of the other tortfeasor taken into account. The defendant must compensate for the damages it actually caused but need not compensate for the debilitating effects of the other wrongful act that would have occurred anyway. This means that the damages of the tortfeasor may be reduced by reason of other contributing causes: *Athey*, at paras. 32-36.
> (Emphasis added by Justice Cromwell)

[84] I also draw reference to the majority decision of Chief Justice McLachlin in *Clements v. Clements*, 2012 SCC 32, at para.8:

> The test for showing causation is the "but for" test. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's negligence was *necessary* to bring about the injury — in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.

[85] In the case at bar, the plaintiff has not shown on a balance of probabilities that but for the March 9, 2012, accident the headaches would not have occurred. Rather, it is my finding that Ms. Gibson's headaches were present before the accident and would have continued (in the manner they have) without the events of March 9, 2012.

[86] Furthermore, it is my finding that the headaches suffered by Ms. Gibson do not constitute a "serious impairment" as contemplated by s.113E(1). Having regard to the *Applicable Regulations* (see ss. 8(2)(i)(A) and (C)) I find the headaches do not result in a substantial inability of the plaintiff to perform the essential tasks of her regular employment, or normal activities of daily life. In the result, I find that Ms. Gibson's injuries fall within the classification of "minor injury" as defined by the *New Cap* and the *Applicable Regulations*, such that the maximum recoverable at the time of the accident is the aforementioned $7,956.00.

[87] The *New Cap* was modelled after Alberta legislation. Indeed, the basic provisions and wording of the minor injury definition are essentially identical. Whereas there have been no Nova Scotia cases interpreting the *New Cap*, *Sparrowhawk v. Zapoltinsky*, 2012 ABQB 34, analyzed the Alberta legislative framework. The interpretive approach in *Sparrowhawk* has been cited with approval by the Alberta Court of Appeal in *Benc v. Parker*, 2012 ABCA 249 (see para. 27).

[88] In *Sparrowhawk* the Court considered a case involving a passenger of a motor vehicle involved in a rear-end collision. The issue before the Court was whether the plaintiff's jaw injury would be considered a "minor injury" under the Alberta *Insurance Act Minor Injury Regulation and Diagnostic and Treatment Protocols Regulation*. At paras. 85-88, Justice Shelley canvassed "Related Legislative Schemes", noting, at para. 87:

> Nova Scotia has enacted legislation (*Insurance Act*, R.S.N.S. 1989, c. 231, *Automobile Accident Minor Injury Regulations*, N.S. Reg. 94/2010) that is clearly modelled on the Alberta *Insurance Act* and *MIR*, but has not yet passed an equivalent to the *DTRP*.

[89] The above-referenced *DTRP* refers to the *Diagnostic and Treatment Protocols Regulation* (ALTA Reg.122/2004). At the time of her decision, Justice Shelley rightly noted, Nova Scotia had not yet passed an equivalent to the *DTRP*. Our legislature subsequently brought in similar regulations; however, they did not become effective until April 1, 2013. Accordingly the parties agree, and I find, that Regulation 11(1A) and (2) (as well as Regulation 12(2)) are not applicable to this lawsuit (as March 9, 2012, predates the applicability of these Regulations).

[90] In the result, I find *Sparrowhawk* is of limited application (see for example, paras.148-150) as it was primarily concerned with the interpretation of the procedure for the assessment under the legislative scheme, inclusive of the *DTRP*. I would add that I make no comment with respect to Justice Shelley's analysis of what constitutes injuries outside of the *New Cap*.

Loss of Valuable Services

[91] Under the above head of damages, the plaintiff claims $10,000 and the defendant suggests $2,500. In the defendant's submission, there is no evidence to support a claim for loss of valuable services beyond the time when Ms. Gibson returned to work, six weeks following the accident. In response, the plaintiff says

she no longer can carry out all of the tasks she did before the accident. In *Monk v. Duffy*, 2008 NSSC 359, Justice Leblanc referred to two Court of Appeal decisions in considering the law respecting loss of valuable services, at para. 63:

> [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.

[92] The evidence and documentation on this head of damages is somewhat vague. For example, it is not as fulsome as what Justice MacAdam had before him in *Tibbitts v. Murphy*, 2015 NSSC 280, when he awarded $10,000 (see para. 87). Nevertheless, I am satisfied the plaintiff has endured a modest loss of valuable services which I am prepared to quantify in the amount of $7,500.

Cost of Care

[93] The plaintiff argued for $5,000 under this head of damages, while the defendant submitted there should be no cost of care award. With respect to treatment, Dr. Loane answered a number of related questions at the close of his report, at pp. 8-10:

> …
>
> **5. "Usual course of treatment/recovery period for these injuries."** Although some individuals do continue to experience headaches, it is unusual, in my experience, to have headaches as the sole symptom without any associated neck muscular pain patterns. The differential diagnosis can include occipital neuralgia and this condition can persist following the resolution of soft tissue injuries. It would normally be managed by attempts of occipital nerve blockade, use of tricyclic muscle relaxant medications (including nortriptyline) and the occasional use of stronger medication such as pregabalin or gabapentin.

> Another possibility is that she has developed analgesic rebound headaches, a common cause of chronic daily headache following whiplash injuries. Normally innocuous medication such as acetaminophen and anti-inflammatories, when used chronically can produce an increased tendency to daily headaches. The treatment for this would be withdrawal from all analgesics and anti-inflammatories for a period of time, substituting muscle relaxant medications or anti-neuralgia medication if necessary.
>
> The treatment for any type of chronic pain, including chronic daily headaches, would be to address any associated stressors that contribute to pain, including non restorative sleep patterns and to gradually reintroduce all normal daily routines, including exercise on a regular basis.
>
> It is not my impression that there are other psychological factors that are contributing to stress and pain at this time although Ms. Gibson acknowledges that looking after two children as a single parent is difficult.
>
> …
>
> **8. "Medications used and affects."** She [has] no appropriate medication but, as pointed out above, the presence of chronic daily headaches is concerning with long term use of analgesic or anti-inflammatories. I would suggest a withdrawal from acetaminophen and anti-inflammatories as a trial Use of nortriptyline is appropriate. This medication often has a "window" effect and increasing dosage may not provide better therapeutic benefit. A trial of gabapentin could be considered.
>
> Perhaps the most appropriate person to assess her chronic daily headaches would be a neurologist. A consultation with Dr. David King or any of the neurologist who deal with chronic headaches would be appropriate at this state.
>
> **9. "Opinion of treatment to date ie., type, benefits, alternatives, duration, etc."** Ms. Gibson has had appropriate treatment. It seems as if she is in a "maintenance" phase of massage therapy treatment getting some temporary benefit but no trend towards overall recovery. I believe that she is at a maximal medical recovery with respect to treatment and, apart from some medication changes and possibly injection therapy, I do not have any other recommendations for physical therapists to address her headache pain.
>
> ...

[94] Having regard to my causation finding concerning the headaches, a cost of care award is unwarranted. I would add that on the basis of Dr. Loane's opinion, the plaintiff's Section B insurer declined to pay for the cost of further treatment.

There is no evidence from any other physician suggesting Ms. Gibson requires ongoing treatment for any accident-related injuries. Accordingly, there is insufficient evidence to found this head of damages.

Loss of Earning Capacity

[95] The plaintiff sought an award of $20,000 whereas the defendant argued the evidence did not support loss of earning capacity.

[96] The above head of damages was discussed in *Mawdsley v. McCarthy's Towing and Recovery Ltd.*, 2010 NSSC 168. Bryson J. (as he then was) picked up on the words of our Court of Appeal in *Newman v. Lamarche (1994)*, 134. N.S.R. (2d) 127, [1994] N.S.J. No. 457, where the Court held, at paras. 22 and 24:

> We must keep in mind this is not an award for loss of earnings but as distinct therefrom it is compensation for loss of earning capacity. It is awarded as part of the general damages and unlike an award for loss of earnings, it is not something that can be measured precisely. It could be compensation for a loss which may never in fact occur. All that need be established is that the earning capacity be diminished so that there is a chance that at some time in the future the victim will actually suffer pecuniary loss.
>
> …
>
> In making an award for loss of future earning capacity the court must, of necessity, involve itself in considerable guesswork. Indeed, in many cases where there is less than total disability and the loss of earning capacity cannot be calculated on the basis of firm figures, the diminution of earning capacity is compensated for by including it as an element of the non-pecuniary award. See *Yang et al v. Dangov et al* (1992), 111 N.S.R. (2d) 109 at 126; *Armsworthy-Wilson v. Sears Canada Inc.* (1994), 128 N.S.R. (2d) 345 at 355.
>
> …
>
> I keep in mind the fact that any loss to be sustained by the appellant would occur some time into the future and perhaps never.

[97] Having regard to the above, Ms. Gibson has not satisfied me that she has sustained a loss of earning capacity. In this regard, she continues to work at the Woodlawn Library in the same capacity as she did prior to the accident. To the extent she has aspirations to move up within the library system but cannot do so, I

find the impediment relates to her lack of relative seniority and not accident related *sequelae*.

Conclusion

[98] Given my awards and the agreements of counsel (which I find to be appropriate), coupled with my liability finding, Ms. Gibson shall have judgment as follows:

1.	General damages (*New Cap* amount)	$7,956.00
2.	Special damages	$2,275.03
3.	Loss of valuable services	$7,500.00
4.	Prejudgment interest on general damages and valuable services (2.5% x 46 months)	$1,500.00
5.	Prejudgment interest on special damages (4% x 46 months)	$350.00
Total		$19,581.03

[99] If the parties cannot agree on costs, I will receive written submissions within thirty days of this decision.

Chipman, J.