

Date: 20000620  
Docket: S.H. 126537

IN THE SUPREME COURT OF NOVA SCOTIA  
Cite as: Hill v. Ghaly, 2000 NSSC 112

BETWEEN:

Madonna Hill

Plaintiff

- and -

Abdel Kader Ghaly

Defendant

AND:

Madonna Hill

Plaintiff

- and -

George Bernard, Sr. and George Bernard, Jr.

Defendants

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SUPPLEMENTARY DECISION

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HEARD BEFORE: The Honourable Justice John M. Davison

PLACE HEARD: Halifax, Nova Scotia

DATE HEARD: December 20 - 23, 1999  
Final written brief received January 31, 2000

DECISION: June 20, 2000 (Supplementary to decision dated March 31, 2000)

COUNSEL: Robyn Elliott, for the Plaintiff

Jennifer Jennings  
and Connie Morrissey, for the Defendant Abdel Kader Ghaly

Dale Dunlop, for the Defendants George Bernard Sr. and  
George Bernard Jr.

**DAVISON, J.:**

- [1] The plaintiff suffered injuries in two motor vehicle accidents which occurred on November 5, 1992 and May 13, 1995. The accident on November 5, 1992 occurred when there was impact between the vehicle operated by the plaintiff and a vehicle operated by George Bernard, Jr. who was driving his father's car. The accident on May 13, 1995 occurred when the plaintiff's motor vehicle had impact with a vehicle operated by Abdel Kader Ghaly.
- [2] There was an order from a judge of this court dated November 27, 1998 directing the two actions be tried concurrently. Liability for each accident has been admitted by the appropriate defendants. The issue before the court is to determine the quantum of damages to which the plaintiff is entitled and to determine if the defendants in both actions are liable for damages to the plaintiff and the extent of that liability.

**THE EVIDENCE**

**(a) Lay Witnesses**

- [3] The plaintiff is 45 years of age and resides in Dartmouth, Nova Scotia. She and her husband, Geoffrey, have two sons, Graham age 16 and Andrew age 13. The plaintiff obtained a Bachelor of Arts degree in French from Dalhousie University in 1976 and a Bachelor of Education degree from Mount Saint Vincent University in 1977, the year she was married.
- [4] In September of 1978, the plaintiff secured a full-time position as a teacher in Dartmouth. She continued to take courses at St. Mary's University until 1983 when she obtained Teaching Certificate No. 6. Her husband is also a school teacher. He graduated in 1981.
- [5] The plaintiff, during her testimony, speaks of an active life before the first motor vehicle accident. She says that she represented the union, took courses at university and became involved in a number of professional activities.
- [6] When her first child was born in December 1983, she was working full time and had no lengthy absences from work. She was on maternity leave for 15 weeks and returned to teaching on a full-time basis. Her second son was born February 1986, and she was on maternity leave until June 1986 and again returned to her teaching position on a full-time basis. When she went back to school after Andrew's birth, Phyllis Hill, her mother-in-law, looked after the children on a frequent basis.
- [7] In 1987 and 1988 there were discussions between the plaintiff and her husband about her not working full time because they could afford to have her work part time or work on a job-sharing basis. She said she wanted to spend some time with the children and she assumed a part-time position in 1987 at a salary of \$24,000 a year. She shared the job with a Ms. MacDonald and worked two and one half days each week. Ms. MacDonald retired at the

end of 1991 and the School Board appointed another partner for Ms. Hill. In early 1992 she decided to go back to work full time. Her mother-in-law was looking after the children, and the plaintiff believed she could work full time with her own children attending school. She continued on a full-time basis but had a large number of days of absenteeism until 1995 which she states was caused by the accident in November 1992.

- [8] The plaintiff says that her salary is determined by her level of certificate. After eleven years as a teacher, years of experience are no longer calculated in effecting the amount of salary. She was making approximately \$26,000 in 1990 and 1991 and when she returned on a full-time basis in 1992, she earned an annual salary of \$36,119. It was her view that she would teach school until she was "55 years of age or maybe 60 years of age".
- [9] Prior to the motor vehicle accident, the plaintiff said she was more adventuresome and more socially involved than she is at the present time. She states she was happy and enjoyed skiing and being with her family. She gardened and enjoyed working outside the home. She organized family dinners and had social contacts with her relatives and with her friends. She says that her health was very good but does say that before the first collision, she was having difficulty sleeping at night. This started in 1991 and she was tired after a few days work when she was not sleeping. She attended her family physician, Dr. Oliver, who referred her to the sleep clinic at Camp Hill Hospital in 1991 and part of 1992. At the clinic she saw Dr. Morrison. He says that the sleeplessness was a concern but did not affect her work, and she took her job back on a full-time basis.
- [10] In speaking of incidents which occurred prior to the accidents she mentioned that in 1985 her dentist noticed she was grinding her teeth and she saw Dr. Hannigan who made an appliance and placed it in her mouth. Ms. Hill says that she stopped grinding her teeth.
- [11] On November 5, 1992 the first accident occurred. The plaintiff had her seatbelt in place and her vehicle was struck on the passenger side near the rear of the vehicle. She described feeling "like rubber" immediately after the accident. She stated she was cold and her teeth started to chatter. She described herself as being in a state of shock. The next morning she called her uncle who took her to the Dartmouth General Hospital. She says she felt stiff all over her body and had a mark on her neck from the seatbelt. She was prescribed antibiotics and muscle relaxants. During the following days, she felt very stiff and her head felt heavy. She said her whole face was sore.
- [12] The plaintiff had an appointment with Dr. Morrison which was arranged before the motor vehicle accident. When she attended, the doctor asked about her sleeplessness and the plaintiff mentioned the motor vehicle accident. Dr. Morrison suggested she see a psychiatrist. She attended on a

- Dr. Morehouse from whom she obtained medication which seemed to be of assistance.
- [13] Ms. Hill returned to work about a week or so after the first motor vehicle accident. Her ears felt blocked and she had a sore throat. She saw a doctor at the Woodlawn Medical Clinic and mentioned the motor vehicle accident and the fact that she had a sore throat and felt that her neck could not support her head. She was prescribed another antibiotic.
- [14] In December of 1992, a month after the first motor vehicle accident, the plaintiff still had a sore face, body stiffness, blurred vision and she started to experience dizziness. A doctor said she should check her sinuses and she saw an eye specialist, Dr. Quigley, in January of 1993. There was no difficulty or malfunction with respect to the eyes and x-rays to the sinus proved normal.
- [15] In February 1993 she found it difficult to handle her work and made reference to the blurred vision and the sore face and the fact that her neck could not support her head. She started to complain at work and a friend suggested that she might have multiple sclerosis. This prompted her to return to Dr. Oliver who said that he would check with a neurologist. She saw Dr. Bedwell in June of 1993 who said her symptoms were not acute and not debilitating, but she kept thinking something was wrong with her when she started to ache at the top of her head and in the neck behind the ear where it stretches down to the rib cage. She says that she awakes with pain and feels crippled. She felt dizzy and had headaches from the back of the head and felt achy all over.
- [16] After she saw Dr. Bedwell, she saw Dr. Oliver in August of 1993. He prescribed physiotherapy, and she started to attend three days a week. Her neck was stiff and the rotation was poor. During the Autumn months of 1993 these symptoms seemed to get worse. Her face swelled on one side, and the jaw started to bother her. Physiotherapy helped her, but she no longer went to those sessions because she could not afford them. She spoke with Dr. Oliver and told him she would like to have some time off from her job and the doctor said to discuss it with her employer. The employer said he could get a substitute so that she could go to physiotherapy treatments.
- [17] She started to have difficulties with her jaw again and attended on Dr. Hannigan. She began using her biteplane and went to physiotherapy about three times a week. With all of these problems, she started to miss a lot of time from work.
- [18] In 1993 Dr. Bedwell suggested that she receive an injection of cortisone in her neck from her doctor, but she did not want her doctor performing those injections and decided she would get acupuncture through her physiotherapist.

- [19] In 1994 she started to search for a person to share her job. About this time she started to withdraw from her husband and her children. She did some cooking, but she had to pick and choose the jobs she could perform around the house. At this time her relationship with her husband and her children was strained and she had little contact with her family and friends. She did not have a Christmas gathering as was the habit of the family.
- [20] It is the impression of the plaintiff that at this point in time she was starting to have personality changes. She felt she could not cope anymore and believed that she was not the person she thought she was prior to the accident. She stated that the only persons who seem to understand her problems were the physiotherapist and Dr. Hannigan. She was having difficulty with Dr. Oliver who stated that he believed she was young and healthy and that there was "no reason for not recovering." She continued to see Dr. Hannigan who gave her a medical certificate to permit her to have a couple of days away from her work to assist with her rehabilitation.
- [21] The plaintiff was asked how she felt in June of 1994 and she said she had a stiff neck. She had headaches at the back of the head and felt dizzy. She again complained of pain from the back of the ear to the chest wall. In the year 1993 to 1994 she missed 30 days of work. She had difficulty at work and found it difficult to stand at the board and solve other person's problems when she had so many problems of her own.
- [22] Ms. Hill saw Dr. Loane at the Rehabilitation Centre and complained to him about the pain at the top of the head and how the pain started at the back of the head and continued over her head. She said the pain started at her ears and down her chest wall and that her face was sore. She said that her vehicle had been hit on the right side but she was having problems with her left side.
- [23] During this time she saw a number of doctors. She continued to see Dr. Hannigan and saw a person at the Woodlawn Medical Clinic which she believed was Dr. Oliver. She saw a Dr. Lawrence at the Penhorn Medical Clinic. She said at this period of time she missed her menstrual period and her breasts were sore and she believed that she was pregnant. She started to haemorrhage. She preferred to see a female physician in the person of Dr. Lyons who filled out a form for a therapeutic abortion and she received a D. and C.
- [24] In 1994 she continued to think about job sharing and spoke to Dr. Hannigan about it. She felt that she had stabilized to a point but could not work five days a week. She described herself at this time as feeling "really terrible", that she had not been a good wife, she was cranky and failed in her role as a parent. She was asked how she fared with respect to the relationship with her husband and she indicated she did not know how he stayed with her. She

- says she could not even sit through a dinner. She was "twitching around". She withdrew from her family and kept to herself.
- [25] She finally wrote for a job sharing position in March of 1995 and this was approved in April of 1995.
- [26] Counsel referred to a sleep clinic questionnaire filled out by the plaintiff in her handwriting. There are a number of incomprehensible answers given in this questionnaire by the plaintiff and she says that she does not recall filling out the form. She says it was completed in a rush, and she was probably impulsive in her answers. In fact one form was said to be filled out by her husband, but was filled out by the plaintiff who signed her husband's name. She said a number of answers were inaccurate. One question, on the form, was when did her sleep problems begin and she stated October 1990, when in fact she says it began in 1991. She stated on the form she wakes up with a headache "nightly" and that is not accurate. She refers to other answers which were inaccurate including the fact that she indicated she "rarely" feels sudden weakness in her knees, neck, jaw or arms when angry, sad, laughing or emotional. The plaintiff maintains she just did not recall how the answers to the portion of the questionnaire that were supposed to be filled out by her husband arose.
- [27] The plaintiff's testimony did not adequately convince me as to why there should be a difference in the answers and why she would have signed her husband's name to the questionnaire.
- [28] Prior to the second accident on May 13, 1995, the plaintiff was stopped at a red light. One of her sons was in the car. When the light turned green, there were two young girls with skate boards so the plaintiff hesitated and her vehicle was struck from behind with severity and it ended on top of another person's car. She says that "she was hanging from the ceiling" and that her leg was pinned between the seat and the transmission. She had to be retrieved from her vehicle by the "jaws of life" and was taken directly to the hospital. She believed that she had remained in her vehicle after the accident for about one hour. She was taken to the Victoria General Hospital and stated that she was feeling "absolutely awful". Her face was swollen and she had the same problems she had after the first motor vehicle accident.
- [29] The plaintiff started physiotherapy immediately. They placed ice on her face. Her shoulder area was aching and her headaches were more severe than they were before the first motor vehicle accident. She said that because of her swollen face, a great deal of her difficulties with her jaw returned in greater severity.
- [30] She described her circumstances after the first motor vehicle accident as having rather dull aches, but after the second motor vehicle accident, they were more intense and there was vertigo associated with her injuries. She

felt like her "worst days" after her first motor vehicle accident, and one questions whether the greater severity results from more injury in the second motor vehicle accident or whether she became more vulnerable following the first motor vehicle accident.

- [31] Ms. Hill returned to work in September 1995. She was taking Tylenol and muscle relaxants and had physiotherapy treatments three times a week. She spoke about pain in her left shoulder and mid back and she did not have that pain before the second motor vehicle accident. She wore her biteplane at night but not during the day because she could not speak properly with it. She started having nightmares about having a further motor vehicle accident where she believes she would be doomed. She had them several nights a week and still has them from time to time.
- [32] When she returned to work in September, she started by way of job sharing and stated that she had headaches which extended from the back of the head and the back of the ear down to the chest wall which was a similar complaint to that which she had after the first motor vehicle accident but she was feeling more pain.
- [33] In the fall of 1995 she saw a number of doctors, including Dr. Lyons, her new family doctor, Dr. Dhawan and the physiotherapist. She received some injections from Dr. Dhawan and they helped at the beginning. By the winter of 1997 she was terribly upset because she said she had a lot of pain and she saw Dr. Loane who did a physical examination and recommended a psychiatrist particularly with respect to the nightmares. She went to a psychiatrist whose name was Dr. Mills.
- [34] When she arrived home from work, she was not in good condition. She said she was tearful most of the time and had little to do with her family. She did not go out and often did not get dressed. She saw Dr. Mills two or three times around the summer of 1996. She says that Dr. Mills did not tell her about his diagnosis, but she went to Dr. Lyons and received medication for depression and the doctor recommended that she might see a psychologist. Dr. Lyon referred her to Dr. Glish, and she saw that doctor in the fall of 1996 and during 1997 about once every two weeks. Dr. Glish moved to Toronto and her visits to him stopped in 1997.
- [35] She also saw Dr. Precious and Dr. Majaess in the fall of 1996. Dr. Precious is an oral surgeon and talked to her about her dental problems. The plaintiff summarized her medical visits in 1997 as attendances on Dr. Lyons, Dr. Hannigan, Dr. Glish and Dr. Dhawan and upon the physiotherapist throughout the year. Dr. Hannigan checked her and continued to work with her biteplane. Dr. Dhawan gave her injections, but they were not effecting any change in her difficulties.

- [36] She described how in 1997 she started becoming depressed and believed that her health would never improve. She was having nightmares more often and described herself emotionally as "a mess". She continued to have headaches at the top of her head which could last three or four days. The plaintiff had difficulty comparing how she felt at this time with how she felt before the second accident, but suggested that the headaches were more intense in 1997 and that she could not teach for more than Wednesday of a week. She felt in 1997 that she was remaining fairly constant with respect to her problems.
- [37] Between 1997 and 1999 Ms. Hill continued with physiotherapy and consulted Dr. Lyons and indulged in antidepressant drugs for over a year. She also saw Dr. Loane and Dr. Hannigan.
- [38] With respect to her work, the plaintiff said that she attempted to miss as little as possible but she did pick and choose committees. She still had physical problems and found it difficult to work. She alleges she cannot work more than half time and indicated her neck gets stiff when the top of her head aches. In addition, she has problems with her shoulder and her back, and most of the time by Thursday of a given week she is in bed. Her relationship with her family is better since she took antidepressant drugs, and she believes that they were understanding of her problems.
- [39] With respect to her home life, there were still things she could not do. With respect to her house work, her husband and sons do much of the house work, but she cooks supper and breakfast. She will do some house work and still does some gardening and laundry, but often her mother-in-law makes the dinner. Her children are helpful. She says she exercises and tries to walk, but she is tired at night. She believes, with respect to her work, that she is stabilized into a good balance to accommodate her difficulties and finds that she does some duties on committees. She believes her condition has "plateaued" since 1997 in the sense that it has not improved nor has it become worse. Her personality is not the same, in her view, because she believes that she is fearful of another motor vehicle accident and she is more cautious because the thought of experiencing more pain concerns her. She anticipates she will take antidepressant medication for a long time. She will take physiotherapy if she has a "flare up".
- [40] With respect to her future, she says she is quite satisfied with her job as the situation is at the present time and she will continue to work until she is 55 years of age. She says she will not have as good a pension because there is a penalty every year.
- [41] She believes the second accident was more significant with respect to the amount of pain and involved more portions of her body. She says there was more swelling in the face.



- [42] During the course of cross examination, counsel for the defendants Bernard attempted to establish that the plaintiff's health before the first accident was not as good as she professed. Around 1990 she saw about three doctors with respect to gall bladder and also had a problem with kidney stones. She saw a urologist for an ailment and she had a significant problem with respect to sleep loss. She attended a sleep clinic.
- [43] She was cross examined with respect to the questionnaire she filled in and the fact she signed her husband's name to a portion of that questionnaire. It was my impression she was defensive about the answers she gave on that questionnaire and they do seem to be exaggerations of her ailments. There really was not an effective explanation as to why she would have signed her husband's name to the form.
- [44] Ms. Hill was questioned with respect to her sleep problem which she said made her frustrated and agitated, but she did not think it affected her job to any great extent.
- [45] During the course of trial a number of doctors testified *viva voce*. The court heard the evidence of Dr. Hannigan, a peridontologist, Dr. Loane, a specialist in physical medicine and rehabilitation, two general practitioners in the person of Dr. Oliver and Dr. Lyons and Dr. Majaess, another specialist in physical medicine. In addition, by agreement of counsel, various written reports were advanced as exhibits. Some of the authors of those reports did not testify.
- [46] During the course of cross examination, reference was made to the reports of Dr. Morrison in 1992 relating to difficulties the plaintiff was having with her sleep. Initially she advised Dr. Morrison that for many years she had difficulty sleeping three or four days per month at the time she was ovulating, but in the fall of 1991 the nights of poor sleep became more frequent and she slept very poorly which made her "quite irritable and short tempered". When she feels agitated and when she was very tired, her head would start to shake. The doctor said that there was a long history of abnormal sleep patterns and that she now suffers from conditioned insomnia. In a report dated January 22, 1992 the doctor said that the plaintiff expects to stay awake when she goes to bed rather than sleeping.
- [47] There is also a report from Dr. Morrison dated November 27, 1992, the month of the first accident. There is no mention of the accident in the report, but possibly the appointment was prior to the accident. There was still complaints of poor sleeping habits which were accompanied by agitation and the inability to sit still. She mentioned to the doctor that at that time she could not bear to have her husband touch her and seems to have cycles of good sleep and bad sleep. The doctor recommended Ms. Hill see a psychiatrist, Dr. Rachel Morehouse, in order to rule out a mood disorder.

[48] Dr. Morrison filed a report dated December 8, 1992. In the report there was indication that the doctor received a history that the plaintiff was a good sleeper before November 1991. The doctor noted that after a few nights of poor sleep, the plaintiff becomes agitated, irritable and verbally abuses her children, "but still has a degree of control". After a few nights of poor sleep, "she finds herself withdrawn and tearful and depressive." Ms. Hill denied depression to the doctor and the doctor did comment on post partum depression after the birth of the second child which lasted for about a year. The reference to the symptoms are as follows:

She did not feel like herself, was tearful, hateful, had difficulty coping with her home and family life and would occasionally run away for a few hours at a time wanting to be rid of her family situation.

Dr. Morrison could not identify the reason for the insomnia but prescribed some medication for Ms. Hill.

- [49] On cross examination Mr. Dunlop, counsel for the defendants Bernard, made reference to the handwritten notes of the family physician, Dr. Oliver, with the indication that the first visit to the family doctor was three weeks after the accident. With respect to Dr. Oliver's notes, there seems to be little reference to the motor vehicle accident of November, 1992. There is some reference in May of 1993, but there was obviously complaints because Dr. Oliver referred her to a number of specialists including Dr. Bedwell. She was referred to a report of Dr. Oliver which indicated that on August 6, 1993 she complained of pain in the left shoulder and was asked if that was the first occasion when she complained of pain and Ms. Hill advised that the stiffness had turned to pain. She was referred to a physiologist, Marcia Berthier who filed a report which would suggest a sudden onset of headaches in the spring of 1993 with sharp pains along the left arm radiating down to the fingers. The plaintiff denied that it was sudden and said all of these incidents came on her in a gradual fashion.
- [50] Ms. Hill said that the pain in her jaw started in the autumn of 1993 and she was in great distress during that period of time, but she started to feel better at the beginning of 1994.
- [51] When she was questioned with respect to her ability to perform her teaching job, she said that after the first accident, she struggled to complete five days of work and after the second accident, she struggled to complete three days of work a week.
- [52] Geoffrey Hill, the husband of the plaintiff, spoke about life in the family before the first motor vehicle accident and said that the plaintiff was active in family and social events. She was an "upbeat" person doing many things with the family. She was an active teacher and when her children were born,

they needed more time and for that reason she started working part time and resumed full time in 1992.

- [53] Prior of the motor vehicle accident, she did not have a great deal of time away from her work except when she was pregnant and they shared the household chores which included cleaning and vacuuming and caring for the children. She went swimming and participated in many events involving the children. They had an active social life with people coming to their home for dinner. There was a warm relationship between the two and they were a happy couple. Prior to the first motor vehicle accident, Ms. Hill was in excellent health and had no physical or other health restrictions.
- [54] She did have problems with her sleep and was referred by Dr. Oliver to a sleep clinic on a couple of occasions. He does not recall that this problem had any adverse effect on the family life. She was tired, but did not miss any time from school.
- [55] Ms. Hill had problems with her teeth because she did grind them and a biteplane was prescribed and then discontinued.
- [56] After the first motor vehicle accident, the plaintiff was shaken and upset. He described her as being distressed by the motor vehicle accident and at the time, her only real complaint was one of stiffness. As the weeks went by, she did not appear to get better and indeed she worsened in her condition with pain in the left side of her neck and the left side of her face. As time went on, her face was swollen.
- [57] She started to look for other reasons because her doctor really did not support her complaints and then thought that she might have had multiple sclerosis. Her complaints involved pain in the neck and face and in the leg and she complained about her arm becoming cold and that she felt dizzy. She started to miss days from school. She became irritable and felt she needed rest.
- [58] With respect to her concern about multiple sclerosis, she had a CAT scan and found that she did not have the disease, but the pain continued and more regular time from work was missed.
- [59] She started to attend physiotherapy in August 1993. The pain continued in the neck and the face, and she had numbness in the arm with pain on the top of her head. It seemed that her symptoms were increasing. She became more withdrawn from the family and was not happy. She became preoccupied with her health and she needed rest. There was a change in those responsible for the household chores in that Mr. Hill's mother, Phyllis Hill, became more active in the work around the home and he also did household work in the evenings.
- [60] Mr. Hill said his wife stayed home more frequently this time, and he took the children out on occasion. She did not swim anymore and had no more

- interest in cross country skiing and was very cautious in the things that she did. She had less contact with neighbours and the marital relationship became strained. She was irritable and that caused stress on the family. Mr. Hill indicated that it was obvious to him she was feeling pain and at the end of the day, she was exhausted and could not rebound from these difficulties.
- [61] The decision with respect to work was important, and it was decided that she would work part time. They talked about this problem for about six or eight months.
- [62] After the second motor vehicle accident, Mr. Hill attended upon his wife at the hospital and found that she was on a board and in a neck collar. She was not able to talk very much. When she was released from the hospital, she could not walk and she felt stiff and had pain in her neck. She was very distressed and over the next several days was in severe pain. She had pain at the top of her head and in her face. It was Mr. Hill's assessment that she had really stabilized from her injuries suffered in the first accident and after the second motor vehicle accident, she seemed to be back at the beginning of her health difficulties.
- [63] Months after the second motor vehicle accident, it seemed that her complaints of pain were daily and she seemed to be much more stressed after the second motor vehicle accident. The left side of her face was swollen on a regular basis, and there was pain in the top of her head and in her back. She was very unhappy and discouraged and dispirited.
- [64] He described her as having some improvement at the time of trial in that there really is no need to attend physiotherapy every day. She still remains concerned about anything which may cause pain. She is participating in some more family activities and does a little gardening, but not to any great extent. She tries to do some household chores, but basically most of it is left to Mr. Hill and the children. Ms. Hill does take the children places, but does not participate in any activities.
- [65] Mr. Hill believes that because she is now working part time, she feels better. She says she wants to keep working and now she can rest and contribute more to the children at school. Effectively, the last seven years have made major changes in the family and she is not as outgoing as she used to be and not as social. Her health concerns her.
- [66] On cross examination, it was emphasized she went back to work on a full-time basis in September of 1992 and started to inquire about a teacher to share her work in the fall of 1994. They made a decision in March of 1995 to go part time. All of this took place before the second motor vehicle accident.

- [67] Phyllis Hill is the mother-in-law of the plaintiff. She described the plaintiff as being outgoing and an active person who liked to dance prior to the motor vehicle accidents.
- [68] After the first accident in November of 1992, the plaintiff came home, and Phyllis Hill says that she was "white" and in a state of shock complaining about stiffness. She says that she did not seem to be progressing in her improvement and that from observations made of the plaintiff, it was obvious she was having pain. She backed away from things that she usually did and was not taking part in family activities. Her husband usually took the boys to various places with respect to activities.
- [69] Phyllis Hill said that she often went to the home to look after the children, and the plaintiff could not make dinner after working during these days after the first motor vehicle accident.
- [70] After the second motor vehicle accident, she was in shock again. She appeared to be very sore and complained about her shoulder and her neck. There were personality changes and she did not participate in sporting activities. There were no long drives, and she did not dance.
- [71] Phyllis Hill helped the plaintiff extensively in the home and often stayed overnight. She got the boys ready for school and made the beds. She did the laundry and made supper.
- [72] After the second motor vehicle accident, the plaintiff complained a great deal, and she seemed to be continually in pain. Her face was red and swollen. She would often leave shutting the door and asking not to be bothered.
- [73] On cross examination Phyllis Hill said that before these accidents, Ms. Hill did have trouble sleeping but she did not complain about it to any great extent.
- [74] Prior to the second motor vehicle accident, she was feeling quite a bit better and did not have as many complaints. She felt that she was in worse shape after the second motor vehicle accident than she was after the first motor vehicle accident. After the second motor vehicle accident, she went to physiotherapy every day.
- [75] In addition to the family witnesses, the plaintiff called two teachers to the stand. Glenna Ritcey is a retired teacher who taught with the plaintiff for five years until the spring of 1995. She described the plaintiff as being full of fun and energy and very efficient as a teacher before 1990. The opinion was expressed that the plaintiff was a good teacher and that the children liked her.
- [76] Ms. Ritcey said that after the accident, she noticed the duties of being a teacher proved more difficult to the plaintiff, and she seemed to be uncomfortable in her tasks. She discussed her complaints and she did

mention the difficulty she had with her neck and her jaw and that she had numbness in her fingers and vision problems. After the second accident, Ms. Hill seemed to have suffered "many blows" and she was tired and discouraged.

- [77] Karen Cleaver is a teacher and is a good friend of the plaintiff. They taught in the same school during the mid 1980's, and Ms. Cleaver described the plaintiff as young, happy and a person with a sense of humour who was conscientious about her work. She was said to be well prepared in her job.
- [78] After the motor vehicle accident which occurred in November 1992, the two had conversations quite often and the plaintiff described pins and needles in her hands, sensations in her scalp and difficulty with her vision. Ms. Cleaver indicated she seemed to be a little impatient with her family and all of these complaints seemed to be magnified after the second motor vehicle accident. She was prone to use a sharp tone in her voice and was having difficulty getting along with her husband.
- [79] Ms. Cleaver noticed that the plaintiff's face was swollen, and she saw that on more than one occasion and noticed that she held her neck in an awkward way.

**(b) Medical Witnesses**

- [80] Dr. Robert Oliver was called by counsel for the defence. The plaintiff ceased attending upon Dr. Oliver after discussions took place where he stated she was young and healthy and there was no reason for not recovering. The plaintiff was a patient of Dr. Oliver from March 2, 1986 to April 6, 1995. He was asked about the plaintiff's health up to 1991 and replied that there was nothing significant or any illness of long term effect.
- [81] During his testimony Dr. Oliver was asked a number of questions concerning the plaintiff's condition from time to time when he was treating her, but it was clear that the doctor could not add anything *viva voce* except that which was contained in his office notes. I find that the *viva voce* evidence of Dr. Oliver did not expand on that which was set forth in his notes and the doctor made that admission. There was indication in the notes that there was not any complaints about soft tissue injuries until 1993 and that the first indication of a motor vehicle accident in the notes was under the date March 1, 1994.
- [82] There was a report from the Dartmouth General Hospital dated November 6, 1992 after attendance by the plaintiff following the first motor vehicle accident. There was reference to impact on the passenger side of the vehicle and the fact that the plaintiff was thrown forward violently at the time of the impact and experienced pain over her chest, shoulder and upper back and

neck. There were areas of mild tenderness and pain between the head and the shoulders with the pain extending down into the thoracic area.

- [83] The plaintiff attended upon Dr. Janet Lyons as her family doctor beginning in October of 1994. The doctor's notes refer to the second motor vehicle accident on May 13, 1995 and there is reference to neck stiffness, a swelling in the face and pain in various parts of the body including during rotation of the left shoulder. There was pain noted on flexion of the cervical spine and pain behind the ear. It was Dr. Lyon's impression that she had had a previous motor vehicle accident, but the injuries were "reasonably stable". As she examined the plaintiff during the month of May 1995, she noted that the pain seemed to be at the thoracic spine rather than the cervical spine. She was attending physiotherapy on a daily basis at that time. She did describe the injuries as being situated at the neck area and the thoracic area together with a temporomandibular joint (TMJ) injury.
- [84] Dr. Lyons referred Ms. Hill to Dr. Dhawan who met with the plaintiff on a number of occasions over a two-year period and administered injections to her. She complained to him of pain in the neck and shoulder with left arm symptoms of tingling and numbness. In addition she said she had pain shooting from the left shoulder down to the hand as well as pain on the left side of the face. There was pain in the jaw and pain in the left ear. She was getting headaches frequently, but mostly in the back of the head and occasionally with nausea.
- [85] Dr. Dhawan in the report to Dr. Lyons described symptoms the plaintiff had after the first accident which were similar to the complaints she had in 1995. They involved neck pain on the left side and left shoulder girdle pain with symptoms down the left arm. After the first accident, she did not have pain between the shoulder blades which she complained of in November of 1995. There is reference in the letter to the fact that the plaintiff stated she had about fifty percent recovery after the first accident before the second accident occurred.
- [86] It was the conclusion of Dr. Dhawan that the plaintiff had suffered two cervical sprains and had a re-occurrence of the exact injuries after the second accident as that which was suffered after the first accident. The second accident caused re-occurrence of the TMJ dysfunction on the left side and myofascial pain in the left cervicobrachial muscles. There was no evidence of any neurological compromise, but she had some symptoms of a neurological nature in the left arm.
- [87] By a report dated June 9, 1996, Dr. Dhawan noted that she had full cervical range of motion, full thoracic motion and full shoulder motion. She had no visible muscle spasms in the neck or the shoulder area. There were tender points but to a lesser extent in the suboccipital muscles. But all tender points

- were mild compared to that which existed on previous examinations. She went to physiotherapy once a week. She was intact neurologically, and Dr. Dhawan suggested that she seek an opinion from a psychiatrist or a psychologist. She was still angry and hostile regarding the accident.
- [88] In a report dated June 1, 1997 Dr. Dhawan indicated that possibly the sleep disorder made her more susceptible for chronic pain state, but the injuries caused her to develop the chronic pain state as she was fully functional before the injuries. He opined that she did not fit the criteria for fibromyalgia syndrome and feels that she has myofascial pain. He continued to treat the plaintiff with injections of medication.
- [89] Dr. Thomas Loane, a specialist in physical medicine and rehabilitation, testified and filed a number of reports. His evidence was given in a definitive manner. He examined the plaintiff on June 20, 1994, February 7, 1996 and March 8, 1999. The reference to him in June of 1994 arose out of the motor vehicle accident which occurred in November of 1992. He received reports from Dr. Oliver, Dr. Steven Bedwell, Dr. Hannigan and various physiotherapy reports. He had access to x-rays taken in June of 1993.
- [90] In June of 1994 Ms. Hill's complaints to Dr. Loane were headaches, stiffness in the neck, throat, shoulder and arm together with the occasional numbness in the left arm. The history given to Dr. Loane was that over the few weeks following the accident, the plaintiff continued to have neck stiffness, difficulty swallowing, sore throat and headaches. She began to notice changes with her vision in association with the headaches.
- [91] The complaints continued through the early part of 1993 and in March of 1993 she noticed numbness and tingling of her left arm. In May 1993 she was referred to Dr. Bedwell who did not feel there were any significant neurological abnormalities apart from irritation of the occipital nerves and her cervical sprain. Yet Ms. Hill described to him a ruined summer in 1993 with daily headaches and she was eventually referred to the physio clinic where treatment was started on August 30, 1993. The physiotherapist noticed that there was significant limitation of range of motion of the cervical spine and some altered sensation in the left hand.
- [92] Dr. Loane noted that from the history there seemed to be some improvement in the headaches and neck problems in the fall of 1993. She was seen by Dr. Hannigan who is a specialist in ears, nose and throat and with respect to problems relating to the TMJ dysfunction. She continued physiotherapy throughout the winter of 1993 and 1994 and a variety of treatments were tried including acupuncture, cervical traction, moist heat, muscle stretches and ice.



- [93] Dr. Loane noted that in June of 1994 Ms. Hill had anxiety driving but did not seem to exhibit any other features of a post traumatic stress disorder. She did continue to have sleeping difficulties but no nightmares. The pattern of headaches had improved with one or two per week associated with physical activity. There did not seem to be any further difficulties with visual blurring or dizziness. She feels that her neck had loosened up and had improved but still there was restricted motion to the left and right, and she finds that certain positions of the arm precipitate tingling.
- [94] Dr. Loane noted that the cervical spine x-rays were normal, but there was a slight loss of normal cervical lordosis which can be seen secondary to muscle spasm in the neck. There is an extensive report dated June 26, 1994 which indicates careful examination by Dr. Loane and it was his impression that the plaintiff, as a result of a motor vehicle accident on November 5, 1992 suffered a cervical sprain involving the left neck muscles. As a result of those muscular sprains, she developed symptoms consistent with thoracic outlet syndrome and occipital headaches consistent with occipital neuralgia. In addition, the opinion of the doctor was that she had an aggravation of her disturbed sleep patterns and increased muscle tension in the neck and jaw area which increased bruxism with symptoms of TMJ dysfunction. The doctor said that her initial complaints of sore throat, fullness and aching in the ears, headaches and difficulty swallowing are consistent with spraining injuries to the neck musculature. It is also common to see complaints of visual blurring and dizziness with cervical sprains. Her complaints of left arm numbness, tingling and pain were due to irritation of the nerves and blood vessels travelling into the left arm in the region of the thoracic outlay.
- [95] Dr. Loane noted that Ms. Hill developed almost continuous headaches with hypersensitivity in her scalp to the point where she was unable to tolerate brushing her hair or having the hairdresser brush her hair. This was hypersensitivity in the distribution of the occipital nerve which travels from the base of the skull over the top of the head and supplies most of the scalp.
- [96] All of the complaints which were put forward and the various symptoms would be sufficient to limit neck movement and reduce the ability to perform any regular daily activities with the left hand. Physiotherapy was not instituted until nine months after the accident because of her concern about the possibility of multiple sclerosis, but the physiotherapy almost immediately began to produce improvements in her symptoms which continued until the June examination by Dr. Loane. She has improved the range of movement in the neck and shoulder and had lost the signs of significant occipital nerve entrapment.
- [97] In his report of June 26, 1994 Dr. Loane said it was unfortunate individuals who continue to have symptoms following cervical sprain injuries after two

years tend not to improve. But he was optimistic that she would continue to make improvements if she started into the next phase of her rehabilitation. She may continue to have symptoms of muscle stiffness and aching in the neck and headaches and occasional discomfort involving the left arm, but he did not feel she would have any late degenerative changes involving the neck or the shoulder. He summarized his report by saying that she had suffered injuries to the left neck and shoulder girdle region resulting in persistent myofascial pain, occipital neuralgia and left thoracic outlet syndrome. There was also a secondary development of increased TM joint discomfort. She has made appropriate improvements in her condition and he would expect further improvements as her rehabilitation course progresses. She may be left with ongoing symptoms of headaches and neck stiffness, but he feels that these symptoms would be intermittent. There was no question that Dr. Loane, during his testimony at trial, felt she would continue to have problems from the first motor vehicle accident.

- [98] The second visit the plaintiff made to the office of Dr. Loane was on February 7, 1996 after the second motor vehicle accident. The history given by Ms. Hill at this time was that her condition had stabilized and plateaued in terms of symptoms between June of 1994 and the time of the second motor vehicle accident in May of 1995. She continued to experience headaches, neck stiffness, TM joint discomfort and pain along the left lateral neck muscles. The headaches were occurring once or twice a week and usually associated with physical activity. The left arm and shoulder discomfort was limiting in terms of reaching, lifting or carrying. She continued to have sleep disturbance and anxiety while driving. She missed a lot of time from work and the doctor was told that in the spring of 1995 she had decided to apply for part time work.
- [99] After the second motor vehicle accident, Ms. Hill advised Dr. Loane that she had immediate headaches which were severe and increased neck and upper back pain with lower back stiffness and increased left arm numbness and tingling. She started the physiotherapy on a daily basis, but her symptoms remained at a high level. She was experiencing symptoms of anxiety, flashbacks and nightmares of being killed in a car crash.
- [100] In February of 1996 Ms. Hill told Dr. Loane that her headaches occurred three or four times per week and they were more severe than that which she experienced immediately prior to the May 1995 accident. She described pain in the left neck region which radiated into the left ear and facial area. The pain extends into the left shoulder and posterior shoulder region. She had an aching sensation in the left arm intermittently. She continued to have jaw pain on the left side.

- [101] In his report of February 13, 1996, Dr. Loane suggested that the symptoms appear to be related to post traumatic stress disorder. She had nightmares at least once a week and had experienced some problems with memory and found that she had decreased concentration. She said that she had some brief improvement from the nerve blocks done by Dr. Dhawan but that the pain only improved for about a week.
- [102] Again, Dr. Loane did a thorough examination of Ms. Hill and his impression was that she continued to experience the symptoms of a lateral cervical sprain with the area of the injuries concentrated mainly in the left neck and shoulder girdle muscles. She had headaches with occipital nerve tenderness symptoms suggesting a left brachial plexus irritation and facial pain possibly related to the TMJ dysfunction. She continues to exhibit sleep disturbance and had symptoms which resemble a post traumatic stress disorder with anxiety, intrusive thoughts of the accident, nightmares and avoidance of activities that resemble the circumstances of the accident. Dr. Loane suggested that she see a psychologist or a psychiatrist.
- [103] Dr. Loane noted that the accident in May of 1995 was more spectacular and frightening and that her car was flipped and landed upside down and that her son was a passenger in the car who was trapped in the vehicle and had difficulty breathing following the accident. Dr. Loane said that prior to this accident there was some anxiety when driving but she did not meet the diagnosis for post traumatic stress disorder. After the May 1995 accident, she seemed to have the symptoms "full blown" of post traumatic stress disorder and continued to experience those symptoms in February of 1996 although they were slowly improving. She believed that the second accident produced an aggravation or reinjury of her preexisting cervical sprain condition.
- [104] Dr. Loane was concerned with the post traumatic stress disorder because it can produce severe disability through problems of memory, concentration, sleep disturbance and depression. Dr. Loane believed it was important to have an assessment by a psychiatrist or a psychologist. In addition she should continue to require medication to control the sleep disturbance and muscle spasms and headaches. He noted that with respect to physical therapy, she is gradually transferring to a home program of walking, swimming and light exercises.
- [105] With respect to the plaintiff's duties as a school teacher, Dr. Loane, in his report of February 13, 1996, stated as follows:  
With respect to her duties as a school teacher, it appears that she is coping with her part time employment and she should be able to continue in this. It is difficult to foresee when she will be able to return to full employment, but it is unlikely that she will be able to do so for the remainder of this year (1995/96). Her ability to work full time in 1996/97 will depend on her response to treatment.

- [106] Effectively the doctor's view was that Ms. Hill's condition had plateaued from the 1992 motor vehicle accident, but the second accident had duplicated the mechanism of the injury and aggravated her symptoms which were suggestive of a left sided cervical sprain affecting the left sternocleidomastoid and lateral cervical muscles. This involved symptoms of occipital nerve irritation and left sided headaches, left arm aching and occasional tingling suggestive of brachial plexus irritation and myofascial pain in the left upper back. In addition, she had developed symptoms suggestive of post traumatic stress disorder largely because of the second motor vehicle accident.
- [107] Following the third visit Ms. Hill had to the office of Dr. Loane, the doctor filed a report dated March 10, 1999. In the report the doctor noted that the history given to him by Ms. Hill was that her symptoms were essentially unchanged from that time when he saw her in February of 1996. The physiotherapy had stopped prior to the 1996 examination, but she continued an exercise program including walking, stretching and lifting weights. She continues to be followed by Dr. Hannigan and continues to wear a biteplane. She did receive some sessions on stress management, relaxation therapy and chronic pain and post traumatic stress problems, but she was not being followed by a psychiatrist or a psychologist.
- [108] The plaintiff complained of pain in the left facial and maxillary area, left lateral neck and occipital area, the top of the head, the left clavicular area and the left scapular and thoracic region. She had aching in an ulnar nerve distribution radiating into the fingers. She says her pain was present on a daily basis and she felt "debilitated by pain". She believed this has caused symptoms of depression and fatigue.
- [109] Her sleep patterns improved, and she was not being bothered by nightmares of the accident, but she is still nervous when driving. She had headaches once or twice a week which seem to be triggered by neck tension and are worse towards the end of her working week. They are associated with nausea and dizziness. She found that her scalp on the left side became tender to touch and described pain radiating from the ear into the face and eye region and described swelling and increased temperature on the left side of her face. She continues to have pain in her shoulder and discomfort radiating into the left collar bone. She continues to describe throbbing, tingling pain in the fourth and fifth fingers of the left hand and described pain and tightness through the left thorax on deep breathing and coughing.
- [110] Again Dr. Loane conducted a thorough examination of Ms. Hill and found that she continued to exhibit findings of myofascial pain which is related to muscles and ligaments and involves the muscular structures of the left neck and shoulder girdle. She feels findings of left occipital nerve irritation and

minor left thoracic outlet compression and her range of motion in the neck shoulder girdle have returned to normal.

- [111] The doctor believed that her symptoms of post traumatic stress disorder have largely resolved but she continues to have symptomatic depression requiring medication. It is noted that her psychological status is being evaluated by a specialist.
- [112] The doctor believed that her current problems with headache, neck muscle stiffness, shoulder girdle pain and arm pain and paraesthesia are related to the two motor vehicle accidents in question. He did not indicate that it was his place to deal with symptoms of post traumatic stress disorder, but did say that there was "full blown" post traumatic stress disorder after the second accident.
- [113] It was apparent that the doctor was asked to try to differentiate between the two accidents. He found this "a bit more difficult". He speaks about the forces involved in the second accident being more severe and that it was involved in triggering her post traumatic stress condition and he expresses his opinion in the following terms:

Although there's no scientific way to apportion her current medical condition between the two accidents, I believe that the first motor vehicle accident is responsible for approximately 40% and the second motor vehicle accident is responsible for 60%. The ongoing symptomatology more than two years following the first motor vehicle accident indicated the likelihood of permanent ongoing symptoms. The reason for attributing the large percentage to the second motor vehicle accident relates to the forces involved, the appearance of post traumatic stress disorder and the higher levels of residual pain noted at this time almost four years following the second accident.

- [114] Dr. Loane expressed the view that her current functional restrictions are on the basis of pain and muscle spasm. Activities could lead to increased pain levels and she will choose to limit her activity because of symptomatic pain and headaches. Working with her neck in a flexed or rotated position as she does during her teaching methods will produce increased muscle tension. The doctor said that he believes she is working at an optimal level for her in her current job at the present time.
- [115] It is my impression that his prognosis was the symptoms would likely persist but there could be some improvements.
- [116] Dr. Edward J. Hannigan is a periodontist which is a specialty that involves treatment to the gums, jawbones and infectious diseases of the mouth. He saw the plaintiff in 1984 and 1985 with respect to bite therapy and he prescribed a biteplane to control some mandibular muscle spasms due to bruxism which is a habit of unconsciously grinding teeth either in situations of stress or when sleeping. He said that the plaintiff seemed to be symptom

free in 1986 and he did not see her again until November of 1993 when she reported she was having problems with her jaw again.

- [117] When Ms. Hill saw Dr. Hannigan on November 16, 1993, she described the motor vehicle accident she was involved in 1992, and on examination the doctor found the left superficial and deep masseters to be slightly swollen and tender which indicated chronic inflammation. She indicated she was having pain on the left side of her face and jaw area and the doctor recommended further use of her biteplane because he believed she was suffering from the onset of sympathetic masticatory muscle spasm which was secondary to neck and shoulder injuries. The doctor advised there was nothing he could do mechanically to resolve her problems in the jaw because it was a functional problem that would resolve in time with the right non-stressful situations and the support of medical treatment and physiotherapy. He said that as the neck and shoulder problems improve, the jaw problem will improve.
- [118] The plaintiff next attended upon Dr. Hannigan on November 23, 1994 where he adjusted the biteplane. She had found reduction of pain at the left side of her face and the doctor noticed some improvement in her neck problems and that she had better posture in both the shoulder and the neck although "not ideal".
- [119] The next appointment was May 10, 1995 where he noticed evidence of nocturnal grinding patterns on the biteplane which is commensurate with neck and upper shoulder muscle spasm problems. There was slight left facial swelling in the temporal and masseter area in front of her ear. There was no evidence of any degenerative arthritis in the TMJ. The doctor's diagnosis was that she suffered from muscle pain and inflammation with influence from her neck and shoulder problems and he believes that her decision to reduce her work week was a wise and necessary move with respect to rehabilitation. He advised her that it might take another year for her to reach her optimal level of improvement, but she took no medication for pain except the basic Tylenol pills.
- [120] After the second accident, Dr. Hannigan saw her in April of 1996 and believed that there was an increase in the left facial and jaw joint muscle tenderness by reason of the increased problems to the neck and shoulder. He asked her to continue with physiotherapy and muscle relaxants and recommend part time teaching.
- [121] The plaintiff saw Dr. Hannigan in December 1998 when she had pain in the left jaw over the TMJ and signs of continued nocturnal jaw grinding or bruxism. One of the complaints that she gave to the doctor was that she had increased headaches and jaw fatigue after working a full day. It was a doctor's opinion that she continued to have soft tissue injuries and also

continued to have TMJ ligament capsulitis or inflammation of the main supporting ligaments of the jaw, mostly on the left side. He doubts there will be full recovery.

- [122] The plaintiff has seen three psychiatrists. In 1992 she consulted Dr. Morehouse with respect to insomnia. In 1996 she saw Dr. Philip Mills on three occasions and, at the request of her counsel, she saw Dr. Eric Hansen on March 8, 1999.
- [123] Dr. Mills filed a report and said that the problems which existed in 1996 were nightmares, fear of traffic, poor concentration, forgetfulness and irritability. He diagnosed a classic case of PTSD which he indicated was moderate as opposed to severe. He recommended psychotherapy to address both the chronic pain component and such symptoms as avoidance and hyperaroused state. He suggested Steven Gleich, a psychologist to perform the therapy. Ms. Hill did attend Dr. Gleich for a period of time.
- [124] Dr. Hansen spoke about the plaintiff's role as a teacher and the fact that she is valued as a teacher by her employer and her students. If she is not overly fatigued and does not have neck and facial pain to the point where it interferes with her concentration or emotional state, she is able to think, behave and feel in a relatively normal way. She is troubled by her ongoing symptoms and the impact they have on her activities such as driving motor vehicles and her inability to contribute more to the family finances.
- [125] Dr. Hansen stated that in March 1999 Ms. Hill continued to have symptoms of post traumatic stress. Several of these symptoms have improved since she began taking antidepressants in October of 1998, and she is less irritable and has better concentration. She also has experienced improvement in symptoms of depression and specifically has more energy and is less tearful. Dr. Hansen advanced the opinion that the symptoms which subject her to stress and interfere with her daily living appear to be secondary to the problems she has with neck and facial pain. This opinion seems to be one that differs with the opinion of Dr. Loane who would indicate that insofar as her physical and muscular symptoms are concerned, there would not be any problem in conducting a full time teaching position.
- [126] It is also interesting to note that Dr. Hansen believed that the lack of unbroken restorative sleep contributes to her lack of stamina. He commented as follows:

Her problem with fatigue together with her pain and the tendency of the pain to be made worse by certain physical activities appear to be the main basis for her inability to take on full time teaching duties at this time rather than the direct impact of the persisting symptoms of post traumatic stress disorder.

This again seems to be different from the opinion of Dr. Loane who believed that her difficulties with her employment stemmed basically from her inability to cope with her problems.

## **FINDINGS OF FACT**

- [127] I was very impressed with the witness Geoffrey Hill, and I accept his evidence and believe he has advanced the injuries of the plaintiff as he perceived them and the impact of the accidents on the family in an accurate fashion. He gave his evidence in a thoughtful manner and was quietly definitive in his testimony both during examination-in-chief and cross examination.
- [128] His evidence was supported by his mother, Phyllis Hill and by the two school teachers, Karen Cleaver and Glenna Ritcey. It was my impression that these three persons were truthful in their testimony.
- [129] In hearing this evidence, I have no doubt and do find as facts the plaintiff, prior to the motor vehicle accidents, was an active and competent teacher closely involved in her family's activities. I find the accidents were the cause of a substantial change in the character of the plaintiff and her approach to life. It is my view that she was probably vulnerable to react to the unfortunate incidents as she did. Before the first accident she reacted to her sleep deficiency with irritation, agitation and "verbal" abuse of her children. On those occasions she advised Dr. Morrison that after sleepless nights, she advised the doctor she was "withdrawn and tearful and depressive". She considered herself "tearful, hateful" and "had difficulty with her home and family life".
- [130] This pre-disposition of the plaintiff is irrelevant with respect to the claim for non-pecuniary general damages. The defendants take her as they find her and are liable if the losses of the plaintiff are more dramatic than they would be to an average person. See *Athey v. Leonati et al.*, [1996] 3 S.C.R. 458. But the pre-disposition has to be considered if it increases contingencies for financial losses such as loss of earnings from sources other than the accidents.
- [131] It is my finding that the two motor vehicle accidents caused the extensive hurt and loss to the plaintiff that she described in her evidence. I accept her evidence that she suffered real pain and suffering which can be directly attributable to the negligence of the defendants.
- [132] Her complaints and medical problems are supported by the evidence of Dr. Thomas Loane, and I accept the evidence of Dr. Loane and reject any of the medical evidence which tended to contradict any of his evidence within his specialty. In my view Dr. Loane conducted an extremely careful



examination of the plaintiff and effected a thorough analysis of the injuries and disabilities of the plaintiff.

- [133] To be more specific about the injuries and damages suffered by the plaintiff, I find the accident which occurred on November 5, 1992 caused severe headaches, stiffness in the neck, pain in the throat, shoulder and arm area with occasional numbness in the left arm. In addition she had changes in her vision when she had headaches which for a lengthy period of time occurred daily. She had significant limitations of motion in the cervical spine and she did not notice a great deal of improvement in the headaches and neck problems until a year after the accident.
- [134] I accept the view of Dr. Loane that she had anxiety driving after the first accident, but did not have features of post traumatic stress disorder. Before the second motor vehicle accident, she did not have any nightmares, and her headaches had improved to a frequency of about one or two per week. Her vision improved and her neck was less restrictive. Effectively, she had a cervical sprain which involved muscles in the neck and the left side from which she developed thoracic outlet syndrome causing tingling in the arms and headaches. She had sleep problems before the accident but these were aggravated as a result of the motor vehicle accident.
- [135] I accept the opinion of Dr. Loane which he expressed June 1994 that she had improved from symptoms of the first accident although she had not completely recovered, and he did expect further improvements but she may be left with symptoms of headaches and neck stiffness which would be intermittent. In addition it should be remembered that she was free of symptoms with respect to her jaw before the first motor vehicle accident happened. After the accident, there was inflammation of the masseters and pain on the left side of her face and jaw area requiring further treatment from Dr. Hannigan with respect to her biteplane. These pains and muscle spasms occurred from the injuries to the neck and shoulder. The difficulty she was having with the TM joint did improve, but were not completely rectified.
- [136] The motor vehicle accident in 1995 was a more serious impact than that which occurred in November of 1992. I find there were more incidents available which caused extreme distress to the plaintiff following the severe crash and the position of the motor vehicle after the accident together with anxiety concerning the health of her son who was in the vehicle at the time of the accident.
- [137] The muscular injuries related to the same areas which were affected in the first motor vehicle accident, but the impression I received from the evidence is that the injuries were more severe. She had immediate headaches and increased neck and upper back pain with lower back stiffness and numbness in the arms. It was important to note that she experienced great symptoms of

anxiety with flashbacks and nightmares. She had pain in the facial area and in the neck and shoulder area and even in the left arm. The pain in her jaw increased. In addition to being more severe, the headaches were more unpredictable.

- [138] The most alarming consequence of the second accident was PTSD which was confirmed by the psychiatrists and Dr. Loane. She had frightening nightmares of persons dying or being killed in motor vehicle accidents and flashbacks with a general nervousness over disasters.
- [139] By 1999 there were improvements in her muscular difficulties, but Dr. Loane termed them as "minor". There was improvement in her sleep patterns and her acute PTSD symptoms had resolved in the sense that she did not have nightmares, but she was still very nervous driving and had fear of accidents. Her headaches had improved and were less frequent. But Dr. Loane made it clear that her condition at the time of his last examination in March 1999 had not resolved. He felt that her symptoms would probably persist. He said that she was still experiencing some PTSD symptoms and they would likely be ongoing problems. It is clear that there were no degenerative changes resulting from the accident that could be observed.
- [140] There is improvement in the muscular and neurological aspect of her injuries. Geoffrey Hill noted this and Dr. Dhawan stated in 1996 she had full cervical range of motion, field movement in the shoulder and thoracic area. Dr. Loane found the most significant injury in 1999 was the PTSD and found no degenerative changes and no muscular or neurological impairment.

## **ASSESSMENT OF DAMAGES**

- [141] It is without question that the accidents materially changed the life of the plaintiff. It is not necessary for the plaintiff to prove that the negligence of the defendants with respect to the two accidents was the sole cause of her injuries. When the court ascribes damages for non-pecuniary loss, an award must be found which would attempt to restore the plaintiff to the position she would have enjoyed but for the negligence of the defendants. It is my view that the plaintiff was particularly vulnerable to suffer some of the injuries which occurred to her, but the defendants cannot take advantage of this vulnerability when I assess damages for the non-pecuniary loss.
- [142] In addition to the injuries and physical difficulties suffered by the plaintiff as a result of the accidents, there was a major impact on her home life and on her career. It is my view the extent and nature of the injuries and the loss of amenities dictates an award in excess of the range suggested in *Smith v. Stubbart* (1992), 17 N.S.R. (2d) 118. The plaintiff is entitled to receive from the defendant the sum of \$55,000 for non-pecuniary general damages.

- [143] The plaintiff claims \$486,856 for lost income and employment benefits. In support of such a claim a report of an actuary was filed, and the parties agreed the actuary need not testify.
- [144] The actuarial report set forth present value for the loss at \$416,903 if the plaintiff retired at age 55 and \$486,856 if she retired at age 60. As the plaintiff stated she would retire at age 55 or 60, there is no basis to require the defendants to pay according to a retirement age of 60. Indeed, the preponderance of evidence indicates planned retirement at age 55.
- [145] The total present value of \$416,903 was calculated by the actuary as follows:

Net past loss of sick time	\$30,082
Interest on past loss	6,951
Net past loss of income	78,344
Interest on past loss	5,725
Net loss of future earning capacity	242,547
Net loss of future pension	82,001

From these amounts there were deductions:

Net past savings in pension contributions	6,898
Interest on past savings	505
Future net savings in pension contribution	21,344

- [146] The actuary, for a disability contingency, used disablement rates for females based on Canada Pension Plan experience. This calculation reduces the present value of future earning capacity to age 55.38 by 4.4% and to age 60.38 by 7.5%. The actuary advised in her report she has not adjusted disablement rates because of pre-existing problems with bruxism and disrupted sleep patterns. Indeed she did not consider any of the circumstances which relate to the plaintiff.
- [147] Loss of past earnings is an item of special damage which must be proved strictly. Greater latitude with respect to proof is given for future loss of earnings, but the burden of proof is on the plaintiff and realistic contingencies must be considered.
- [148] The choice of remaining home on sick leave and the choice of working one-half time was that of the plaintiff. No doctor instructed her to reduce her hours of work. After she made the decision, some doctors, including Dr. Hannigan and Dr. Dhawan, approved of the decision undoubtedly because it was obvious lesser time at work would improve her symptoms, but I am not prepared to find they would have directed the reduction in work hours. Dr. Hannigan is a periodontist and the plaintiff did not remain away from

teaching because of her jaw problem. Dr. Dhawan agreed with reduced hours of work because of stress generated by the teaching job.

- [149] Dr. Hannigan stated he hoped for improvement in Ms. Hill's jaw condition which was related to her neck condition and that recovery would follow the same course. Dr. Loane said her neck problem is not what restricts her work hours. It is her inability to cope.
- [150] In my view the doctor who was in the best position to assess the appropriate amount of employment was Dr. Loane, who said "at that stage" (ie. March 1999) she would be likely to continue with part-time work. There were no degenerative changes because of the accident, and Dr. Loane did not believe she had any muscular or neurological impairment. He testified there was no medical reason for her not to return to work full time but the restriction in work hours related to her inability to cope with her symptoms. He said returning to full-time work would not further injure her. He replied in the negative when he asked if he would oppose her request to increase her hours of work. The doctor agreed, in assessing her ability to cope with her symptoms, great reliance was placed on her statements of her inability to cope.
- [151] I accept the opinion of Dr. Loane who was subject to examination-in-chief and cross examination at trial when it conflicts with a statement in the reports of doctors who did not testify.
- [152] The ability to cope is influenced by the stress in a persons life. Counsel for defendant Ghally submitted the court should consider an event in the life of the plaintiff involving the murder of her brother as a source of stress. There is not sufficient evidence to permit me to draw any inference from that fact, but there is evidence the plaintiff had difficulty coping before the accidents in her reaction to herself and her family following sleep deprivation. She also had post-partum depression. My impression from the evidence is that the plaintiff was susceptible to a reaction similar to that caused by the accidents if she was exposed to stress caused by other sources.
- [153] The court has to consider the PTSD would cause problems with coping, and the plaintiff no longer has the major symptoms of PTSD. The court has to consider that the plaintiff chose to work part time for a period of five years before the accidents. The plaintiff gives two reasons for this departure from a full schedule. The couple believed they could afford it. Ms. Hill wanted to spend more time with her children.
- [154] It is clear the plaintiff suffered a loss of earnings as a result of the accidents. She will also lose earnings in the future as a result of the accidents. The actuary used a per cent for contingency established from a table with no consideration of the circumstance surrounding the plaintiff, her lifestyle and

these two accidents. The court must consider the contingencies, and there is little evidence available to effect mathematical precision.

[155] In calculating the contingency, the court considers, based on the evidence, the chance of events other than the accidents leading to a reduction in teaching time for the respondent.

[156] Doing the best I can it would seem the plaintiff has established on the balance of probabilities the loss of work hours up to the present time was caused by the accidents, and I award the figures set by the actuary. Indeed no argument was advanced by counsel to dispute the figure of the actuary that \$30,082 was appropriate for the valuation of loss of sick time. But I do find it was probable on the evidence that causes other than the accidents would serve to partially reduce the hours of work in the future, and I reduce the claim for future losses. I award damages for loss of earnings and benefits as follows:

Net past loss of sick time	\$30,082
Past loss of income	78,344
Interest on past loss	5,725
Net loss of future earnings	145,528
Net loss of future pension	<u>49,200</u>
	\$308,879
Total deductions	<u>22,000</u>
	<u>\$286,879</u>

[157] The plaintiff claimed housekeeping expenses in the amount of \$45,000. This type of claim was considered by the Nova Scotia Court of Appeal in *Carter v. Anderson* (1998), 168 N.S.R. (2d) 297. The injuries and circumstances involving Ms. Carter are similar to those involving Ms. Hill.

[158] In *Carter v. Anderson (supra)* the court recognized that loss of housekeeping capacity is a pecuniary loss even where services are replaced gratuitously by family members. The court awarded \$41,000 for future loss of housekeeping capacity. There was an actuary who gave evidence in that case and considerable calculation was effected by the court.

[159] I have no evidence on the quantum of this claim. Although the facts are similar to the *Carter* case there are differences. Ms. Hill is eleven years older than Ms. Carter. There is evidence the couple shared housekeeping duties before the accidents and Ms. Hill is doing more duties around the home than she was a year or two ago. I award \$25,000 for future loss of housekeeping expenses.

[160] I award the amount of \$300 which is claimed for special damages.

- [161] The evidence establishes there will be future cost of medical expenses including drugs and physiotherapy and I direct the sum of \$6000 be paid to compensate these expenses.
- [162] The issue of apportionment between the defendants involved in the two collisions must be considered. Counsel for the defendants in each case enter finite calculations to encourage the court to award a greater portion of the damage claim on the other defendants.
- [163] Ms. Elliott for the plaintiff and Mr. Dunlop for the defendants Bernard urge the court to award 60% of the damages against the defendant Ghaly. Ms. Jennings for the defendant Ghaly takes the position that if the second accident had not occurred the plaintiff would continue with the symptoms she had before the second accident. She could not cope with those symptoms or work full time with them.
- [164] The plaintiff advances the 40/60 proportion based on the evidence of Dr. Loane. My impression was Dr. Loane was reluctant to ascribe a certain causative figure to each accident. He said "there was no medical way" of doing that and "he would have difficulty supporting anything on a medical basis". His impression was the second accident was more devastating. There were no more physical injuries, but the second accident caused PTSD and for that reason he put greater weight on the second accident.
- [165] The second accident did not cause any more physical injuries, but certainly increased the severity of the symptoms originally caused by the first accident. Dr. Loane says there is no medical basis on which he can make a division, and I say there is no legal basis I can make a division. The court has no evidence to determine the extent to which the injuries in the first accident precipitated the injuries in the second accident. There undoubtedly were a number of events which affected and preconditioned the injuries suffered in both accidents. How can the court mathematically assess causation?
- [166] In my view the only reasonable approach is to apportion liability upon terms where the defendants in the case involving the first accident pays 50% of the damages and the defendant in the case involving the second accident pays 50% of the damages. The negligence of the defendants in both actions caused the injuries and loss of the plaintiff.
- [167] Furthermore, it would seem an equal division is more in keeping with the principles set out in *Athey v. Leonati (supra)* at p. 467:

In *Snell v. Farrell, supra*, 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.

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.

## CONCLUSION

- [168] It is clear from the evidence, including the report of the actuary, that the loss of sick time claimed related to a period after the first accident and before the second accident. The actuary calculated the loss of sick leave from November 5, 1992 to August 1, 1995 to be \$30,082. It was noted after she reduced her work to a part time basis, she "was able to minimize the amount of time missed from work".
- [169] Ms. Jennings, counsel for Mr. Ghaly, submitted the court should consider the number of days of sick leave "as a result of the accident" and sick leave taken prior to the second accident resulted from the first accident and should not be attributed to the second accident.
- [170] Mr. Dunlop on behalf of the defendants Bernard raises the interesting argument that compensation for loss of sick leave is an award for a loss which will take place in the future and the effects of the second accident cannot be separated from the effects of the first accident. Although there is no evidence as to the sick leave benefits which would be taken in the future, it is clear the sick leave taken from each accident was separated by the actuary.
- [171] I find on the evidence the only basis appropriate for ascribing fault for loss of sick leave benefits is that of causation. I find the defendants Bernard liable for the loss. Although loss of sick leave can be calculated as special damages or as a general damage figure taking into account contingencies, there was no argument advanced by counsel or evidence adduced to deduct from the award as calculated by the actuary. The defendants Bernard are responsible for the claim of \$30,082.
- [172] The remaining damages assessed are to be divided between the defendants in each action in an equal fashion. Those damages are:

Non pecuniary general damages	\$55,000
Damages for loss of earnings and benefits	256,797
Housekeeping expenses	25,000
Special damages	300

Future medical expenses

6,000

\$343,097

- [173] By written memorandum, the court has been told the parties have agreed on the rate for pre-judgment interest. The agreement was 2.5% per year on general damages and 5% on other past losses. Because the court has not been privy to the details of the agreement reached by counsel, calculations of interest should be left to counsel. If there exists difficulty reaching agreement on this issue, I will hear counsel.
- [174] The plaintiff shall recover costs against the defendants and written submissions can be advanced to the court on costs.

J.



