

SUPREME COURT OF NOVA SCOTIA
Citation: Marsh v. Paquette, 2010 NSSC 43

Date: 20100205
Docket: Hfx. No. 149594
Registry: Halifax

Between:

Carolyn Marsh

Plaintiff

v.

Wendy Paquette

Defendant

DECISION

Judge: The Honourable Justice Suzanne M. Hood

Heard: May 26-28; June 1-4; June 8-11; June 15-18;
June 22 & 23; June 29; July 17 and August 5, 2009
Last written submission on November 10, 2009

Written Decision: February 5, 2010

Counsel: David W. Richey for the Plaintiff
Philip Chapman for the Defendant

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By the Court:

[1] Carolyn Marsh was a front seat passenger in the family car stopped near the entrance to a parking lot. She says the car ahead reversed into their vehicle. She claims that, as a result, she suffered neck and lower back injuries and psychological injuries. She claims she now has chronic pain as a result of the injuries she sustained. The defendant says the impact was minor and caused no injuries, physical or psychological.

ISSUES

1. Credibility
2. Causation
3. Damages
4. Pre-judgment interest and costs

FACTS

[2] On August 15, 1996, more than thirteen years ago, Carolyn Marsh, her husband, John Marsh, their son, Barry Marsh and John Marsh's nephew, Shawn Brodeur, were in the Marsh vehicle, a 1986 Oldsmobile Delta '88, on their way to Barry Marsh's doctor's appointment at the Dartmouth Professional Centre, 277 Pleasant Street, Dartmouth. When they approached the ticket booth at the entrance to the parking lot from Acadia Street, there was a vehicle already at the booth. The booth attendant and the driver of that vehicle were conversing.

[3] Much else with respect to the incident is in dispute. John Marsh and Carolyn Marsh claim that, after they were waiting for quite a long time, there was a substantial impact. They also say that the Marsh vehicle was a number of feet behind the defendant's vehicle. There are many estimates of that distance in evidence. Much time was spent, and a number of exhibits entered, with respect to the distance between the vehicles, the force of the impact and its results.

[4] The causation, nature and extent of Carolyn Marsh's injuries are also very much in dispute.

[5] To understand the context of this matter, it is necessary to go back in time to review Carolyn Marsh's history before the motor vehicle accident.

History of Carolyn Marsh

a) Up to 1995

[6] In 1996, Carolyn Marsh was thirty-five years old. She grew up in Eastern Passage and quit school at age fifteen, after completing grade 7 and failing to complete grade 8. She moved out of the family home and took a job at the Moirs Chocolate Factory on the production line. She was there only a few months when she was dismissed for missing too much time from work.

[7] She then went to work on a production line at National Sea Products in Halifax and resided with some friends. That work was casual and she eventually moved back home and began to work at a laundromat in the Woodside area of Dartmouth. It was while working there that she met John Marsh.

[8] She stopped working when she became pregnant with their first child, Barry, born in 1978. They have two other children: Rebecca, born in 1982 and Rachel, born in 1992. Carolyn Marsh was principally a homemaker after 1978 when she was seventeen. She did not return to the paid workforce (with a brief exception) until 1995 when she began to work at Tim Horton's on the Waverley Road in Dartmouth.

[9] Carolyn Marsh testified she worked as a cleaner on a temporary basis for her sister in the late 1980's for approximately one to two months. She was also the registered owner of a set of flats (2 apartments) which she said she managed. She said she helped get the flats ready to rent by laying "peel and stick" tiles, cleaning and painting. She testified about her duties with respect to the flats but it is clear that her job was principally finding tenants and collecting rents.

b) The Tim Horton's Job

[10] Carolyn Marsh testified that she went to work in late 1995. She said she and her husband had a plan that she would work for ten years so that she could contribute to the family financially and eventually have a pension. At this time, they had two teenagers and a two year old. Her sister-in-law and good friend, Danita Curwin, who worked at Tim Horton's, assisted Carolyn Marsh in getting this job.

[11] She went to work weekends, initially working two overnight shifts on Friday and Saturday, 11:00 pm to 7:00 am. She later picked up a 3:00 to 7:00 pm shift on Thursdays. She began her job at Tim Horton's on December 4, 1995.

[12] Not long after she began work, Carolyn Marsh had surgery (a partial hysterectomy) on February 1, 1996. She was off work for a number of weeks, returning on March 16, 1996.

c) Tim Horton's Accident

[13] A few weeks after her return to work, Carolyn Marsh was working the back shift, alone as usual, overnight on April 5 and 6, 1996. She was injured when a box of garbage bags she was trying to remove from a shelf overhead hit her on the head and shoulder. She was understandably upset about the incident since she was working alone and had difficulty getting someone to relieve her so she could seek medical attention. Her husband came and took her to the Dartmouth General Hospital where she was diagnosed with a mild concussion. She was not kept in hospital but was sent home with instructions to make sure she was awakened at intervals overnight.

[14] Two days later, she quit her job. She testified that it was not worth the risk of having something more serious occur. Quitting made her ineligible for Workers' Compensation benefits for the workplace injury. In her subsequent report to the Workers' Compensation Board, she said:

I was so upset that I felt if this ever happened to me again I could have died working there alone at night on backshift. (Tab 20B, p. 33)

[15] On April 15, she saw her family doctor, Dr. Kenneth Cameron, who treated her for approximately one month and then referred her for physiotherapy. She attended physiotherapy beginning on May 9, 1996. Later that year on October 29, Dr. Cameron wrote to the Workers' Compensation Board on behalf of Carolyn Marsh with respect to Carolyn Marsh quitting her job. In his letter he says:

... Over the rest of the day and the following day she was suffering from a severe headache and reported that she felt disorientated, and on April 7, she called and quit her job. She was at that time very upset about the circumstances of her injury and because of the head injury protocol her sleep had been interrupted frequently when being checked by her family.

It is difficult to give a precise diagnosis at this time, but an acute stress disorder was (*sic*) defined in DSM IV, would have resulted in impairment of her judgement to the extent that she quit her job, despite the financial implications involved.

I hope that this letter might assist in any review, which Workers' Compensation may make of the decisions in her case.

d) Motor Vehicle Accident on August 15, 1996

[16] Immediately after the accident on August 15, 1996, Carolyn Marsh presented herself at Dr. Cameron's office. She was very upset, anxious and crying. She said she told Dr. Cameron that someone had "smashed into us." By August 30, Dr. Cameron referred her for further physiotherapy. He questioned on September 4, 1996 whether she was suffering from post-traumatic stress disorder ("PTSD"). On October 9, Dr. Cameron diagnosed her with post-traumatic stress disorder and referred her to Jason Roth of Jason Roth & Associates. She attended for therapy with Myrna Ranger, a social worker with Jason Roth & Associates.

e) Job with Modern Building Cleaners

[17] On November 10, 1997, Carolyn Marsh began working as a cleaner with Modern Building Cleaners. Her sister-in-law, Danita Curwin, was employed there, having left her Tim Horton's job around the same time as Carolyn Marsh did. She arranged for Carolyn Marsh to have an interview with Modern.

[18] Carolyn Marsh testified she worked at a government building in Dartmouth and at the Sears Call Centre doing cleaning. She said she was then offered a supervisor's job at the Toronto Dominion Bank Building on Barrington Street in Halifax which she accepted.

[19] She described her duties at the first two locations as emptying the garbage, dusting and cleaning one office. On December 14, 1997, she injured her hand but said she did not miss any time from work from this injury.

[20] At the Toronto Dominion Bank Building, she said she supervised and did cleaning herself. She also ordered supplies, did the time sheets, met with other

supervisors and inspected the work of her crew. She said her cleaning duties were: helping clean the washrooms, some vacuuming, dusting and wiping off desks. She said she only cleaned the bathroom mirrors and sinks because she did not have to crouch down to do so. She said they also cleaned a few small offices.

[21] Her next workplace injury was on October 20, 1998. She struck her left knee on a coffee table near an elevator. The injury led to left knee tendinitis. One week later, she said her knee gave out on her and she fell, sliding down a wall to the floor. She then fell sideways but her back did not hit the floor. However, she said her back hurt worse than before. She was put off work because of this injury and returned on December 14, 1998. She saw Dr. Venugopal with respect to her knee.

[22] Soon after her return to work in December, she made complaints about a flea problem in the building. Her complaints on the subject continued into March of 1999. Dr. Cameron, on cross-examination, said his diagnosis was “adjustment reaction.”

[23] Carolyn Marsh’s final workplace injury occurred on April 27, 1999. She testified that the service elevator on the bottom floor of the Toronto Dominion Bank Building was out of service and it was on this level that the supplies and cleaning carts were kept. In order for her to get the heavy cleaning supply cart to the main entrance and the main elevators of the building on Barrington Street, she pushed it out the back door of the building and up a steep hill to Barrington Street. She said she injured her back doing this and it kept getting worse that night. She said she was put off work. She has never returned to work.

f) Carolyn Marsh’s Dealings with the Workers’ Compensation Board

[24] After the April 1999 injury, Carolyn Marsh was in receipt of Workers’ Compensation Board benefits. She was notified that they would be terminated on August 25, 1999. She appealed the decision and her benefits were reinstated on October 7, retroactive to August 25, for a further period to allow her to participate in a work hardening program for approximately four weeks. Thereafter, she received word that the benefits would cease on November 15, 1999. She appealed that decision, but the original decision was upheld. Carolyn Marsh appealed again on June 16, 2000. On October 23, 2000, the preliminary decision of the Workers’ Compensation Appeal Tribunal was that Carolyn Marsh suffered from chronic

pain. Further submissions were made but, ultimately, her appeal was denied on February 23, 2001 on the basis that there was no Workers' Compensation Board coverage for chronic pain.

[25] Thereafter, a decision of the Supreme Court of Canada resulted in the Workers' Compensation Board being required to pay benefits to injured workers suffering from chronic pain as a result of workplace injuries. On October 25, 2005, the Workers' Compensation Board wrote to Carolyn Marsh about the chronic pain regulations they had enacted and their effect on her claim. Carolyn Marsh then attended at Columbia Health Centres beginning on March 24, 2006 for a Return To Work Assessment and eventually for Vocational Rehabilitation Services Career Counselling.

[26] On January 31, 2007, Carolyn Marsh's claim was reviewed to determine if she was eligible for benefits and services under the Chronic Pain Regulations as a result of the April 26, 1999 work injury. She was found to be entitled to benefits beginning February 1, 2007, retroactive to November 15, 1999. The monthly benefit is \$662.65, to be reviewed at the end of thirty months and again after twenty-four months (February 2010 and February 2012).

Carolyn Marsh's Medical History and Treatments

a) History before the Tim Horton's Accident

[27] Dr. Cameron testified at length with respect to his treatment of Carolyn Marsh. Defence counsel, in cross-examination, focussed on issues of stress and anxiety and complaints of lower back pain before the motor vehicle accident.

[28] Dr. Cameron's chart notes of November 6, 1991, when Carolyn Marsh was thirty, refer to complaints of lower back pain for five days and stiffness in the morning. The pain was increased by activity. The chart note of six days later (November 12, 1991) refers to lower back pain for five days and a tender lumbar spine. It also refers to acute lumbar pain, not diagnosed, followed by a question of whether this was a urinary tract infection (UTI). On November 20, the same complaints continued and, on December 10, a chart note indicates her lower back pain was worse when she woke up. A bone scan on December 13 found no abnormality.

[29] On July 3, 1993, Carolyn Marsh again complained of lower back pain and Dr. Cameron's assessment was "facet joint syndrome." Complaints of lower back pain were made again on October 5, 1993 and June 12, 1995. Dr. Cameron concluded this was mechanical lower back pain. On some of these occasions, there were references to possible UTI's but Dr. Cameron testified the tests for it were always negative.

[30] In her medical history, there were also a number of occasions when Carolyn Marsh complained of stress or anxiety. On June 1, 1995, Carolyn Marsh complained of daily headaches which she said she had been having for months. Dr. Cameron's conclusion was that they were "probably tension."

[31] The next reference to stress was on Carolyn Marsh's return to work at Tim Horton's on March 16, 1996 after her surgery on February 1. She had been threatened with dismissal and was stressed and tired trying to keep up. She said she could not sleep and had a twitching eye. She said her job was threatened. Dr. Cameron's assessment was "situational adjustment reaction."

[32] These complaints are relevant to the issues raised in Jason Roth's report and testimony and the reports of other psychologists which I will deal with hereinafter.

b) Tim Horton's Injuries

[33] As noted above, Carolyn Marsh sustained an injury at Tim Horton's on April 5, 1996. The Emergency Room Report from that night says she had a head injury and she was put off work for two days. The Emergency Room Physician's Report dated April 15 referred to a minor concussion. When Carolyn Marsh visited Dr. Cameron on April 15, his notes reflect that she had severe frontal headaches since the accident and that neck pain had begun later that same night. His subjective examination indicated she was tender over the occipital nerves and the left side of her neck.

[34] Dr. Cameron's report to the Workers' Compensation Board that same day gave as his diagnosis "occipital neuralgia due to soft tissue injury to neck." He said her return to work date would be in three weeks. When medications and injections to the neck on April 23 did not solve Carolyn Marsh's problems, Dr. Cameron referred her to Physiotherapy Atlantic on May 16. His report to the Workers' Compensation Board of the same date estimated her return to work date as eight weeks hence.

[35] The first report from Physiotherapy Atlantic dated May 28, 1996 states that Carolyn Marsh's symptoms were "Pain and stiffness, neck and shoulders. Headaches." "The Objective Findings" were stated to be:

Limited range of motion cervical spine. Tenderness over cervical and shoulder musculature. Pain frontal area of head and base of neck and shoulders.

The next report dated June 12, 1996 states:

SYMPTOMS

Continues to have pain and stiffness of the neck and associated headaches although subsiding slowly.

OBJECTIVE FINDINGS

Limited cervical range of motion. Decreased tenderness over shoulder girdle. ...

RESULTS

Slow progress ...

The report of June 25, 1996 states:

Carolyn's headaches are less severe and she has found acupuncture helpful. I am trying to increase her exercise program however, she has had a flare up of left sided neck spasm since doing weighted exercises and now is on a stretching and slow strengthening program. I hope to be able to increase her program in the near future.

On July 17, 1996, the report states:

Carolyn continues to progress in her exercise regime and her headaches are much less severe and frequent. She continues to find lifting tasks difficult but hopefully as her tolerance increases these problems will resolve. She has been booked for therapy three times per week but has recently started to miss these appointments. I have indicated that regular attendance is imperative but may find that a home program will be more appropriate for her.

[36] The final report before the motor vehicle accident is dated August, 2, 1996. In it, Nancy James, the physiotherapist, states:

Carolyn has recently started on a gym routine with some increase in discomfort however I have explained that this should be temporary. Her headaches are improving and generally is starting to return to a regular routine. I will follow her for 2 more weeks and then discharge her on a home program.

c) Treatment after August 15, 1996 to November 1997

[37] After the motor vehicle accident, Carolyn Marsh continued to see Dr. Cameron and returned again to physiotherapy at Physiotherapy Atlantic. By October 15, Nancy James was concerned that she may have missed something or should try some different techniques so, as was her practice, she referred Carolyn Marsh to Duncan MacAulay.

[38] Nancy James reported to Carolyn Marsh's counsel about this on October 15, 1996. She said:

Carolyn has attended therapy at this clinic for an extended period for treatment of injuries sustained in a motor vehicle accident.

Although there has been improvement in some of her symptoms, she continues to have persistent headaches and arm pain. I have decided to seek a second opinion ...

[39] She also reported to the Marsh insurer on October 25. She said:

Initially she had significant neck and back pain, spasm and loss of movement of both her cervical and lumbar spines.

Treatment of acupuncture, interferential current, moist heat, exercises and mobilizations was applied with good results for her lumbar spine and slow progress for her neck.

[40] Danielle LeBrun's report of January 6, 1996 (*sic: 1997*) states:

Carolyn has made significant progress with her exercise regime. She still experiences occasional headaches and upper, thoracic back pain however, both are manageable. ...

[41] Two days later, the Director of Physiotherapy Atlantic, Linda Langley, wrote to the Marsh insurer saying:

... She does seem very keen to continue on with her exercise program and is feeling that she is on the road to being in better shape than she has been before.

[42] All of the above testified and their reports are in evidence. However, the Physiotherapy Atlantic file notes with respect to Carolyn Marsh were lost when a briefcase was stolen. Because of the lapse of time between 1996-97 and 2009, the evidence of the witnesses was limited to their reports. They now had no independent recollection of their treatment of Carolyn and no opportunity to refresh their memories from their contemporaneous file notes.

[43] Duncan MacAulay saw Carolyn Marsh on referral on October 15, 1996 . He reported to Nancy James on October 17, 1996 (Tab 9A). Under the heading, “Area of Pain,” he said:

Carolyn was seen in this clinic on Wednesday, October 15th, complaining of left yoke pain, left posterior arm and forearm pain, spreading into the hand, frontal and vertex headaches.

[44] He also said with respect to “sleep”:

She reported no difficulty getting to sleep or problems being woken during the night.

[45] He stated his “Impression”:

This presents as a probable C4 extension/left hypermobility. As well, there appears to be some dural irritability but no specific restrictions noted.

[46] Dr. Cameron’s chart notes also track Carolyn Marsh’s progress and complaints of physical symptoms following the motor vehicle accident.

[47] Dr. Cameron’s report to the insurance adjuster dated October 14, 1996 outlines her complaints to him. On August 20, she reported “neck and lower back pain and headaches and pain in her left shoulder.” He saw her again on September 16 when he said “her main complaint was of her neck pain, headaches and lower back pain ... Her left shoulder was increasingly painful” He continued:

Last seen in the office on October 9, 1996, her headache, neck, left shoulder and lower back pain ... were still present.

[48] On November 8, Dr. Cameron's Chart Notes indicate she was "not sleeping good." She complained of neck pain and lower back pain but the latter "has had some improvement."

[49] On November 20, she reported she still had pain in her neck and shoulder and "her back is beginning to hurt more," since she "started to exercise."

[50] Carolyn Marsh reported to Dr. Cameron on December 17 that her "neck hurts more" and her back is "still sore" although "at times it feels ok."

[51] On January 8, 1997, Carolyn Marsh saw Dr. Cameron with respect to her ongoing sinus problems. She also reported "neck still sore - varies in severity and activity" and that she was "finished with physiotherapy" but needed to keep "conditioned." She also reported her lower back was "recently more of a problem" and she "relates this to her exercise."

[52] When she next saw Dr. Cameron on January 23, 1997 about abdominal and chest discomfort, she also reported that her back was "bothering her since she stopped physio"

[53] On a visit several months later, March 27, 1997, her second area of complaint was that her "neck and back still bother her," "not severe, but every day."

[54] Carolyn Marsh's next visit on May 7, 1997 was with respect to her sinuses but she reported that her back "feels worse than neck." Dr. Cameron's diagnosis then was "mechanical low back pain."

[55] On August 13, 1997, after discussing her sinus problem and lactose intolerance, she reported that "neck & back still bother her."

[56] Carolyn Marsh mentioned her back again on September 3, 1997 when seeing Dr. Cameron for other matters.

[57] Thereafter, there is no mention of lower back pain until several months after she went to work at Modern Building Cleaners.

[58] Dr. Cameron prepared a report dated May 17, 2009 (Exhibit 5) and testified at trial. I will deal with that report and his testimony hereinafter.

[59] Dr. Cameron had referred Carolyn Marsh to Jason Roth of Jason Roth & Associates after the motor vehicle accident. Dr. Cameron's notes, as mentioned above, indicate he believes she was suffering from PTSD. His letter to Jason Roth dated October 10, 1996 says:

... she has continued to have flashbacks to the accident, jumps with a loud noise, has withdrawn from her usual activities, cannot motivate herself to do things, has difficulty getting out of bed in the morning, is irritable and breaks down in tears.

I believe she is suffering from an acute post traumatic stress syndrome as a consequence of the MVA.

[60] Carolyn Marsh was treated by Myrna Ranger, a social worker working with Jason Roth & Associates. There are no file notes from 1996 and 1997. Jason Roth's initial report to Dr. Cameron is dated October 23, 1996, after his meeting with Carolyn Marsh on October 21. He reports that Carolyn Marsh is:

... experiencing enormous psychological 'distress' which appears to have originated as the result of her having been in a MVA which occurred on August 15, 1996. At that time, Carolyn (who was a passenger in a car driven by her husband) was stationary when a car in front of her backed up going very quickly and 'hit us in the front with great force'.

[61] His assessment was:

A preliminary (one session) assessment of Carolyn would suggest that she is suffering from 'Post Traumatic Stress Disorder'. A firm diagnosis of such would require additional assessment time.

[62] Subsequently, Jason Roth concluded that a diagnosis of PTSD "can be made" (letter of November 18, 1996 to The Co-operators).

[63] A subsequent letter from Jason Roth to Joe Scott at The Co-operators (the Marsh insurer) on August 11, 1997 says:

This letter is intended to serve as a termination report concerning our contact with the above mentioned individual. Information in this letter is a summary of our recent face-to-face meeting.

The psychological distress which Carolyn displayed at the time of her initially being seen has moderated to the point where counselling intervention is no longer necessary. Presenting symptoms which led to our originally making a diagnosis of 'Post traumatic Stress Disorder' are no longer apparent. Carolyn's last appointment with us was on March 21, 1997; at that time she reported no unusual difficulties in dealing with day-to-day demands.

Carolyn was committed to the counselling process and was a pleasure to work with. We do not anticipate further contact with her.

[64] Jason Roth prepared a report for trial (Exhibit 9) dated May 4, 2009. He also testified at trial. I will refer to that report and testimony hereinafter.

d) Treatment after November 1, 1997

[65] Carolyn Marsh attended at Dr. Cameron's office on November 10, 1997 complaining of "panic at jury summons" and "chest pain." He concluded the jury summons was the cause of her panic. He referred her to the Dartmouth Mental Health Clinic, since he concluded she needed immediate help. Dr. Cameron testified that he was not aware at that time that Carolyn Marsh had been discharged from therapy in March 1997 or that she was about to start a new job on that very day. The Dartmouth Mental Health Clinic could not see her immediately. Dr. Cameron then referred her back to Myrna Ranger on January 23, 1998. As a result, Carolyn Marsh saw her again between February 20, 1998 and May 8, 1998. The notes indicate that she saw Myrna Ranger on four occasions. The notes indicate Carolyn Marsh "is still showing signs of anxiety attacks." Carolyn Marsh reported "having a startle reaction at times," however, "She isn't having many problems with driving." During the sessions, she referred to a number of stresses: issues with family members including her mother, being referred by the defendant's insurer to a psychiatrist as well as "recurring symptoms from her MVA." The termination report of May 9, 1998 stated "Carolyn notes a decrease in the intensity of these reactions."

[66] Dr. Cameron continued to treat Carolyn Marsh after she began her job with Modern Building Cleaners in November 1997. On March 13, 1998, after dealing

with a respiratory infection and abdominal concerns, Dr. Cameron notes that Carolyn Marsh reports that her “lower back still hurts” and “neck gives her headaches.” There is a further reference to her neck and lower back in Dr. Cameron’s chart note of May 4, 1998 which he could not decipher.

[67] On August 14, 1998, Carolyn Marsh reports that her neck is “improved” and that it “comes and goes.” She also reports that her lower back is “fairly constant” and that she has to keep “turning in bed at night” and can drive for two hours but “has to keep moving around in the seat.”

[68] On October 28, 1998, after the work injury to her knee and the occasion on which it gave out on her, Carolyn Marsh saw Dr. Cameron complaining of severe pain from her hip to her foot. Dr. Cameron questioned whether she had a disc protrusion and referred her on October 28 to Drs. Legay and Venugopal, orthopaedic specialists. In his letter to them, Dr. Cameron said:

Over the past year or two, she has endured non specific neck and low back pain, due to two MVAs. These have no bearing on the current episode.

[Dr. Cameron said at trial the reference to two motor vehicle accidents was an error.]

[69] In his reply to Dr. Cameron on November 2, 1998, Dr. Venugopal says:

She denies any history of back problems with the MVA that she had before. It was mainly a whiplash sort of situation.

[70] Two weeks later, Carolyn Marsh saw Dr. Cameron again saying her “back still hurts” and complaining about her knee. His diagnosis was “non-specific low back pain.”

[71] Thereafter, Dr. Cameron received Dr. Venugopal’s report of December 4, 1998 after x-rays were done. The report says:

X-rays of her back show degenerative disc disease at L5-S1 and possibly L4-5. Clinically she has a good range of motion with straight leg raising to 90 degrees and no neurovascular deficit on examination. I think this is mechanical back pain and this should be treated nonoperatively with weight loss, appropriate rehab program, etc. As far as work is concerned, I think her back will continue to

bother her from time to time, and I think it is a matter of trial and error to see what she can and cannot manage. We will then see how she progresses and assess whether she is able to function in her job or not. A work hardening type of program may be appropriate for this lady.

[72] I will deal with Carolyn Marsh's work related injuries further hereinafter.

CREDIBILITY

[73] Credibility is a key issue with respect to liability and causation. Causation is the principal issue in this trial. Carolyn Marsh says she is in constant pain and has been ever since the motor vehicle accident more than thirteen years ago. She also says she suffers psychologically as a result of the motor vehicle accident.

[74] There is conflicting evidence about a number of matters: 1) the nature of the impact between the Marsh vehicle and the defendant's vehicle and the damage to the Marsh vehicle; 2) the events immediately following the motor vehicle accident; 3) the extent of Carolyn Marsh's recovery from the Tim Horton's injuries by the time of the motor vehicle accident; and 4) the extent of Carolyn Marsh's recovery from the motor vehicle accident and the connection between the motor vehicle accident and the injuries Carolyn Marsh subsequently sustained in the workplace.

a) Evidence of the Nature of the Impact and Damage to the Marsh Vehicle

[75] John Marsh testified that his car was at least five feet behind the defendant's vehicle. He said that meant it was partly on the street but he said the street was very wide. He said he was trained at work to always be sure he could see the asphalt beneath the rear wheels of any car he stopped behind.

[76] He was shown Exhibit 3 which is current photographs of the entrance to the parking lot. He marked on photo #2 the approximate location of his car by putting a green line on the photograph, near some bushes just beyond the paved parking lot.

[77] Carolyn Marsh testified that their vehicle was seven feet behind the defendant's vehicle. She said in her evidence that she based this upon measurements she and her husband had made, during the trial, of the site of the accident. Exhibit 17 is a series of photographs taken recently. It is clear from this

exhibit and Exhibit 3 that the ticket booth has been removed, although its outline can still be seen on the concrete pad which remains. This was confirmed by the testimony of Brenda Richards who was working in the ticket booth at the time of the accident.

[78] Brenda Richards marked on Exhibit 17, photo #9, the approximate location of the ticket booth window at which she was talking to Wendy Paquette. It is some distance behind where the driver's window is in that photo, which was taken by the Marshes during trial. She testified that the vehicles were not very far apart, because, when Wendy Paquette backed up, she could still see the front of her car when she heard the impact.

[79] Barry Marsh testified that their car was about a car length behind the defendant's vehicle and partly on the street. On cross-examination, he admitted it could have been less than a car length, which he said for most cars is 12 to 13 feet. As well, he testified that during the trial he went to the site of the motor vehicle accident. He said his parents placed their two present vehicles (they no longer own the 1986 Oldsmobile) in certain locations and took measurements. He said they took the photographs which were entered as Exhibit 17. He testified that in photo #13 the distance between the two cars was seven feet and, in another, photo #12, the distance was ten feet.

[80] However, in her handwritten statement of October 2, 1996 (Tab 23), Carolyn Marsh said their car was three to four feet behind the defendant's car. This statement was made much closer in time to the actual accident than her testimony in court. In her discovery testimony (Exhibit 28), Carolyn Marsh confirmed that statement.

[81] In his discovery evidence, John Marsh said he was at least five feet behind the defendant's vehicle. He said his car was partly in the street, approximately three feet from the centre line. Carolyn Marsh said there were other cars waiting to enter the parking lot. She said Brenda Richards told her this on her return a few days after the motor vehicle accident and that she should try to get the names of the other drivers.

[82] I have viewed both Exhibit 3 and Exhibit 17 and compared the testimony of the witnesses about the location of, and distance between, the vehicles.

[83] The location of the red car (representing the Marsh vehicle) is almost entirely in the street in photo #10 of Exhibit 17. Its location in photo #13 of that exhibit places it almost exactly at the location John Marsh marked for it on photo #2 of Exhibit 3. However, when Brenda Richards marked an "X" for the location of the ticket booth window (on photo #9 of Exhibit 17), she placed it by the rear passenger window of the vehicle shown in that photo.

[84] Putting these depictions together would mean the forward vehicle shown in photo #13 was much closer to the red car. In my view, that is consistent with Carolyn Marsh's original estimate of only 3 to 4 feet between the two vehicles. This is also consistent with evidence about the impact and the damage to the Marsh vehicle which I will refer to hereinafter.

[85] John Marsh said they waited behind the defendant's vehicle during two to three songs on the car radio, possibly as long as ten minutes. Carolyn Marsh said they were sitting there for a while and discussed why it was taking so long. She said they were concerned her son would be late for his appointment. Barry Marsh said they were waiting for a few minutes. Wendy Paquette testified that she had to pay a ticket and wanted to know if this was the place to do it. Therefore, she wanted to drive through the parking lot to look at the building to see if it was the right place. She did not want to pay for a ticket because she did not want to park, only to drive in and out again. She said the woman in the ticket booth would not let her go in without paying so she decided to leave. She said they had a brief conversation with respect to this before she put the car in reverse. She testified that the car did not move. Brenda Richards testified that she and Wendy Paquette spoke for only a short time.

[86] The description by John, Carolyn and Barry Marsh of events seconds before their vehicle was struck is as follows: John Marsh said that, although Wendy Paquette did not floor her car, she reversed it "rashly." Both Carolyn Marsh and John Marsh said the defendant's vehicle came up on their front bumper. John Marsh said the car "bounced." Carolyn Marsh said she saw the back-up lights on the defendant's vehicle.

[87] Barry Marsh testified that he too saw the back-up lights and then they were hit hard, with the other car up on their bumper. He also testified that he saw his mother "flailing around." He said her head snapped back and then forward; he repeated this on cross-examination.

[88] They described what happened to them on impact. Carolyn Marsh said she was “whipped,” and thrown “in a flexion,” that she was thrown back and ahead. Both Carolyn and John Marsh said the car “bounced” when Wendy Paquette drove off their bumper. Barry Marsh said their car shook up and down when the other car drove off their bumper. John Marsh testified that due to the force of the impact he was pushed sideways and back around in his seat so he could see the rear seat passenger on the opposite side of the vehicle. He said Carolyn Marsh was “distorted in her seat.”

[89] Carolyn Marsh testified that her neck began to hurt right away. She said she also began to cry and was very upset. She said when her husband asked her if she was okay she was frozen and could only manage to get out the words “I’ve been whipped.” She said she then put her head down and put her sunglasses on because she was embarrassed that she was crying.

[90] Shawn Brodeur, although not a completely independent witness because he is the nephew of John Marsh, was, in my view, the best witness with respect to the impact of the motor vehicles. He said all he could remember was that there was a “jolt.” He said nothing about the car “bouncing.”

[91] Brenda Richards testified she heard the impact, but it was not a loud noise. A 1986 Oldsmobile Delta ‘88 is a large solid car described by John Marsh as a “tank.” No one disputed this evidence. It is shown in the top photograph of Tab 25 of Exhibit 1.

[92] There was little apparent damage to either vehicle. There is an appraisal of damage to the Marsh vehicle (Tab 24) which noted damage to the license plate bracket. The appraisal says:

Prior damage to the grill and bumper was marked. Owner advises vehicle making noise when turning right and when applying brakes. It is my opinion that this is old damage and not related to this loss.

[93] John Marsh testified at trial that there was a “loud screeching sound” from the left front wheel of his vehicle as he drove home. He said when he got home he saw plastic around the left front wheel which was out of place. He said after he removed it the sound was gone. He agreed that, at discovery, when he was asked

about the damage to the car, he did not mention that the plastic was out of place and he removed it.

[94] Subsequently, the Marsh vehicle was serviced on October 15, 1996 (Tab 26). The service notes state: "Squeak left front. Removed LF wheel needs pads one slider seized no accident damage."

[95] John Marsh said the impact scratched the bumper of his car and the scratches were not there before the accident. He agreed there was no damage to the grill, the logo or the headlights of the vehicle. Danita Curwin, Carolyn Marsh's sister-in-law, testified she had looked at the car before John Marsh bought it and there were no scratches on its bumper then.

[96] There is no damage report on the defendant's vehicle. There is some evidence, through Wendy Paquette, that its rear bumper may have moved slightly but I give this evidence little weight. The Automobile Accident Report (Exhibit 27) was prepared by Valerie Gallant, the telephone adjuster for the defendant's insurer. She testified that she completed the first two pages after questioning the driver, Wendy Paquette. In that part of the report, completed on August 19, 1996, she writes that there was a "Black line on passenger side rear bumper" of the defendant's vehicle.

b) Evidence with Respect to the Events Immediately after the Motor Vehicle Accident

[97] John Marsh testified he got out of the car right after the accident and went towards the defendant's vehicle. He said that, because he saw two children in the car, he went part way up to the vehicle, only to the post behind the driver's door, to speak to the driver. He said he asked her "Why the hell did you do that?" but nothing more. He then said he returned to his vehicle to check on his wife.

[98] John Marsh said that he got out again and spoke to Wendy Paquette to get her license and insurance information. He testified that she gave him the former but would not give him the latter saying it was not her car. He testified that he did not yell or swear at Wendy Paquette. Carolyn Marsh said that, because she had her head down, she did not see the inter-action between John Marsh and Wendy Paquette and could not hear their conversation. Neither Barry Marsh nor Shawn

Brodeur could recall any details of the interaction between John Marsh and Wendy Paquette.

[99] Wendy Paquette testified that John Marsh yelled, screamed and swore at her to the point that she was afraid he would hit her and rolled up her car window. She said she eventually rolled it down an inch so they could talk but John Marsh was aggressive and still yelling and swearing at her. She said she had four children with her in the car: her two sons aged 11 and 8 and two children she was babysitting, a boy of 6 and a girl of 4.

[100] She said she was very upset and crying because of John Marsh's actions. She said she gave John Marsh her license but could not find the insurance card because the car was a rental. She testified that she spoke to a policewoman after two police officers arrived.

[101] Brenda Richards testified that she recalled that the man in the car behind Wendy Paquette's car got out and yelled, screamed and swore at Wendy Paquette near the booth window. Brenda Richards said Wendy Paquette was crying. She said she herself could not understand all the commotion from a bump to an older car.

[102] John Marsh testified that he returned to his car after speaking calmly to Wendy Paquette. Because he said she told him she did not have insurance, he asked his son to go inside and call the police. He said that at about this time an RCMP vehicle appeared in the parking lot and he approached it. Because Dartmouth was not RCMP jurisdiction, the officers contacted city police.

[103] During this time, John Marsh testified that he had not moved his vehicle. John Marsh said he understood that you were not supposed to disturb the scene of a motor vehicle accident. It was approximately fifteen minutes before the police arrived. When they did, they spoke to John Marsh and had him move his vehicle. Then they spoke to Wendy Paquette.

[104] Carolyn Marsh says she has very little recollection of some of the events immediately surrounding the motor vehicle accident. However, she does recall going to Dr. Cameron's office which was in the professional building. She said she was very upset and asked to see him. Dr. Cameron testified he understood from what Carolyn Marsh told him that the impact was substantial.

c) Evidence about Carolyn Marsh's recovery from the Tim Horton's Accident

[105] Carolyn Marsh testified that she had completely recovered from the Tim Horton's injury by the time of the motor vehicle accident. Both she and John Marsh testified that, on that very day, they had been talking in the car about her looking for a job. On cross-examination, however, she admitted that she had not yet prepared her resume or taken any steps to find a job.

[106] The record of her progress after the Tim Horton's accident is contained in the chart notes of Dr. Cameron and in the reports of Physiotherapy Atlantic. These chart notes and physiotherapy reports have been referred to above. Nancy James (now Walker) testified about Carolyn Marsh's progress in physiotherapy. She said that Carolyn Marsh was "doing well" on August 2, 1996. She said she was not "perfect", but getting to a "more normal state." On cross-examination, she said Carolyn Marsh's injury "had not resolved" but she was "improving." She said that discharging someone from physiotherapy does not mean that they have made a complete recovery. She said that often physiotherapists have done all they can and patients must continue with home or gym exercises to continue and maintain their recovery.

[107] Dr. Cameron testified about the meaning of being discharged from physiotherapy. He too said that at some point the physiotherapist can do no more but that does not mean that the person has completely recovered.

d) Extent of Recovery from Motor Vehicle Accident and Connection Between Motor Vehicle Accident and Work Injuries

[108] Carolyn Marsh says she never fully recovered from the motor vehicle accident. She says her work related back injury in April 1999 is directly related to the motor vehicle accident and, in particular, to the back injury she sustained in it. She got a job as a cleaner in November 1997, fifteen months after the motor vehicle accident, but she said she was always in pain from the motor vehicle accident and worked through it.

[109] As a result of workplace injuries, Carolyn Marsh saw a series of treating professionals. In assessing her credibility, it is useful to review what she told them about workplace versus motor vehicle accident injuries. Some of these treating professionals testified and the reports of others are in evidence.

[110] Carolyn Marsh also returned to Myrna Ranger for counselling in June 2001. It is also helpful to consider what Myrna Ranger's notes reflect of their discussions about work injuries and the motor vehicle accident.

[111] I have referred above to Dr. Cameron's chart notes and to his referral of Carolyn Marsh to Dr. Venugopal after her knee injury at work which had been reported to the Workers' Compensation Board ("WCB"). Dr. Venugopal's report to Dr. Cameron states that "She denies any history of back problems with the MVA she had before." He then in a subsequent report says: "I think this is mechanical back pain."

[112] At trial, Carolyn Marsh gave an explanation of her reported comment about the motor vehicle accident to Dr. Venugopal. She said that she had been in a motor vehicle accident twenty years before and it was that motor vehicle accident to which she had referred not the 1996 one.

[113] Dr. Venugopal referred Carolyn Marsh to Maritime Physiotherapy. Robert MacDonald, the physiotherapist there, reported to Dr. Venugopal and to the WCB. In his letter of December 11, 1998, he says:

Carolyn states that she had previously injured her lower back in a work related injury in 1996, for which she required extensive physiotherapy. At the time that

she had almost fully recovered from this injury, she was involved in a motor vehicle accident which resulted in aggravation to (*sic*) her lower back problems. She once again had extensive physiotherapy treatment following this motor vehicle accident and had reasonably good recovery. She states that she has had intermittent low back pain since that injury, but she has been able to work without significant aggravation of symptoms. At this time she is employed with a cleaning company and is a supervisor cleaner at the Toronto Dominion Bank building in Halifax. Her job involves not only supervising other personnel, but also doing physical cleaning jobs her self.

His records indicate he saw her between December 11, 1998 and January 20, 1999 and invoiced the WCB for the treatments.

[114] In April 1999 Carolyn Marsh injured her back at work. Thereafter, she saw a number of treating professionals. She first saw Heather MacAuley at Burnside Physiotherapy in May 1999. She reported to Dr. Cameron and to the WCB on June 14, 1999. In her report, she states the results of Carolyn Marsh's physiotherapy:

Carolyn's progress have been poor. Although the spasm is distinctly less, her function remains low. I think she is capable of more.

I will teach stabilization exercises this weeks (*sic*) and I feel Carolyn will need a conditioning program (with some precautions) soon. An obese, weak person working as a cleaner is not a good mixture.

Eliciting information has been difficult, but strength testing through a functional capacity evaluation will obtain more objective information.

[115] In July 1999, Carolyn Marsh was referred by the WCB to CBI Physiotherapy & Rehabilitation Centre where she participated in a Functional Capacity Evaluation ("FCE"). Mark McFarland's Initial Assessment Report dated July 30, 1999 (Ex. 1, Vol. 4, Tab 14A) states in part:

Ms. Marsh relates a past medical history of low back pain, and treatment approximately 1 year ago.

[116] He continues:

... A modified Functional Capacity Evaluation was conducted at the time of assessment and there were noted inconsistencies in observed exertion; that is to say, Ms. Marsh did not demonstrate the change in body mechanics or techniques normally associated with an individual performing at their maximal capabilities.

[117] His Summary & Recommendation was:

SUMMARY & RECOMMENDATION: Given the fact that neurological testing is negative and there is no significant objective impairments of note upon assessment, I am recommending that Ms. Marsh enter into a structured work conditioning program to progress her activity tolerance up to 8 hours over the course of the next four weeks. I am confident that Ms. Marsh will be able to make a successful return to her previous employment, albeit with much effort and compliance with her outlined treatment program.

[118] The program began on July 30 but Carolyn Marsh continued only until August 6. Because Mr. McFarland mistakenly believed Carolyn Marsh went on vacation, he closed her file. He subsequently wrote to say he now understood it was because of family illness. In any event, she did not return to the Canadian Back Institute. Her WCB benefits had been terminated but were reinstated so she could attend the Halifax Work Hardening Centre in October and November, 1999. Debra Vieth-Morse, an Occupational Therapist, reported to the WCB on October 19, 1999. She says in her report:

She reports she has recently begun to experience cervical spine pain as well as bilateral shoulder pain.

...

Ms. Marsh reports having a previous back injury 5 to 6 months prior to her April 26 injury ...

[119] There is no mention in the report of a back injury in a motor vehicle accident. On cross-examination, Ms. Vieth-Morse said that if it was mentioned it would be in her report.

[120] She also refers to Carolyn Marsh's previous job as a cleaner and what it required:

... She reports she was responsible for lifting at waist and floor levels, as well as carrying both in her right and left hand. She reports she was also required to perform activities that involve grasping, pinching, standing, bending, stooping, crouching, squatting, kneeling, and twisting.

She said this information was provided by Carolyn Marsh. She continues:

Ms. Marsh's program will involve progressive lifting, carrying, and push/pulling, as well as job simulated tasks. Although Ms. Marsh presently does not hold her job as Cleaning Supervisor with SMS Modern Building, it is my understanding she is going to pursue this line of work ...

[121] Debra Vieth-Morse's Discharge Report is dated November 12, 1999. In it, she reports that Carolyn Marsh has not made "large improvements" but says that Carolyn Marsh has told her she has "noticed improvements in her functional abilities"

[122] She concludes:

It is, however, my understanding, that Carolyn's benefits will be discontinued as of November 15, 1999, thus, we will be discharging her from our Centre on this date. Carolyn has expressed to me, however, that she is investigating ways in which she can continue with this program to help improve and maintain her present abilities.

[123] Carolyn Marsh began to see Myrna Ranger again in June 2001, almost five years after the motor vehicle accident and just over three years after her back injury at work. The reports indicate she was "having anxiety attacks and panic attacks." There is mention of difficulties with her mother and that "Carolyn reports still be (*sic*) anxious in a car, especially when someone is backing up in her direction." Over the next eighteen months, there are numerous references to anxiety about driving and especially about seeing "back-up lights." There is also some reference to this litigation and to discoveries.

[124] Except for one mention in June 2001 that "Carolyn is not working," there is no reference to her work injuries or to her dealings with the WCB.

[125] However, between May 1998, when she last saw Myrna Ranger, and June 2001, Carolyn Marsh had been fighting with WCB to secure benefits arising from

her April 1999 injury. Earlier in 2001, she had been involved in submissions to the WCB about benefits, stating, *inter alia*, that she was in pain and suffering from depression and anxiety because of her injuries.

[126] Although Jason Roth said Myrna Ranger was not a good note-taker and record keeper, there is a pattern in her notes about Carolyn Marsh's concerns. If her note-taking was truly bad, one would expect there to be some disjointedness to the notes. Also, one would expect, if the notes were random, that at some time over eighteen months, they would have referred to work injuries and/or the WCB fight if Carolyn Marsh had mentioned them. This is particularly surprising since only about three months before returning to Myrna Ranger, Carolyn Marsh had presented at the Dartmouth General Emergency complaining of panic attacks and anxiety and mentioning stress over the loss of the "long WCB battle."

[127] After the WCB enacted chronic pain regulations, Carolyn Marsh was referred to Columbia Health Centres for a Return to Work Assessment. It was completed beginning March 24, 2006. Derek Weir, who is a kinesiologist, testified about the assessment. As a result of it, the five assessors recommended Carolyn Marsh participate in a "pain management program." This was although they said:

Ms. Marsh's poor validity score casts doubt on the accuracy of her reporting as well as the results obtained in the other psychometric assessments. Nevertheless, she appeared motivated to participate in a pain management program and likely could benefit from further education/information on concepts such as 'hurt vs. harm' and the importance of remaining as physically active as she is able, in spite of her persistent pain experience.

[128] On cross-examination, Derek Weir agreed that Carolyn Marsh would only have attended at the Columbia Health Centre because she attributed her chronic pain to the workplace injury in 1999. He also agreed, on cross-examination, that there was only one objective test in the assessment and Carolyn Marsh failed it. He said it made them question her other responses.

[129] The assessment noted she was interested in "being trained in real estate sales," but would be "open to identifying other appropriate job ideas and return to work options."

[130] As part of the program, Carolyn Marsh saw Stephen White, a psychologist with Columbia Health. In the first reported session with Carolyn Marsh, his notes state:

... after the [workplace] injury, she began experiencing panic attacks

[131] Since there were reports during her time at Columbia Health that Carolyn Marsh was suffering from anxiety, she was referred to Debra Garland, a psychologist, by the WCB. She saw Carolyn Marsh on five occasions before writing her report of October 31, 2006. She reported that Carolyn Marsh “has features of agoraphobia.” She said:

... her anxiety has developed into an irrational fear (phobia) regarding daily life tasks that involve her going to the drugstore, grocery store, bank, doctor’s office, etc. in general, engaging in everyday activities that would not typically be a cause of anxiety. ...

[132] She said on cross-examination that it would be “unusual” for this to occur without any prior indications of it. She also said it would be a “fairly significant change” to have this occur within one and one-half months after Carolyn Marsh left Columbia Health. However, on re-examination, she said she would not change the opinion in her reports.

[133] Both Ron Patterson and Lori Shackleton, who worked with Carolyn Marsh at Columbia Health, said they did not see symptoms of agoraphobia when they dealt with Carolyn Marsh in July and August of 2006. Ron Patterson testified that, if there were social problems, they would have been identified. Lori Shackleton said the only fear Carolyn Marsh expressed to her was anxiety she would have returning to work in any job. She said they had discussed the possibility of Carolyn Marsh doing retail work.

e) Statutory Declaration

[134] As part of the process of appealing the Workers’ Compensation Board decision terminating her benefits, Carolyn Marsh swore a Statutory Declaration on January 12, 2001. In it she said:

I, Carolyn Marsh of Dartmouth, in the Province of Nova Scotia, make oath and say as follows:

...

2. My reason for preparing this affidavit is to review my pre-injury health and to describe my work duties with my pre-injury employment, to describe my work accidents and the injuries resulting and flowing therefrom along with a description of my ongoing symptoms and restrictions which have prevented my return to my pre-injury employment.

3. Prior to the work accidents which I will be describing herein, I never experienced any problems with my back or my knees, nor had I received any medical treatment for any such problems nor had I ever missed time from work prior to the work accidents with the exception of the difficulties I experienced following my motor vehicle accident which I previously disclosed to the Board. The problems I have experienced and the symptoms I suffer stem from the time of my work accidents.

4. I had no prior problems of the nature that affected me following my work accidents. I was in excellent overall general health and very active. I always worked in demanding physical jobs predominantly as a cleaner.

5. My duties as a cleaner were very demanding. I would be on my feet virtually throughout my entire shift. I was required to bend, twist, carry, lift and I was required to push and pull various items such as cleaning machines. I worked hard and I feel I did a good job. I was respected by my colleagues and enjoyed the work I was performing.

6. As I stated, I did suffer a motor vehicle accident in August 1996 which as a result I suffered injuries to my lower back. However, it is my view I recovered from that condition and certainly that was the view of my treating and examining physicians and specialists. Clearly, I recovered to the point I was able to work because I had returned to my employer and was discharging, in a satisfactory manner, all my job functions.

...

15. As a result of my inability to work, I have lost wages. Along with my loss of wages I have lost a corresponding degree of independence. I am now more dependent on others to provide for me. This leaves me feeling depressed, anxious and at times, angry.

16. I always considered myself to be of strong caring character. Now I cry easily and often.

...

22. Prior to my work accidents, I did not experience any type of pain or symptoms to the degree I experienced them following my work accident.

f) Conclusion on Credibility

[135] I have considered all the evidence including that specifically mentioned in the preceding paragraphs. I now consider the inconsistencies in that evidence.

[136] 1. Carolyn Marsh said she had completely recovered from her injuries in the Tim Horton's accident before the motor vehicle accident occurred. However, that is not consistent with the evidence of Nancy James Walker nor that of Dr. Cameron. Both said that being discharged from physiotherapy does not mean the patient has recovered but only that the physiotherapist has done all she can for her. On July 18, 1996, which was Carolyn Marsh's last visit to Dr. Cameron before the motor vehicle accident, the chart notes indicate she still had very serious symptoms. He said it would be very surprising, although not impossible, if she would have recovered in the next four weeks, before the motor vehicle accident. He said he expected it would take months for those symptoms to resolve and the physiotherapy report of August 2 did not say she was symptom-free. Dr. Cameron said that his report of September 26, 1998 which stated Carolyn Marsh had completely recovered from the Tim Horton's injury was his interpretation of what Carolyn Marsh herself had told him.

[137] 2. Carolyn Marsh gave conflicting evidence about the distance between the two vehicles in the parking lot at the time of the motor vehicle accident. I have commented above on my conclusion with respect to the distance.

[138] 3. When Carolyn Marsh was cross-examined, she admitted that she had said on discovery that she only remembered in a dream having seen the back-up lights of the defendant's vehicle. She said she had blocked it out but she is now 100 percent positive she saw them. She said she remembered this in a dream because of the benefits of the counselling from Myrna Ranger.

[139] 4. Although she said she was thrown in a “flexion”, she explained that she was thrown back and then forward by the impact of the defendant’s vehicle. However, all the medical professionals said that in a front-end collision, one is first thrown forward and then back.

[140] 5. When she met with Duncan MacAulay on October 17, 1996, she told him she was not having trouble sleeping but told Dr. Cameron the opposite three weeks later on November 8.

[141] 6. Carolyn Marsh could give no reasonable explanation about why there is no reference to low back pain in Duncan MacAulay’s report. It refers to her pain complaints on October 15, 1996 with no mention of low back pain. Her only explanation was that she was referred there only because of neck and arm pain and headaches.

[142] 7. When Carolyn Marsh went to the Emergency Room at the Dartmouth General Hospital on October 25, 1996, she complained of pain in her left flank, nausea and increased urinary frequency. The working diagnosis on the report (Tab 2C, p. 111) was “kidney stone.” However, when she saw Dr. Cameron on November 8, two weeks later, his chart notes refer to an exacerbation of low back pain and having gone to the Emergency Room because of it. There is no mention of a kidney stone.

[143] 8. The “Discharge Summary” from Physiotherapy Atlantic dated January 6, 1997 makes no reference to low back pain at all, yet when Carolyn Marsh saw Dr. Cameron on January 8, 1997 she complained that her low back was “recently more of a problem” but attributed this to her exercises. Thereafter, as discussed previously, there were references to low back pain later in January, March, May and August 1997.

[144] 9. Carolyn Marsh saw Robert MacDonald at Maritime Physiotherapy on referral by Dr. Venugopal in January 1999 after her workplace knee and back injury. He reported that she told him she had injured her back in the Tim Horton’s workplace injury and then re-injured it in the motor vehicle accident. Carolyn Marsh could give no explanation for this other than to say he must have “mixed up” the information.

[145] 10. Carolyn Marsh never mentioned stress from her “long battle” with WCB in her sessions with Myrna Ranger.

[146] 11. Carolyn Marsh did not mention problems with driving and seeing “back-up lights” to either Stephen White, the psychologist at Columbia Health, or to Debra Garland, the psychologist to whom she was referred by WCB.

[147] 12. Carolyn Marsh’s description of the impact between the two vehicles varies from that of the two most independent witnesses, Shawn Brodeur (a “jolt”) and Brenda Richards (a “bang”). She also represented it as a severe collision to Dr. Cameron and Jason Roth, both of whom later had to re-visit their opinions when they learned it was not a significant impact.

[148] 13. Carolyn Marsh testified she recalled little of what occurred after the motor vehicle accident. However, I have concluded John Marsh was yelling and swearing at Wendy Paquette. I do not believe that Carolyn Marsh could have been unaware of this and unaware of how angry he was.

[149] 14. Dr. Venugopal reported that Carolyn Marsh told him she had been involved in a motor vehicle accident but denied any back problems arising from it. Her explanation was that she had told him about the 1976 motor vehicle accident and it was that to which he must have been referring. Carolyn Marsh saw Dr. Venugopal with respect to a workplace injury.

[150] 15. The report resulting from the FCE by Mark McFarland refers only to low back pain from an injury about one year prior to his report of July 1999. Carolyn Marsh saw Mark McFarland on referral from the WCB.

[151] 16. Debra Vieth-Morse, in October 1999, reported that Carolyn Marsh had a back injury about six months before the April 1999 back injury. She said if there had been a reference to a motor vehicle accident, it would have been in her report. Carolyn Marsh saw her on referral from the WCB.

[152] 17. In her report (for the WCB), Ms. Vieth-Morse reported that Carolyn Marsh described activities of her cleaning job to include “bending, stooping, crouching, squatting, kneeling, and twisting.”

[153] 18. Finally, and of great significance, is the contradictory evidence in Carolyn Marsh's sworn Statutory Declaration. She said:

- a) she never had any back problems before her workplace injuries;
- b) all her problems stem from her workplace injuries;
- c) she had been in "excellent overall health" and "very active";
- d) her work had been physically demanding;
- e) as a cleaner, she had to "bend, twist, carry, lift" and had to "push and pull" such things as "cleaning machines";
- f) she recovered from her lower back injuries in the motor vehicle accident;
- g) her loss of income and dependence has caused her to be "depressed, anxious, and at times, angry."

[154] Yet at trial Carolyn Marsh said her physical problems all began with the motor vehicle accident and it was that which caused her anxiety. At trial, she described her work duties as light. The evidence at trial was of a woman who was inactive and with health complaints such as sinusitis which brought her to her family doctor quite regularly.

[155] Carolyn Marsh's explanation of the inconsistencies in the Statutory Declaration was threefold: firstly, that she swore this Statutory Declaration without having read it carefully; secondly, that she had no input into the Statutory Declaration because her workers' counsel had all her medical and WCB information; thirdly, that her concentration is not very good. She then said that paragraphs 4 and 5 were not true and that paragraph 6 was true in that she had recovered to the point where she could work.

[156] It is surprising that, in light of the Statutory Declaration, the plaintiff continued to pursue damages beyond April 1999 for the motor vehicle accident.

[157] Carolyn Marsh's counsel provided to the court *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.). In that decision, O'Halloran, J.A. dealt with issues of credibility. He said in paras. 8 and 9:

8 ... But the validity of evidence does not depend in the final analysis on the circumstance that it remains uncontradicted, or the circumstance that the judge may have remarked favourably or unfavourably on the evidence or the demeanour of a witness; these things are elements in testing the evidence but they are subject

to whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time; ...

9 If a trial judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, ...

[158] In this case, the testimony of Carolyn Marsh has been contradicted by her own words. This is not a situation where a credibility finding is based upon the witness' demeanour but upon inconsistencies.

[159] Because of all these discrepancies in Carolyn Marsh's testimony and the reports of those treating her and, in particular, because of the information contained in her statutory declaration, I conclude that Carolyn Marsh is not a credible witness. There are too many instances where there are inconsistencies, which have not been satisfactorily explained.

[160] I must also consider the credibility of John Marsh. He too gave several different versions of the distance between the two vehicles at the time of the motor vehicle accident. He also described the impact quite differently from other witnesses including Shawn Brodeur and the independent witness, Brenda Richards. He said he did not yell at Wendy Paquette or make her cry. He said that other than asking her "Why the hell" she did that, he did not swear at her. He said he was very calm. This is in contradiction to the evidence of the independent witness, Brenda Richards, and that of Wendy Paquette. Furthermore, it is consistent with the type of behaviour explained by Valerie Gallant, the telephone claims adjuster with Underwriters Adjustment Bureau in 1996, with whom John Marsh argued on the telephone. Valerie Gallant testified that, even after all these years, she can still recall how irate John Marsh was with her on the telephone on a couple of occasions, yelling at her and swearing.

[161] John Marsh testified about a loud screeching sound from his car. He said when he got home he removed a piece of plastic from the area of the left front

wheel and the screeching sound stopped. I find this to be inconsistent with his discovery evidence and the repair records.

[162] I do not find his testimony about these subjects to be credible. They therefore cause me to conclude that John Marsh is not a credible witness either.

[163] It is in the context of these credibility findings with respect to Carolyn Marsh and John Marsh that I view the conflicting evidence at trial.

CONCLUSIONS ON CONFLICTING EVIDENCE

a) The Accident

[164] I conclude that Carolyn Marsh and John Marsh exaggerated the distance between the two vehicles and the extent of the impact of the two vehicles. Had there been seven feet or a car length between the two vehicles, I conclude there would have been greater damage to the two vehicles if, as John Marsh said, Wendy Paquette backed up “rashly” from a seven foot distance or greater.

[165] I conclude it is more reasonable to accept Carolyn Marsh’s original estimate of the distance between the two vehicles as no more than three to four feet as she said in her original statement.

[166] I conclude that the efforts of Carolyn Marsh, John Marsh and their son, Barry, to re-create the accident scene almost thirteen years later was to create evidence that would fit with their testimony in court about the distance between the vehicles.

[167] I conclude that Carolyn and John Marsh exaggerated the distance to explain their evidence with respect to the force of the impact between the two vehicles and the injuries Carolyn Marsh claims she sustained. Both Dr. Cameron and Jason Roth initially believed it was a substantial collision.

[168] The photographs show no visible damage to either vehicle. The repair report for the Marsh vehicle refers to the replacement of the damaged license plate holder. The testimony of Shawn Brodeur and Brenda Richards refer to a “jolt” and a “bang.”

[169] On the other hand, I do not accept the testimony of Wendy Paquette at trial that the vehicle she was driving did not move. All the other evidence contradicts this including the evidence of the independent witness, Brenda Richards. It is also contradicted by the Vehicle Accident Report signed by Wendy Paquette on August 15, 1996. This report describes the accident as follows:

Pulled in to parking lot when backing out hit other car.

I conclude that the defendant's vehicle moved only a minimal distance, three to four feet at most.

[170] I am therefore satisfied on the evidence I do accept that the defendant's vehicle did reverse into the Marsh vehicle. I therefore conclude that there is liability on the part of the defendant for any damages which can be proven.

b) Aftermath of the Accident

[171] The other areas where there is conflicting evidence involve issues of causation. Three people testified about the actions of John Marsh: John Marsh, Wendy Paquette and Brenda Richards. John Marsh said he only spoke firmly to Wendy Paquette and swore only once. Wendy Paquette and Brenda Richards' description of the interaction between Wendy Paquette and John Marsh is consistent. It is also consistent with the testimony of Valerie Gallant about John Marsh's anger. I accept the evidence that John Marsh was irate, swearing and yelling at Wendy Paquette.

[172] This, in turn, affects my conclusions about Carolyn Marsh's reaction to the motor vehicle accident. I conclude Carolyn Marsh was upset for two reasons: 1) she was concerned that she may have re-injured her neck; and 2) her husband was swearing and yelling at the other driver, calling for the police and not moving their car from the parking entrance so other cars could enter.

c) Recovery from Tim Horton's Accident

[173] I must also look carefully at the conflicting evidence with respect to Carolyn Marsh's state of recovery from the Tim Horton's incident. Carolyn Marsh testified that, on the day of the motor vehicle accident, she was about to be discharged from physiotherapy. Her last session was scheduled for a few days later. She said she had made a complete recovery from the injury sustained in the Tim Horton's accident. In fact, she said she and her husband were discussing the possibility of her looking for a new job while in the car on the very day of the motor vehicle accident. She said one of the reasons she was so upset by the motor vehicle accident was because it put her right back where she had been with the Tim Horton's injuries.

[174] John Marsh also testified they were discussing the possibility of Carolyn Marsh looking for a new job. However, neither gave any specifics of jobs she would seek or efforts made to find a job.

[175] Nancy James Walker testified that discharging someone from physiotherapy does not mean they have made a complete recovery. She testified that it means they have done all they can for the person as physiotherapists and that they can continue their recovery with home regime exercises. Dr. Cameron said the same thing and said he would have thought it would take more than four weeks from her last visit to him on July 18, 1996 for her to completely recover.

[176] I therefore do not accept Carolyn Marsh's testimony that she had made a complete recovery from the Tim Horton's accident on the day of the motor vehicle accident. She still had one physiotherapy appointment remaining and was to continue exercises at home. I conclude that Carolyn Marsh was still suffering the effects of the Tim Horton's incident, an incident for which she was not able to collect Workers' Compensation benefits because she had quit her job.

d) Recovery from Motor Vehicle Accident

[177] The next area about which there is conflicting evidence is the extent of Carolyn Marsh's recovery from any injuries she sustained in the motor vehicle accident before she suffered workplace injuries. In particular, there is conflict about the connection between the motor vehicle accident injuries and the back injury of April 1999.

[178] I must first determine what injuries Carolyn Marsh did sustain in the motor vehicle accident. She has claimed that, as a result, she suffered: a) neck pain and headaches; b) lower back pain; and c) psychological injuries.

[179] One of the key witnesses for Carolyn Marsh is Dr. Kenneth Cameron. He is a general practitioner practising in Dartmouth with his office in the Dartmouth Professional Building at 277 Pleasant Street. The parking lot for that building is the location of the motor vehicle accident in question. Dr. Cameron was the only medical doctor called by the plaintiff.

[180] Carolyn Marsh has been Dr. Cameron's patient since approximately 1981. His chart notes for all the years since are in evidence as is his correspondence. Most recently, he prepared a report for trial dated May 17, 2009 (Exhibit 5).

[181] An issue arose at trial about portions of the report. On p. 2, Dr. Cameron gave an explanation of chronic pain and his conclusion that the motor vehicle accident initiated the chronic pain from which he concluded Carolyn Marsh continues to suffer. He admitted he is not an expert with respect to chronic pain. He also gave an opinion about posttraumatic stress disorder.

[182] Objection was made to both those opinions on the basis that Dr. Cameron is not an expert in these areas. However, I allowed the evidence, although Dr. Cameron agreed he is not an expert with respect to either. I admitted the evidence, subject to weight, as the opinion of a family doctor who has some expertise in dealing with patients with psychological problems and patients with chronic pain, but not as much expertise as specialists in these areas.

[183] In his recent letter, he begins by referring to the collision. He says:

The vehicle reversed rapidly into the car in which Mrs. Marsh was the front seat passenger.

[184] He then relates Carolyn Marsh's "symptoms related to the collision" as follows:

The pain she immediately experienced in her neck persists to the present.

The lower back pain that developed over the subsequent few days persists to the present.

The emotional upset she experienced immediately and which developed into a traumatic stress disorder remitted but she continues to experience a high level of chronic anxiety and panic attacks.

At least one element of the post traumatic stress disorder remains: if she sees a vehicle reversing towards her she feels very anxious and experiences tightness in her chest and racing of her heart.

[185] In his report, he says his initial examination, very shortly after the motor vehicle accident, on the same day, was as follows:

Examination:

At the time of the injury her neck movements were very limited by pain and a week later she was tender to touch over her neck, shoulders, upper and lower back.

[186] He concluded that Carolyn Marsh had chronic pain saying:

... The collision of the 15th August 1996 initiated this neurological malfunction. ...

[187] With respect to chronic anxiety, he said:

Chronic anxiety:

She developed a traumatic stress disorder as a result of the collision of the 15th August 1996. This resolved with psychotherapy. She was left with an on-going anxiety disorder that did not exist prior to the collision of the 15th August 1996.

He continued:

...

She did not have a problem with anxiety before the collision; since the collision, she has suffered from chronic anxiety.

[188] He concluded:

1. She needs medications for pain and medications for anxiety.
2. She is unable to work due to the combination of pain and anxiety.
3. Enjoyment of physical activities is curtailed; hobbies have been abandoned.
4. Simple domestic tasks are at times impossible.

The chronic pain and anxiety were caused by the collision of the 15th August 1996.

There is no sign of improvement.

Her pain and anxiety will remain with her for the rest of her life.

[189] However, at trial on cross-examination, he reversed his opinion. He did so for the following reasons:

1. The motor vehicle accident was not the significant collision he believed it was. From Carolyn Marsh's description, he thought the Marsh vehicle was moving and the vehicle backing into it backed up 20 to 30 feet. He testified that he believed the two vehicles had slammed into each other with significant force. He said there would have to be fairly significant force to injure someone's neck in a front-end collision like occurred here.

2. He did not accept that Carolyn Marsh's neck injury from the Tim Horton's accident had completely resolved. He said this after being referred to the physiotherapy reports and his notes of July 18, 1996. Dr. Cameron also gave the opinion that the shoulder and arm pain which Carolyn Marsh complained of for the first time on September 4, 1996 was not related to the motor vehicle accident. He

said it probably was related to a rotator cuff problem which he said is quite common.

3. He also said that the headaches Carolyn Marsh had following the motor vehicle accident were the same as those she had before, arising from the Tim Horton's injury. He testified that he concluded that Carolyn Marsh had recovered from the lower back pain by September 4, 1996 and that her ongoing complaints of lower back pain were mechanical lower back pain which pre-existed the motor vehicle accident. He was referred to his chart notes (mentioned above) where Carolyn Marsh complained of lower back pain which was unrelated to possible UTI's.

4. He said his diagnosis of an anxiety disorder was premised on Carolyn Marsh having no anxiety problems pre-dating the motor vehicle accident. He was referred to instances in his chart notes (to which reference has been made above) when Carolyn Marsh had complained of stress and anxiety. He was also referred to her description of the Tim Horton's incident as "catastrophic" and her statement in the Workers' Compensation Board Report that she could have died there. He referred to her stress and anxiety as an "adjustment reaction." He no longer believed she had suffered posttraumatic stress disorder as a result of the motor vehicle accident, since his diagnosis was based upon the assumption there was a significant impact. Nor did he know about John Marsh's behaviour on the day of the motor vehicle accident.

5. He agreed it was beyond his expertise to link Carolyn Marsh's chronic pain to the motor vehicle accident.

6. Most significantly, his attention was drawn to many instances where the information Carolyn Marsh provided to him and to other treatment providers around the same time varied greatly. An example is the January 8, 1997 physiotherapy report.

7. Dr. Cameron's attention was also drawn to the Statutory Declaration Carolyn Marsh swore for purposes of her Workers' Compensation Board appeal. He said that, contrary to what she stated in the Statutory Declaration, she was not in previous good health, because of the Tim Horton's injury, and that statement was not consistent with his chart notes. It was also inconsistent with the complaints she made to him. He also said that, according to what she told him, it

was not the loss of income and independence which caused her depression as she stated in the Statutory Declaration.

8. He said that the accuracy of any conclusion he would draw is based ninety percent on the history he has been given by the patient. If it is not accurate, he said any opinions he would give are not supportable. He said the history is “crucial,” since there is little, if any, objective evidence of pain. If the patient says it hurts, that goes into the chart notes.

[190] In summary, after having these inconsistencies brought to his attention, he said “issues like this went on and on” and he had no option but “to reverse my opinion” and “reverse my testimony.”

[191] Since his evidence was the underpinning of much of Carolyn Marsh’s claim, Dr. Cameron’s reversal of the opinion he gave only one week prior to trial, is extremely problematic for the plaintiff in addition to the credibility issue to which I have already referred.

[192] I accept Dr. Cameron’s evidence at trial. He gave it in an honest and straightforward manner. When confronted with facts which supported a conclusion contrary to his opinion, he acknowledged that his opinion was wrong.

[193] Other witnesses for the plaintiff (other than Jason Roth, with whom I will deal hereinafter), saw Carolyn Marsh for brief periods in the past thirteen years. The physiotherapists at Physiotherapy Atlantic treated Carolyn Marsh after the Tim Horton’s accident and the motor vehicle accident. Duncan MacAulay saw her on one occasion. Robert MacDonald of Maritime Physiotherapy saw her in December 1998 and January 1999 after her October 1998 work injuries on referral from Dr. Venugopal. Heather MacAuley of Burnside Physiotherapy saw Carolyn Marsh later in 1999 after her final workplace injury. She treated Carolyn Marsh between May 10, 1999 and June 14, 1999, thirteen treatments. Mark MacFarland, another physiotherapist, had Carolyn Marsh participate in a Functional Capacity Evaluation on July 27, 1999 at the Canadian Back Institute. He recommended she begin a work conditioning program. That program began but did not continue beyond August 6. Carolyn Marsh was subsequently engaged in a work hardening program at the Halifax Work Hardening Centre between mid October and early December 1999. She was treated by Debra Vieth-Morse, an occupational therapist, during that period. Years later, as has been referred to above, Carolyn Marsh was seen at

the Columbia Health Centre on referral from the Workers' Compensation Board for a Return to Work Assessment and Vocational Rehabilitation Services. As can be seen, those who treated her did so for very short periods and, in the case of some, many years after the motor vehicle accident. The constant in her ongoing care was Dr. Cameron.

[194] Dr. Cameron's opinion was that Carolyn Marsh had recovered from the motor vehicle injuries to her neck and back before the work related injuries occurred. I conclude that this is a reasonable opinion in light of Dr. Cameron's chart notes and the evidence of the physiotherapists who were treating Carolyn Marsh and reporting to Dr. Cameron.

CAUSATION

[195] Causation is very much in issue. The issue was stated quite simply by Spence, J. in *Joseph Brant Memorial Hospital v. Koziol*, [1978] S.C.R. 491:

There must be not only negligence but negligence causing the injury before there can be recovery.

[196] Carolyn Marsh claims that the negligence of the defendant has caused her chronic pain which disables her from employment. The defendant says, first, she was not injured in the motor vehicle accident and, alternatively, if she was, the injuries were minor and short-lived.

[197] I have concluded above that the defendant is liable for any injuries Carolyn Marsh sustained as a result of the motor vehicle accident. However, this issue is complicated by the previous Tim Horton's accident and subsequent workplace injuries.

[198] In *Athey v. Leonati*, [1996] 3 S.C.R. 458, the leading Canadian case on causation, Major J. said in para. 13:

13 Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury: *Snell v. Farrell*, 1990 CanLII 70 (S.C.C.), [1990] 2 S.C.R. 311; *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.).

He continued in para. 17:

17 It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. ...

He said in para. 32:

32 The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the 'original position'). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary

not only to determine the plaintiff's position after the tort but also to assess what the 'original position' would have been. It is the difference between these positions, the 'original position' and the 'injured position', which is the plaintiff's loss.

He continued in para. 35:

35 ... The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage: ...

[199] These principles must be applied in this case where Carolyn Marsh suffered an injury prior to the motor vehicle accident.

Carolyn's Marsh's Complaints

a) Neck Pain and Headaches

[200] Carolyn Marsh complained of neck pain and headaches arising from the Tim Horton's accident. When she saw Dr. Cameron immediately after the motor vehicle accident, she complained of immediate neck pain. His subsequent chart notes contain references to neck pain. The physiotherapy reports from Physiotherapy Atlantic and Duncan MacAulay dealt with the neck pain. These have been referred to above.

[201] Thereafter, Carolyn Marsh did not return to physiotherapy until after her work related knee and back injury in the fall of 1998.

[202] In his testimony on cross-examination, Dr. Cameron said on September 4, 1996, Carolyn Marsh's range of motion was improved. In his opinion, the flare-up of her previous neck injury had resolved by that date. He said she was back to her pre-accident position. He testified that the problems thereafter, for which she was going to physiotherapy and was referred to Duncan MacAulay, were the result of the Tim Horton's injury not the motor vehicle accident. He said the only new complaint was shoulder and arm pain which he said was unrelated to the motor vehicle accident.

[203] I conclude that, by September 4, 1996, based upon the testimony of Dr. Cameron, Carolyn Marsh had made a complete recovery from any aggravation caused by the motor vehicle accident to her pre-existing neck and headache problems.

[204] This evidence is in direct contradiction to Carolyn Marsh's own testimony. However, as I have said above, I do not find her to be a credible witness. I conclude any problems Carolyn Marsh may have had with her neck and with headaches since that date are unrelated to the motor vehicle accident.

b) Low Back Pain

[205] Carolyn Marsh testified she began to have low back pain as a result of the motor vehicle accident and that it has continued since. She complained of lower back pain to Dr. Cameron. Nancy James' report of October 15, 1996 does not refer to low back pain. Her report of October 25, 1996 says:

Initially she had significant neck and back pain, spasm and loss of movement of both her cervical and lumbar spines.

It then refers to "good results for her lumbar spine ..."

[206] When Carolyn Marsh was referred to Duncan MacAulay, the referral was with respect to neck pain only. Similarly, the discharge report from physiotherapy in January 1997 refers to "occasional headaches and neck pain." That report makes no reference at all to low back pain.

[207] Thereafter, Carolyn Marsh was not continuing physiotherapy or any treatment for low back pain.

[208] Dr. Cameron testified on cross-examination that he concluded from the October 25, 1996 report from Nancy James that, if Carolyn Marsh had sustained a lower back injury in the motor vehicle accident, it had resolved by that time. He gave his opinion that any low back pain suffered by Carolyn Marsh thereafter was unrelated to the motor vehicle accident.

[209] Dr. Cameron said it was normal that in both November 1996 and January 1997 Carolyn Marsh complained of low back pain from exercising. It was unrelated to the motor vehicle accident.

[210] Dr. Loane, a physical medicine and rehabilitation specialist, testified for the defendant. He was the only specialist to testify, Dr. Cameron having been qualified as a general practitioner. Dr. Loane conducted an independent medical examination of Carolyn Marsh on March 29, 2007, more than 10 years post-accident.

[211] In his report, he states on p. 12:

... The mechanism of accident, in August of 1996, was that of a frontal impact collision which does not appear to have been at a high velocity. Damages to the vehicle were minimal or non existent and, in spite of Ms. Marsh's recollection of a high force impact, the automobile appraisals and photographs do not suggest that the accident was at a threshold that would have been likely to produce any structural injury to the spine, including cervical, lumbar and shoulder girdle areas. Low velocity motor vehicle collisions can produce temporary muscular tightness and stiffness but would not, in any realistic scenario, produce damage to discs, bones, joints, nerves or other structural components of the cervical or lumbar spine.

He continued on p. 13:

... There is virtually no likelihood that structural damage to discs, bones, joints or ligaments of the lumbar spine could occur with this mechanism of accident.

He then said on p. 13:

... As with the neck and shoulder symptoms, it seems more probable that any back ache in the post accident time frame was related to muscular tension factors and aggravated by deconditioning and obesity rather than being the result of a structural injury to the spine.

[212] He concluded on p. 17:

... It is the opinion of the examiner that the motor vehicle accident does not have any direct role in the etiology of her chronic neck and back musculoskeletal problems. ...

[213] In a subsequent letter to counsel on March 18, 2009, he said:

... I continue to believe that Ms. Marsh suffers from a long standing pain disorder associated with chronic anxiety and that the motor vehicle accident of September 1999 cannot be viewed as a significant contributor to her current chronic pain and pain related disabilities.

[214] Dr. Loane agreed that injuries can occur from low impact collisions such as I have concluded this was. However, his conclusion was that she may have suffered some “temporary muscle tightness and stiffness.” He said such pain would diminish quickly.

[215] Dr. Loane, on cross-examination, said that Carolyn Marsh was showing signs of degenerative disc disease which could cause low back pain. He also said approximately half the population suffers from mechanical back pain at some time, and about 20 to 30 percent have chronic low back pain. In most, he said, there is no structural explanation for it. He reiterated that it is very common in the general population.

[216] The lack of reports of low back pain within a few months after the motor vehicle accident support this conclusion in my view. Because I do not find her to be a credible witness, I do not accept Carolyn Marsh’s evidence of ongoing lower back pain after the motor vehicle accident.

[217] I therefore conclude that any low back pain that Carolyn Marsh suffered as a result of the motor vehicle accident was short term and has resolved. I therefore do not attribute any of her problems to the motor vehicle accident.

c) Stress/Anxiety

[218] Carolyn Marsh says her other complaint arising from the motor vehicle accident is psychological. This is complicated for several reasons.

[219] First, Dr. Cameron referred Carolyn Marsh to Jason Roth based upon his opinion that she was suffering from post traumatic stress syndrome. That was because of what he now says was his erroneous conclusion about the significance of the impact.

[220] It is further complicated by the fact that the social worker who primarily treated Carolyn Marsh has since died and we have only her notes of their sessions. Jason Roth recalls that he met with Carolyn Marsh on her initial visit and testified he sat in on parts of some of her sessions with Myrna Ranger.

[221] Another complication is that Jason Roth prepared a recent report which contradicts the earlier indications that Carolyn Marsh was suffering from posttraumatic stress disorder which was also based upon Jason Roth's understanding that the collision was a significant one. There are also reports in evidence from other psychologists.

[222] In Debra Garland's notes of her first session with Carolyn Marsh on September 20, 2006, there is a note "1996 - car accident - anxiety - panic attacks." Debra Garland's report dated January 8, 2007 says:

Mrs. Marsh continues to attend therapy sessions on a weekly basis to address her overriding symptoms of anxiety to manage her pain.

[223] She concludes her report by referring to "changes required to reduce anxiety thereby reducing (to some extent) her pain."

[224] In my view, the anxiety to which Debra Garland refers is anxiety relating to Carolyn Marsh's complaint of chronic pain. There is no mention of "back-up lights" or anxiety about driving or parking lots in this report.

[225] While attending at Columbia Health Centres in 2006, Carolyn Marsh had sessions with its psychologist, Stephen White. She was there on referral from the WCB with respect to her work-related back injury in April 1999. Stephen White did not testify but his notes are in evidence (Tab 13B, p. 8), as follows:

This was Ms. Marsh's first session - she presents as somewhat shy and having a history of anxiety which has worsened significantly since her injury. Prior to that she had described herself as shy but the anxiety was within her behavioural control but after the injury, she began experiencing panic attacks which are now controlled by Effexor. ...

His notes do not refer to back-up lights" or anxiety about parking lots or driving either.

[226] The original referral by Dr. Cameron to Jason Roth was in October 1996. Jason Roth's first report to Dr. Cameron dated October 26, 1996 has been referred to above.

[227] Jason Roth subsequently wrote to Joe Scott at the Cooperators on November 18, 1996 (Tab 3, p. 2) . In that letter, Jason Roth says:

From the onset of contact with Carolyn, it appears that she has been significantly psychologically 'traumatized' by her accident. Utilizing the **Diagnostic and Statistical Manual of Mental Disorder, (DSM-IV)**, a diagnosis of 'Posttraumatic Stress Disorder' (309.81) can be made.

He then goes on at some length explaining how Carolyn Marsh's condition fits within the criteria for posttraumatic stress disorder.

[228] Carolyn Marsh attended 14 sessions with Myrna Ranger between October 1996 and March 21, 1997. On August 11, 1997, Jason Roth wrote to Joe Scott again (Tab 3, p. 8). In that letter, quoted above, he referred to Carolyn Marsh's last appointment having been on March 21, 1997.

[229] After March 1997, there are no references to anxiety or stress in Dr. Cameron's chart notes until Carolyn Marsh came to his office on November 10, 1997, complaining of panic on receipt of a jury summons. (This has been referred to above.)

[230] As mentioned above, as a result, Dr. Cameron referred Carolyn Marsh back to Jason Roth & Associates on January 22, 1998. She began to see Myrna Ranger again beginning on February 20, 1998 and saw her until May 1998, four sessions. Myrna Ranger's notes of those sessions are in evidence. However, Jason Roth said Myrna Ranger was a terrible note taker and that her notes do not necessarily reflect everything said in the sessions. On May 9, 1998, there is a termination report which mentions both the motor vehicle accident and stresses from dealing with her mother. That report concludes:

Carolyn felt that she was able to continue on her own. She will reconnect in future if the need arises.

[231] There is a gap of just over three years before Carolyn Marsh was referred back to Jason Roth & Associates. This was three years after the final workplace injury. Carolyn Marsh had thirty-five sessions with Myrna Ranger during this period. After Myrna Ranger's death in February 2004, Carolyn Marsh did not see anyone in the offices of Jason Roth & Associates until Jason Roth met with her on April 23, 2009 to prepare his May 4, 2009 report for trial. In his report, Jason Roth stated that he met with Carolyn Marsh for ninety minutes. He stated that, in preparing for his report, he read Carolyn Marsh's medical files and transcripts from her discovery and that of John Marsh. Jason Roth says in his May 9, 2009 report:

After reviewing Carolyn's file, I believe the 1996 diagnosis of 'Posttraumatic Stress Disorder' was not the most appropriate diagnosis that could have been made since the first criteria necessary for such a diagnosis (the individual involved had to be 'confronted with an event that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others') was not met.

[232] He then says:

In my April 23, 2009 meeting, Carolyn reported that she continues to experience emotional distress. Based upon this interview and my examination of her file, I believe it would be appropriate to offer a current *DSM-IV-TR* Axis 1 diagnosis of 'Adjustment Disorder with Anxiety, Chronic (#309.14)'. In order for a diagnosis of 'Adjustment Disorder' to be made, the *DSM-IV-TR* requires certain criteria to be met. Unlike the Posttraumatic Stress Disorder, (where there must be the presence of 'an extreme stressor and a specific constellation of symptoms'), an 'Adjustment Disorder' can be triggered by a stressor of any severity and may involve a wide range of possible symptoms.

He explains his rationale for so concluding.

[233] He then continues on p. 6:

Were I to be asked to offer a complete Multiaxial Evaluation, I believe the Axis II diagnosis, 'Personality Disorder Not Otherwise Specified (#301.9)', could be justified. The *DSM* defines this disorder as applying to individuals where

'disorders of personality functioning do not meet criteria for any specific Personality Disorder. An example is the presence of features of more than one specific Personality Disorder that do not meet the criteria for

any one Personality Disorder ('mixed personality'), but that together cause clinically significant distress in one or more important areas of functioning (e.g. social or occupational).

[234] Dr. Brad Kelln is a clinical psychologist whose report for the defence was entered as an exhibit by consent (Exhibit 23). Dr. Kelln's report is not the result of an independent medical examination of Carolyn Marsh. Dr. Kelln did not meet Carolyn Marsh and the only purpose of his report was to give his "opinion about Mr. Jason Roth's May 4, 2009 letter which appears to update his opinion on his work with Ms. Carolyn Marsh."

[235] Although Dr. Kelln's report says: "For the most part, Mr. Roth's report seems balanced and sound," he then says there were "a few significant issues that warrant clarification."

[236] He says on p. 2 of his report:

... Mr. Roth presents a plausible hypothesis in suggesting that Ms. Marsh suffered from a pre-existing condition - namely - a personality disorder. However, Mr. Roth inappropriately qualifies his explanation by suggesting that personality disorders can lie 'latent and are activated only in response to an intense stressor'. By definition, a personality disorder cannot lay dormant until activated by 'an intense stressor'.

[237] He refers to the DSM-IV-TR as (*The Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition - Text Revision) and says:

The DSM-IV-TR defines personality disorder as:

an enduring pattern of inner experience and behaviour that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment (p. 685)

The DSM-IV-TR goes on to say:

The personality traits that define these disorders must also be distinguished from characteristics that emerge in response to specific situational stressors (p. 686)

In other words, the DSM-IV-TR cautions clinicians against mistakenly confusing personality disorder traits with characteristics that might emerge after a situational stressor (e.g., a minor motor vehicle accident). Given the pervasive and enduring nature of personality disorders, clinician's (*sic*) cannot attribute the onset of a personality disorder to a situational stressor.

THE DSM-IV-TR does suggest that life events can exacerbate the pre-existing symptoms of a personality disorder although it cautions that:

The development of a change in personality in middle adulthood or later life warrants a thorough evaluation to determine the possible presence of Personality Change Due to a General Medical Condition or an unrecognized Substance-Related Disorder. (p. 687)

In other words, the development of a full-fledged personality (*sic*) later in life would be so unusual that the clinician should investigate a medical problem (e.g. thyroid, hysterectomy) or the onset of a substance abuse issue (e.g. alcoholism). It appears that none of these issues were investigated by Mr. Roth in his assessment of Ms. Marsh.

[238] He concludes by saying:

That leaves one to assume that the most likely explanation, as posited by Mr. Roth, is that Ms. Marsh reacted so strongly to the minor motor vehicle accident in 1996 because she suffered from pre-existing personality disorder.

[239] He then deals with the diagnosis of adjustment disorder. He refers to Jason Roth's letter to the Co-operators which has been quoted above. In his letter, Jason Roth said that Carolyn Marsh's symptoms were no longer present. Dr. Kelln says:

... In all likelihood, the transitory issues of anxiety related to the minor accident were resolved.

[240] He is supported in this view by Carolyn Marsh's Statutory Declaration prepared for the Workers' Compensation Board which quotes Carolyn Marsh as saying:

It is my view that I recovered from that condition.

[241] Dr. Kelln concludes by saying:

In summary, Mr. Roth identifies Personality Disorder as the most likely explanation for the symptoms observed in Ms. Marsh. Such a pre-existing condition could certainly explain the degree of Ms. Marsh's reaction to a minor accident. Adjustment Disorder, if it is even a valid diagnosis, would have been more transitory than the enduring traits of a personality disorder and, if it was an issue, was likely resolved by 1997.

[242] In evidence are both the opinion of Jason Roth and the comments on it by Dr. Kelln. Dr. Kelln did not say Jason Roth was wrong in his diagnosis of personality disorder but he does say it would have to be pre-existing and emerging from specific situational stressors. In particular, he quotes from the DSM-IV-TR cautioning against "confusing personality disorder traits with characteristics that might emerge after a situational stressor "(e.g. a minor motor vehicle accident)." He also pointed out "the onset of a personality disorder" cannot be attributed to a situational stressor.

[243] I must then consider what the basis is for Jason Roth's opinion. He met with Carolyn Marsh on October 22, 1996 and testified he sometimes sat in on her sessions with Myrna Ranger. He did not see her at all again except for ninety minutes in April 2009, more than five years later. He quite reasonably concluded that the diagnosis of a person with posttraumatic stress disorder could not be sustained. He then had to decide what opinion he could give. His options were to conclude that, since there was no posttraumatic stress disorder, there was no disorder or to find one that fit with what Carolyn Marsh told him and what she had told Myrna Ranger.

[244] In this context, two things are significant: 1) Carolyn Marsh's lack of credibility; and 2) the nature of Jason Roth's evidence.

[245] I have already concluded that Carolyn Marsh is not credible. I have said that there was no mention of anxiety with parking lots or driving or seeing back-up lights in her sessions with other psychologists. If these were such significant anxiety causing events, one would expect them to be mentioned if not emphasized when Carolyn Marsh met with Debra Garland and Stephen White.

[246] I conclude that I do not believe Carolyn Marsh when she says she still has anxiety when driving and particularly when seeing back-up lights. I conclude that the behaviour she displayed in Dr. Cameron's office after the motor vehicle

accident was situational stress arising from both the minor motor vehicle accident and, in particular, from her husband's extreme reaction. It is similar to the stress she displayed arising from the Tim Horton's accident and her reports of it.

[247] Carolyn Marsh does not react well to stress. The question is whether she has a personality disorder as Jason Roth concluded. His conclusion is based upon what Carolyn Marsh told him. Since I do not accept that what she told him is accurate, it undermines the foundation of Jason Roth's opinion. Jason Roth did not read Dr. Cameron's chart notes (with good reason, there are virtually illegible); he did not know about the WCB decisions; he did not know Modern had fired Carolyn Marsh; he did not know her husband was on strike in the summer of 1996.

[248] In addition, Jason Roth's testimony and demeanour in court are problematic. Clearly, he and Mr. Chapman, counsel for the defendant, had an antagonistic relationship. I had to caution both about the tone of the questions and answers when Jason Roth was being cross-examined.

[249] In addition, Jason Roth, in his testimony, appeared to be more of an advocate for Carolyn Marsh rather than a professional giving an objective opinion. The antagonism between Jason Roth and Mr. Chapman coloured the tone of his answers to Mr. Chapman but cannot explain the content.

[250] I cannot conclude that he accurately portrayed Carolyn Marsh's psychological state, principally because of the inaccurate information he received from Carolyn Marsh and upon which he based his opinion.

[251] Dr. Kelln's critique of Jason Roth's report was also of assistance in understanding possible weaknesses in Jason Roth's opinion. It must not be forgotten that Jason Roth had not seen Carolyn Marsh in over five years and, even at that time, she was not on his case load but that of Myrna Ranger. Jason Roth did not have the benefit of discussing Carolyn Marsh with Myrna Ranger before he wrote his recent report. He had only her notes to rely upon, notes which he himself said were notoriously poor. Added to that is the inaccurate information that Carolyn Marsh provided to him and the result, I conclude, is an opinion which did not stand up to rigorous cross-examination. In my view, this is the real reason for Jason Roth's defensiveness on the witness stand and why he was so antagonistic to defence counsel. His professional opinion was being called into question and, I conclude, with good reason.

[252] The defendant made much of the document in Exhibit 13 which is a Direction Re: Funds dated October 1, 2002. It was submitted that, because of that, Jason Roth was not an independent witness since the payment of his account appears to be contingent on Carolyn Marsh's success at trial.

[253] However, that submission, in my view, is not the true explanation for the "sparring" between Jason Roth and Mr. Chapman. I have explained above why I conclude there was hostility between the two.

[254] I give no weight to the opinion of Jason Roth for all the reasons set out above but ignoring the issue of the Direction to Pay. Although I do have concerns about it, I have concluded there is otherwise good reason to give no weight to Jason Roth's opinion.

[255] It is clear to me from the evidence that Carolyn Marsh lived a fairly sheltered life after her children were born and she was a stay at home mother. That is not to say that being a mother and a homemaker is stress free, but it is a different lifestyle from one where a person is working outside the home and involved in school, church and community organizations and activities. The description of Carolyn Marsh's life before she began part-time work at Tim Horton's is of little contact with people outside her immediate family and one or two close friends. Even her involvement with the two unit rental property which she managed was low key. The tenants were responsible for many of the usual tasks of a landlord. She had only undertaken those activities about one year before the motor vehicle accident.

[256] Dr. Cameron's chart notes also disclose that Carolyn Marsh often complained to him of stresses and anxiety ranging from her husband being on strike to worries about flesh eating disease. In my view, these are reactions to every day stresses and could be considered normal. The reports of Myrna Ranger also indicate that Carolyn Marsh had anxiety with respect to her relationship with her mother.

[257] Overall, I conclude that Carolyn Marsh is a person more likely to respond in an extreme fashion to a minor "jolt" to the family car in a parking lot, especially when her husband acts explosively - yelling and swearing at the other driver. I do not accept Carolyn Marsh's testimony that she was unaware of what I have found

to be John Marsh's reaction to Wendy Paquette and the accident. I conclude that she was upset by the altercation which accounts, in part, for her over-reaction when she saw Dr. Cameron very shortly thereafter.

[258] I therefore conclude that Carolyn Marsh was affected psychologically by the motor vehicle accident but only in part by the physical impact. Part of her reaction was because of John Marsh's response to the accident.

[259] In any event, Jason Roth wrote to the Co-operators to advise that, by March 21, 1997, no further counselling was necessary as Carolyn Marsh was not having trouble dealing with everyday life.

[260] I do not attribute the second referral to Myrna Ranger and Jason Roth and, before that, to the Dartmouth Mental Health Clinic, to the motor vehicle accident. Dr. Cameron was not aware that on the very day her new job was to begin she received a jury summons which brought her to his office in a state of anxiety. Without that crucial piece of information, he could only conclude that she was still suffering anxiety related to the motor vehicle accident. He was not aware that she was no longer seeing Myrna Ranger. Furthermore, as indicated above, his knowledge of the nature of the motor vehicle accident was based upon the incorrect impression of the incident given to him by Carolyn Marsh.

[261] I conclude there is no causal connection between the August 15, 1996 motor vehicle accident and Dr. Cameron's second referral of Carolyn Marsh for mental health assistance.

[262] I therefore conclude that the effects of the motor vehicle accident on Carolyn Marsh were relatively minor and short lived. I conclude that the lower back pain arising from the motor vehicle accident was of a minor nature and resolved within a matter of weeks. Her previous and subsequent complaints prior to April 1999 were mechanical lower back pain. I conclude that the aggravation to her neck pain and headaches from the Tim Horton's incident resolved by fall 1996. I conclude that the stress/anxiety Carolyn Marsh suffered was only in part from the motor vehicle accident but it had resolved by March 1997.

[263] I therefore do not need to consider the events in her life after March 1997 and the injuries she sustained at work, the final one of which has now resulted in Carolyn Marsh receiving a partial disability pension from Workers' Compensation.

The work injuries were not causally connected to the motor vehicle accident. They occurred after Carolyn Marsh had made a complete recovery from the motor vehicle accident.

DAMAGES

[264] Carolyn Marsh claims damages as follows:

- a) General damages
- b) Loss of income
- c) Diminution of earning capacity
- d) Loss of valuable services
- e) Judgment interest and costs

[265] John Marsh claims in *quantum meruit* for services he says he provided around the home as a result of Carolyn Marsh's injuries.

a) General Damages

[266] Carolyn Marsh's claim is primarily for general damages according to her counsel. In his pre-trial submissions, he says:

It is clear that, given Carolyn Marsh's ongoing symptoms, if a court is not convinced she is totally disabled, then this case falls squarely within the range of \$18,0000.00 to \$40,0000.00 non-pecuniary general damages established by our Court of Appeal in *Smith v. Stubbart*. ... for 'persistently troubling but not totally disabling injury.' ...

He submits there is "compelling evidence of the totally disabling nature of her injuries"

[267] Mr. Richey then refers to cases with respect to chronic pain resulting in total disability. However, as I have concluded above, the chronic pain which the Workers' Compensation Board has concluded Carolyn Marsh suffers is not causally connected to the motor vehicle accident. I therefore do not consider that Carolyn Marsh is totally disabled from the injuries sustained in the motor vehicle.

[268] Carolyn Marsh's alternate argument, as noted above, is that she falls within the *Smith v. Stubbart* ((1992), 117 N.S.R. (2d) 118 (C.A.)) range, for general damages, which now has a ceiling of approximately \$55,000.00. Damages within that category must be persistently troubling but not totally disabling.

[269] However, I have also concluded that Carolyn Marsh had recovered from all injuries sustained in the motor vehicle accident by March 1997. Accordingly, she was not partially disabled by the motor vehicle accident. She recovered and returned to a job which required lifting, bending, stooping, crouching, squatting, kneeling, etc. (referring to the Vieth-Morse report of Carolyn Marsh's information to her).

[270] Plaintiff's counsel referred me to *Abbott v. Sharp*, [2007] NSCA 6. In that case, the court said in para. 95:

95 The weight of the medical evidence supported the respondent's contention that her disabling condition was caused by the accident.

However, that is unlike the situation here where there is no evidence that Carolyn Marsh was disabled by the motor vehicle accident. In fact, as I have described it, the evidence is to the contrary.

[271] He also referred me to *Warner v. 2331653 Nova Scotia Ltd.* (2004), 226 N.S.R. (2d) 28 (S.C.). In that case, MacAdam, J. said in para. 52:

[52] ... Although the Plaintiff has suffered a multitude of trauma, particularly since the accident, and had a pre-existing degenerative disc disease, I am satisfied the accident was a contributory cause and in fact, on the evidence as a whole, I am satisfied it was a substantial contributory cause, to her present condition, including both her functional limitations and her pain and suffering.

[272] He also said in para. 80:

[80] Although finding that the Plaintiff was and is prone to exaggeration, I am also satisfied the injuries sustained in 1996 were substantially more severe and functionally more limiting than as suggested by Defence counsel. I am also satisfied that none of the pre-accident trauma and health problems experienced by Ms. Warner had any substantial debilitating effect on her condition. It was the accident that is the principal cause of the pain and suffering and functional limitations she experienced in the ensuing years. The fact the violence of the accident may not have been as substantial as suggested by both Ms. Warner and her mother does not detract from the fact it was the cause of her injuries.

[273] I have concluded the accident caused only minor short-term injuries and was not the cause of her present condition. I have concluded the minor accident did in fact cause injuries but not to the extent claimed by Carolyn Marsh.

[274] It is clear that Carolyn Marsh did suffer: 1) a temporary aggravation of the previous Tim Horton's neck injury; 2) a sore back for a brief period; 3) anxiety arising only in part from the motor vehicle accident, a situational stress which had ended by March 1997.

[275] I conclude these injuries were suffered by Carolyn Marsh, although the impact was minimal and the damage to the Marsh vehicle slight. Carolyn Marsh is entitled therefore to an award of general damages for these injuries.

[276] In *MacDonnell v. Campbell*, 2001 NSSC 4, the plaintiff was awarded \$10,000.00. He suffered mild neck and back injuries resolving within three to four months. In *O'Brien v. Nova Scotia (Attorney General)*, 2000 Can LII 3105 (N.S.S.C.), the court provisionally awarded \$7,500.00 for soft tissue injuries to the low back which caused “minimal” pain for about seven months.

[277] In *Kelly v. Loblaws*, 1999 Can LII 6887 (N.S.S.C.), the court provisionally awarded \$9,000.00 for a mild lumbar sprain which resolved within eighteen months. In *St. Peter v. Atlantic Shopping Centres Ltd.*, 1999 Can LII 3678 (N.S.S.C.), the court provisionally awarded damages of \$7,500.00 for a mild soft tissue injury to the lower back which resolved within five months.

[278] Another 1999 decision was *W.E.D. v. Rice*, 1999 Can LII 5238 (N.S.S.C.), where the plaintiff suffered a mild whiplash injury and was awarded \$15,000.00.

[279] Carolyn Marsh suffered an aggravation of a previous neck injury which very quickly resolved, a sore back which also quickly resolved and anxiety caused only in part by the motor vehicle accident.

[280] However, using the cases cited as guidance and allowing for an updating from the dates on which the awards were made, I conclude that an appropriate general damage award in this case is \$10,000.00, taking into consideration both the physical injuries and the anxiety caused only in part by the motor vehicle accident (and in part by John Marsh's angry reaction).

b) Loss of Income

[281] Carolyn Marsh claims for loss of income for six periods of time beginning with April 27, 1999, the date of her final workplace injury.

[282] Since I have concluded that Carolyn Marsh's injuries from the motor vehicle accident had all resolved by the time her anxiety had been successfully treated during early 1997, I do not need to consider any loss of income for the periods for which she claims. Carolyn Marsh was not working at the time of the motor vehicle accident and did not return to the paid workforce until November 1997. Since she was able to return to the paid workforce in the spring of 1997 but did not do so until much later that year, I conclude that it was her choice not to return to work

until that time. Accordingly, she suffered no loss of income arising from the motor vehicle accident.

c) Diminution of Earning Capacity

[283] Carolyn Marsh claims a diminution of earning capacity arising from the motor vehicle accident. She relies, *inter alia*, upon the decision of MacAdam, J. in *Warner v. Bulk Barn Foods, supra*. In that decision, MacAdam, J. in para. 71 said:

[71] ... I am satisfied Ms. Warner's opportunities for employment have been severely curtailed and may even have been totally eliminated by the accident.

[284] However, I have concluded that Carolyn Marsh had recovered from the mild injuries sustained in the motor vehicle accident by the spring of 1997 and, in fact, did return to work in November 1997. The work she did was not light work. I do not accept her evidence that she "worked through the pain". There are no indications that she missed time from that job and, in fact, was promoted to supervisor. The only time she missed work was because of work-related injuries which I conclude were wholly unrelated to the motor vehicle accident.

[285] Carolyn Marsh's opportunities for employment were clearly not curtailed by the motor vehicle accident. She recovered from it and went to work as a cleaner. She suffered a series of workplace injuries, beginning approximately one month after she started work and culminating with a back injury within eighteen months, in April 1999, which the Workers' Compensation Board is satisfied has resulted in chronic pain.

[286] I therefore make no award under this head of damages.

d) Loss of valuable services and claim of John Marsh

[287] In the short period when Carolyn Marsh was recovering from the injuries sustained in the motor vehicle accident, she was limited in her housekeeping capacity. However, she had a pre-existing neck injury.

[288] Dr. Cameron concluded that, by early September, Carolyn Marsh's back symptoms had resolved. She was limited at that time in the things she could do

around the house for a very brief period as a result of the motor vehicle accident, but was continuing to suffer the effects of the Tim Horton's injury, in any event.

[289] Although Carolyn Marsh had a stress reaction to the motor vehicle accident and the incidents surrounding it, I cannot conclude there is any evidence that her situational anxiety prevented her from performing her usual household tasks. Any limitation in performing valuable services arose from the earlier work injury.

[290] John Marsh has also made a claim based upon *quantum meruit* for the work he said he performed which Carolyn Marsh was not able to do. Carolyn Marsh's counsel submits the award for Carolyn Marsh should be \$45,000.00 and, for John Marsh, \$5,000.00. However, these amounts are based upon the assumption that there is a loss of valuable services arising from the motor vehicle accident which continues to this date. That is not the case.

[291] The Workers' Compensation Board is satisfied that Carolyn Marsh suffers chronic pain arising from workplace injuries but I have concluded that the injuries from the motor vehicle accident were short lived.

[292] In *Leddicote v. Nova Scotia (Attorney General)*, 2002 NSCA 47, Saunders, J.A. said, with respect to claims for loss of valuable services, at para. 50:

[50] The question becomes to what extent, if at all, have the injuries impaired the claimant's ability to fulfill homemaking duties in the future? Thus, in order to sustain a claim for lost housekeeping services one must offer evidence capable of persuading the trier of fact that the claimant has suffered a direct economic loss, in that his or her ability or capacity to perform pre-accident duties and functions around the home has been impaired. Only upon proper proof that this capital asset, that is the person's physical capacity to perform such functions, has been diminished will damages be awarded to compensate for such impairment.

[293] The court upheld the trial judge's decision to make no such award in that case. Saunders, J.A. distinguished Ms. Leddicote's situation from the situation in *Carter v. Anderson*, 1998 Can LII 3012 (N.S.C.A.), (1998), 168 N.S.R. (2d) 297. He said the facts in that case were "strikingly different" from Ms. Leddicote's evidence.

[294] I am not satisfied that the evidence in this case supports such a claim. Carolyn Marsh was already suffering from the effects of the Tim Horton's injury

and the physical effects of the motor vehicle accident were brief. Any valuable services she could not perform, and which may have been performed by John Marsh, were services being performed before the motor vehicle accident in any event.

[295] There is no claim for future costs of future care. Carolyn Marsh's counsel states:

The cost of care for Ms. Marsh has been subsumed in the workplace injuries and will be covered by WCB.

[296] Nor is there a claim for special damages.

e) Pre-judgment Interest

[297] The plaintiff seeks the payment of pre-judgment interest for the entire period from August 15, 1996 to the date of this judgment. However, her counsel submits that the issue of pre-judgment interest should be dealt with subsequent to the release of this decision along with the issue of costs. If the parties cannot agree, and it appears from their pre-trial briefs that they will not be able to agree, I will accept written submissions.

COSTS

[298] The defendant has been largely successful and is entitled to her costs. I will accept written submissions on the issue of costs if the parties cannot agree.

Hood, J.