Date: 20000609
Docket: S.H. No. 127957 (1997)

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: Leddicote v. Nova Scotia (Attorney General), 2000 NSSC 113

BETWEEN:

ELIZABETH KATHLEEN LEDDICOTE

Plaintiff

- and -

ATTORNEY GENERAL OF NOVA SCOTIA,
representing Her Majesty the Queen in Right of
The Province of Nova Scotia, and
JOCELYN PATTERSON

Defendants

D E C I S I O N

HEARD BEFORE:	**The Honourable Justice Gordon A. Tidman**
PLACE HEARD:	**Halifax, Nova Scotia**
DATES HEARD:	**January 31, February 1, 2, 3, 4, 7, 8, 9, 10, 2000**
DECISION:	**June 9, 2000**
COUNSEL:	**Mr. Raymond Wagner, solicitor for the plaintiff, Leddicote** **Ms. Michelle Awad, solicitor for the defendant, Patterson** **Ms. Catherine Lunn, solicitor for the defendant, AGNS**

Tidman, J.:

The plaintiff brings this action against the defendants for damages for injuries suffered in a motor vehicle collision on Provincial Highway 101 at Lower Sackville, Halifax County, on February 21, 1995.

The plaintiff alleges that the negligence of one or both of the defendants caused the collision.

The plaintiff lost control of her motor vehicle when shortly after a snowstorm she drove into a patch of slush on the travelled portion of Highway 101. While her vehicle was crossways on the highway it was struck by the defendant Patterson's following vehicle. As a result of the collision the plaintiff suffered personal injuries. As well as claiming against the defendant Patterson the plaintiff claims against the Attorney General of Nova Scotia alleging failure to properly clear the highway of ice and snow.

The claim raises a number of questions, specifically:

1. Was the defendant Patterson negligent in the operation of her motor vehicle?

   If so, to what extent?

2. Was the Attorney General of Nova Scotia negligent in maintaining the highway at the time?

   If so, to what extent?

If the answer to questions 1 or 2 is yes;

3. Is the plaintiff entitled to damages for loss of income?

If so, the amount of such damages.

4. Is the plaintiff entitled to damages for loss of earning capacity?

If so, the amount of such damages.

5. Is the plaintiff entitled to damages for loss of valuable services?

If so, the amount of such damages.

6. Is the plaintiff entitled to damages for past and future care costs?

If so, the amount of such damages.

7. What is the quantum of the plaintiff's non-pecuniary general damages?

Following the trial of this matter I orally rendered decisions on five of those questions giving some reasons for two of them. I found no liability on the part of the A.G.N.S. and awarded no damages for loss of future earning capacity, loss of valuable services, and loss of future care. The three questions which remain to be decided are the extent of the liability of the defendant, Patterson, if any, quantum of the plaintiff's claim for loss of wages and quantum of the plaintiff's claim for non-pecuniary general damages.

I shall herein incorporate reasons for the decisions which I have given orally.

Evidence - Liability:

The Plaintiff Leddicote

The plaintiff, on February 21, 1995, was operating her 1989 Dodge Colt on Highway 101 travelling eastward from Middleton to Halifax. The highway between Middleton and Lower Sackville was snow covered following a snow storm. Highway 101 is one of the main travelled highways in Nova Scotia and in the Sackville area is divided into four lanes, two in each direction separated by a concrete median.

At the time of the accident both eastbound lanes had been plowed of snow and salted but remained partially snow or slush covered. As the plaintiff approached Lower Sackville around noon time the snowfall stopped, but the highway remained covered with snow or slush with, according to the defendant Patterson, some clear patches. As the plaintiff was proceeding easterly in the right hand lane she observed an oil tanker truck 600-700 feet ahead go through a patch of slush after seeing his lighted brake lights. She says when she saw the brake lights she geared down and observed a patch of snow on the highway when she was 5-10 feet away from it, but decided that she could proceed through it without difficulty. The patch has been variously described but I accept that it consisted of slush 2-4 inches in depth extending from the plaintiff's right edge of the highway almost to the center line dividing the two eastbound lanes and

between 1 and 2 car lengths in width. When the plaintiff's vehicle struck the slush patch it began to fishtail, moving to the right and then left on the highway. The plaintiff lost control of the vehicle and it turned sideways and moved down the highway across both lanes of travel with the front of the vehicle facing the median. Either shortly before or after coming to a stop her vehicle was struck by the defendant Patterson's vehicle.

The Defendant Patterson

Jocelyn Patterson says that she left Auburn around 10:00 a.m. and proceeded toward Halifax on Highway 101. She says it was a real winter's day with snowplows out all over the Valley. She says the roads were snow covered, but when she arrived at Sackville the sun broke out and the road surface was wet and slushy. She says as she proceeded along she was travelling between 40 and 80 kph depending on road conditions.

She says she first noticed the plaintiff's vehicle in the Sackville area. She says that she followed behind that vehicle for some time and she saw what was later identified as the Towriss vehicle in her rear view mirror. She says she was keeping about the same distance, 6-8 car lengths, behind the plaintiff's vehicle, and that all three vehicles were travelling in the right hand lane.

She says that both lanes had been plowed of snow. On cross-examination she

says she could have been travelling approximately 6 car lengths behind the plaintiff's vehicle and was at that time travelling at approximately 80 kph.

The defendant was following the plaintiff and also driving in the right hand lane when she observed the plaintiff's vehicle start to skid. She says she braked and attempted to steer around the plaintiff's vehicle, first to the left and then to the right, but because the plaintiff's vehicle extended into both eastbound lanes she was unable to do so and struck the plaintiff's vehicle in the left side at the rear quarter panel. She says she did not see the slush patch before the collision because her view of that area was obstructed by the plaintiff's vehicle.

Towriss' Evidence

The defendant's vehicle was being followed by a vehicle driven by Jamie Towriss who was accompanied in the front seat by his father Leslie Towriss. Jamie Towriss says that for some time prior to the accident the three vehicles were travelling about equidistant from one another and at about the same speed. He says he saw the first car go out of control, with a lot of snow and slush flying and then the middle vehicle collided with the front vehicle. He says at the time of impact the plaintiff's or the front vehicle was somewhat sideways. He says that after the accident he saw the slush patch that the plaintiff's vehicle struck before going out of control and that it was 4-6 inches deep and 6-8 feet wide and located in the right hand lane. He can recall no slush in the left hand lane. He says the middle car appeared to attempt to stop but

there was nothing it could do. He says he was travelling about 200 yards behind the second vehicle.

Mr. Towriss Sr., the right front passenger in his son's vehicle says they were travelling about 100 feet behind the second vehicle. He says he saw the brake lights of the middle vehicle come on and then the collision.

Submissions and Findings on Liability Issues:

Mr. Wagner submits that there is a heavy burden on a following vehicle to maintain control and avoid striking vehicles ahead. In this case Mr. Wagner submits that the defendant Patterson was following too closely for the existing driving conditions and the collision could have been avoided if she had been following the plaintiff's vehicle at a greater distance.

The defendant says that she was following approximately 6 car lengths behind the plaintiff's vehicle. I accept the Towriss evidence that the three vehicles were travelling along equidistant from one another. I do not accept Mr. Towriss Jr.'s estimate of that distance as being 200 yards. In my view, from that distance, Mr. Towriss Jr. could not have seen everything as he says he clearly did. I do accept Mr. Towriss Sr.'s estimate of the following distance as being 100 feet which accords more closely with Ms. Patterson's estimate of 6-8 car lengths.

It is impossible to reconstruct exactly what occurred to cause the collision since usually witnesses see and recall things differently. However, from the evidence I find as defence counsel submit, that the collision was caused primarily by the plaintiff losing control of her vehicle. She lost control as a result of driving her vehicle into a slush patch where she skidded and while sideways partially blocked both eastbound lanes so that the defendant Patterson was unable to pass or avoid striking her vehicle.

Although the defendant Patterson did all she could in trying to avoid the plaintiff after being placed in the agony of collision position she must bear part of the responsibility because, in my view, she was travelling too closely behind the plaintiff's vehicle considering the slippery condition of the highway at the time. Although 6 car lengths may be a safe following distance under normal road conditions, particularly on a 4 lane highway, it was not, in my view, a safe distance under the slippery road conditions existing at the time. On the plaintiff's part, the slush patch was clearly visible to her in sufficient time to have avoided striking it. She says that she saw it but did not think it would be a problem for her to drive through. The accident could have been avoided if she had either slowed earlier or driven to the left of the slush patch since the left hand lane was clear of obstruction.

Mr. Wagner points out that the Towriss vehicle stopped in time to avoid colliding with the front vehicles. However, the Towriss vehicle had the advantage of a greater stopping distance since it was 2 cars behind the plaintiff's vehicle. Although I agree with Mr. Wagner's submission as to the heavy onus on the following vehicle, I am of the view

that the greater portion of the blame for the collision rests with the plaintiff for failing to maintain control of her vehicle and placing the defendant's vehicle in jeopardy by blocking both lanes of traffic so the defendant could not safely pass.

I would assess the defendant Patterson's liability at 10%.

Liability - A.G.N.S.:

I shall next deal with questions 3 and 4 with regard to the responsibility of the province, represented by the Attorney General of Nova Scotia.

The duty of care test for public bodies was recently re-visited by the Supreme Court of Canada in *Ryan v. Victoria (City)* 1999, 168 DLR (4th) 513 (S.C.C.).

In *Ryan* the Supreme Court of Canada referred to the often quoted English House of Lords case of *Anns v. Merton London Borough Council,* [1978] A.C. 728 (H.L.), to wit:

> [22] The duty of care owed by a railway with respect to public crossings is determined, as it is for other private actors, under the two-step test of **Anns v. Merton London Borough Council**, [1978] A.C. 728 (H.L.), at pp. 751052, which was adopted by this court in **City of Kamloops v. Nielsen**, [1984] 2 S.C.R., 10 D.L.R. (4th) 641, and numerous subsequent decisions. See, e.g., **Just v. British Columbia**, [1089] 2 S.C.R. 1228, 64 D.L.R. (4th) 689; **Hercules Managements Ltd. v. Ernst & Young**, [1997] 2 S.C.R. 165, 146 D.L.R. (4th) 577. The two stages of the test were restated by Wilson J. as follows in **Kamloops**, at pp. 10-11:
>
> (1) is there a sufficiently close relationship between the parties (the [defendant] and

the person who has suffered the damage) so that, in the reasonable contemplation of the [defendant], carelessness on its part might cause damage to that person? If so,

(2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

[23] The first step to the **Anns/Kamloops** test presents a relatively low threshold. In order to establish a *prima facie* duty of care, it must be shown that a relationship of "proximity" existed between the parties such that it was reasonably foreseeable that a careless act by the Railways could result in injury to the appellant.

[24] The second step of the **Anns/Kamloops** test requires that it be determined whether any factors exist which should eliminate or limit the duty found under the first branch of the test. This approach recognizes that while the test of "proximity" may be met, liability does not necessarily follow. The existence of a duty of care must be considered in light of all relevant circumstances, including any applicable statutes or regulations. Thus, a legislative exemption from liability can negate a duty of care in circumstances where that duty would otherwise arise. The same holds true for immunities created by the courts. A policy decision is made in such cases to prevent the law of negligence from regulating certain relationships or relieving certain injuries, notwithstanding a finding of proximity between the parties. This may reflect the need to shield specific activities from judicial control, or the wish to prevent the "floodgates of litigation" from opening into areas of potentially unlimited liability. See, e.g., **Allen M. Linden, *Canadian Tort Law*** (6th ed. 1997), at p. 275.

[25] In addition to negating a duty of care entirely, policy considerations may also serve to "limit" the "scope" of an existing duty under the second step of the **Anns/Kamloops** test. It is necessary to be clear about what this means. The purpose of the **Anns/Kamloops** test is to establish the existence of a legal duty, not to determine the standard of care required to establish liability. Policy considerations do not give rise to "greater" or "lesser" duties in different cases. A duty of care either exists or it does not. As discussed below, when the language of "duty" is framed in terms of its degree or content, what is really at issue is not the duty but the applicable standard of care. While the distinction is obvious, courts from time to time seem to lose sight of that principle. See, e.g., **Wade v. C.N.R.**, [1978] 1 S.C.R. 1064, at p. 1083, 80 D.L.R. (3d) 214.

[26] The "scope" of a duty of care can be "limited" under the **Anns/Kamloops** test only in the sense that the duty will arise in certain situations and not in others. Such limitations may be based on broad policy considerations such as efficiency and economic fairness (see **Canadian National Railway Co. v. Norsk Pacific Steamship Co.**, [1992] 1 S.C.R. 1021, at pp. 1155-60, 91 D.L.R. (4th) 289) or on specific principles of law which operate in particular cases. See, e.g., **Hercules**, *supra*, at paras. 31-34, and *Just, supra,* at pp. 1235-36. The ultimate determination of whether a duty of care arises or not is an issue properly framed within the second step of the **Anns/Kamloops** test and its answer depends on the factual and legal context of each case. In that sense, the test is highly flexible.

[27] However, the **Anns/Kamloops** test is not concerned with legislative or judicial policies which, as in this case, define the conduct required to meet an existing duty. Such policies relate to the standard of care. As a practical matter, the distinction between limiting the "scope" of a legal duty under **Anns/Kamloops** test or limiting the requisite

> standard of care to discharge that duty is an elusive one. Both formulation go to reducing a defendant's exposure to liability, and in most cases the outcome will be the same under either approach. As a matter of analytical coherence, however, the distinction if important. See Lewis N. Klar, *Tort Law* (2nd ed. 1996) at p. 247, and **Just**, *supra,* at pp. 1243-44. Without it, the entire analysis of duty and standard would be collapsed together into the **Anns/Kamloops** framework, a purpose for which that test was not designed.

The test in this case may thus be framed:

1. Did the Province owe a duty of care to the plaintiff?

2. If so, what was the standard of care?

3. Did the Province breach that standard?

First Part of Test:

Did the Province owe a duty of care to the plaintiff?

The proximity of the parties, that is, the user of the highway and the agency responsible for maintaining the highway, leads one quickly to the conclusion that such proximity imposes an obligation of care on the part of the maintainer to the user. That has not been placed in issue by the parties and I find that the Province owed to the plaintiff a duty of care.

Second Part of Test:

What then is the standard of care owed to the plaintiff?

Maintenance and care of public highways in the province is provided for in the *Public Highways Act*, R.S.N.S. 1989 c. 371. There is nothing in the *Act,* however, that

either expressly mandates the provincial government to maintain public highways in a particular way or excuses it from doing so. Rather, the courts over time have determined the standard of care for maintenance of public highways. The courts have made it clear that the province has a duty to take reasonable care in maintaining public highways to best ensure the safety of the driving public. The standard is not so rigid as to hold the province to be a virtual insurer against harm to the public using the highways. It is, for instance, unreasonable to demand that after a snowstorm every highway be immediately cleared of ice and snow. Allowance must be made for priorities to be established in maintenance depending on the degree of use of the highway with the busiest highways being cleared first. For instance, in the application of salt to slippery highways it is reasonable to expect that during or after a storm salt would be applied to the Sydney By-Pass before being applied to the highway leading into Meat Cove. Consequently, the Province is required to take reasonable care, including prioritizing, to ensure that public highways are safe for use by the travelling public.

Third Part of Test:

Did the Attorney General Breach that Standard of Care?

In relation to this issue Ms. Lunn called two witnesses from the Provincial Department of Transportation and Public Works. The first was Hugh Burns, a departmental operating supervisor, responsible for the maintenance of highways in the district which that portion of Highway 101 in issue is a part. The other, Murray Slaunwhite, the snow plow operator who during the day in question was actually plowing

snow on that portion of Highway 101.

Mr. Burns gave evidence of the Province's Highway 101 maintenance policy and program, specifically regarding salting and snow plowing. He says that the departmental maintenance program gives priority to the 100 series of provincial highways. In his district the procedure calls for Highway 101 to be the first road plowed and salted during and after a storm. He says that procedure was followed on February 21, 1995.

Mr. Slaunwhite gave evidence that prior to the accident on the day of the storm he had plowed and salted, in quantities exceeding those set out by departmental policy manuals, both eastbound lanes of Highway 101 in the Sackville area. From the evidence of Mr. Towriss Sr. that some snow may have been pushed into the core area between the Dartmouth exit and Highway 101 contrary to departmental policy, Mr. Wagner submits that this may have contributed to the cause of the accident by contributing to the size of the slush patch on the highway. Departmental policy, according to Mr. Burns and Mr. Slaunwhite, does not allow plow operators to back up on Highway 101 to clear any snow that may have been pushed aside by the plow blades and left on the highway. Mr. Slaunwhite says during initial plowing some snow is usually left on the highway in the various core areas and is eventually cleared by subsequent snow plowing. Based on the evidence of Messrs. Burns and Slaunwhite, I find that the Department of Transportation had in effect a reasonable policy to ensure that the highways, and particularly Highway 101, are properly cleared of snow and ice

during and after storms. I also find that on the day in question that policy was adequately carried out by Mr. Slaunwhite. It may be that snow was left on the highway that formed the slush patch in issue or it may be that the slush accumulated in the area as a result of automotive traffic on the highway. In either event it is not unreasonable to expect to find various accumulations of snow or slush on the highway during and after snow storms and in this case immediately after a snow storm.

Accordingly, I find no negligence on the part of the province and would dismiss the action against the Attorney General of Nova Scotia.

Damages:

Evidence of the Personal Injuries of the Plaintiff

The Plaintiff's Evidence

As a result of the collision the plaintiff suffered physical injuries. Immediately following the collision the plaintiff was taken to Cobequid Multi-Service Center for treatment. She says that her right arm, shoulder, spine, hips, chest and neck were sore. She says that since the accident the injury to her right shoulder has given her the most difficulty but she still suffers from severe headaches which radiate from the back of her neck to the top of her spine. X-rays and CT scans taken following the accident revealed no abnormalities.

The plaintiff says she has difficulty sleeping and suffers from anxiety and anxiety

attacks which continued for two years after the accident. She says she has also had anxiety attacks while preparing for trial.

The plaintiff says that she suffered from migraine headaches prior to the accident but says she no longer has those type of headaches very often. She says she has a different type of headache since the accident where the pain radiates upward from the back of her neck. The plaintiff says she still suffers pain in her chest if she moves a certain way, but it is the right shoulder that gives her the most difficulty. She says she suffers pain daily in her spine and hips and cannot stand or sit for long periods of time. She says that she has experienced a great deal of stress since the accident and cannot now take care of herself as she did before. The plaintiff says that she experienced anxiety and emotional attacks almost immediately after the accident. She says she was afraid to drive a motor vehicle after the accident and drove again only after her father forced her to do so. She says she has panic attacks with flash backs of the accident. She says that six months after the accident she started to have bulimia nervosa and anorexia experiences. She says she is now anorexic and has attacks sometimes daily and sometimes weekly. She says that before the accident she was in control of her life, but the accident has taken that away. She says that she suffers from stress which causes gas pains and stomach upset.

Treatment of Plaintiff's Injuries

The plaintiff's injuries on an ongoing basis have been treated by her family doctor, Philip J. Wells. From February to October following the accident the plaintiff took physiotherapy treatment. In the autumn of 1995 the plaintiff moved from Middleton to Halifax. In August of that year the plaintiff was referred to Dr. John Sapp, a physical medicine and rehabilitation specialist in Halifax. Dr. Sapp recommended more physiotherapy, but the plaintiff says she does not recall taking physiotherapy following that appointment with Dr. Sapp. I shall deal further with the plaintiff's medical treatment under the headings of the plaintiff's claimed losses.

Loss of Income:

The parties have agreed that immediately following the accident the plaintiff was unable to work for a period which I find to be 15 weeks and as a result she lost income. The parties do not much dispute the total amount of income lost during that period but do dispute the amount of past lost income the plaintiff should recover in this action.

I find that during the 15 weeks following the accident the plaintiff was unable to work she lost $425.00 weekly, made up of $250.00 weekly she was receiving from working in her brother's music store and $175.00 weekly from loss of her night-time personal care worker income. I find that the total lost income for that period is $6,375.00. The plaintiff received Section "B" benefits totalling $2,180.00 which I would deduct from the lost income of $6,375.00. Ms. Awad for the defendant Patterson argues that the court should also deduct from the lost income award benefits received

by the plaintiff under the *Unemployment* and *Employment Insurance Acts*. Those benefits total $2,347.00. Although there may be an obligation upon the plaintiff to repay those benefits recovered in a damage award the defendant is not entitled to the benefit of that obligation. Consequently I make no deduction for unemployment and employment insurance benefits.

For loss of income I award the plaintiff the sum of $4,195.00.

Loss of Earning Capacity and Valuable Services:

Dealing first with the claim for loss of Earning Capacity. The plaintiff claims $100,000.00 for future loss of earning capacity and $16,562.00 for past loss of earning capacity. In order to demonstrate what the plaintiff has allegedly lost as a result of her earning capacity being impaired by the motor vehicle accident injuries, I have been provided with figures compiled by Ms. Jessie Gmeiner, an actuary. One of Ms. Gmeiner's assumptions is that as a result of those injuries the plaintiff is no longer able to join the R.C.M.P. and Ms. Gmeiner has calculated the plaintiff's financial loss based upon that assumption. I accept the evidence of the plaintiff and other witnesses that it has been the plaintiff's life-long ambition to become a member of the R.C.M.P. The evidence also indicates that the plaintiff over her working years has had a particular interest in police work. She has done volunteer work with both a municipal police department and the R.C.M.P. She has also been employed as a security officer with Pinkertons and Citadel Security. The employment with Pinkertons and Citadel has been

post-accident. The plaintiff says that in March of 1997 or 1998, while with Citadel Security, she was off work for about a week as a result of a scuffle she had in an attempt to arrest shoplifters. She says that she blocked a punch with her right fist and her fingers swelled at that time.

In November of 1994, the plaintiff, in order to fulfill her ambition to join the R.C.M.P. wrote the R.C.M.P. entrance examination. She failed that examination, scoring 79 out of a possible 145. Staff Sargent Mossman of the R.C.M.P. gave detailed evidence of the R.C.M.P. entrance requirements, recruitment procedures, and of the plaintiff's attempts to join the force.

Staff Sargent Mossman says that persons failing the entrance examination may re-write after the expiration of a one year period. The plaintiff wrote a second entrance examination in May of 1996. This time the plaintiff passed the examination, scoring 90 out of 145. The plaintiff, however, was not invited by the R.C.M.P. to continue in the recruitment process toward acceptance as a member.

Staff Sargent Mossman, in explaining the recruitment process, says that from the particular recruitment process in which the plaintiff successfully passed the initial written examination 13 females were selected to proceed but the plaintiff was not one of those selected. He says all of the 13 scored in the 107-110 or above range. He says that all those selected to proceed in the recruitment process would not necessarily be recruited, but if not they would remain on a list from which they may be selected to proceed in the

next recruitment process. He says that the plaintiff remained eligible for continuation in the next recruitment process, but she was not selected to proceed at that time either. The plaintiff has not applied to re-write the recruitment examination which she must in order to remain eligible for recruitment. She could have done so had she wished.

Staff Sargent Mossman could give no assessment of the plaintiff's chances of being accepted in the R.C.M.P. should she again apply.

Dr. Kenneth Mahar, who examined the plaintiff and whose evidence I will later deal with, says that, in his opinion, because of the plaintiff's medical condition, it is unlikely that she would be accepted as a member of the R.C.M.P. The doctor admitted, however, that he knew nothing of the qualifications, medical or otherwise required of an R.C.M.P. applicant.

The plaintiff has twice attempted to join the R.C.M.P. and, on both occasions, she has been unsuccessful. The first attempt preceded the accident, the second followed the accident. The evidence indicates to me that neither of those failures can be attributed to the plaintiff's injuries suffered in the automobile accident.

Consequently, I find that the plaintiff's inability to join the R.C.M.P. cannot be attributed to the injuries she received in the February 21, 1995 motor vehicle accident. I say so, particularly, since the plaintiff has not made application to join the R.C.M.P. since May of 1996, although, following that time she has been involved in security work

similar to the work she may have been called upon to do had she joined the R.C.M.P. On at least one occasion she had a physical confrontation with one alleged shoplifter, apparently with no physical after effects. It thus appears that the plaintiff's medical condition has not affected her ability to do that type of work, similar to work she could be called upon to do as a member of the R.C.M.P.

In dealing further with the plaintiff's claim for future or past loss of earning capacity, I consider the plaintiff's post-accident employment.

Following the accident the plaintiff's first job was on a part-time basis with Pinkertons in June, 1995, when the G-7 Summit was held in Halifax. In July 1995 the plaintiff commenced full-time work with Pinkertons but left their employ in November 1996 due to a misunderstanding with her employer not associated with her injuries. It is noteworthy that although the plaintiff was hired by Pinkertons on a part-time basis for the G-7 Summit her ability on the job led to her full-time employment with Pinkertons following the G-7 Summit meeting.

In November 1996 the plaintiff commenced employment as a sales associate with Eatons department store where she worked 37½ - 40 hours per week. Her employment was terminated when Eaton's closed its stores in October 1999. While working with Eatons the plaintiff also worked for Citadel Security from March, 1997 to March, 1998 doing work similar to the work that she formerly had done with Pinkertons. She says that she left Citadel because she was dating a fellow employee which was not

permitted by company policy.

The plaintiff says that another reason for leaving Citadel was that she did not think she could do the security work because of her injuries. However, she did hold down that additional job with Citadel for some time, apparently without difficulty that can be attributed to the motor vehicle accident.

Since September of 1998 the plaintiff has also worked with President's Choice Financial, a company associated with the operation of the CIBC Call Center in Halifax. She is now on short-term disability from that work because of panic attacks she says were caused by her concern about this upcoming trial.

According to Darren Poirier, the plaintiff's team leader at President's Choice, since August of 1998 the plaintiff has worked full-time hours, as both a part-time and full-time employee, up to the present period of short-term disability. She is now a full-time employee with President's Choice.

Both Ms. Fost, who supervised the plaintiff at Eatons and Mr. Poirier, the plaintiff's team leader at President's Choice Financial, were well satisfied with the plaintiff's employment performance. Ms. Fost, particularly, spoke in glowing terms of the plaintiff's abilities and she says that because the plaintiff so quickly acquired computer skills she was very early on placed in charge of a sales department. She says that she also had very good skills in sales and customer relations.

For most of the time since the accident the plaintiff has held two jobs simultaneously, most requiring long periods of standing or sitting and others potentially requiring physical effort in dealing with security situations.

Dr. Robert K. Mahar, M.D., F.R.P.C., a specialist in physical medicine and rehabilitation, gave evidence on behalf of the plaintiff. A written report prepared by Dr. Mahar was also submitted in evidence (Tab 3, Ex. 1). Dr. Mahar's comprehensive 20 page report is dated September 27, 1999. He states that his report is based on his meeting with the plaintiff and examining her on June 22, 1999, the reports of other medical doctors who have examined and treated her, and the reports or records of agencies where she had been seen and treated. The plaintiff had been seen and treated by a number of medical personnel following the accident many of whom gave evidence at trial. The following are the reports examined, reviewed and summarized by Dr. Mahar:

> Copy of the file of Dr. Phillip Wells covering the period from May 1990 through April 1997;
> Copies of the record of Cobequid Multi-Service Centre - February 21, 1995;
> Note of Dr. Wells to Whom It May Concern - March 1, 1995;
> Report of xray of right clavicle and shoulder - June 12, 1995;
> Report of CT scan of the head - March 17, 1995;
> Report of Dr. A.B.F. Connolly (orthopedic surgeon) - May 16, 1995;
> Report of Dr. John Sapp (physical medicine and rehabilitation) - August 21, 1995;
> Report of Dr. Wells to Mr. Wheeldon - September 1, 1995;
> Copy of Associative Rehabilitation Inc. File - Evaluation - September 19, 1995;
> Report of Dr. Sapp Anna Marie Butler - October 28, 1996 and April 15, 1997; and,
>
> Report of Dr. Eugene Nurse (family physician) to Mr. Bruce Olie - June 3, 1997.

At page 20 of his report Dr. Mahar gives the following opinion, which I accept:

> … There is no evidence to indicate that she is at premature risk of an accelerated or exaggerated tendency towards degenerative disc disease or arthritis in any region of her body as a result of the consequences of this accident.
>
> There is no evidence to indicate that her working career will be prematurely curtailed as a result of the consequences of this accident. She will probably continue to experience ongoing pain and there is little evidence to indicate that this will resolve completely with the passage of time. Therefore, the consequence of this would be the ongoing experience of pain....

Based mainly upon the plaintiff's post-accident employment record and Dr. Mahar's opinion, I am not satisfied that the plaintiff has proved that her injuries caused by the accident have reduced her earning capacity, accordingly I award no damages for Loss of Earning Capacity either past or future.

Loss of Valuable Services:

The plaintiff also claims the amount of approximately $38,000.00 for Loss of Personal Services most of which the plaintiff claims will be required to pay the cost of housekeeping services in the future. This claim is based on Ms. Gmeiner's rationale found in her actuarial report at p. 17 of Tab 11 of Exhibit 1.

Counsel for the plaintiff argues that the situation here is similar to the circumstances in *Carter v. Anderson,* (1998), 168 N.S.R. (2d) 297, where the plaintiff Ms. Carter was awarded an amount of damages which would provide for the payment of the costs of past and future housekeeping services she would probably require in the future.

In my view the circumstances here are not analogous to those in *Carter*. In *Carter* there was a realistic expectation that the plaintiff would be required to pay for housekeeping services she could no longer perform because of her injuries. As Ms. Awad has argued, and as Roscoe, J.A. stated in *Carter*, a claim for the cost of future personal services is based on the concept of direct economic loss. In other words there must be a probability of out of pocket expenditures for doing necessary household chores, or, at least of someone providing that ongoing service which would otherwise require an expenditure by the plaintiff.

In this case there is no reasonable expectation that housekeeping or personal services will have to be paid for in the future due to the plaintiff's injuries. The plaintiff has not paid anyone to do household chores to date and there is no evidence to suggest that she will be unable to perform such chores in the future. Indeed, the plaintiff's roommate who has no physical impairment says that the housekeeping work that is done in their apartment is done by the plaintiff and not by him.

It may be, and probably will be the case, that the performance of some household chores by the plaintiff will be affected by her injuries. However, I will take into consideration that circumstance in determining the amount of a general damage award for pain and suffering and loss of enjoyment of life.

In the circumstances outlined I find nothing to justify a separate category award for the loss of valuable services. Consequently, no award is made for loss of those

services.

Cost of Past and Future Care:

The plaintiff claims for cost of past and future care costs. Specifically, the plaintiff claims $10,000.00 for future care costs based on a claimed requirement for medication, psychological and physiological therapy. The claim for future care costs have not been documented nor has acceptable evidence been adduced to substantiate that claim. Although the plaintiff may have some care costs in the future attributable to the motor vehicle accident the court should not on its own be required to guesstimate the amount of such a loss. Consequently, I shall make no award for the cost of future care. I shall award the sum of $800.00 for the cost of past care.

Surveillance Video:

The defendant Patterson produced as evidence an approximately 1 hour video of the plaintiff taken at various times on the 15th and 17th days of July 1999. I comment briefly on that evidence.

Gregory Andrea, the video cameraman gave evidence. He says the videotape he produced represents all the footage he shot over those two periods of time except for a period of inactivity which he edited out of the tape. I do not recall testimony that he

observed the plaintiff's activities on other days which he did not record but, as Mr. Wagner pointed out during his summation to the court, the billing that was provided for those services is for several more hours of surveillance than the approximate 1 hour video that was shown in court and the totality of the tape which I watched alone during my deliberations.

The value of a surveillance video as evidence, in my view, is limited since it is only a snapshot in the lengthy period of time under consideration. A video may also be distortive since it is of only two dimensions in a three dimensional actuality. That makes it difficult to determine the actual extent of pain from various body movements or whether the range of body movement is limited by the fear of pain. Notwithstanding, a surveillance video has some evidentiary value in that it captures a person in unguarded circumstances.

The first section of the video produced shows the plaintiff on July 15th, 1999 assisting in securing a large mattress to the top of a motor van. The plaintiff appears to have no difficulty in raising both her left and right arms above her head, although the plaintiff in giving her testimony indicates that raising her right arm above her head caused her difficulty. The evidence also indicates that the range of rotation of the plaintiff's head was somewhat limited, particularly to the left. That was not apparent from watching the video in which the plaintiff appeared to turn her head to both the right and left. It also appeared that the plaintiff while driving or upon entering traffic flow from a parked position had no difficulty in moving her head to either the left or right.

Dr. Eugene Nurse, an experienced family practitioner, who gave evidence, says that when he examined the plaintiff she had difficulty in abduction of her right shoulder. He demonstrated that movement as placing the arm behind the back in order to put on clothing. Although the plaintiff did not demonstrate that particular movement on the video tape she was able without apparent difficulty to place her right hand on her hip with her elbow behind the horizontal plane of her shoulders.

Although all of the movements I have described the plaintiff as performing are subject to the video limitations I have mentioned, the video tape does not conflict with, and does, in fact, enforce my impression of the plaintiff's work capabilities following the accident formed as a result of the *vive voce* evidence to which I have already referred.

Assessment of General Damages of the Plaintiff:

I have already detailed the plaintiff's evidence as to the injuries she suffered in the motor vehicle accident and the affect they have had and continue to have on her and will not repeat that evidence here.

Dr. Claire O'Donovan, M.D., FRCPC., an active staff psychiatrist with the then Camp Hill Medical Centre gave evidence on behalf of the plaintiff. Dr. O'Donovan saw the plaintiff on three separate occasions, the last time on March 20, 1996. Dr. O'Donovan reports and testified that the plaintiff was referred to her by Dr. Wells for

review of possible mood disorder. Dr. O'Donovan says the plaintiff had a history of emotional disorders pre-dating the automobile accident including binge eating and purging followed by an anorexic period. She says that immediately following the accident the plaintiff had post traumatic stress symptoms including anxiety which by December 14, 1996, the time of the first visit, had largely settled.

After the first visit Dr. O'Donovan in her report made the following comments:

> SUGGESTION:
>
> (1) I have explained to Elizabeth that I am unclear whether she has an ongoing mood disorder, what nature it is and when it commenced. Clearly, she has at least a mild disorder of bulimia nervosa. I am also unclear as to the connection between her road traffic accident and her moods.
>
> (2) Because of the initial possible response to Luvox, I have recommended that she increase her Luvox to 100 mg hs, and see if she again gets a therapeutic response.
>
> (3) I have given her some mood diary sheets to prospectively map her mood to try and get a clearer picture of what is going on.
> ...

When giving her testimony at trial Dr. O'Donovan said that the plaintiff felt that the real issue with her was self-esteem.

In her final report dated March 20, 1996 Dr. O'Donovan states:

> ...I reviewed Elizabeth with her accompanying mood diary today. Things have remained much the same. Her diary is consistent with a cyclothymic pattern, although it tends to be quite reactive to situations in the environment, hence a high mood does not sound as if it is, in fact, excessive to the situation that she was in. She does report three days in the four week period of low mood which again is consistent with a cyclothymic pattern and

> goes beyond simple mood reactivity. However, she is not interested in medication and obviously this pattern of cyclothymia is very common in the general population. Our tendency is only to treat if it is causing significant dysfunction and the patient wishes medication management.
>
> In fact, Elizabeth is not interested in medications. We discussed a referral to Family Services but I understand she has not been back to you in that regard. I have encouraged her to phone them herself as the waiting list is quite long. My guess is that she is quite disappointed that I have not made a significant connection between her moods and the motor vehicle accident, but I did not feel this to be the case. Therefore, I have closed her case today, though would be happy to review her at any time, particularly if she develops a more major mood disorder. ...

From the evidence of the plaintiff and Dr. O'Donovan the mental difficulties and eating disorders described obviously pre-dated the motor vehicle accident. However, the evidence also indicates that those difficulties were exacerbated to some degree as a result of the motor vehicle accident.

The Supreme Court of Canada in *Athey v. Leonati*, [1997] 1 W.W.R. 97, dealt with pre-existing medical conditions and how they should be considered in arriving at damage awards. At p. 107 the Court states:

> 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 ... Likewise, if there is a measurable risk that
>
> the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award.

Accordingly, I shall, in assessing general damages consider that the injuries

received in the accident did, in fact, have a debilitating affect on the plaintiff because of her innate emotional inability to cope with problems as well as could a person without that type of mental fragility.

In considering the medical evidence I found the testimony given by Dr. Mahar particularly helpful. Although he had seen the plaintiff only once, his examination and research of her past medical history and treatment was obviously extensive and thoughtfully considered. His conclusion was in agreement with that of Dr. Nurse, whose testimony was equally helpful.

At page 16 of his report Dr. Mahar states in relation to the plaintiff's physical injuries:

> I would feel that her current musculoskeletal findings and complaints as they relate to muscular pain are a consequence of the motor vehicle accident of 1995. At this point in time, it would be very difficult to establish the direct relationship between the tender areas and the areas injured in the motor vehicle accident ie., as noted in the above medical reports. She now presents with more widespread pain. I believe that the
>
> experience of pain in association with documented emotional upheaval and depression is associated with the evolution of "fibromyalgia" or what I believe to be a pain amplification disorder affecting muscles diffusely.
>
> There is no evidence to indicate that she had a significant pre-existing problem in that regard as noted by the family physician or the two orthopedic surgeons she had seen in 1994 (Dr. Canham and Connelly).
>
> Individuals do develop fibromyalgia in the absence of any trauma. It is not possible for me to rule out that she might have gone on and developed this soft tissue pain syndrome in any event. However, I do not believe that this is likely.

After performing tests on the plaintiff including "trigger point" tests where various points on the body are pressured for the purpose of detecting pain, Dr. Mahar diagnosed the plaintiff as suffering from a medical condition described as "fibromyalgia". Dr. Mahar admitted that there is a good deal of disagreement among medical professionals surrounding the cause and actual existence of such a medical condition. This was brought out and aired by a searching and thorough cross-examination of Dr. Mahar by Ms. Awad.

At page 3 of Dr. Nurse's report of June 3, 1997 (Ex. 1, Tab 5) Dr. Nurse concludes:

> This unfortunate young lady suffered a significant soft tissue injury to her neck and right shoulder girdle which includes her trapezius, sternomastoid and scalene muscles. Her suprascapular and supraclavicular are also involved to a lesser extent. This produced significant and ongoing disability and unfortunately has now developed into a chronic pain syndrome.
>
> Because of the length of time since the accident (February 21, 1995) I am not optimistic for a full recovery. Certainly Dr. Philip Wells has carried out yeoman's efforts in trying to return this young lady to normal function and I believe he has done everything within his
>
> abilities to accomplish this.

On the basis of all of the evidence I have concluded that as a result of the injuries suffered in the motor vehicle accident the plaintiff is suffering from chronic pain syndrome which Dr. Mahar describes as "fibromyalgia".

Ms. Awad submits that the plaintiff failed to mitigate her loss and for that failure the court should deduct a percentage from an award of non-pecuniary general

damages.

There is evidence that the plaintiff did not follow to the letter her medical advice with respect to research, education, aerobic exercise and medication. I was particularly surprised that the plaintiff did not follow up on the suggestion of Dr. Nurse to investigate the use of the Synaptic 2000 Electron Activator that according to Dr. Nurse's information had been having some success in providing relief for persons who had, as the plaintiff says she had, tried without success to obtain relief from all other medical sources. In his report of June 3, 1997 Dr. Nurse stated:

> Interestingly enough, only recently have I been made aware of a treatment protocol for chronic pain syndrome - musculoskeletal injuries. Mr. Brian Tomie at the Renova Physiotherapy, Bedford branch which is situated in the Royal Bank building, Suite 307, 1597 Bedford Highway, phone 835-6561, is presently carrying out trial on a new form of treatment called a Synaptic 2000 Electron Activator. This is a non-invasive, non-chemical treatment. He is having relatively good success in some of the chronic cases that appear to be unresolved by other means. Since this is a trial at the present time, it would be extremely useful to involve Elizabeth Leddicote in this trial. You can enter her name in the program by calling Mr. Tomie at the phone number given above.
>
> I would strongly recommend that Elizabeth be entered in this treatment program as soon as possible and to this end I would recommend that you contact Mr. Tomie to have her included in the treatment program. The program can last for varying periods of time. The last patient that I enrolled has made dramatic success over a six to eight week period to an almost unbelievable extent.

I will not decrease an award by a specific amount to account for that circumstance, but I conclude from it, in arriving at the amount of an award, that the degree of the plaintiff's present suffering is not so extreme as her evidence would otherwise indicate.

Upon considering all the evidence, including that relating to the exacerbation of pre-existing psychological difficulties, and failure to mitigate as related I would assess general damages for pain and suffering and loss of enjoyment of life in the amount of $30,000.00.

Summary:

In summary I have answered the questions considered as follows:

1. **Q.** Was the defendant Patterson negligent in the operation of her motor vehicle. If so, to what extent.

A. Yes, 10%.

2. **Q.** Was the Attorney General of Nova Scotia negligent in maintaining the highway at the time?

A. No.

3. **Q.** Is the plaintiff entitled to damages for loss of income? If so, the amount of such damages.

A. Yes, $4,195.00.

4. **Q.** Is the plaintiff entitled to damages for loss of earning capacity?

A. No.

5. **Q.** Is the plaintiff entitled to damages for loss of valuable

services?

A. No.

6. **Q.** Is the plaintiff entitled to damages for past and future care? If so, the amount of such damages.

A. Yes, $800.00.

7. **Q.** What is the quantum of the plaintiff's non-pecuniary general damages?

A. $30,000.00.

Plaintiff's Total Recovery - 10% of $34,995.00 = $3,499.50

Pre-judgment Interest:

Ms. Gmeiner has calculated pre-judgment interest on the basis of a weighted average of the interest paid on one year treasury bills since the accident date in accordance with Practise Memorandum No. 7 at 5.21%.

Since, in arriving at the amount of the award for non-pecuniary general damages, I have not taken into account inflationary factors, I shall allow pre-judgment interest at the rate of 5.21% on the award of non-pecuniary general damages from the date of the accident to the date of the order for judgment. I would also allow the annual compounding of pre-judgment interest from the date of the accident to the date of the

order. Mr. Wagner has claimed compounded pre-judgment interest and has provided cases from this court in support of that claim. Although I am aware that other cases decided in this court have disallowed the compounding of pre-judgment interest, in the absence of an argument against it by the defence I shall allow it.

I would also allow pre-judgment interest at the same rate of 5.21% on the awards of pecuniary damages from the date of loss or payment to the date of the judgment order.

Costs:

Counsel have indicated a wish to make submissions on costs following this decision. If counsel are unable to agree on costs they should make arrangements to bring the matter before me, after providing me with their positions in writing.

J.