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1985 S.K. 1803

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

BETWEEN:

HAZEL BUSH

Plaintiff

- and -

AIR CANADA

Defendant

HEARD: At Kentville, Nova Scotia, before the Honourable Mr. Justice David W. Gruchy on March 18, 19 and 20, 1991

DECISION: April 19, 1991

COUNSEL: Brian W. Downie, Counsel for the Defendant

H. Heidi Foshay-Kimball,
Derrick J. Kimball, Counsel for the Plaintiff

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GRUCHY, J.

BACKGROUND

Hazel Bush was to be a passenger on an Air Canada flight which was to depart from Toronto on March 24, 1984. She had boarded the plane with the other passengers. While waiting for the flight to depart, somebody yelled "Fire" and all the passengers had to exit the aircraft. Mrs. Bush was directed to the rear of the plane by a stewardess and was to go out through an emergency exit and slide down a chute to the ground. On the first attempt to make such an exit, somebody outside the plane told the stewardess not to send the passengers out that exit yet as the ground crew was not ready to receive them. She was then directed to another emergency exit and a stewardess told Mrs. Bush to slide down the chute in a sitting position. She did so. She slid down the chute and landed abruptly on her rear end on the pavement. She was hurt. That fact must have been

obvious to the staff who were present as she was almost immediately taken to hospital at Etobicoke. There her back was X-rayed.

There was no fire and Air Canada has admitted liability for the incident. The resulting damages are at issue. Mrs. Bush remembers sliding down the chute and she remembers a sharp pain at the base of her spine, radiating upwards. Then her memory becomes somewhat hazy. She says that she does not recall telling the people present that she had hurt her back, but she was taken to hospital with the aid of a wheelchair in a limousine. I conclude that while Mrs. Bush does not recall complaining of her back, she either did so or the manner of her landing on the tarmac was such that it was obvious she had been hurt. She was taken to the hospital where she was examined by people with white coats. X-rays were taken. She was given a prescription and sent, again by limousine, to her daughter's residence in Toronto.

Mrs. Bush was in pain overnight. On the following day she flew home. She was taken into and out of the aircraft by wheelchair.

Mrs. Bush claims never to have been out of pain since that time. The pain is sharp and originates at or near the coccyx, radiating upwards and outwards to her hips and between her shoulders. It is a "toothache" kind of pain.

Mrs. Bush was clearly in pain as she testified before me. The pain was obvious on her face. She sat on a "do-nut" pillow throughout. During her testimony she shifted her position from side to side and I am satisfied that she was not even aware she was doing that; that is, I am sure she did not do that in order to exaggerate the extent of her injury. I find her

disability is completely genuine.

The sole question is whether the disability arose solely from an injury suffered in the incident at the Toronto Airport. Air Canada takes the position that it did not. Mrs. Bush has not been employed since the incident and has claimed accordingly.

Mrs. Bush is now 63 years of age. Her husband died since this action was commenced. She is the mother of six children, the youngest of whom, Valerie, still resides with her. She had been a domestic servant for many years prior to March 24, 1984. Her previous employers gave evidence and spoke in glowing terms of Mrs. Bush. She had been a completely trustworthy and reliable employee, apparently with no unusual history of absenteeism or illness causing loss of time. Several of her former employers gave evidence.

Mrs. Bush had been employed by Mr. Royce Fuller and his wife for some eighteen years. Mr. Fuller was a farmer and his wife was a schoolteacher. Mr. and Mrs. Fuller had both been previously married and each had a family. They then had a family together. Mrs. Bush worked for them on a daily basis until Mrs. Fuller retired, two or three years before the incident in question. Mr. Fuller said that Mrs. Bush had helped bring up three families including his own. She was only paid $30.00 a week but there were a number of fringe benefits which Mr. and Mrs. Fuller gave to her and her family. He said it would be impossible ever to put a price tag on the services that Mrs. Bush gave him and his family.

When Mrs. Bush eventually came back from Toronto from her first vacation in many years, Mr. Fuller said it was

obvious she could not go back to work. He could tell from the pain shown on her face that she was in such agony she would not be able to return to work.

Other former employers of Mrs. Bush gave similar evidence.

Upon her return from Toronto, Mrs. Bush went to her home. She did not see a doctor immediately although her pain persisted. In due course, however, she received a letter from Air Canada advising she should go to see her own doctor. She then made arrangements to see a local doctor, her personal physician being away at that particular time. Indeed, over the years she has seen many doctors, most of whom were at her own behest and at least one at the request of Air Canada.

She went through a period of five or six months of extreme nervousness. While Mrs. Bush says she was not depressed at that time, it is probably a logical inference that such was the case.

It is not necessary to set forth all of her medical history. The medical evidence will be examined below. She claims the effects of her injury have included virtually constant pain from her tailbone upwards in her spine and shoulders. She cannot do her usual housework any longer, but can only do relatively minor tasks to assist her daughter. She cannot dress herself. She needs help in bathing. She cannot sit or stand for any length of time. Her daughter who is to be married soon has to do virtually all her housework.

AIR CANADA'S POSITION

Air Canada's position is that the burden of proof is on the plaintiff to prove the injury, loss or damage and that

contributed to her disability. With respect to the claim by Mrs. Bush's medical advisors that she has suffered myofascial pain syndrome and coccydynia, Air Canada says there have been intervening factors which have contributed to her disability. Considering there has been no objective evidence adduced to substantiate Mrs. Bush's claim of her disability, the defence has submitted that the claim is relatively minor.

THE MEDICAL EVIDENCE

DR. MARK KAZIMIRSKI

Dr. Mark Kazimirski and Dr. Judith Kazimirski are a husband and wife team of medical doctors at Windsor. Dr. Mark Kazimirski is Mrs. Bush's personal physician. He is a specialized family practitioner and has taken an interest in and oriented his practice to a degree to sports medicine. He or his wife first saw Mrs. Bush in relation to this matter in September, 1984. In preparation for his testimony, Dr. Mark Kazimirski had reviewed Mrs. Bush's entire chart or file, including all visits to Dr. Judith Kazimirski. When she was first seen by Drs. Kazimirski following the 1984 incident, she was suffering from low back, shoulder, neck and arm pain to such an extent as not to be able to do regular housework and required assistance even in her own light work. He said in his report of April 27, 1990, and reaffirmed his opinion in **viva voce** evidence, that he believes "...the causative factor of Mrs. Bush's neck and shoulder problems was the traumatic jolt received during the deplaning procedure on March 24, 1984." He concluded as follows:

> "It is my opinion that Mrs. Bush will continue to be disabled due to this unfortunate accident and I do not foresee that her back, neck and shoulder pain will improve. It may stabilize to the point where she will be able to do her own light housework chores on a regular basis and to be able to enjoy a quiet lifestyle."

In reaching this opinion, as expressed in his report and in his evidence, Dr. Mark Kazimirski drew on his experience in his family practice and sports medicine. Originally, when Mrs. Bush had come to see Dr. Mark Kazimirski and Dr. Judith Kazimirski, she had been expected to have a complete recovery. Physiotherapy had been prescribed and Mrs. Bush had taken that treatment until it was felt that it would do her no further good.

Dr. Mark Kazimirski had reviewed Mrs. Bush's chart and had noted no previous history of this type of problem. He had treated Mrs. Bush for the injury she suffered in a motor vehicle accident in February, 1988. That was a whiplash type of injury and the effects of it were clearly distinct from the coccyx injury. He concluded that Mrs. Bush had been very disabled by the effects of her injury. He felt in view of her history, Mrs. Bush will maintain an ongoing disability which will be exacerbated with age.

On cross-examination concerning Mrs. Bush's chart, it was clear that there had been "peaks and valleys" in her condition since 1984. There were occasions when Mrs. Bush had felt well and other times when the extent of her disability did not appear to be entirely justified by objective indicia. In making his opinion, Dr. Mark Kazimirski had access to the various medical opinions of Dr. Erdogan, Dr. Connelly and Dr. Milton, as well as various charts.

DR. ROBERT K. MAHAR

Dr. Robert Mahar specializes in physical medicine and rehabilitation. He has impressive qualifications and gave a detailed report which he referred to and reviewed in his evidence.

Dr. Mahar concluded that there was "no evidence to state that Mrs. Bush sustained a fracture of the sacrum or coccyx as a result of the trauma which occurred in 1984". There was some evidence of degenerative arthritis, but Drs. Mahar, Kazimirski, and ultimately Dr. Gerald Reardon, were all agreed that such arthritis is not contributing to Mrs. Bush's disability.

Dr. Mahar, in his evidence before me, confirmed his written opinion, including the following:

> "It is my impression that this lady suffers from coccydynia and a regional myofascial pain syndrome involving the muscles of the entire spine with xrays evidence of minor degenerative change in the mid thoracic spine (not unusual in this age group) and in the lower cervical spine which antedated the motor vehicle accident of 1988.
>
> Injuries to the sacrococcygeal spine and coccyx commonly result from a direct blow such as would be sustained in a fall onto the buttocks. In 'State of the Art Reviews, May 1989' of the journal 'SPINE' it is stated **'These injuries are more common in women and symptoms often are disproportionate to radiographic or clinical findings. Most patients respond to conservative treatment with cushioned seating and anti-inflammatory drugs. Occasionally, successful resolution of the problem can be achieved only by surgical excision of the coccyx and/or fracture fragment.'** I believe this lady did sustain blunt trauma to the sacrum and coccyx region. No fracture was demonstrated. This is not uncommon for this clinical scenario. She has gone on to complain of chronic pain in this region. In addition, she has demonstrated features consistent with a myofascial pain syndome. This is a nebulous entity in that there are no corroborating laboratory or radiographic findings. That is because this is predominantly a soft tissue problem with trigger points occurring in characteristic distribution in muscles. These 'trigger points' cannot be visualized but are basically tender areas in muscle which become painful as a result of mechanical or postural stimuli ie., pressure, bending, lifting, prolonged sitting, etc.
>
> I find there is a reasonable correlation between the history of her injury, her subsequent clinical course and the findings which were present on the day of my

examination. I feel that her present symptoms in the low and mid back region are as a result of the trauma which occurred in April 1984. Our understanding of coccydynia is not complete. It is difficult to find an explanation for the persistence of symptoms in the absence of significant demonstration of a bony or cartilaginous injury as a result of such trauma. Nonetheless, despite our poor understanding of the pathogenesis, persistent pain such as described by this individual and physical findings such as demonstrated by this individual are not uncommon following such episodes of blunt trauma to the tailbone region.

I do not feel this injury produces the discomfort she describes in her upper neck and upper back region.

I feel this lady has been compliant with regards to all forms of treatment which have been suggested. She obtained symptomatic relief from chiropractic manipulation and her symptoms recur when she increases her level of activity.

At the time I saw her she would be totally disabled from performing the duties of her vocation as a housekeeper. It would be my impression that her inability to do so is as a result of her symptoms as described and compatible with her physical findings. She will never return to this form of activity, in my opinion."

Dr. Mahar's prognosis was expressed in the following terms:

"The prognosis is that this situation will remain essentially unchanged. There is no evidence to suggest she is at increased risk of an accelerated or premature tendency towards lumbar degenerative disc disease or "arthritis" as a result of the injury of 1984, in my opinion."

Dr. Mahar's understanding of Mrs. Bush's injury and the history of her developing disability was completely in accord with Mrs. Bush's evidence.

According to Dr. Mahar, further treatment is possible and with that treatment there is less than a twenty-five percent

chance of eradication of pain, but there is a fifty percent chance of improvement. He also said any degenerative change or arthritic development experienced by Mrs. Bush has not contributed to her disability. He concluded she will never be able to return to her work as a housekeeper.

On cross-examination, Dr. Mahar emphasized that Mrs. Bush was totally disabled solely as a result of the 1984 incident. He felt it was possible to discount the other factors in her overall condition and still conclude that the 1984 injury alone accounts for her disability. Such other factors included her age, six pregnancies, overwork and obesity.

I found the overall impact of the evidence given by Dr. Kazimirski and Dr. Mahar impressive. Between them they fully convinced me that Mrs. Bush was not malingering in any way and total disability was genuine and related solely to the accident in March, 1984.

DR. GERALD P. REARDON

The defendant called Dr. Gerald P. Reardon. Dr. Reardon is a well qualified orthopaedic surgeon to whom Mrs. Bush had been referred by Air Canada. A preliminary examination of Dr. Reardon's report in relation to the report of Dr. Mark Kazimirski and Dr. Mahar would lead to the impression of a conflict of opinions, but on hearing Dr. Reardon's evidence, the differences appeared not to be quite as extreme as originally appeared.

Dr. Reardon examined Mrs. Bush and obtained a fairly detailed medical history from her. He produced a report dated November 16, 1990, and reviewed that report in **viva voce** evidence. His written report concluded as follows:

"There is no question that the type of injury that she sustained can result in a painful condition. Many patients sustain direct blows to their sacrococcygeal area and even without fractures, are left with discomfort which is particularly aggravating when direct pressure is applied while sitting. These symptoms, however, tend to resolve over a period of a couple of years following the initial trauma. It is now six years since this lady sustained her injury, and I find it a bit hard to accept that her symptoms are still as severe as she describes, at this late date following the actual incident. Her x-ray examination has not borne out the initial suggestion of a fracture. It would appear that the tomograms which were performed within a month of the injury were normal and these are certainly much more sensitive than a normal x-ray in determining whether or not a fracture was present. It would appear therefore from reviewing the documentation that she sustained a soft tissue injury to the sacrococcygeal area. It was the feeling of the doctors who saw her in the early stages following the injury that she would not be left with a chronic problem.

The physical examination that I performed revealed some definite hyperreactivity. The limitation of straight leg raising and the hypersensitivity to light touch over the entire lower spinal region cannot be explained on an organic basis. These are findings which are often seen in patients who complain of chronic back pain and they are felt to be functional in nature. By this I mean these phenomena cannot be explained on the basis of organic pathology. I also have no explanation for the abnormality of her gait. Mrs. Bush told me that she finds that she must walk in this abnormal way because of the pain, but I really do not see how any amount of sacrococcygeal trauma could result in such an abnormal gait.

It is my feeling that this lady did sustain an injury on the day in question as she evacuated the plane. It would appear that she sustained rather extensive bruising to the sacrococcygeal area in her lower back. Normally I would have expected these symptoms to have resolved or most certainly significantly improved, within two years of the trauma. I do not have any anatomic explanation as to why her symptoms have not improved and as to why she has remained so seemingly impaired physically, for such a long period after the initial trauma. I feel that there are definite elements of hyperreactivity in her clinical presentation. I feel that it is possible she is still experiencing some mild discomfort which may have originated with the accident,

> but I certainly do not feel that she could be classified as being totally disabled as a result of this injury. I have had considerable experience in assessing patients for levels of permanent physical impairment. I would assess this lady's level of physical impairment, that is, based on loss of total body physical function, at no more than 10%."

In his evidence Dr. Reardon made it clear that he was not suggesting that Mrs. Bush was malingering. The hyperreactivity which he thought was present is apparently quite a common feature of patients suffering from low back pain syndrome. The arthritic changes which he noted in her back have been asymptomatic. He explained that many factors can contribute to the overall effect of back injuries, including such factors as the socio-economic position of the patient, age, personal difficulties, job, physical condition, depression and third-party involvements. With the presence of such factors, an injury which is not ordinarily disabling may become disabling.

Dr. Reardon explained his use of the term, "physical impairment, that is, based on loss of total bodily function, at no more than 10%." He said that many patients of 5-10% disability may never return to work while others at 50% may be able to do so.

Dr. Reardon commented on Dr. Mahar's opinion to the effect that coccydynia and myofascial pain syndrome were vague conclusions with no pathological evidence to support them. On cross-examination he said that the diagnosis of myofascial pain syndrome is one which has been used, but it is used when the root cause cannot be found. It is a diagnosis which he says is over-used for lack of a proper diagnosis. He felt that Mrs. Bush does not have this syndrome. He did agree, however, that it is well documented that certain patients has do not respond well to treatment. He also agreed that given Mrs. Bush's socio-

economic background and her personal and physical history and condition, the effect which this injury had on her was not surprising at all.

CONCLUSIONS RE MEDICAL EVIDENCE

I had the opportunity to observe Mrs. Bush closely while she gave evidence. She was clearly in pain and she was not exaggerating. All the medical doctors agreed that she was not malingering. She had faithfully carried through with treatments as prescribed to her. She had been a lady who had clearly enjoyed her work, both for others and for herself. She had continued her chiropractic treatments throughout the years since her injury in a clear attempt to recover. She had made a "fair recovery" from a subsequent injury. Against this personal background, I must evaluate the effect to be given to the various medical opinions.

I was impressed by Dr. Mark Kazimirski. He knew Mrs. Bush well and was able to relate to Mrs. Bush as a whole person. I accept his evidence completely. I also accept the evidence of Dr. Mahar. Dr. Reardon gave reasonable evidence, but it seemed to me that when there was no physical or objective evidence to substantiate Mrs. Bush's condition, Dr. Reardon rather favoured a negative interpretation.

On the evidence before me, I find on the balance of probabilities:

(a) Mrs. Bush is suffering from myofascial pain syndome;

(b) She suffers from coccydynia;

(c) These conditions were caused solely by the incident of March 24, 1984, with no extraneous contributing factors;

(d) Mrs. Bush is totally disabled (as I explain below) as a direct result of the above conditions and is unable to return to her former employment or other employment for which she is or may reasonably become qualified by reason of her education, training and experience;

(e) Although Mrs. Bush has had degenerative changes in her spine, with some indication of arthritis, such changes have not contributed to her disability.

DAMAGES

1. **Non-Pecuniary**

The defendant has set forth for my consideration a passage in the decision of Hallett, J. in **Greek and Hillier v. Ernst** (1980), 43 N.S.R. (2d) 191 at p.200. That paragraph, set forth below, discusses the principles governing the assessment of damages for personal injury and addresses particularly the question of pre-existing evaluations. He said:

> "In attempting to assess damages so as to arrive at a fair and reasonable compensation for pain and suffering and disability where there is a pre-existing condition, the court must first answer that question. On that issue, the victim must prove on a balance of probabilities that the present complaint was caused in whole or in part by the wrong-doer's negligence. To answer that question, the court will invariably have to consider the medical evidence to determine whether the victim, because of his pre-accident condition, would probably have suffered from the present complaint whether there had been an accident or not. If the victim cannot prove that the ongoing complaint was caused in whole or in part by the defendant's negligence, there cannot be an award for damages for the ongoing complaint (I use the term ongoing complaint to mean pain and suffering and/or disability that has continued to the date of trial). This assessment can be particularly difficult in the many cases involving either pre-existing degenerative changes in the spine or osteoarthritis in the joints where the victim was symptom-free before the injury was sustained. As in

> this case, very often the pre-existing condition first manifests itself on x-rays taken immediately following the injury. Usually the victim's position at trial is stated to the court in simple logic, 'I was in good health; I then had the accident; I now have a sore back; therefore the accident caused my present complaint! Very often the medical evidence, including the x-rays, proves that the victim, although he was unaware of the problem, had degenerative changes in the spine or advanced osteoarthritis before the accident which gives rise to the lawsuit. It seems to me that in most of these cases, despite the victim's apparent logic, the court will have to accept the usually uncontradicted medical testimony **that the victim did in fact have a pre-existing condition** and that the damages must be assessed with this fact in mind."

In applying this statement of the law to the factual situation as I find it to be, I make the following observations:

1. Mrs. Bush had no pre-accident condition which was aggravated by the incident in question; and

2. While Mrs. Bush has, and probably had on March 24, 1984, a certain degenerative condition of her spine, it is not that condition which is now causing her disability.

In attempting to assess the degree of disability suffered by Mrs. Bush, I have kept in mind the difficulties inherent in that term as used by Dr. Reardon. I have concluded that a reasonable definition of the term "total disability" may be found in **MacEachern v. Co-Operative Fire and Casualty Co.** (1986), 75 N.S.R. (2d) 271. Mr. Justice Rogers was there dealing with a claim under an Accident and Sickness Policy and examined that phrase as found in the policy. He discussed the meaning of the phrase in the policy, but as well examined other aspects of disability.

As in that case, the pain which Mrs. Bush is suffering

as a result of the 1984 injury is debilitating and continuous. The pain has taken over her life. It occupies her thoughts and actions on a daily basis. It prevents her from returning to or doing any work for which she is personally suited or for which she may become suited. The likelihood of her being able to return to work in the future is extremely remote. I discount such a possibility totally. Given her age and socio-economic background, I also totally discount the possibility of Mrs. Bush finding a suitable secondary occupation.

The object of awarding damages is to attempt to place the injured party into the position he or she would have been in had the injury not occurred. That, of course, is not possible.

Mrs. Bush had been extraordinarily active virtually all her life until the accident. While her husband was living, she arose daily at around 4:00 a.m. to allow him to leave for work at 5:00. She had six children and took care of them completely. After they had gone to school, she went to work as a domestic, doing all the hard work involved in such a job. She cooked and cleaned for the families for whom she worked as well as for her own. She and her husband worked in their garden. She did the household painting and wallpapering. She even hauled firewood.

She is now restricted to very light housekeeping chores. As set out above, she is unable to do any but the lightest of household chores. She cannot stand or sit for any prolonged period in any one position. Her sleep is disturbed. She cannot bathe herself and needs help to dress herself.

It is for the change from her former active, happy and productive lifestyle to her present condition and for the pain and suffering she has experienced that I must assess damages.

The overall physical effects of Mrs. Bush's injuries are somewhat similar to those addressed in **Gallant et al v. Oickle et al** (1984), 63 N.S.R. 91. That case dealt with more diverse injuries but the physical result to the plaintiff was similar; she was changed from an active, happy and productive person to one who is almost totally disabled. The underlying diagnosis was myofascial syndrome with a poor prognosis.

Mrs. Gallant's injury was different from that of Mrs. Bush. The treatment of them was different and the overall effect of psychological damage was more pronounced. But in my view, the pain and suffering were similar and the effect on her ability to work was similar.[1] Points of dissimilarity between that case and the instant case include the ages of the plaintiffs (Mrs. Bush is much older) and the effect that Mrs. Gallant's injuries had on her marriage. The Appeal Division raised Mrs. Gallant's non-pecuniary damages from $27,000.00 to $42,000.00. A major point in such decision on the appeal related to psychological damage suffered. We have little or no medical evidence of such damage here, but it seems to me the descriptions of the changes in Mrs. Bush's lifestyle are so similar to those in Mrs. Gallant's that the parallel between the cases is clear.

Counsel referred me to various cases in order to show the range of damages awarded. I have read them but will not review them all for the purposes of this decision. I found the following helpful:

Matheson v. Roddick (1989), 88 N.S.R. (2d) 60

King v. Briand's Cabs Ltd. et al (1984), 64 N.S.R. (2d) 210

Sponagle v. Killen and Kaizer Construction Services Limited (1983), 57 N.S.R. (2d) 360

Pilgrim v. Corkum (1982), S.BW No. 0770

In addition, I have reviewed the recent unreported

case of **Fulton v. East Coast Oilfield Services Limited and Roberts** (1988), S.H. No. 66427.

I have also found the case of **Donaldson and Thibault v. Mosher** (1988), 88 N.S.R. (2d) 148 to be especially helpful as in that case. Glube, C.J.T.D. was dealing with two plaintiffs who had suffered from myofascial pain syndrome. Chief Justice Glube reviewed a number of cases involving that syndrome and her analysis of those cases is helpful and instructive.

In all the circumstances, I find the plaintiff is entitled to non-pecuniary damages of $20,000.00.

2. **Pecuniary**

(a) Wages

Mrs. Bush had worked for Mr. and Mrs. Royce Fuller for 17 or 18 years, of which period 16 or 17 years had been on a full-time basis. During the summers she was not required to work as much, except when Mr. and Mrs. Fuller were travelling, when Mrs. Bush took over the running of the Fuller household totally. Her wages were deceptively low. She was only paid $30.00 per week, irrespective of hours worked. But she was given many side benefits, including such items as clothes, furniture, fruit and vegetables and even at one point the advantageous sale of a car. While she was only paid $30.00 per week, Mr. Fuller said she would have been worth a great deal more: $80.00 per week in cash plus benefits - totalling $125.00.

After Mr. and Mrs. Fuller no longer required her services full time, Mrs. Bush worked for Olive Clark at $20.00 per day for ten months per year, or approximately $800.00 per year.

Mrs. Bush also worked for Paula Shaw as a housekeeper and babysitter at $10.00 per week, or for a total of $500.00 per year.

I permitted the filing of an affidavit by Doris Nichols, for whom Mrs. Bush had also worked. Mrs. Nichols paid Mrs. Bush $7.00 per hour, or $21.00 for each three-hour afternoon she worked. Mrs. Nichols estimated that she paid Mrs. Bush $1,000.00 per year.

In actual cash Mrs. Bush was earning $3,860.00 per year. But I am convinced that I must consider additional income to compensate for the loss of benefits Mrs. Bush was deriving from her employment by Mr. and Mrs. Fuller. Mr. Fuller said, and I accept, that an appropriate rate would have been $125.00 per week. The evidence indicated that Mrs. Bush worked for Mr. and Mrs. Fuller about 7 hours per day, or 35 hours per week. At $125.00 per week, that would have amounted to $3.57 per hour. Considering that Mrs. Nichols was paying her $7.00 per hour, and Mrs. Clark paid her $20.00 per day, the figure of $125.00 per week is reasonable. I also note that as a matter of law, minimum wages in Nova Scotia in the same period rose from $3.75 to $4:50 per hour. The minimum wage legislation does not apply to persons employed as domestics, but that rate has a persuasive effect in these considerations.

I therefore accept that Mrs. Bush's income at the time of her disabling accident was effectively $125.00 per week, or $6,250.00 per year, since March 24, 1984. Alternatively, I find that such rate was that which Mrs. Bush should have earned during the period in question had she not been injured. Counsel had agreed on a valuation table to determine present value of a wage loss. Accepting

that table, the present value of this loss is $63,306.00 to March 24, 1991. That figure includes interest accumulated at a fluctuating rate dependent on the bank rate throughout this period.

The defendant has argued that the lack of appropriate income tax returns by Mrs. Bush prevents her recovery of the wage loss. In support of its position, the defendant has submitted the unreported decision of Glube, C.J.T.D. in **Pilgrim v. Corkum**, S.BW. 0770, in which she said:

> " This court, no matter what the arguments put to it, will not accept information of unclaimed earnings in looking at the loss of income. The court cannot condone, nor will it arrive at a loss of income based on such evidence. I do not believe that the plaintiff earned $20,000 or $15,000.00 in the two years, as stated before his accident and if he did, that is his problem, but I cannot accept these as figures on which I should base loss of income. He possibly earned something more than what is showing on his income tax returns but aside from refusing to base it on income undeclared for tax purposes, the court is not in a position to play a guessing game as to what income a person could, should or did earn. Therefore, I have taken the figures and arrived at a combined income for a three year period of $12,300.00."

Burchell, J. addressed the same subject in **Hachey v. Dakin et al** (1983), 57 N.S.R. (2d) 441, at 443, as follows:

> "[8] The plaintiff claims for loss of income over a period of two years at $35,000.00 per year although at trial he estimated his annual income as between $20,000.00 and $25,000.00. At the time of the accident he was operating his own auto repair and salvage business in a garage constructed by himself on his own property whereon he had also built a residence. He had been in business for about one year when the accident occurred. He insisted that the business was profitable but he kept no records and filed no income tax returns.

> On the authority of **Bannister v. MacDougall's Estate** (1981), 53 N.S.R. (2d) 201; 109 A.P.R. 201, and an unreported case, **Fenety v. Canadian National Railway Company** (1980), S.H. No. 28244, it is submitted for the defendants that, because of the failure of the plaintiff to file income tax returns, no award should be made for loss of income. While I agree with the general proposition that the court should not condone fraudulent breaches of the provisions of the **Income Tax Act**, I think the question of whether there was or was not a loss of income is one of facts to be determined upon a consideration of the evidence as a whole. It is my opinion, in other words, that a failure to file income tax returns should not be treated as an absolute bar against a claim for loss of income, especially where (as here) the evidence falls short of establishing that the plaintiff had any income that was subject to tax and the only demonstrable breach of the taxing statute has been a breach of the technical requirement that a return be filed. At the same time it must be said that an unexplained failure to file income tax returns raises a strong inference against the plaintiff that he had no income that was subject to tax. In this case the failure to file has been partly explained by the fact that the plaintiff's business was in a beginning phase and the plaintiff also alluded to the disruption of his life that was caused by the accident. These explanations are unconvincing in view of the plaintiff's failure to maintain business records of any kind."

But in Mrs. Bush's case, I am convinced that, (a) in all likelihood in the years when she did not file returns, she was not taxable; (b) if she was required to file at all (and I rather think she was not), then such requirement was no more than a technical requirement; and (c) she completely left such matters to her husband.

(b) Future Wage Loss

Mrs. Bush was born in October, 1927. She is now 63 years of age. I will assume, as did her counsel, that Mrs. Bush would have stopped working at age 65. I, therefore, allow one and one-half years of future wage loss at $6,250.00 per

year, for a total of $9,375.00. I recognize that this figure ought to be discounted to recognize present value of a future benefit, but since such figure is at best an estimate, I will not do so.

(c) Chiropractic Services

Dr. Kazimirski acknowledges that the chiropractic services obtained by Mrs. Bush served to make her feel better. Mrs. Bush said the treatments helped her for a short time. She has had a total of 180 visits, 68 of them since her car accident. Since the car accident, one half of the visits should be attributed to the treatment of the whiplash injury. The total cost of these services was $2,320.00 from which I deduct one half of 68 visits at $10.00 per visit, or $340.00. I, therefore, allow $1,980.00 for these services.

(d) Transportation Costs

Mrs. Bush travelled 7,592 kilometers to 180 chiropractor's visits, 2,287 kilometers to physiotherapy treatments and 400 kilometers for visits to doctors in Halifax, for a total claimed of 10,279 kilometers. She claimed a travel rate of 29 cents per kilometer, that rate being submitted as the "government rate".

I have no evidence before me as to the arrangements for vehicles from time to time throughout the period and I have no evidence as to the various "rates" in that same period. I do not know what the relationship is between such a rate and the actual cost of operating a vehicle. I do not accept that approach. But Mrs. Bush did have a real cost and I allow $2,750.00.

(e) Out-of-Pocket Expenses

I have no evidence of any such costs or expenses. I disallow any such claim.

3. **PRE-JUDGMENT INTEREST**

Pre-judgment interest since 1984 has been claimed by the plaintiff. Such interest is authorized by section 41(i) of the **Judicature Act**, or it may be refused or reduced by section 41(h). While an explanation was given to me concerning the delay from 1984 to the present, I am not convinced that such delay was justified. I will allow interest at 10 percent per year on the non-pecuniary damages of $20,000.00 only from March 24, 1987, to the date of payment. The wage loss already contains an interest component. The other items of special damage were incurred over the years and I do not allow interest on them.

4. The defendant voluntarily paid Mrs. Bush $750.00. I allow that as a credit to the defendant.

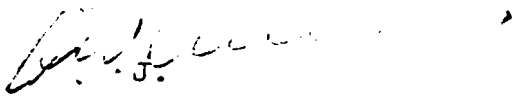
SUMMARY

I award the plaintiff the following, as set out above:

1.	Non-Pecuniary	$ 20,000.00
2.	Pecuniary	
	(a) Wages	63,306.00
	(b) Future Wage Loss	9,375.00
	(c) Chiropractic Services	1,980.00
	(d) Transportation Costs	2,750.00
3.	Pre-Judgment Interest	
4.	Credit	$750.00

The plaintiff shall have her costs to be taxed.

I conclude by observing that Dr. Mahar held out some degree of optimism for future treatment of Mrs. Bush. That optimism was not such as to diminish Mrs. Bush's damages. Now that the stress of this trial is behind her, it is my hope that Mrs. Bush will be able to follow up on future prescribed treatment and obtain sufficient relief from her symptoms so as to permit her to enjoy a retirement which she so richly deserves.



Kentville, Nova Scotia
April 19, 1991