SUPREME COURT OF NOVA SCOTIA
Citation: ***Gale v. Purcell***, 2018 NSSC 319

Date: 20181214
Docket: Halifax, No. 413709
Registry: Halifax

Between:

Angela Marie Gale

Plaintiff

v.

George D. Purcell

Defendant

D E C I S I O N

Judge:	The Honourable Justice Christa M. Brothers
Heard:	May 8, 9, 10, 14, 15, June 12, 13, 14, 2018 Halifax, Nova Scotia
Decision:	December 14, 2018
Counsel:	Peter Rumscheidt and Nicole Power (Articled Clerk), for the Plaintiff Chad Horton and Joshua E. Martin, for the Respondent

Brothers, J:

Overview

> There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real.
>
> *Martin v. Nova Scotia (Workers' Compensation Board*), 2003 SCC 54

[1] This case is about pain, how it was caused, by what accident and the opinions of dueling experts. Pain is a subjective experience that can neither be measured nor seen. This is why, in cases such as this, the credibility and the reliability of the Plaintiff's subjective reporting is of crucial importance to a determination of causation and extent of injuries.

[2] Although the Plaintiff, Angela Gale, says her current pain was caused by an accident that occurred on March 23, 2010 ("the 2010 MVA"), and that this pain has caused substantial interference with her daily activities and her employment, I find that the Plaintiff has not met her burden and has failed to prove on a balance of probabilities that the 2010 MVA caused ongoing pain affecting her activities and employment. The Plaintiff's testimony is in conflict with various medical documents as well as documents she authored herself or authorized others to author on her behalf.

[3] While I find that the Plaintiff has proven on a balance of probabilities that she suffers from ongoing relapsing and remitting pain, the Plaintiff has not proven that her injuries and the resulting pain were caused by the 2010 MVA. While she may hold an honest belief that her current circumstances were caused by the 2010 MVA, I find that the evidence does not support this.

[4] This is a difficult conclusion to reach in the circumstances. I am convinced that the Plaintiff did suffer injuries which are ongoing and that impact her day-to-

day personal and work life. However, these injuries emanate from an accident which took place on September 19, 2006 ("the 2006 MVA").

[5] The Plaintiff commenced a lawsuit seeking damages from the alleged tortfeasor in the 2006 MVA. Her then counsel, David Richey, tasked with advancing her claim and representing her interests, failed to do so, by omitting to serve the Defendant tortfeasor. This failure by counsel had devastating consequences to the Plaintiff, who was prevented from renewing her Notice of Action and Statement of Claim pursuant to Civil Procedure Rule (CPR) 4.04(5)(b). Consequently, the Plaintiff was foreclosed from seeking compensation from the Defendant for the injuries suffered in the 2006 MVA.

[6] In dismissing the renewal motion, Boudreau, J. had this to say in ***Gale v. Morash***, 2015 NSSC 316:

> 29 It may be Mr. Richey's practice to deal entirely with insurance companies and adjusters in order to negotiate settlements for personal injury clients. However, Ms. Gale and Mr. Richey filed a Notice of Action; that is a very important fact, and makes this matter the court's business. This action has brought them into the jurisdiction of the Supreme Court. Having filed an originating notice, it is not open to a litigant to then ignore the court process entirely, to pursue other issues or other priorities. In my view, to do so constitutes a disrespect to this court and to its processes, even if that is not the intent.
>
> 30 The rules of court are, as to these issues, very simple and very clear. They are widely available to the public and should certainly be very familiar to counsel who practice in this court. Mr. Richey is counsel of many years experience; he is very much aware of how this process works.
>
> 31 When an originating notice is filed with the court, according to Rule 4 it expires in 12 months, unless service is effected as provided for in Rule 31. That second Rule explicitly speaks of personal service to the Defendant. These are simple rules, easy to understand and, in most cases, easy to follow. If personal service cannot be effected, there are alternatives.
>
> 32 This Notice of Action was filed to preserve this action, with a few days left before a limitation period expired. After that, it appears that the court process was ignored. That is unacceptable.
>
> 33 I do note, and have already mentioned, the attempt to renew the expired Notice of Action in 2011. However, anyone, and certainly counsel of many years experience, would see by reading the Rule that the notice was expired, and that an application to a judge was required.

[7] Despite this unfortunate result, I cannot ignore the evidence, including the inconsistencies in reporting and documentation. I am left with the conclusion that the 2010 MVA did not cause the Plaintiff's current maladies. She is indeed suffering ongoing injuries, but these are not related to the 2010 MVA.

[8] As Boudreau, J stated in ***Gale v. Morash***, supra:

> 37 There can be no doubt that the Plaintiff will suffer prejudice if this proceeding is terminated. She will not be able to seek compensation through the courts from the Defendants for injuries suffered. There was a discussion during this hearing about possible alternatives for her. In my view, those are speculative. I do not believe that it is necessary to consider those alternatives in detail here. Rule 4.04 (5)(b) asks if serious prejudice to the Plaintiff can be shown and, whether there are alternatives or not, I find that is the case here.

[9] There may be an alternative path to compensation for the Plaintiff; however, it is not my role in this decision to discuss, comment or consider alternatives.

[10] The Plaintiff, Angela Gale, is 47 years of age, born on February 28, 1971. She has two children. She completed a dental assistant course at Nova Scotia Community College, and worked in that occupation four days a week for two years. In 2004, after purchasing a home in Mineville, she began working with Dr. Paul Downing in Woodlawn, Dartmouth, as a dental assistant, four days a week until 2006. After the 2006 MVA, the Plaintiff worked as a dental receptionist.

[11] Ms. Gale seeks damages from the Defendant, Mr. Purcell as a result of injuries she claims arose from the 2010 MVA. On March 23, 2010, the Plaintiff was driving on the A. Murray MacKay Bridge (MacKay Bridge) from Halifax to Dartmouth. She stopped her vehicle in traffic and turned to look towards the Bedford Basin. She was on the end of the bridge closer to Halifax, with her vehicle on an incline. It was then that the Defendant rear-ended her vehicle.

[12] The Defendant does not contest that the accident occurred, and admits he negligently rear-ended the Plaintiff's vehicle. He argues, however, that any injuries the Plaintiff suffered were caused by the prior 2006 MVA, or that her injuries have resolved and are therefore capped by virtue of the ***Automobile Insurance Tort Recovery Limitation Regulations***, NS Reg. 94/2010.

[13] The Plaintiff testified that the Defendant's impact pushed her vehicle into the vehicle in front of her. She was wearing a seat belt at the time of the collision, but says her body went forward and backward several times. The Plaintiff claims

that this accident has had devastating consequences on her ability to work in a dental office in any capacity and perform household chores. She also testified that the car she was driving sustained over $10,000 worth of damages.

Issues

[14] The issues to be addressed in this case are:

1. Did the 2010 MVA cause the Plaintiff's injuries?
2. Did the Plaintiff suffer a minor injury as a result of the 2010 MVA?
3. What are the damages, if any?

Preliminary Issues

[15] At the outset of trial, counsel proffered five bound volumes identified as a three- volume Joint Exhibit Book, a Supplemental Exhibit Book, and a second Supplemental Exhibit Book. These were marked as Exhibits 1-5. Two agreements were reached by counsel in relation to the documents contained in these Exhibits.

1. The documents in the five volumes are admitted for the fact that observations or statements were made but not for the truth of the contents;

2. Opinion evidence in the five volumes is limited to Drs. Clark, Seaman, and Koshi, who all provided Rule 55 Expert reports.

3. In addition to the bound Joint Exhibit Books there were two loose exhibits, Exhibits 6 and 7, which were admitted by consent with the same above-noted caveats.

Causation

[16] In order to recover compensation, the Plaintiff must prove, on a balance of probabilities, that the Defendant's negligence caused her injuries. I must apply the "but for" test to this analysis. The parties agree that this is the legal standard to be

applied in the circumstances. The test, as articulated by the Court in ***Clements (Litigation Guardian of) v. Clements,*** [2012] 2 S.C.R. 181**,** is:

> 8 The test for showing causation is the "but for" test. The Plaintiff must show on a balance of probabilities that "but for" the Defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the Defendant's negligence was necessary to bring about the injury — in other words that the injury would not have occurred without the Defendant's negligence. This is a factual inquiry. If the Plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the Defendant fails.
>
> 9 The "but for" causation test must be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the Defendant's negligence made to the injury.

[17] I further acknowledge that I am not to apply the causation test too rigidly. Despite this I cannot reach the conclusion the Plaintiff has proffered.

[18] In summary, the Plaintiff maintains that the 2006 MVA initially caused left arm pain and numbness. Due to the left arm pain, she slept on her right side, resulting in right shoulder pain as an ongoing complaint. The Plaintiff says her injuries from the 2010 MVA consisted of left arm, shoulder, and back pain.

[19] The Plaintiff testified that after the 2006 MVA and before the 2010 MVA, many of her symptoms and injuries from the 2006 MVA resolved or subsided; specifically, she said, the Ulnar nerve resolved, the whiplash associated disorder (WAD) resolved (aside from three right-side trigger points), the headaches resolved, and the anxiety and depression subsided.

[20] I will review in detail the medical records containing the Plaintiff's reporting, which, taken with the totality of the evidence, does not support the Plaintiff's trial evidence. At the outset I acknowledge that many of the medical records and the recording of the Plaintiff's complaints were not entered for the proof of the truth of the contents. However, the repeated consistent recordings of the Plaintiff's complaints, in the face of contradictory testimony of the Plaintiff, was not explained by the Plaintiff. In fact, there was only a few occasions that the Plaintiff complained a record was inaccurate.

Evidence and Findings of Facts

Prior Motor Vehicle Accidents and Prior Injuries

[21] The Plaintiff has been in several motor vehicle accidents, aside from the 2006 and 2010 MVAs. These have resulted in her commencing legal actions and receiving compensation, although the nature and extent of compensation was not in evidence. She was in accidents on January 27, 1999; August 7, 2000; and September 20, 2000, each of which led her to retain counsel and commence legal proceedings.

[22] The Plaintiff acknowledged that she suffered injuries as a result of these accidents. In particular, she confirmed injuries to her right upper arm and hand, her shoulder, her right upper back, and TMJ injuries that necessitated jaw surgeries. In addition medical documents record prior injuries including: neck pain, and back pain.

[23] The Plaintiff suffered ongoing sinus issues for years. She testified that this arose from wires entering her sinus cavity after jaw surgery. In 2009, she had surgery due to right chronic sinusitis. In 2011, Dr. Precious surgically removed four wires, relieving her pain. However, by 2014, her complaints continued and she was reporting chronic right frontal and mid-facial pain. In 2015, she had surgery to remove the wires. While these were ongoing issues requiring some time away from work due to surgeries, the Plaintiff was adamant that these issues did not affect her work attendance or abilities. While I accept her evidence to a certain extent, it is clear she lost over 100 hours of work due to these ongoing issues and necessary surgeries.

2006 Motor Vehicle Accident

[24] On September 14, 2006, the Plaintiff's vehicle was rear-ended while she was merging onto the highway. She suffered injuries to her left shoulder girdle area and reported numbness in her left arm. In the Emergency Room at Dartmouth General Hospital, she also complained of head and neck pain. The medical records also indicate that she complained of:

> …C/O Back Of head Pain Neck Pain…C-Spine Tenderness On Palpation. Left Shoulder Pain No LOC…
>
> …
>
> … midline tenderness @ several different levels of c-spine + left trapezius

[25] On September 26, 2006, the Plaintiff was prescribed massage therapy and physiotherapy by Dr. Seaman for grade II cervical WAD and left upper trapezius strain. She testified that she was treated for an injury to her left shoulder girdle and received massage therapy, physiotherapy, and chiropractic treatments.

[26] The Plaintiff's then counsel, David Richey, commenced an action on September 11, 2009. The claim alleged injuries to the Plaintiff's neck and back, with numbness to her left arm and fingers and resulting stress, anxiety, and depression. The Plaintiff agreed with all that was claimed.

[27] In an undated letter to Mr. Richey, the Plaintiff commented on the damage caused by the 2006 MVA. She stated that there was over $10,000 worth of damage to her vehicle, including a broken frame. As a result, the vehicle was written off. She testified at trial that this felt like a major accident to her.

[28] The Plaintiff attended physiotherapy with Robert MacDonald at Maritime Physiotherapy after the 2006 MVA. Mr. MacDonald's letter of November 13, 2006, records the Plaintiff's complaints of left-sided neck and shoulder pain and paresthesia to her left arm, into the fourth and fifth fingers. The Plaintiff confirmed that these areas were of concern at the time.

[29] The Plaintiff testified that the left shoulder issues, including numbness and pain, forced her to stop working as a dental assistant and to work instead as a dental receptionist. She testified she could perform receptionist duties, including answering phones, obtaining and preparing charts, dealing with accounts receivable, coordinating appointments, managing people, accepting payments, and writing tasks. She used a headset to answer phones to accommodate her left arm pain and numbness.

[30] The Plaintiff testified that her performance of household tasks such as laundry, sweeping, and mopping were affected, by pain and difficulty reaching or lifting. She testified that over time, with the help of massage, she resumed her household duties and resumed socializing.

[31] The Plaintiff testified that the numbness in her left arm bothered her so much that she only slept on her right side for 15 months, while she previously slept on both sides. The Plaintiff testified that she had three trigger points on her scapula under her right shoulder blade and mid-back area as a result of this prolonged sleep position on her right side

[32] The Plaintiff had massage therapy with Tanya Laybolt, during the course of which the areas being treated varied. On April 24, 2008, a report by Ms. Laybolt noted that the Plaintiff experienced mid-lower back pain. Ms. Laybolt recorded that the Plaintiff reported shooting pain on her right side when putting on socks or bending over, and that she had to put ice on her back all day to treat pain.

[33] The Plaintiff minimized the significance of this report saying these references do not connote ongoing back pain. She testified that she had two incidences of a pinched nerve in her back. One lasted a few weeks and the other bothered her for a few months. She testified this pain never caused her to miss work as a dental receptionist. The Plaintiff said Ms. Laybolt's report was inaccurate with respect to her lower back pain, as the Plaintiff testified her pain was in her mid and right mid-back. This point will be more fully addressed later in these reasons and I note this was one of the rare occasions the Plaintiff denied the accuracy of the recording of her complaints.

[34] The Plaintiff testified that before the 2010 MVA, she was jogging and increasing her activity levels. She went camping and was able to go on day trips to Magic Mountain in New Brunswick. She testified that she had resumed all of her household duties aside from lawn mowing and gardening, adding that lawn mowing was not a chore normally performed by her in any event.

[35] The Plaintiff completed a form on September 30, 2006. The following

excerpts from this document are of importance:

> Any previous accidents? Yes Any previous injuries? Yes
>
> Nature of Previous Injury: Right upper arm & hand and shoulder & right side upper back
>
> Treatment of Previous Injury: Physio, Chiro, Massage, Personal Trainer/Gym Member
>
> . . .
>
> Details of accident:
>
> Date: Sept 14/06
>
> Give details of accident and Injury/injuries sustained:
>
> I was stopped behind a vehicle in left lane waiting to merge into right lane due to construction. I was rear ended by a young man who was playing with his heater.

> He must have been doing about 50-60 as there were no tire marks on the pavement. My injuries were the back of my head, neck, shoulder and back all on the left side.
>
> . . .

[36] On October 21, 2006, the Plaintiff's massage therapist noted that the Plaintiff reported her left shoulder and cervical spine were more sore than the right side.

[37] The Plaintiff saw Dr. Roger McKelvey, who provided a report dated February 28, 2007. At that point, the Plaintiff was reporting pain in her left arm. In particular, Dr. McKelvey recorded the following:

> She is limited by left arm pain and numbness aggravated by using the arm. She works as a dental hygienist, but has been unable to do so since the accident. She is working in reception in the dental office. Even there, she uses a headset because repeatedly answering the telephone with the left hand will bother her. She has noted that flexing the left elbow or dorsiflexing the left wrist will aggravate her symptoms.

[38] Dr. George Majaess saw the Plaintiff on June 8, 2007. In a report dated June 26, 2007, he recorded her chief complaints as pain in the left arm and left hand numbness.

[39] Dr. Sarah Seaman provided a report on July 17, 2007, indicating that the Plaintiff reported constant pain in her left arm and occasional numbness. She also reported a constant ache in the left side of her neck and upper trapezius which affected her ability to do housework and blow-dry her hair.

[40] Dr. Majaess saw the Plaintiff on November 9, 2007, with regard to her left shoulder and arm symptoms. He referenced her suffering from myofascial pain and

recommended left shoulder injections. There was also reference to right shoulder issues.

[41] The Plaintiff began chiropractic treatment on November 12, 2007. Dr. Jans Ellefsen reported the Plaintiff complained of her mid-back and neck being acutely painful the last few days. In addition, Dr. Ellefsen noted the following reports from the Plaintiff:

> She reports not being able to perform normal work activities at this time because of pain and left ulnar nerve symptoms. Since the collision the patient has had problems with grooming, dressing, typing, writing, leaning, bending, twisting, carrying, lifting, pushing, pulling, sitting, exercising, restful sleeping, loss of concentration, nervousness, irritability and tactile feeling. The patient can go to sleep without any problem. She wakes up in the middle of the night because of pain in her left arm, left forearm, left wrist and left hand. The patient reports having no prior sleep problems. Ms. Gale is a dental assistant, who is on light duty. This collision has caused a financial burden to Ms. Gale and her family.

[42] In addition, the Plaintiff reported the following concerning neck and mid-back pain:

> **NECK AND MID BACK PAIN**
>
> This symptom came on immediately. It has not changed since it started. The intensity of this complaint is moderate; meaning it inhibits activity. The frequency of this complaint is continuous, or occurs 80% to 100% of the time. On a scale of 0 to 10, with 10 being the highest possible level of pain, patient graded the pain as 7. Patient describes the feeling associated with this complaint as aching, burning, tingling and stiff. Located on both sides. Aggravated by bending forward, bending to the left, bending to the right, sitting and driving. Relieved by heat, resting and medications. Radiates to both sides of the head.

[43] On December 14, 2007, and March 7, 2008, the Plaintiff reported tightness in the right cervical spine and mid-back tenderness. With further regard to back pain, on April 24, 2008, Ms. Laybolt recorded the following:

> However, she is now experiencing mid to low back pain. She can not put on her socks or bend over without shooting pain on the right side. Angela has to ice her back all day to maintain the pain. The motion of bending her cervical spine forward also provokes the shooting pain. There has been slight progression over the last week since seeing the chiropractor and having massage.

[44] In a report dated July 7, 2008, Dr. Ellefsen reported that the Plaintiff presented to her in December 2007 with “severe acute debilitating right mid-back

pain and chronic left arm radicular symptoms and neck pain". The Plaintiff also complained of her left arm aching, describing sharp, stabbing "pins and needles".

[45] On August 15, 2008, Patti Card, an Occupational Therapist employed as a case manager at Harbourfront Solutions, noted that the Plaintiff reported pain in her left arm, and neck and left arm numbness. The Plaintiff also reported right shoulder discomfort, from sleeping on her right side for a period due to the left arm pain. In a report dated December 1, 2008, Ms. Card indicated that she contacted the Plaintiff on August 27, 2008, and that she reported a flare-up of neck and back pain, as well as right shoulder pain.

[46] On September 17, 2008, Patti Card wrote to Dr. Ellefson to confirm information she received concerning the Plaintiff's recovery from the 2006 MVA. This records that the Plaintiff was suffering from a flare-up of arm symptoms, neck and mid-back pain. This illustrates the waxing and waning nature of the injuries, and the fact that her pain was not resolved but was chronic prior to the 2010 MVA.

[47] In a report of March 25, 2009, Ms. Card recorded that the Plaintiff reported right shoulder pain, neck stiffness, and back discomfort.

[48] The Plaintiff was put off work from April 29, 2009 continuing throughout the spring and summer of 2009. On July 8, 2009, she was put off work indefinitely. A note from a physician at the Forest Hills Medical Clinic, dated July 10, 2009, states:

> The patient is currently suffering from a medical condition for which she is seeing myself and awaiting referral to specialist. At this time, I have decided that her work situation is aggravating her symptoms. At this time, this patient will be returning no sooner than September 7, 2007.

[49] The Plaintiff was further placed off work on August 27, 2009, and the physician's note stated:

> Angela cannot work as a dental assistant due to her physical disability - she may return to a regular work environment which <u>does</u> accommodate her physical impairment.
>
> Signature: (sgd) *Alison McCallum*, MD #6688

[50] The Plaintiff saw Dr. David O'Brien on September 16, 2009, three years after the 2006 MVA. He suggested a referral to the pain clinic, reviewing the Plaintiff's history and reports as follows:

> This 38-year-old woman was in for evaluation of her right shoulder. She had a motor vehicle accident in 2006. She had a lot of troubles with her neck and left upper extremity with a pinched nerve C7 distribution. She slept funny on her right side for a long time but a type trapezius on the right side and has been left with 3 mild fascial trigger points involving the pectoralis anteriorly rhomboid region posteriorly and the latissimus posterior shoulder. She has been going to a chiropractor without much benefit. She has pain with any type of rotation of the shoulder not in the shoulder itself but increase trigger points.

[51] The documents demonstrate that the Plaintiff was receiving treatment from her chiropractor for lower back pain in the five to six months prior to the 2010 MVA. On January 18, 2010, the Plaintiff filled out a diagram indicating stiffness and tightness on the left and right shoulder, back of her neck, back of her shoulders, and mid-back and lower back on the right and left sides. This diagram was filled out by the Plaintiff just two months before the 2010 MVA. She was reporting bilateral symptoms of her neck, shoulders, and lower back. Furthermore, on that form, the Plaintiff stated the following on the questionnaire:

> **Section 1 - PAIN INTENSITY**
>
> √ The pain is moderate at the moment
>
> **Section 2 - PERSONAL CARE**
>
> √ I can look after myself normally but it causes extra pain
>
> **Section 3 - LIFTING**
>
> √ I can only lift very light weights
>
> **Section 4 - READING**
>
> √ I can't read as much as I want because of moderate pain in my neck
>
> **Section 5 - HEADACHES**
>
> √ I have moderate headaches which come frequently
>
> **Section 6 - CONCENTRATION**
>
> √ I can concentrate fully when I want to with slight difficulty
>
> **Section 7 - WORK**
>
> √ I cannot do my usual work (added handwritten note: 'not back to Dental Assistant yet')
>
> **Section 8 - DRIVING**
>
> √ I can't drive my car as long as I want because of moderate pain in my neck
>
> **Section 9 - SLEEPING**

> √ I have no trouble sleeping (added handwritten note 'taking medication to sleep')
>
> **Section 10 - RECREATION**
>
> √ I am able to engage in few of my usual recreational activities because of pain in my neck

[52] The medical records indicate that the Plaintiff was reporting left shoulder pain as of February 8, 2010. She was lifting a debit machine at work repeatedly onto a desk for patients and had resulting pain.

[53] Despite the Plaintiff's testimony that her complaints were left-side arm pain after the 2010 MVA, her personal trainer, Luigi Lucia, recorded right-side pain in a letter authored after July 3, 2012:

> Ms. Gale resumed training with me on July 3, 2012. Insured presented at that time still complaining of pain in the shoulder and deltoid area. Insured advised that she still has not returned to the position of dental assistant but is currently working as a receptionist in the dental office. During my assessment the insured noted that she is still experiencing pain in her shoulder, trapezious, and rear deltoid area during movements such as answering the phone. I notices [sic] that Ms. Gale's right should [sic] was rolled forward and her body was guarding this shoulder by lifting it slightly. We have been working on the affected area and the insured has advised that she has noticed some improvement.

[54] What emerges when one considers the totality of the evidence is that the Plaintiff originally injured her left arm. After sleeping on her right arm for fifteen months, her right side was impacted. Both sides of her body continued to be affected by the accident of 2006. Despite the Plaintiff's evidence to the contrary, the overwhelming medical reports, recording the Plaintiff's complaints highlight the inconsistency of her evidence, and the records cannot be ignored.

Employment History Pre 2006 - 2010

[55] The Plaintiff first worked four days a week as a dental assistant for Dr. Fung. In 2004, she began her employment as a dental assistant with Dr. Downing. The Plaintiff described the duties of a dental assistant as follows: chairside assisting; rubber damming; suctioning; assisting with lights; sterilizing equipment; preparing dental room; passing instruments; x-rays; and bite plates.

[56] The Plaintiff testified that she stayed in this job until the 2006 MVA. She continued working at Dr. Downing's office after the 2006 MVA, as a receptionist

rather than a dental assistant. The Plaintiff testified that she could perform the duties of a receptionist including: answering phones; pulling charts; working on accounts receivables; scheduling appointments; and processing customer payments.

[57] The Plaintiff's inability to perform the duties of a dental assistant was a direct result of injuries suffered in the 2006 MVA. Any dental assistant work that the Plaintiff performed after the 2006 MVA caused an increase in pain and discomfort. These reports are littered throughout her medical documents and were confirmed by her testimony at trial.

[58] The Plaintiff testified that the consequences of the 2006 MVA had a detrimental affect on her mental health. She said that from April 29, 2009, she was placed off work due to anxiety-related issues. There was a supporting note from Dr. Seaman; however, the medical notes do not state a reason. She was put off work again on July 10, 2009, and the unidentified physician's note says:

> This patient is currently suffering from a medical condition for which she is seeing myself & awaiting referral to specialist. At this time, I have decided that her work situation is aggravating her symptoms. At this time, this patient will be returning no sooner than September 7, 2007.

[59] The Plaintiff agreed this note was related to her work aggravating her physical symptoms. A further physician's note of August 27, 2009, placed the Plaintiff off work citing her physical disabilities:

> Angela cannot work as a dental assistant due to physical disability - she may return to a regular work environment which does accommodate her physical impairment.

[60] The Plaintiff testified that she felt better during her leave, and contemplated returning to work. She met with Dr. Downing, her employer, in September 2009. She claims she was fired at that meeting.

[61] The Plaintiff was hired at Dr. Mary Anne MacDonald's dental office, where she started work on December 7, 2009. At this office, the Plaintiff performed four days of receptionist duties per week. She said she was dismissed on May 20, 2010 without explanation. However, a few days later, she returned to work and remained until after the 2010 MVA. I note that the Plaintiff filled out an application for Employment Insurance on February 11, 2010, during a brief

stoppage from work. On the form the Plaintiff indicated her status as "person with a disability".

[62] Regarding the Plaintiff's evidence that she worked one day a week as a dental assistant for Dr. John Peters after the 2006 MVA but before the 2010 MVA, there was an agreed statement of facts submitted which indicates that Dr. Peters was prepared to provide the following evidence at trial:

> Upon review of photographs of Ms. Gale and considering Ms. Gale's testimony at trial, Dr. Peters has advised the parties that if called upon, he will testify as follows:
>
> - He has never been employed by, or otherwise performed Endodontic services at Dr. Mary-Anne MacDonald's (Dentist) clinic at Scotia Dental.
> - Angela Gale has never worked for him as a Dental Assistant, either at Scotia Dental or Lacewood Endodontics, or otherwise at all.
> - He has conducted a thorough review of his business and office records to satisfy himself with respect to the foregoing points.
> - The local dental community is a small one, and he was the only Dr. Peters, Endodontist, practicing in Nova Scotia at the relevant time, and he remains the only Dr. Peters, Endodontist, practicing in Nova Scotia today.

[63] The Plaintiff acknowledges now, after testifying differently, that she did not work as a dental assistant for Dr. Peters while employed by Dr. MacDonald.

[64] This is significant. The Plaintiff would have had this court believe she was able to perform some dental assistant work prior to the 2010 MVA and it was only as a result of the 2010 MVA that she lost that ability. I find that is not the case. The Plaintiff was never able to resume assistant work after the 2006 MVA due to her ongoing and chronic injuries. This agreed statement of fact and the Plaintiff's acknowledgement of her error during testimony erodes her reliability as a witness.

2010 MVA

[65] The Plaintiff testified that this rear-end collision occurred when she was travelling on the MacKay Bridge to Dartmouth and stopped for traffic. Immediately, she reported pain in her lower back, left shoulder, and left wrist.

[66] While the Plaintiff testified at trial about left-sided symptoms allegedly arising from the 2010 MVA, the records from Dartmouth General Hospital, from the day of the collision, include the following complaints:

> Acute Central Moderate Pain (4-7), Rear ended while stopped on Bridge today at 5 pm, Now pain in neck L side and R shoulder.
>
> …
>
> **NECK SWELLING PAIN**
>
> **ACUTE CENTRAL MODERATE PAIN (4-7), REAR ENDED WHILE STOPPED ON BRIDGE TODAY AT 5PM, NOW PAIN IN NECK L SIDE AND R SHOULDER**
>
> Handwritten note: tender L cervical spine, L upper thoracic spine and L trapezius - tender L side of forehead - tender L wrist

[67] The Plaintiff was asked about this entry in direct examination and testified that she believes the right shoulder pain referenced in the document was not new or worse, but the same pain that she had before the 2010 MVA. When the totality of the medical evidence is considered, this evidence is not plausible. I find that the Plaintiff's evidence is strategic in minimizing the injuries caused by the 2006 MVA and magnifying the injuries from the 2010 MVA.

[68] The Plaintiff testified her right shoulder pain did not get worse, but that the 2010 MVA caused new injuries, including lower back and left shoulder pain, each of which she testified did not exist prior to the 2010 MVA. Given my review of the previous medical reporting, and my later review of other documents, this statement concerning left shoulder pain is implausible and unsupported by the totality of the evidence.

[69] The Plaintiff testified that she had "no life" after the 2010 MVA. She said she missed two weeks of work due to lower back pain and difficulty walking. She said she then worked three shifts per week and tried to rest. She did not do any outside camping, driving or activities. Despite the Plaintiff's testimony that she had no life after the 2010 MVA, she acknowledged on cross-examination, that she also attended a concert in Montreal with friends in the summer of 2017, and that she had gone camping in 2015 and probably in 2016.

[70] The Plaintiff worked a further 15 months at Dr. MacLean's office, but she claimed it was almost impossible to work because of lower back and left shoulder

pain. At trial, she said any movement of her left shoulder caused pain. She testified that she has pain in her lower back, 24 hours a day, seven days a week.

[71] The Plaintiff testified that her daughter would sweep, mop, empty the dishwasher and do the dishes and laundry for her. She said she does the laundry but, can only use one hand to hang the clothes, as she could not use her left arm. But on a review of the medical records and other documents, this claim that she has lost the use of her left arm (for laundry, at least) is difficult to accept.

[72] The Plaintiff testified that she does little meal preparation now and eats out frequently due to lower back and left shoulder pain. She can dust with a feather duster, only with her right arm. She does not sweep or mop floors because this requires the use of both arms. She also testified she can not drive for more than two hours at a time.

[73] The Plaintiff testified that after the 2010 MVA, her left shoulder was painful, and she required trigger point injections every three months. Her sleep was terrible and she had to increase her pain medication from 7.5 mg to 10 mg. She testified that after the 2010 MVA her lower back pain was the biggest problem.

[74] The Plaintiff attributes her back pain to the 2010 MVA. She testified that while she had episodes of back pain prior to the 2010 MVA, the pain was neither ongoing nor was it interfering with her employment. The medical records, however, call into question the reliability of this reporting.

[75] When the Plaintiff saw Dr. Ellefsen on November 12, 2007, she reported issues with her neck and mid-back, indicating that these were her most severe issues. She reported not being able to perform normal work activities. She also noted problems with daily functioning such as grooming, dressing, typing, writing, leaning, bending, twisting, carrying, lifting, pushing, pulling, sitting, exercising, loss of concentration, nervousness and irritability. She reported lack of sleep due to pain in her left arm, forearm, wrist, and hand.

[76] On April 24, 2008, Tanya Laybolt wrote that the Plaintiff was reporting mid to lower back pain, serious enough that she was unable to put on socks or bend over without experiencing shooting pain. The Plaintiff accepted this description.

[77] Dr. Seaman authored a letter dated July 17, 2007, which states:

> I inquired about Ms. Gale's report of mid-back pain. She advised that she had two episodes of a pinched nerve in her back which resolved with chiropractic adjustments and massage therapy.

[78] The Plaintiff testified that any reference to back pain prior to the 2010 MVA was due to isolated incidences of a pinched nerve. The totality of the medical and expert evidence does not support her testimony.

[79] The Plaintiff began seeing a personal trainer, Aulay Wiseman in April or May 2013. This was after she left her employment with Dr. MacLean. Of interest is the notation in an undated letter by Ms. Wiseman:

> Angela came in for personal training due to her motor vehicle injuries on September 14, 2006 and March 21st 2010. She came in with lower back pain, right and left shoulder pain and Also [sic] neck pain. With her time in personal training we will be working towards correcting these injuries.

[80] While the Plaintiff's evidence at trial was that the 2010 MVA caused her significant low back pain and left-side arm pain, both as new injuries, the totality of the evidence does not support this conclusion. The evidence indicates that the Plaintiff's pain was present between 2006 and 2010. I will elaborate on this reasoning.

Employment after the 2010 MVA

[81] As discussed earlier, at the time of the 2010 MVA, the Plaintiff was working at Dr. Mary MacDonald's office as a dental receptionist, but she never returned to dental assistant work.

[82] The Plaintiff started a new position as a dental receptionist at Lakeside Dental with Dr. Michael MacDonald on May 25, 2010. She testified that she was in constant pain and found the duties difficult, but could do the work if she was taking Tylenol. In the fall of 2010, the office moved from Lakeside to Chain Lake Drive, and her duties were increased. She testified that her pain level increased because her duties now included filing for prolonged periods and, while working four days a week, she also had an extended day.

[83] The Plaintiff testified that she was laid off on March 10, 2011. She said Dr. MacDonald indicated he needed someone "faster" to do the job. Dr. MacDonald did not testify. I have not considered this hearsay evidence.

[84] The Plaintiff then filed for Employment Insurance (EI) benefits, not disability benefits. In the application, she answered the following:

> In order to be considered available for work you must be:
>
> . Ready, willing and capable of working immediately;
>
> . Looking for the same type of work and wages as in your previous employment OR other suitable work for which you have the necessary skills;
>
> . Looking for work in an area where your choice of work is now available.
>
> * I am available for work as described above.
>
> ●Yes ○No

[85] The Plaintiff testified to the accuracy of the information contained in a statement from her employer, Dr. MacDonald, listing her working hours as 39 per week.

[86] After receiving EI benefits the Plaintiff did not seek employment, she testified that she needed time to recover from her lower back and left shoulder pain. She testified that her right shoulder was an issue while she was working for Dr. MacDonald until she began attending the pain clinic.

[87] The Plaintiff was not employed again until October 31, 2011. This was at Dr. MacLean's dental office, five days a week on a full-time basis. This office was paperless, so her job duties did not include pulling charts. The Plaintiff testified that she was asked to assist a few times, but this caused more pain in her lower back, left shoulder, and right shoulder. Her usual duties were answering the phone, greeting patients, providing estimates, and processing payments. Sitting became increasingly difficult and she complained of left shoulder and lower back pain.

[88] Dr. MacLean did not testify. The records show that the Plaintiff was laid off as of February 18, 2013, after working there about 15 months. She applied for EI benefits on February 27, 2013. Her Record of Employment (ROE) notes dismissal as the reason for termination, although she testified that this was not accurate. She testified that the office was losing money, and there were lawsuits against her employer.

[89] The fact remains, the Plaintiff was able to work for 15 months as a dental receptionist and did not chose to stop.

[90] Shortly after this, the Plaintiff started working at Goodlife Fitness (Goodlife) one day a week, and then at ADP, a payroll administrator. At Goodlife, she initially worked shifts providing childcare. After a promotion as a motivator, her duties included checking people into the club, providing hand towels and liaising with members about their satisfaction levels and requirements. She worked a ten-hour shift each Wednesday from April 10, 2013, until May 14, 2014. The Plaintiff claims her work at Goodlife ended because a new manager stopped her ten-hour shifts. She applied for EI benefits on June 10, 2014.

[91] The Plaintiff worked at ADP as a payroll administrator on Mondays, Tuesdays and Fridays, beginning July 15, 2013. She worked shifts from 11:30 am until 8 pm. This work included data entry for payrolls of 50 employees or less.

[92] The Plaintiff testified that a full-time position with ADP was possible, and she was next in line seniority-wise. However, she testified she cannot physically work full-time hours. This is not supported by the opinion of medical experts, which will be discussed later. The Plaintiff worked three days per week at ADP until October 2017. Until then, she could physically perform the duties of the job and the hours, but an increased workload, due to a job change made her responsible for 100 employers with 100 payrolls rather than the previous job of data entry for 50 employers and 27 payrolls. The Plaintiff testified that this increased workload aggravated her left shoulder pain.

[93] ADP engaged Morneau Shepell, a health management company, to administer its short-term disability program and to deal directly with the Plaintiff's pain complaints. The Plaintiff reduced her work hours to two days a week after October 2017. She testified that she could return to part-time work at ADP if she had small payrolls to process.

[94] The Court received a second agreed statement of facts from the parties that as of May 30, 2018, the Plaintiff's position with ADP was terminated, apparently due to a restructuring. The parties agreed that "this agreed statement of fact is not to suggest that Ms. Gale's termination was a result of the accident or any health related issues, but rather to simply make the court aware that Ms. Gale's employment with ADP has ceased".

[95] The Plaintiff accepted a dental assistant job in June 2014 with Dr. Melanie Fredette. She worked one day per week, including chair-side assisting and mixing impressions. The Plaintiff left after eight to ten weeks due to increased lower back pain and left shoulder pain, rendering her physically incapable of performing

the job duties. She testified that this was the last time she performed dental assistant work, which upset her, because this was her career. However, the evidence is clear, after the 2006 MVA, the Plaintiff never returned to dental assistant work, with the exception of this job.

[96] The Plaintiff began working for E&J Gallo Winery in 2015. She worked in Nova Scotia Liquor Commission (NSLC) stores providing samples of the company's products to customers. She typically worked four hour shifts. She stopped this work in September 2017. The NSLC hired her in December 2017, and she continues to work at the NSLC as a cashier on Saturdays or Sundays.

[97] The Plaintiff also works for Metcap Living Management (Metcap), leasing and renting apartments. This employment commenced January 2, 2018. The company manages about 13 buildings, with around 16 units in each building. The only pay stub from this job shows her working 48 hours in a two-week period.

[98] The Plaintiff has also worked four-hour shifts during the Christmas season, at Fairweather as a cashier, starting in 2014 or 2015 until 2017.

[99] The Plaintiff continues to be gainfully employed working similar hours per week when her various part-time jobs are considered.

Current Activities and Condition

[100] The Plaintiff says the 2010 MVA made it difficult for her to go about her daily life. However, the evidence indicates she is not any further impacted than she was after the 2006 MVA.

[101] Currently, the Plaintiff can grocery shop, although she has a lot of take-out meals because she says the meal preparation causes her pain in her left shoulder and lower back. She does laundry but cannot use her left arm to fold clothing. She does light dusting but only uses her right arm. She does not wash her floors because of her left arm pain. She can make her bed, but can only use her right arm. She cleans the bathroom by using her right hand only.

[102] The Plaintiff said she took long drives before the 2010 MVA, but now she only takes short drives. She cannot go to Cape Breton, Prince Edward Island, or Moncton because of lower back pain. She testified that she was able to ski on two or three occasions in 2010.

[103] The Plaintiff testified that her left shoulder is tight, painful, and pinches a nerve at times, making her eyes water. She testified that any movement causes pain. She said her lower back causes constant pain all day. She continues to be treated by Dr. Clark, with injections every three months and chiropractic treatment and massage therapy for her neck, lower back, and shoulder.

Dr. Sarah Seaman

[104] Dr. Seaman, the Plaintiff's family doctor, provided a Rule 55 Expert Report dated November 19, 2017 and was subject to cross-examination. Dr. Seaman was qualified as an expert in family medicine capable of giving opinion evidence regarding causation, diagnosis, prognosis, treatment and disability of the Plaintiff. She treated the Plaintiff after both the 2006 MVA and the 2010 MVA.

[105] The bulk of Dr. Seaman's report reiterates chart notes entries. However, Dr. Seaman opined that, while the Plaintiff could work full time, the scope of work that she could tolerate was limited. This conclusion is based on the Plaintiff's reported difficulty typing with her left hand. Dr. Seaman opined that the Plaintiff could work full time as long as her regular duties limit the regular use of her left hand. This opinion is largely based on the Plaintiff's subjective reporting. Dr. Seaman testified that she does not perform functional capacity evaluations and any comment on the Plaintiff's functional ability was based on her subjective complaints.

[106] Significantly, Dr. Seaman did not know that the Plaintiff had worked full time as a dental receptionist after the 2010 MVA. She agreed this information would have probably been relevant to her opinion. Dr. Seaman testified that her report is as reliable as the Plaintiff's subjective reporting.

[107] Dr. Seaman suggested that the Plaintiff undergo physiotherapy, which is a more active therapy than massage or chiropractic care. She also recommended continuing at the pain clinic with trigger point injections. She stated that the Plaintiff had chronic pain which was permanent and unlikely to resolve

[108] Dr. Seaman confirmed that her treatment plan included referring the Plaintiff to Dr. Edvin Koshi if Dr. Alexander Clark could not address the issues. Dr. Seaman agreed she would defer to Dr. Koshi's opinion on the diagnosis and treatment of musculoskeletal and chronic pain; the cause of musculoskeletal

conditions, including chronic pain; the existence of medical restrictions arising from musculoskeletal conditions, including chronic pain; and functional capacity.

[109] This admission decreases the weight of Dr. Seaman's opinion. Given her lack of knowledge about some of the Plaintiff's activities, I accept Dr. Koshi's opinion in relation to causation, functional capacity and restrictions where they differ from Dr. Seaman's.

Dr. Alexander J. Clark

[110] Dr. Clark was qualified as an expert in the field of pain management and disability, capable of giving opinion evidence on all aspects of physical injuries and resulting pain conditions, specifically causation, diagnosis, prognosis, treatment, and disability.

[111] The Plaintiff was first seen at the Pain Clinic on March 25, 2011, referred for chronic pain arising prior to the 2010 MVA. She received injections from Dr. Clark, and asked him to tend to her right shoulder before treating her left side. This is not only relevant but significant, because she did not begin seeing him until after the 2010 MVA, and is still being treated for right-sided pain, stipulating a preference for the right side to be treated first.

[112] Dr. Clark acknowledged that the Plaintiff was still suffering from ongoing symptoms as a result of the 2006 MVA when he first saw her on March 25, 2011. Writing to Dr. Seaman after that visit he states:

> **Presenting Complaint:**
>
> As you know, Angela has had on going [sic] myofascial pain since 2006. At that time, she was involved in a motor vehicle collision. I believe it was a rear end type of accident causing a whip lash [sic] type injury. Her symptoms were further worsened by a second motor vehicle collision in which she was again rear ended in 2009.
>
> She indicated that this pain is located around her right shoulder. She indicated her left shoulder is also bothersome. She also indicated that she has headaches in the left posterior aspect area of her occiput. This pain radiates anteriorly along the temporal aspect of her skull.
>
> . . .
>
> She has tried physiotherapy, TENS, acupuncture and has seen a chiropractor regularly. She has tried Celebrex, Elavil and NSAIDs in the past.

> . . .
> She indicated that her pain is worst while sitting. She does try and maintain her activity level through jogging. She made note of her back pain being an issue since the accident. She indicated this is only a minor component to her pain syndrome and indicated she could function adequately if her upper thorax myofascial pain was mediated.
> . . .
> Angela does have what looks like a myofascial pain syndrome. This is all secondary to her traumatic MVCs x 2.

[113] Dr. Clark opines that the pain caused by the 2006 MVA was worsened by the 2010 MVA. Of particular significance are his comments that the pain in her right shoulder was initially the major source of pain, but that she reported pain in her left shoulder as well. Dr. Clark noted that over the five years he had treated her prior to this report, the Plaintiff continued to complain of pain in the upper back and shoulders. This is noteworthy, as he references both shoulders. In his report, Dr. Clark refers to the Plaintiff's ongoing myofascial pain as being bilateral in nature.

[114] Dr. Clark confirmed he was not asked to treat the Plaintiff's low back until June 28, 2017. This was over seven years after the 2010 MVA.

[115] Dr. Clark's reports do not support the Plaintiff's testimony that her injuries from the 2006 MVA were resolved at the time of the 2010 MVA.

[116] The Plaintiff was seen again by Dr. Clark on July 5, 2011. He reported the following:

> I saw this lady for assessment in the pain management unit on July 5, 2011. She reports the right side of her upper back is much improved. She feels she has 80% - 90% relief on this side. Today, her main concern is her left upper back pain and numbness to the left arm.

[117] On September 8, 2011, Dr. Clark saw the Plaintiff and reported the following:

> I saw this lady for reassessment on September 8, 2011. She reports continued benefit from the trigger point injections she has been receiving. She does note today that her right trapezius muscle is tight, and she has a couple of trigger points in this area. She is also concerned about her recurrent sinus infections.

[118] On May 31, 2012, Dr. Clark reported:

> This lady returned to the pain management unit for assessment on May 31, 2012. Since last being seen, she again reports some benefit from trigger point injections to her upper back. However, she continues to note significant discomfort involving her trapezius muscles, levator scapulae, and rhomboids on the right hand side particularly. She was also tender over the rhomboids on the left as well.

[119] On September 25, 2012, Dr. Clark reported:

> I saw this lady for reassessment in the pain management unit on September 25, 2012. Since last being seen she has been doing really well. She has been managing well. She continues to go to massage therapy, etc., with significant benefit. She has increased her exercise abilities, and overall pain levels are much better than previously. She does note 2 trigger points today on the right-hand side;

[120] On March 19, 2013, Dr. Clark reported:

> I saw this lady for reassessment in the pain management unit on March 19, 2013. Overall, she has done reasonably well since last being seen, she does note a couple of trigger points in the left upper back that are bothering to her.
>
> . . .
>
> She has recently been laid off from work.

[121] Between April 11, 2013, and December 8, 2016, Dr. Clark reported the following:

> I saw this lady for reassessment in the Pain Management Unit on April 11, 2013. Since last being seen approximately 1 month previously, she has noted significant improvement in her left-sided upper back and shoulder pain. She continues to attend GoodLife Fitness with a trainer and seems to be making significant progress.
>
> Today, she noted that she had a couple of trigger points on the right-hand side which we had documented when last being seen and, on examination today, she had 4 trigger points identified which were, subsequently injected with Marcaine 0.5%.
>
> **Visit Date:** 2013-Jul-25
>
> I saw this lady for followup [sic] on July 25, 2013. Since last being seen she feels she has been doing very well. She has less trigger points than previously and overall feels that she has made significant progress.
>
> Today, we did identify 3 trigger points lateral to the left scapula that were subsequently injected with Marcaine 0.5%.

Visit Date: 2014-Oct-16

I saw Ms. Gale for followup [sic] in the pain management unit on October 16, 2014. Since last being seen, she has had a significant flare in her myofascial pain syndrome involving the left upper back and neck. This seems to have been precipitated by working as a dental assistant 1 day a week over the past 6 weeks. Prior to this, she was doing well and, actually, is significantly better now than she has been in the past except for this most recent flare.

. . .

Visit Date: 2014-Nov-19

I saw this lady for reassessment in the pain management unit on November 19, 2014. Since last being seen, she noted she had significant improvement following the trigger point injections approximately 1 month ago; however, this only lasted for 2 days and then she feels she has had recurrence of her trigger points and pain.

Today on examination, she does have several trigger points on the left hand side of her upper back and neck as well as 2 trigger points in the right trapezius muscle above the scapula. However, most of these trigger points are different than the ones injected last time and as a consequence, the 6 trigger points were injected with Marcaine today. Hopefully, this will start settling her down.

Visit Date: 2015-Jul-30

I saw this lady for assessment in the pain management unit on July 30, 2015. She reports since last being seen that she did quite well following the trigger point injections in late 2014. She does note over the last month or two that she has a recurrence of pain and trigger points, particularly in the left trapezius area with some in the right trapezius area as well. She notes her muscles are quite hard and tense.

. . .

Today, following assessment, I did inject 4 trigger points, 3 in the left trapezius muscle and 1 in the right trapezius muscle.

VISIT DATE: 2016-Jul-29

. . .

On examination today, she again demonstrated several trigger points on the right hand side around the scapula and into the trapezius and 2 trigger points on the left-hand side. She indicates these areas area creating most of the pain that she is experiencing. She also notes that she is getting some tearing from her right eye because of her ongoing symptoms.

VISIT DATE: 2016-Dec-08

> I saw this lady for reassessment in the pain management unit on December 8, 2016. She describes having significant difficulty with her right upper back and shoulder area. She describes having significant pain in this area, as well as significant tightness.
>
> . . .
>
> She continues to note some issues with sleeping, particular [sic] on her right hand side because of pain.

[122] There are many records from 2011 onward in which Dr. Clark records his treatment of both the Plaintiff's left and right sides. These all conflict with the Plaintiff's testimony at trial. The Plaintiff did not dispute all of these recordings as being inaccurate.

[123] Dr. Clark emphasized that he was treating the Plaintiff and trying to move her forward from a treatment standpoint, and was less focused on causation between MVAs.

[124] On July 25, 2013, the Plaintiff reported to Dr. Clark that she made significant progress. Importantly on March 7, 2014, Dr. Clark wrote the following:

> I saw this lady for reassessment in the Pain Management Unit on March 7, 2014. Since last being seen, she overall has improved by about 50%. She feels that most of her trigger points are reasonably quiescent at this time and actually on examination today, I was not able to stimulate any trigger points. She does note that she is having continued difficulty with her ability to sit for prolonged periods of time and was wondering whether a workplace ergonomic assessment might be useful.
>
> . . .
>
> At this point, I have asked her to return on a p.r.n. basis. If she continues to improve, I do not need to see her again but I would be happy to reassess if there are any significant issues.

[125] This indicates that the Plaintiff was improving, and is consistent with her continuing to work and travel.

[126] On cross-examination, Dr. Clark confirmed that he did not review the April 9, 2009, letter the Plaintiff wrote to the Nova Scotia Human Rights Commission at the time he provided his medical opinion. Dr. Clark also did not review a Functional Capacity Evaluation (FCE) report prior to preparing his Rule 55 expert report. He did not perform a FCE on the Plaintiff, and conceded that he is not an

expert in such evaluations. Dr. Clark agreed he could not give an opinion as to how many hours a week the Plaintiff can work.

[127] In Dr. Clark's report he writes the following:

> If in your opinion Angela is not currently able to work full time hours, your opinion as to how long that has been the case.
>
> It is my opinion that she has not been able to work full time hours since I initially met her at the initial consultation on March 25, 2011. By history at that time I understood that she had not been able to work full time hours since at least the most recent motor vehicle accident of 2010.

[128] On cross-examination, Dr. Clark conceded that this opinion is predicated on examination, the Plaintiff's reliability in providing her history, and on other assessments. He agreed that if the information is inaccurate, and she was working full time, this could be problematic to his opinion. Dr. Clark did not know that the Plaintiff was working from 2011 to 2013 on a full-time basis for Dr. MacLean. His opinion that she can no longer work full-time hours is predicated on his understanding that she has not worked full time since 2010.

[129] Dr. Clark also testified that he was not aware that in 2009 the Plaintiff had reported that she could not vacuum and dust at home. He opined he expected she would have continued limitation in her abilities to clean and perform work around the home. However, he candidly noted he could not quantify this as he did not assess her specifically regarding this issue.

[130] Dr. Clark also testified that he was not aware of any of the trips and flights the Plaintiff had taken for vacation. He was also not aware of her travel by car to Montreal.

[131] Unlike Dr. Koshi, Dr. Clark did not have all relevant documents when he completed his report. In particular, on April 25, 2018, Dr. Clark was provided an additional 14 records and on cross-examination he was taken through documents he did not have in his file.

[132] On redirect, Dr. Clark was asked if any of the information he heard during cross-examination would change his opinion. Dr. Clark candidly said he was provided with information which he had not seen before and would have to review documents in detail and consider any additional elements of which he was unaware when he authored his report in 2016 before he could effectively comment.

[133] This is significant. The Court is left not knowing what, if any, opinions Dr. Clark would change. Of the two pain experts, only Dr. Koshi had all the records and evidence before him when he reached his opinions.

Dr. Edvin Koshi

[134] Dr. Koshi was qualified as an expert in Physical Medicine and Rehabilitation (Physiatrist) capable of providing opinion evidence on all aspects of physical injuries and specifically the causation, diagnosis, prognosis, treatment and disability of the Plaintiff.

[135] Dr. Koshi's report, dated August 29, 2017, is in contrast to Dr. Clark's report. Dr. Koshi had the Plaintiff's medical dossier and relevant documents. When Dr. Koshi examined the Plaintiff on August 28, 2017, her chief complaints were lower back pain, left shoulder pain, trapezius muscle, and a pinched nerve causing left eye to water.

[136] Dr. Koshi performed a thorough review of the Plaintiff's medical history.

[137] Dr. Koshi's opinion is that the Plaintiff's current pain is not causally related to the 2010 MVA. His opinion in this regard was not successfully challenged on cross-examination and was not contradicted by Dr. Clark, who admitted that his opinions could change given he did not have all of the documents in Dr. Koshi's possession. Dr. Koshi stated:

> In summary, Ms. Gale did not recover from the injuries suffered in the 2008 accident. At the time of the subject accident, she was still having the same symptoms in the shoulder that she reports at present. Her pain was "chronic".
>
> The Plaintiff continues to complain of shoulder pain, neck pain and back pain. Her treatments continue to be similar with chiropractic, massage therapy and injections at the pain clinic. All such treatments began after the 2006 MVA and continued until and after the 2010 MVA.

[138] Dr. Koshi's opinion was that the 2010 MVA temporarily exacerbated the pre-accident neck and shoulder pain. I accept this opinion.

[139] In addition, Dr. Koshi found that the Plaintiff's lower back pain was not caused by the 2010 MVA.

> It is my opinion that the injuries that Ms. Gale suffered in the subject accident have resolved. This is in keeping with the natural history of these injuries (the mildest form of sprain and strain) and with the medical report of May 11, 2010 (which also foresaw a good prognosis for the injuries suffered in the subject accident). My opinion is also in keeping with numerous reports of Dr. Clarke, who did not mention any anatomical diagnoses other than myofascial pain syndrome, which Ms. Gale had before the accident.

[140] Dr. Koshi's opinion is that the Plaintiff's injuries in the 2010 MVA did not contribute to her inability to return to her pre-2010 employment. He said:

> The Plaintiff had the same pains before the 2010 MVA,
>
> It's unlikely for mild soft tissues injuries, as that suffered in the 2010 MVA would interfere with activities of daily living, or employment.
>
> The Plaintiff has idealized her function before the 2010 MVA and this is not in keeping with her medical records.
>
> Prognosis for returning to activities depends on tolerance, which cannot be measured scientifically because it is subjective and depends on many other factors (such as reward for doing that activity). For example, an individual with pain may chose [sic] not to work for a minimum wage at a job that he dislikes, but, when offered a much more physically demanding job at three or four times minimum wage, he happily works and endures (tolerates) even greater pain. Thus, tolerance is not scientifically measurable or verifiable by medical practitioners. It is simply an individual's decision after he/she had made the cost/benefit analysis.
>
> . . .
>
> Ms. Gale has received trigger point injections by Dr. Clarke [sic] for her pre-accident myfascial pain syndrome. Dr. Clarke's [sic] reports continuously mentioned very good response from trigger point injections. Today, Ms. Gail [sic] also told me that she receives 70% pain relief for 3 months from these injections, which she receives every 3 months. In other words, these injections have been appropriate and very successful for her condition.
>
> Regarding massage therapy and chiropractic interventions, I do not see a need for such. She reports "very little" relief that lasts less than 1 day. With this response, continuing with these interventions is not justified.

[141] Dr. Koshi did not suggest any ongoing medication and noted that any use of Tylenol and sleep medication was in reference to symptoms from the 2006 MVA, not 2010.

[142] Dr. Koshi disagreed with Dr. Clark concerning the Plaintiff's ability to return to full-time work and the use of her upper body. He found no basis for medical restrictions that would restrict the Plaintiff's employment in this way.

[143] Dr. Koshi reviewed the Plaintiff's history of pain after the 2006 MVA. He noted that some reports indicate the Plaintiff was improving. Dr. Koshi noted that the mention of improvement was a snapshot in time and that while the Plaintiff had some improvements at points in time as reported by different physicians, his opinion was these were neither ongoing nor sustained improvements. His opinion was that conditions such as the Plaintiff's are punctuated with flare-ups and improvements and are cyclical. Dr. Koshi opined this cycle is what one would expect with a chronic pain condition.

[144] Dr. Koshi noted all of the references in the Plaintiff's treatment records to back pain and back treatment prior to the 2010 MVA. The chiropractic file recorded treatments the Plaintiff received for the mid and low back areas leading up to the 2010 MVA. He noted that the treatment she was receiving for back issues were not reflected in the notes produced by Dr. Seaman. Importantly, Dr. Koshi noted that the Plaintiff was having acupuncture or adjustments to her lumbar sacral areas prior to the 2010 MVA, but was still working full time. This is why he concluded that there was no reason why the Plaintiff could not do the same receptionist work despite her complaints of pain.

[145] Dr. Koshi noted that Dr Seaman's report states that the Plaintiff had ongoing symptoms and that her pain had not recovered in the three years after the 2006 MVA. In addition, Dr. Koshi says the referral by Dr. O'Brien seeking treatment for the Plaintiff at the Pain Clinic for chronic pain did not specify which shoulder was causing her difficulty. Dr. Koshi mentioned the letter from Aulay Wiseman dated April 17, 2013, and her statement in the report:

> Angela came in for personal training due to her motor vehicle injuries on September14, 2006 and March 21st 2010. She came in with lower back pain, right and left shoulder pain and Also neck pain. With her time in personal training we will be working towards correcting these injuries.

[146] Dr. Koshi was asked how he concluded that the Plaintiff had not recovered from her injuries suffered in the 2006 MVA and how he concluded she had left shoulder complaints and chronic pain before and after the 2010 MVA. He testified that while many medical documents did not specifically refer to the left shoulder as an area of complaint in the years leading to the 2010 MVA, the Plaintiff's left

shoulder pain lasted over a year and had become chronic, in that it lasted for more than three months. He testified that after 15 months of complaints, one would expect the Plaintiff to have experienced periods of subsiding pain and flare-ups, which he says occurred here. Dr. Koshi also considered the initial diagnosis by Dr. Seaman to be a WAD II on the left side. He testified that, although the Plaintiff did not report left shoulder pain continuously, he believed to a reasonable medical degree of certainty that her left shoulder pain continued in the time leading up to the 2010 MVA, given the history of chronic pain, how it behaves, and what she was reporting throughout the years from 2006.

[147] He testified that her condition was further complicated by myofascial pain syndrome, diagnosed after the 2006 MVA and before the 2010 MVA. Dr. Koshi testified that his opinion was that the left shoulder pain was present, but the right shoulder became the dominant focus.

[148] The Plaintiff was unsuccessful in diminishing Dr. Koshi's opinions on cross examination. Ultimately, both of the Plaintiff's experts either deferred to Dr. Koshi or did not have all of the relevant documents when they prepared their opinions for the court. This impacted their opinions. Based on this, and having heard the experts and considered their reports, I accept Dr. Koshi's opinions concerning the cause of the Plaintiff's injuries and her functional capacity.

Reliability and Credibility Considerations

[149] The Plaintiff was adamant in her testimony that her right arm was the main issue after the 2006 MVA, and her left arm and back were the main complaints after the 2010 MVA. She went to great lengths in her evidence to stress this distinction between the pain and injuries resulting from the accidents of 2006 and 2010. It was clear throughout her evidence, that the Plaintiff was trying to distinguish the accidents by focusing on different areas of her body being affected. However, the totality of the medical evidence, including the documents entered by consent of the parties, belies these suggestions.

[150] The Plaintiff authored an undated letter to Service Canada, date stamped March 18, 2013, which was attached to a Human Resources and Development of Canada form she signed. This letter was ostensibly to explain to Service Canada that she was not fired, and was therefore still entitled to EI benefits. Particularly impacting the Plaintiff's evidence in relation to the effect of the MVAs on her physical health and employment abilities are the following statements:

> I am writing this letter to you as I was dismissed by my employer as he was losing money. My story is as follows; [sic]
>
> …
>
> I am a person with a disability due to a motor vehicle accident and I am no longer able to work full time as a Dental Assistant, however, I am able to do Dental Administration as long as I can use my headset as I am unable to hold the telephone with my ear and shoulder. I am still currently undergoing treatments due to the motor vehicle accident from 2006.

[151] The Plaintiff saw a chiropractor after the 2006 MVA. These recordings of what the Plaintiff noted conflict with her testimony at trial. An entry of September 30, 2009, states:

> Pt very overwhelmed with P and length of life changes she's had to put up with. Tries not to complain or take lots of meds but this builds up. Pt cried today while telling this info.

[152] This is in contrast to her evidence at trial which was that she was overwhelmed by her experience at Dr. Downing's office. I do not accept that the Plaintiff was being candid when she testified to this interpretation of the recorded complaints she gave to Dr. MacPhee. The recorded information indicated that she was overwhelmed by pain.

[153] The Plaintiff consistently downplayed the ongoing effects of the 2006 MVA while emphasizing the effects of the 2010 MVA accident. This was neither consistent with the documents written by others and approved by her, nor the medical records. I find her evidence on these points to be self-serving and strategic, and I do not accept her explanations. Her evidence is both internally and externally inconsistent. There is much to unpack in relation to her trial evidence and the documentary evidence and recordings made in many documents. I have highlighted and considered many, but I have not specifically mentioned all of them.

[154] After testifying in direct examination to her inability to lift a bottle high enough to engage her trapezius muscles because of pain in her left shoulder, and stating that she could not drive longer distances due to lower back pain, the Plaintiff was presented with a picture from her Facebook page showing her in a lawn chair holding bottles of wine in both hands. She acknowledged that this picture was taken during a visit to a friend's trailer at a campground in

Shubenacadie, which she drove to. She acknowledged she visited her friend there three times during the summer of 2016.

[155] Another photograph shows the Plaintiff with friends at a concert in Montreal. She confirmed that she attended this concert in the summer of 2016 and that the photo depicts her seated in the stadium. She drove to Montreal for the concert, although in her testimony she claimed to have forgotten about that trip.

[156] On cross-examination, the Plaintiff admitted to some exaggerations. On direct examination she testified that she had "no life" outside of work, but on cross-examination she admitted that she does have a life and spends time with friends, but does not do all the activities she would like to do. Her travel is an example of her activity, which includes the following trips:

> May 2016 – Jamaica with her children
>
> May 2015 – Cancun
>
> July 2015 – Las Vegas
>
> 2014 – Newfoundland for George Street Festival
>
> 2013 – New York City
>
> 2012 – Dominican Republic
>
> After 2010 – Magic Mountain, New Brunswick
>
> 2008 – Florida for Christmas

[157] While the Plaintiff testified that she could no longer camp, she admitted going camping twice in 2015 and 2016, but said she could no longer sleep in a tent.

[158] The records also belie the Plaintiff's contention that the 2010 MVA caused her back pain and rendered her unable to work full time as a dental receptionist. In particular, in the letter to the NSHRC dated July 19, 2010, the Plaintiff wrote:

> In my eight (8) years working in eight (8) different dental offices, I have never seen a receptionist (whether licensed as a RDA or not), fill in for a dental assistant, except me! I was requested to do so daily, while trying to recover from my injuries sustained in my MVA, even after the following:
>
> 1. a headset;
>
> 2. two Doctor's [sic] notes from my chiropractor and other work absence notes

> 3. an ergonominical [sic] assessment
>
> 4. 'many complaints about work from back problems'
>
> 5. 'she was having trouble with her neck'
>
> 6. 'In fact refuses to work with Dr. Doucet as she feels that her rooms are not set up well enough for her to work without damaging her back'
>
> 7. 'Angie began to have complaints about work from back problems, so when a receptionist/RDA position became available, she accepted this position.'

[159] On cross-examination, the Plaintiff accepted what she wrote as accurate.

[160] On April 9, 2009, the Plaintiff wrote to the NSHRC concerning a complaint regarding her then employment with Dr. Downing and her allegation that she was being discriminated against based on her physical disability caused by the 2006 MVA. This letter was written just over a year before the 2010 MVA. The Plaintiff made several statements in this letter which bear upon the issues in this proceeding. She wrote and I paraphrase:

- The 2006 MVA was "major" and left her unable to perform her work as a dental assistant;
- She began work in the Downing dental office as a dental receptionist in November 2006, shortly after the 2006 MVA;
- In 2008 she was still "having problems with my neck and back" and had an ergonomic assessment;
- As of February 27, 2008, she was still having neck, back and right shoulder pain and could not clean and dust her own home;
- As of December 2008, she stated she could not do her daily activities at home such as prepare meals, laundry or sleep;
- When required by Dr. Downing to perform assistant work, even an hour, she would be up all-night in pain and have to call in sick the next day.

[161] In this letter the Plaintiff describes her injuries from the 2006 MVA as follows:

> My injuries sustained in the MVA to date are:

- Damage to my ulnar nerve on the left side of my body. This made my left arm numb along with my baby finger and ring finger from September 14, 2006 to January 2008. I still have flare ups and my fingers still do not have full feeling in them.
- Whiplash associated disorder (neck & upper back/shoulder pain)
- Mechanical and Neurological injuries
- Headaches (ongoing)
- Right Rotator Cuff out of place to present
- Two episodes of pinched nerves in my middle back, one in December, 2007 and another in April, 2008.
- Anxiety and Depression
- A Dislocated hip (December, 2008)
- A lump in my right breast bone due to the rotator cuff being out of place for which I had a mammogram to make sure it was from the MVA and not a form of cancer on July 4, 2008. Dr. Downing agreed as I was scheduled to work on this day. My Mammogram was scheduled for 9:15 a.m. and I returned to work shortly after my appointment.

[162] This letter confirms the Plaintiff herself was maintaining that she was disabled from dental assistant work due to the 2006 MVA from the time of the MVA until the letter was written. The Plaintiff testified that she wrote this letter when she received a probation letter from Dr. Downing, as she felt it was unfair.

[163] The Plaintiff wrote to the NSHRC again on March 26, 2010. She signed this letter, but testified that it was written by her then counsel, David Richey, before the 2010 MVA. The Plaintiff testified that at the time she signed this letter her injuries were as follows:

Ulnar nerve on left side;

WAD;

Neck/upper back/shoulder;

Mechanical and neurological injuries;

Ongoing headaches;

Right rotator cuff out of place;

Anxiety and depression;

Dislocated hip;

Two pinched nerves;

Sinus surgeries

[164] The Plaintiff filed a formal complaint with the NSHRC against Dr. Downing and Dr. Doucet. She signed the complaint and made several statements in it that bear upon the issues in this matter. In this letter, signed three days after the 2010 MVA, the Plaintiff says the following about her injuries from the 2006 MVA:

> 2. On September 14, 2006 I was involved in a motor vehicle accident in which I sustained major injuries resulting in my having a disability that restricts my ability to perform my duties as a Dental Assistant. The injuries I sustained include to date; damager to my ulnar nerve on the left side of my body, whiplash associated disorder including neck/upper back/shoulder pain, mechanical and neurological injuries, ongoing headaches, right rotator cuff out of place, anxiety and depression, a dislocated hip, two episodes of pinched nerves, a lump in my right breast due to my rotator cuff being out of place, and two sinus surgeries along with numerous sinus infections also related to the MVA.

[165] This letter indicates that all the areas of complaint that continue to this day existed after the 2006 MVA.

[166] The Plaintiff wrote again to the NSHRC on July 19, 2010. This was a rebuttal to Dr. Downing's response to her complaint. In this letter, the Plaintiff commented on her ongoing problems with her back prior to the 2010 MVA:

> 1. I began my employment on August 2, 2004, hired as a Dental Assistant for Dr. Paul Downing.
> 2. On September 14, 2006 I was involved in an automobile accident in which I sustained major injuries resulting in my having a disability that restricts my ability to perform my duties as a Dental Assistant. The injuries I sustained include to date: damage to my ulnar nerve on the left side of my body, whiplash associated disorder including neck/upper back/shoulder pain, mechanical and neurological injuries, ongoing headaches, right rotator cuff out of place, anxiety and depression, a dislocated hip, two episodes of pinched nerves, a lump in my right breast due to my rotator cuff being out of place, and two sinus surgeries along with numerous sinus infections also related to the MVA.
> 3. The employer benefits do not include medical insurance, workers compensation or any physio type insurance coverage. I did have access to no-fault benefits under my automobile insurance policy, known as 'Section B' coverage for the cost of accident-related treatment and rehabilitation. Notwithstanding that I sustained injuries, I struggled to continue doing my

job even though I was in pain at times, depending on what duty I was asked to perform.

4. On November 6, 2006 my doctor placed me on 'medical leave' as a result of injuries I sustained in the auto accident of September 14, 2006.
5. On November 21, 2006 a Dental Receptionist position became available in our office. Dr. Downing, knowing that I was unable to do my duties as a Dental Assistant without working in pain, offered me the receptionist position. He accommodated me with setting up my workstation and purchased a headset as the accident left me unable to lean my head left or right and this prevented me from typing while on the phone. Upon taking on my duties as a receptionist I was forced to perform Dental Assistant duties even though Dr. Downing was aware of the pain and discomfort assisting would cause me. I do not recall, when I was doing Dental Assistant duties in the past, the receptionist ever being assigned to assist me in any capacity. However, between the date of my MVA, September 14, 2006 to November 21, 2006, I worked through my lunch break 33 times and the receptionist, who had a Dental Assisting license at the time, was never required to assist me. When I took on receptionist duties I was directed to leave my desk and go back and assist the Dental Assistants while they take lunch or for a whole day if they were ill.
6. Since the receptionist position did not require a receptionist to have a Dental Assistant license in the past, I wondered why I was forced to do duties assisting Dental Assistants when I was originally assigned there to due [*sic*] my disabilities and my inability to perform the Dental Assistant duties.
7. On January 4, 2007 I had sinus surgery and my tonsils taken out. My doctor placed me on medical leave for two weeks.
8. In February 2007, Dr. Downing told me he wanted me to assist him for two hours a day, as his dental assistant was having back problems and she could use a break. I explained to Dr. Downing that I was still having problems with numbness and pain in my left arm and that I would be able to assist with sterilization of her instruments, making custom trays, trimming models, taking x-rays and setting up her rooms. I left his Dental assistant know that I would give her a hand with any of these things if she got behind.

[167] Despite being written four months after the 2010 MVA, there is no mention of that accident. Additionally, the 2006 MVA is described as causing major injuries.

[168] The Plaintiff testified that her physical health improved in the months leading to the 2010 MVA. She travelled to Jamaica, exercised, jogged, rode a

bike, and camped. Despite this, these letters and the medical records all indicate she was suffering from chronic, ongoing pain after the 2006 MVA.

[169] The evidence of the Plaintiff that the 2010 MVA has caused all of her ongoing injuries and pain complaints is not in harmony with the totality of the evidence. The medical documents are inconsistent her attempts to distinguish the accidents and minimize the effect of the 2010 MVA despite medical records and other documents, some of which she authored. I find her evidence on the injuries arising from the accidents to be strategic at times, and inconsistent.

[170] In this case, like so many, the assessment of the evidence depends upon findings of credibility. I refer to the statement of O'Halloran, J.A. in ***Faryna v. Chorny***, [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152 (C.A.):

> 9 Counsel for the appellant further argued that since Shostak remained uncontradicted by evidence when he testified that he did not know the common Ukrainian word for confinement and that he did not know that the woman referred to in the letter referred to Nancy Faryna his evidence ought to be accepted, and in that event he submitted there was in law no publication of the libel. But the validity of evidence does not depend in the final analysis on the circumstance that it remains uncontradicted or the circumstance that the Judge may have remarked favourably or unfavourably on the evidence or the demeanour of a witness; these things are elements in testing the evidence but they are subject to whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time; and cf. *Brethour v. Law Society of B.C.*, [1951] 2 D.L.R. 138 at pp. 141-2.
>
> …
>
> 11 The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skillful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

> 12 The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can he tested in the particular case.

[171] There were times the Plaintiff gave evidence in a candid and straightforward manner. However, at other times her evidence was strategic, inconsistent with the reporting as contained in the medical documents, and inconsistent with her own documents. Whether she believes now that the 2010 MVA is the root cause of all of her pain issues or whether she is being strategic in the face of the NSSC decision disallowing renewal of her claim in relation to that accident, it matters not. The result is the same, I do not accept her evidence in relation to the two accidents.

[172] Due to the passage of time, the motivation to focus on the 2010 MVA and the inconsistency between the *viva voce* evidence of the Plaintiff and the documents authored by her or on her instructions, I conclude the independent records of treating physicians made contemporaneously with the Plaintiff's visits with them are more reliable. The Plaintiff has not proven that the tortious conduct of the Defendant caused the Plaintiff's ongoing issues and pain condition.

[173] The Plaintiff did not have lasting effects from the 2010 MVA but instead had an exacerbation of injuries from the 2006 MVA, and those injuries have continued. To quote Saunders, J.A. in ***McNaughton v. Ward,*** 2007 NSCA 81, the curtain had not dropped on lasting effects from the 2006 MVA. In fact, the documents all confirm that the lasting effects from that accident continued up until and after the 2010 MVA.

Law and Analysis

Cap on General Damages

[174] The ***Automobile Insurance Reform Act*** came into force on November 1, 2003. As a result, s. 113B of the ***Insurance Act***, R.S.N.S. 1989, c. 231, provides:

> 113B (1) In this Section,

(a) 'minor injury' means a personal injury that

(i) does not result in a permanent serious disfigurement,

(ii) does not result in a permanent serious impairment of an important bodily function caused by a continuing injury which is physical in nature, and

(iii) resolves within twelve months following the accident;

(b) 'serious impairment ' means an impairment that causes substantial interference with a person's ability to perform their usual daily activities or their regular employment.

. . .

(4) Notwithstanding any enactment or any rule of law, but subject to subsection (6), the owner, operator or occupants of an automobile, any person present at the incident and any person who is or may be vicariously liable with respect to any of them, are only liable in an action in the Province for damages for any award for pain and suffering or any other non-monetary loss from bodily injury or death arising directly or indirectly from the use or operation of the automobile for a minor injury to the amount prescribed in the regulations.

. . .

(8) Where no motion is made under subsection (6), the judge shall determine for the purpose of this Section whether, as a result of the use or operation of the automobile, the injured person has suffered a minor injury.

[175] The ***Automobile Insurance Tort Recovery Limitation Regulations***, N.S. Reg. 182/2003, provided at the time of the 2010 MVA:

Definitions for purposes of Section 113B of Insurance Act

2 (1) For the purposes of Section 113B of the *Insurance Act* and these regulations,

. . . . .

(c) "non-monetary loss" means any loss for which compensation would be payable, but for the *Insurance Act*, that is not an award for

(i) lost past or future income,

(ii) diminution or loss of earning capacity, and

(iii) past or future expenses incurred or that may be incurred as a result of an incident, and for greater certainty excludes valuable services such as housekeeping services;

. . . . .

(e) "regular employment" means the essential elements of the activities required by the person's pre-accident employment;

(f) "resolves" means

(i) does not cause or ceases to cause a serious impairment of an important bodily function which results from a continuing injury of a physical nature to produce substantial interference with the person's ability to perform their usual daily activities or their regular employment, or

(ii) causes a serious impairment which results from a continuing injury of a physical nature to produce substantial interference with a person's ability to perform their usual daily activities or their regular employment where the person has not sought and complied with all reasonable treatment recommendations of a medical practitioner trained and experienced in the assessment and treatment of the personal injury.

(g) "substantial interference" means, with respect to a person's ability to perform their regular employment, that the person is unable to perform, after reasonable accommodation by the person or the person's employer for the personal injury and reasonable efforts by the injured person to adjust to the accommodation, the essential elements of the activities required by the person's pre-accident employment;

(h) "usual daily activities" means the essential elements of the activities that are necessary for the person's provision of their own care and are important to people who are similarly situated considering, among other things, the injured person's age.

. . . . .

Total amount recoverable for non-monetary losses

3. For the purpose of subsection 113B (4) of the Insurance Act, the total amount recoverable as damages for non-monetary losses of a Plaintiff for all minor injuries suffered by the Plaintiff as a result of an incident must not exceed $2,500.

. . . . .

Onus to prove injury not minor injury

5. On a determination of whether an injury is a minor injury under subsection 113B (6) or (8) of the Act, the onus is on the injured party to prove, based upon the evidence of one or more medical practitioners trained and experienced in the assessment and treatment of the personal injury, that the injury is not a minor injury.

[176] The Plaintiff has argued that she has not suffered a minor injury as defined by the *Act* and the *Regulations* and is therefore not limited to recovery of $2,500, which is the legislated amount for general damages involving an accident that

occurred prior to April 28, 2010 (Minor Injury Regulations, ss. 3-6). The Defendant argues that the Plaintiff's injuries are minor injuries as defined by the legislation, so that the total amount she is entitled to recover in general damages from the 2010 accident is $2,500.

[177] In ***Farrell v. Cassavant***, 2009 NSSC 233, the Court held that the burden is on the Plaintiff to prove, based on the evidence of medical practitioners who are trained and experienced in the assessment and treatment of personal injuries, that her injuries are not minor. This is based on the wording of s. 5 of the Regulations.

[178] Following the analysis in ***Farrell, supra***, to determine if the Plaintiff suffered a minor injury in the 2010 MVA, I must decide:

1. Did the Plaintiff suffer a "personal injury"?
2. If so, did the personal injury result in a permanent serious disfigurement?
3. Did the personal injury result in a permanent serious impairment of an important bodily function caused by a continuing injury which is physical in nature?
4. Did the personal injury resolve within twelve months following the accident?

[179] In ***Farrell***, ***supra***, the factual underpinning of the Court's decision included the following factors:

- The Plaintiff injured his lower back in the accident and continued to suffer ongoing pain.
- The Plaintiff suffered a fractured right wrist resulting in a deformity.
- The Plaintiff was off work for 4.5 months, returning half days for two weeks, and then full-time. The Plaintiff did not miss time due to the injuries after returning to work;
- The Plaintiff's complaints of pain to his wrist and back from the accident were constant, most days;
- The pain to his right wrist was unrelenting, not improved and at times was worse than initially;
- His grip and flexibility was affected and he would drop items;

- He could do chores around the home, but it took longer to do things. His wife had taken on more of the heavy work around the home;
- The Plaintiff could no longer bowl, play darts, or horseshoes, and could not physically interact with his grandchildren, and did not socialize as much with friends;

Did the Plaintiff suffer a "personal injury"?

[180] The term "personal injury" is defined in section 2(1)(d) of the Regulations (as they were at the time of the 2010 MVA). Counsel made no submissions on the application of this term. However, in keeping with my findings regarding the Plaintiff's continued suffering with chronic pain having been caused by the 2006 MVA and not the 2010 MVA, I find that the injuries the Plaintiff suffered from the 2010 MVA do not fall into one of these exceptions to the term "personal injury".

[181] I find the Plaintiff suffered a personal injury within the meaning of the Regulations as a result of the 2010 MVA. She experienced an exacerbation of pain to her back and both arms and shoulders.

Did the personal injury result in a permanent serious disfigurement?

[182] When answering this question I must make a determination concerning the following three questions as framed in ***Farrell***, ***supra****:*

1. Has the Plaintiff suffered a disfigurement?
2. If so, is the disfigurement serious?
3. If so, is the serious disfigurement permanent?

[183] There is no evidence before me that the Plaintiff suffered a disfigurement, let alone a serious one that is permanent.

Did the personal injury result in a permanent serious impairment of an important bodily function caused by a continuing injury which is physical in nature?

[184] In ***Farrell***, ***supra***, Smith, A.C.J. accepted that, despite differences in the Ontario and the Nova Scotia legislation, the approach by the Ontario Court of

Appeal to the term “permanent serious impairment of an important bodily function" was appropriate. I accept the meaning of this phrase as described and defined in ***Meyer v. Bright et al.*** (1993), 110 D.L.R. (4th) 354, 1993 CarswellOnt 51 (Ont. C.A.), at paras. 15-16:

> . . . Because the word 'serious' qualifies 'impairment' and the word 'important' qualifies 'bodily function', it is only necessary to consider those words when a particular injured person has sustained a permanent impairment of bodily function caused by a continuing injury which is physical in nature. It is only if the injured person has such an impairment that it is necessary to decide whether the bodily function which is impaired is an important one. And it is only if the impairment is of an important bodily function that it is necessary to determine whether the impairment is a serious one.
>
> We conclude therefore that the appropriate approach in these cases is to answer sequentially the following questions:
>
> 1. Has the injured person sustained permanent impairment of a bodily function caused by continuing injury which is physical in nature?
>
> 2. If the answer to question No. 1 is yes, is the bodily function, which is permanently impaired, an important one?
>
> 3. If the answer to question No. 2 is yes, is the impairment of the important bodily function serious?

[185] While the Plaintiff may have suffered a permanent impairment of a bodily function caused by a continuing injury which is physical in nature from the 2006 MVA, I cannot conclude that she suffered such an injury for the 2010 MVA.

[186] Even if I concluded that the Plaintiff’s injuries from the 2010 MVA resulted in an affirmative answer to questions 1 and 2, I would not be able to conclude that the impairment was serious. A serious impairment is defined in s. 113B (1)(b) of the ***Insurance Act***:

> 'serious impairment' means an impairment that causes substantial interference with a person's ability to perform their usual daily activities or their regular employment.

[187] The Regulations also defined “regular employment” and "substantial interference” as follows:

> 2(1)(e) 'regular employment' means the essential elements of the activities required by the person's pre-accident employment;
>
> …

> 2(1)(g) 'substantial interference' means, with respect to a person's ability to perform their regular employment, that the person is unable to perform, after reasonable accommodation by the person or the person's employer for the personal injury and reasonable efforts by the injured person to adjust the accommodation, the essential elements of the activities required by the person's pre-accident employment;

[188] I have reviewed all the evidence at trial. I cannot conclude that the injuries suffered from the 2010 MVA cause a substantial interference with the Plaintiff's ability to perform her usual daily activities or her regular employment as those terms are defined in the legislation. I follow the reasoning in ***Farrell***, *supra*, at para. 210:

> While I am satisfied that the Plaintiff continues to have pain and discomfort in his right wrist and back and I am further satisfied that as a result of this accident he has permanent impairment of important bodily functions which results in interference with his ability to grip, lift, climb, maintain his home and participate in physical activities, I am not satisfied as a result of these injuries there has been *substantial* interference with his ability to perform his usual daily activities (as defined by our ***Regulations***.)

[189] I am not satisfied that all of the Plaintiff's current and ongoing problems are caused by this accident or as a result of the injuries suffered from this accident.

[190] Plaintiff's counsel referred me to ***Brak v. Walsh***, 2008 90 O.R. (3d) 34, 2008 ONCA 22, at paras. 6-7. This is an Ontario decision interpreting Ontario legislation which is different from the Nova Scotia legislation. This case found that where a Plaintiff's pain continued, they could have a permanent injury. Here the Court held that a stoic Plaintiff who continues in their work and activities, despite unremitting and unrelenting pain, could have a serious impairment.

[191] The Plaintiff urges this Court to follow this jurisprudence. First, the evidence before me would not permit such an outcome. I have found the 2010 MVA was an exacerbation of significant injuries arising from the 2006 MVA, but those injuries do not have a continued effect on the Plaintiff. Furthermore, based on the Nova Scotia legislation, I must analyze whether there has been substantial interference with the Plaintiff's usual daily activities and employment. The Plaintiff continued her work as a dental receptionist for years after the 2010 MVA and continued to be able to do such things as travel. Consequently, the facts are not similar and the legislation is different, both factors distinguishing the application of ***Brak v. Walsh, supra*** to this proceeding. I have also considered

Sasso v. Copeland, 2005 78 O.R. (3d) 263, [2005] O.J. No. 5226 (Ont. Sup. Ct. J.) and have distinguished this case on the same grounds.

[192] This Court had occasion to comment on the application of the analysis in that Ontario decision to Nova Scotia cases in ***Farrell***, *supra*, at para. 219:

> As indicated previously, one must be careful when analyzing cases from other provinces due to the differences in the wording of the legislation in question. The Ontario ***Insurance Act*** and ***Regulations*** in effect at the time of that decision are different than the Nova Scotia ***Insurance Act*** and ***Regulations*** that I am considering. My analysis and conclusions must be based on the Nova Scotia legislation.

Did the personal injury resolve within twelve months following the accident?

[193] The Regulations defined "resolves" as follows:

> **2(1)**(f) 'resolves' means
>
> (i) does not cause or ceases to cause a serious impairment of an important bodily function which results from a continuing injury of a physical nature to product substantial interference with the person's ability to perform their usual daily activities or their regular employment, or
>
> (ii) causes a serious impairment which results from a continuing injury of a physical nature to produce substantial interference with a person's ability to perform their usual daily activities or their regular employment where the person has not sought and complied with all reasonable treatment recommendations of a medical practitioner trained and experienced in the assessment and treatment of the personal injury.

[194] I have concluded that for the first several months after the 2010 MVA, the Plaintiff suffered an exacerbation of pain to her arms and back. This was a serious impairment of important bodily functions, resulting in continuing physical injuries and producing substantial interference with her ability to perform usual daily activities and her regular employment as a dental receptionist. However, the Plaintiff was able to continue working with Dr. MacDonald as a dental receptionist. Consequently, I find the personal injury resolved within twelve months following the accident.

[195] The Plaintiff has suffered minor injuries from the 2010 MVA and her non-pecuniary, general damages are limited by the legislation to $2,500.00.

Future Loss or Diminished Earning Capacity

[196] I have concluded that the Plaintiff is neither disabled by this accident nor prevented from returning to a dental receptionist job because of the 2010 MVA. Consequently, I conclude there can be no claim for future income loss or a diminished earning capacity.

[197] I find that the Plaintiff was incapable of working as a dental assistant due to injuries suffered prior to the 2010 MVA.

[198] The Plaintiff wanted the Court to believe that it was impossible for her to work as a dental receptionist even though she did so from April 2010 until May 2010 when she was laid off from Dr. MacDonald's office. She then worked May 25, 2010 until March 10, 2011 as a dental receptionist for 34 hours a week with Dr. Michael MacDonald. She then worked as a dental receptionist from October 31, 2011 until February 18, 2013. This was for approximately 15 months until she was laid off due to issues with the practice, unrelated to her performance or injuries.

Loss of Valuable Services

[199] The Plaintiff testified that after the 2006 MVA, and specifically in the months leading to the 2010 MVA, she could do the following work in her home:

- Laundry
- Dishes
- Sweeping/mopping
- Meals
- Groceries
- Cleaning bathrooms

[200] The Plaintiff testified in the months after the 2010 MVA she could not:

- Put away groceries
- Dishes
- Laundry
- Sweep
- Dust

- Mop
- Wash floors
- Make beds
- Clean bathrooms
- Garden

[201] The Plaintiff testified that she is now able to perform all of these household chores but with more difficulty and without the use of her left hand and arm.

[202] I have reviewed various cases concerning this head of damages, including ***Carter v. Anderson***, (1998), 168 N.S.R. (2d) 297; [1998] N.S.J. No. 183 (C.A.), ***Warnell v. Cumby***, 2017 NSSC 88 and ***Leddicote v. Nova Scotia (Attorney General)***, 2002 NSCA 47. Loss of valuable services is often dealt with in a global way as a loss or an impairment of an asset. I have approached it this way in this case.

[203] I must consider whether there has been persuasive evidence that the Plaintiff has suffered a direct economic loss by the impairment of her capacity or ability to perform duties and functions around the home prior to the 2010 MVA. As discussed above, I find that the Plaintiff has proven that she did have some impairment, for a period of time, of her ability to carry out household tasks. I conclude $10,000.00 is appropriate for an award for loss of valuable services.

Future Care

[204] The Plaintiff has claimed for the costs of a personal trainer, gym membership, massage therapy, physio and chiropractic care.

[205] I have not seen any reliable opinion that these modalities are recommended because of the 2010 MVA. I would not make an order under this head of damage.

Specials

[206] The Plaintiff seeks reimbursement for a new sofa which she maintains assists her comfort with her back. I have no evidence that this sofa either medically necessary or prescribed. There was evidence the Plaintiff did not own a sofa before and this was simply an initial sofa not a replacement sofa that was medically necessary. There is also a claim for a massage device. This outlay

occurred six years after the 2010 MVA. There is no evidence that this was required as a result of the 2010 MVA.

Conclusion

[207] In view of my findings respecting causation and the extent of the Plaintiff's injuries, I cannot provide any corrective justice to the Plaintiff on the facts presented to me. The Plaintiff has not met her burden to prove on a balance of probabilities that she has not suffered a minor injury as a result of the 2010 MVA.

[208] In total, I order the Defendant pay the Plaintiff $12,500.00.

[209] I reserve the right to deal with the issue of costs, and disbursements if

counsel are unable to reach an agreement.

Brothers, J.