SUPREME COURT OF NOVA SCOTIA
Citation: ***Laybolt v. Irving Equipment Limited***, 2021 NSSC 165

Date: 20210629
Docket: **Hfx** No. 458154
Registry: Halifax

Between:

Dionna Laybolt

Plaintiff

v.

Irving Equipment Limited and Jason Meade

Defendants

LIBRARY HEADING

Judge:	The Honourable Justice Mona Lynch
Heard:	December 9, 10, 11, and 12, 2019, May 25, 2020, March 29, 30 and 31, 2021, in Halifax, Nova Scotia
Final Written Submissions:	June 15, 2021
Decision:	June 29, 2021
Subject:	Liability, Causation, Damages, MVA Onus for Minor Injuries
Summary:	Plaintiff was rear-ended by truck driven by one Defendant and owned by the other.
Issues:	Who was at fault for the accident? What injuries were caused by the accident? Who bears the burden to show that the injuries are under the minor injury cap? What is the appropriate award of damages?
Result:	Defendants did not rebut the presumption that they were at fault for a rear-end accident. Plaintiff suffered strain injuries to her neck, shoulder, back and was diagnosed with

a whiplash-associated disorder injury. She also suffered a mental injury. Defendants bear the burden to show that the Plaintiff's injuries are under the minor injury cap. Total damages for pain and suffering, prejudgment interest, and loss of valuable services in the amount of $14,517.80.

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Counsel:	Charles J. Ford and Tom Champion, for the Plaintiff Christopher W. Madill, Ryan Blood and Adam Downie, for the Defendants

By the Court:

Background:

[1] Dionna Laybolt, the Plaintiff, ("Ms. Laybolt") was 21 years old on September 10, 2015, the time of the accident in question. She is a mother of two children and was the spouse of the children's father until his untimely death in March of 2019.

[2] The Defendant, Jason Meade ("Mr. Meade") was, at the time of the accident, a driver for the Defendant, Irving Equipment Ltd. He was driving a boom truck.

[3] The Plaintiff was driving her vehicle on Highway 111, the Circumferential, in Dartmouth, Nova Scotia on September 10, 2015 planning to leave the highway at Exit 7E near the Penhorn Mall. She was in the passing lane. She overtook and passed the Irving vehicle. She changed lanes into the right-hand lane in front of the Irving boom truck.

[4] After changing lanes, the Plaintiff noticed that the cars in the right-hand lane had applied their brakes and their brake lights were illuminated. She applied her brakes and her vehicle stopped. The Irving vehicle hit the rear-end of Ms. Laybolt's vehicle. The accident occurred at approximately 5:20 p.m.

[5] The Plaintiff filed a Notice of Action on December 6, 2016 which was amended on February 23, 2017 and November 8, 2018. The Notice of Defence was filed on May 8, 2017. The Notice of Action is within Rule 57 and was filed prior to the amendment in January 2020, for a claim under $100,000.

[6] The trial was heard on December 9, 10, 11, 2019, May 25, 2020, and March 29, 30, and 31, 2021. Liability, causation, and damages are all in issue.

Issues:

1. Who was at fault for the accident?

2. If the Defendants were at fault for the accident, what injuries were caused to the Plaintiff by the accident?

3. What damages are appropriate?

1. Who was at fault for the accident?

[7] The Defendants acknowledge that the Irving vehicle made contact with the rear of the Plaintiff's vehicle and there is a presumption of negligence on the part of the driver making contact with the rear of another vehicle. Their position is that they have rebutted the presumption by the evidence of Mr. Meade that he was "cut off" by the Plaintiff who passed him and "took away his stopping distance."

[8] The Plaintiff relies on the presumption and submits that the Defendants have not rebutted the presumption.

[9] The *Automobile Insurance Fault Determination Regulations*, N.S. Reg. 227/2018, s. 8(2) provides that the vehicle which rear-ends another vehicle is 100% at fault for the incident. That is also clear from the decisions in Nova Scotia including *Wilson et al. v. Maclnnis*, 1992 CanLII 4671 (NSSC) where Roscoe, J. (as she then was) found:

> When there is a rear end collision, the burden shifts to the defendant as indicated in **Thompson v. Compton and Island Advertising** (1983), 59 N.S.R. (2d) 79 (N.S.T.D.) at p. 80:
>
> "It is well-established in this province that when a car runs into the rear of a car ahead there is a burden on the following driver to give an explanation, otherwise, an inference may be drawn that the rear driver was negligent. Masten, J.A., said in **Beaumont v. Ruddy** (1932), 3 D.L.R. 75, at p. 77:
>
> > Generally speaking when one car runs into another from behind, the fault is in the driving of the rear car, and the driver of the rear car must satisfy the court that the collision did not occur as a result of his negligence."
>
> In **Sibbins v. Atkins et al.** (1982), 52 N.S.R. (2d) 112 (N.S.C.A.), a case involving a rear end collision, McKeigan, C.J.N.S. held that the defendant had to rebut a presumption of negligence.
>
> In **Kosinski v. Snaith** (1983), 1 D.L.R. (4th) 170 (Sask.C.A.), after quoting the above passage from **Beaumont v. Ruddy** reference is made to **Montreal Tramways Co. v. Deslauriers**, [1952] Rev. Leg. 250 at p. 252, where McDougall J.A. said:
>
> "The underlying principle is one of common sense; the driver of the vehicle ahead - in this case a motor vehicle - is required to keep a careful lookout ahead and can do no more than have a casual look to his rear. He warns vehicles behind him of proposed change of pace or direction in the usual

> manner and can do no more. When therefore there is a collision between two vehicles moving in the same direction there is a natural presumption of fact that failing an explanation the driver of the vehicle in the rear is guilty of failure to keep a reasonable distance behind the leading car or govern his speed by the speed of the leading vehicle. He must keep his vehicle under control at all times. Without some such rule the circulation of traffic on our crowded thorough-fares would be impossible. This view is supported by the Courts not only here but elsewhere:"

The burden is on the Defendants to rebut the presumption that they are 100% at fault.

[10] Both Ms. Laybolt and Mr. Meade testified at trial as to how the accident occurred. There were also two expert reports in relation to accident reconstruction and both experts testified at the trial. The Plaintiff filed an expert report from Mike W. Reade. The Defendants filed an expert report by Sam Kodsi. After Mr. Kodsi's report was filed which pointed out deficiencies in the measurements in Mr. Reade's report, Mr. Reade filed an erratum to correct the measurements.

[11] Mr. Reade concluded that the Irving vehicle was at fault. However, in doing so, he appeared to read the statements of the two drivers and determine whose evidence he thought was most likely. Mr. Reade's report and testimony were of little value to the court. Mr. Reade did not attend the scene of the accident at the time of the accident nor did he visit the scene later. He did not inspect either vehicle. He relied on Google Earth or Google Maps to come to his opinion. Mr. Kodsi's report and testimony was that there was a lack of evidence, such as tire marks, documented final rest positions, etc., to determine the sequence of events leading to the accident. I agree with Mr. Kodsi that there was a lack of physical evidence to determine the cause of the accident.

[12] With the expert evidence being of no value to determine liability, I must consider the evidence of the two drivers. Ms. Laybolt testified that shortly after passing the Irving vehicle she had to stop because of the stopped vehicles in front of her. She was fully stopped and looked in her rear-view mirror to see the Irving truck coming upon her and she braced herself as she knew that he was going to hit her.

[13] There was minimal damage to the Irving truck and damage to the rear left of Ms. Laybolt's vehicle. Ms. Laybolt's vehicle was written off.

[14] Mr. Meade's evidence was that Ms. Laybolt's car entered his lane of traffic and stopped leaving no braking distance for the over 20-ton truck.

[15] Both Ms. Laybolt and Mr. Meade agreed that there were no brake lights showing in front of Mr. Meade when Ms. Laybolt changed into the right-hand lane. Ms. Laybolt testified that she had plenty of room to stop. Ms. Laybolt said there were ten car lengths between the Irving truck and the next vehicle when she passed and she had plenty of room to stop with 20 to 25 feet between her and the car in front of her.

[16] Mr. Meade testified that he was returning to work later than usual on the day of the accident and he was not accustomed to driving in that area at rush hour. Mr. Meade had estimated in his testimony at discovery that it was six to eight seconds after he saw Ms. Laybolt's brake lights until the impact. Mr. Meade testified at trial that he had thought about his evidence and had decided it was much quicker than six to eight seconds. At trial Mr. Meade testified that he had 100 to 150 feet of stopping space before Ms. Laybolt took it away. In the statement he provided to the insurance adjuster on September 25, 2015, Mr. Meade said that the nearest vehicle was 200 feet in front of him. He estimates that he was travelling at 80 kms an hour when Ms. Laybolt passed him and 20 to 25 kms an hour when the truck hit the back of Ms. Laybolt's vehicle.

[17] I found both witnesses to be credible, however I had concern about Mr. Meade's reliability. He said that he had thought about his discovery evidence and thought it was incorrect. He said he had lost sleep over the time and distance estimates he had given, and they were too long. He thought his memory was getting better about the events as time went on as he had a long time to think.

[18] Mr. Meade's supervisor, Terry Crowell ("Mr. Crowell") received a call about the accident and attended at the scene. I also had concern regarding Mr. Crowell's reliability and recollection of events. My concern was heightened with his testimony that he prepared a report of the accident for the company shortly after the accident. That report was neither located nor disclosed.

[19] I find that the Defendants have not rebutted the presumption that Mr. Meade, an employee of Irving Equipment, was 100% at fault for the accident on September 10, 2015.

2. If the Defendants were at fault for the accident, what injuries were caused to the Plaintiff by the accident?

[20] Former Chief Justice McLachlin summarized the onus on the Plaintiff in *Clements v. Clements*, 2012 SCC 32 at para. 46 as:

> C. *Summary*
>
> [46] The foregoing discussion leads me to the following conclusions as to the present state of the law in Canada:
>
> (1) As a general rule, a plaintiff cannot succeed unless she shows as a matter of fact that she would not have suffered the loss "but for" the negligent act or acts of the defendant. A trial judge is to take a robust and pragmatic approach to determining if a plaintiff has established that the defendant's negligence caused her loss. Scientific proof of causation is not required.
>
> (2) Exceptionally, a plaintiff may succeed by showing that the defendant's conduct materially contributed to risk of the plaintiff's injury, where (a) the plaintiff has established that her loss would not have occurred "but for" the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; and (b) the plaintiff, through no fault of her own, is unable to show that any one of the possible tortfeasors in fact was the necessary or "but for" cause of her injury, because each can point to one another as the possible "but for" cause of the injury, defeating a finding of causation on a balance of probabilities against anyone.

[21] Sadly, for Ms. Laybolt this accident was not the only automobile accident she was in. She suffered injuries to her lower back and right hip in an accident on January 1, 2013. She also suffered whiplash and shoulder injuries in an accident on July 13, 2018.

[22] Ms. Laybolt was assaulted in 2011 and suffered head injuries causing a convulsion. She had two other experiences of loss of consciousness. One of those was in 2009. There was another loss of consciousness from smoking marijuana in 2011.

[23] On the day of this accident, Ms. Laybolt did not go to the hospital immediately. The accident occurred at approximately 5:20 p.m. and Ms. Laybolt attended the ER around 7:30 p.m. on the same day. She reported lower back pain, neck pain, pain at the base of the skull and pain in the back and front of her head. The diagnosis was a thoracic strain, and she was instructed to rest, and physiotherapy was recommended. She was prescribed pain medication for a pain

score of 4-7. Ms. Laybolt testified that she went to the hospital because she started to get a headache. For the next 48 hours she laid in bed because she was really sore. Ms. Laybolt testified it was a few days later that she went to see her family doctor. She described her neck hitting the seat and her head hitting the head rest of the car.

[24] The medical records show that it was the day after the accident that Ms. Laybolt went to see her family doctor. She reported an instant headache from the accident, lower back pain, chest wall pain, difficulty chewing, swallowing pain, tenderness in cervical muscles, and some range of motion restrictions. The assessment was WADII, soft tissue injury lumbar spine, thoracic spine, shoulder girdle, chest wall and jaw muscles. A week later Ms. Laybolt visited her family doctor again and reported headaches, low back pain having worsened, and ongoing jaw muscle pain. On September 17, 2015, she had 80% range of motion in her neck and was assessed with WADII, shoulder girdle strain and lower back strain. On October 6, 2015, Ms. Laybolt reported to the family doctor having started working at a pizza place and had full range of motion in her neck and shoulders. She reported back pain/strain.

[25] Prior to this accident, Ms. Laybolt was taking medication for anxiety and depression. In physiotherapy records from April 2015, Ms. Laybolt described chronic lateral hip pain since the January 2013 accident. In July 2015, her physiotherapy records show she was complaining of pain in her lower back. Ms. Laybolt was off of work due to stress at the time of the accident in September 2015.

[26] Ms. Laybolt described going to the independent medical examination with Dr. Koshi. She said that she was very emotional, and she had a lot of nervousness and anxiety. She had a nurse with her who helped her. It took her three hours to fill in the forms for Dr. Koshi. She did not understand a lot of the forms and she found it hard to concentrate. She did not like how Dr. Koshi made her feel. She felt he was mocking her and laughing like he did not believe what she was saying. The whole examination took five to six hours. At the end she was asked to fill in a questionnaire regarding her experience.

[27] One of the key questions is whether Ms. Laybolt suffered a concussion. There were two medical experts who prepared reports and testified. Dr. Hanada testified that Ms. Laybolt suffered a concussion in this accident. He also testified that concussions are often underreported in ERs. Dr. Hanada pointed to medical

records where Ms. Laybolt reported hitting her head against the head rest in the accident. Dr. Hanada diagnosed Ms. Laybolt with a concussion from this accident and found her to be partially disabled in relation to heavier housekeeping, home maintenance and recreational activities. Dr. Hanada's evidence was undermined in cross-examination. Dr. Hanada had not reviewed all the documents and did not have any of the medical records from Ms. Laybolt's family doctor after November of 2016. Dr. Hanada did not have correct information about Ms. Laybolt's work history and he did not comment on the effect of the 2018 accident.

[28] Dr. Koshi's evidence was that Ms. Laybolt's injuries and complaints are all from the first accident and the third accident but that she was fully recovered from this accident. Dr. Koshi's evidence gave me concerns. Both Dr. Koshi's report and evidence did not have the air and appearance of an impartial, non-partisan, objective expert. As the Supreme Court of Canada said in *White Burgess Langille Inman v. Abbott and Haliburton Co*., 2015 SCC 23:

> [1] Expert opinion evidence can be a key element in the search for truth, but it may also pose special dangers. To guard against them, the Court over the last 20 years or so has progressively tightened the rules of admissibility and enhanced the trial judge's gatekeeping role. These developments seek to ensure that expert opinion evidence meets certain basic standards before it is admitted. The question on this appeal is whether one of these basic standards for admissibility should relate to the proposed expert's independence and impartiality. In my view, it should.
>
> [2] Expert witnesses have a special duty to the court to provide fair, objective and non-partisan assistance. A proposed expert witness who is unable or unwilling to comply with this duty is not qualified to give expert opinion evidence and should not be permitted to do so. Less fundamental concerns about an expert's independence and impartiality should be taken into account in the broader, overall weighing of the costs and benefits of receiving the evidence.

[29] Ms. Laybolt described her five to six-hour appointment with Dr. Koshi as nothing short of terrible. She described crying, being nervous, having anxiety, needing breaks, feeling disrespected, etc. Dr. Koshi's evidence was that everything went well, and he tried to help Ms. Laybolt during the assessment. It was like they were describing two very different events. The "Post-Assessment Client Satisfaction Survey" which Ms. Laybolt filled out indicating no issues or concerns was pointed to as evidence that Ms. Laybolt was not upset by the assessment. My impression was that after five to six hours Ms. Laybolt wanted to leave Dr. Koshi's office. Ms. Laybolt circled "yes" or "no" in the "Post-

Assessment Client Satisfaction Survey," whichever response required no further explanation for any of her answers and got her out of there quicker.

[30] As a result of the shortcomings, I can give little weight to either medical expert's evidence.

[31] That leaves me with the medical records to determine the Plaintiff's injuries. It is clear that she suffered soft tissue injuries and a WADII. Less clear is whether the evidence supports a concussion and anxiety while driving as a result of this accident.

[32] Ms. Laybolt reported headaches shortly after the accident but there was no mention of dizziness, blackouts, or any concussion symptoms in the medical records during the year after the accident. She was put off work for anxiety in December 2016. She saw her family doctor for a reassessment from this accident on October 17, 2017 and reported continued back pain, jaw pain off and on, anxiety driving, stiffness in neck and low back. The assessment was jaw pain, WADII/back strain, and anxiety. There was no mention of trouble focusing or concentrating until after the 2018 accident. There was no diagnosis of a concussion until Dr. Hanada's diagnosis in January 2019. I am unable to conclude on the evidence that Ms. Laybolt suffered a concussion because of this accident.

[33] The next question is whether Ms. Laybolt can sustain a claim for a mental injury which resulted in her having anxiety while driving. *Saadati v. Moorhead*, 2017 SCC 28, provided guidance on mental injures. At para. 37 the court found that the Plaintiff does not need to show that their mental injury would be classified as a recognized psychiatric illness. The Plaintiff must show more than a mere psychological upset. Claimants must show that the disturbance suffered is "serious and prolonged and rises above the ordinary annoyances, anxieties and fears" that come with living in civil society (para. 37). A psychiatric diagnosis is not required, the trier of fact may find on other evidence the claimant has proven on a balance of probabilities the occurrence of mental injury (para. 38). The lack of diagnosis cannot, on its own, be dispositive, it is something the trier of fact can choose to weigh against evidence supporting the existence of a mental injury (para. 38).

[34] Ms. Laybolt was referred to a psychologist by her family doctor a few weeks after this accident for her driving-related anxiety. Ms. Laybolt testified, and I accept her evidence, that she continues to have the anxiety and it is heightened when she is a passenger in a vehicle as she is not in control. When she drives, she

is always aware of her surroundings and has a fear that someone will run into the back of her or that another car will strike her at an intersection. She recounted drivers asking her why she is so nervous when she applied imaginary brakes and grabbed the door handle as a passenger.

[35] Ms. Laybolt testified that she continued to drive and actually worked as a bus driver after the accident while continuing to have anxiety. She was always fearful of getting in an accident. Ms. Laybolt was in a position where she had to financially support her children. Ms. Laybolt saw the psychologist a few times to deal with her anxiety while driving but she found the psychologist did not help. She also used marijuana to calm her anxiety.

[36] Ms. Laybolt was in three accidents. While she had some anxiety after the 2013 accident, she did not seek treatment for driving anxiety after that accident. Her anxiety continued after the 2018 accident.

[37] Based on the evidence I find, on a balance of probabilities, that this accident caused or materially contributed to Ms. Laybolt's anxiety while driving, a mental injury.

3. What damages are appropriate?

Onus for Minor Injury Cap:

[38] The Defendants' position is that the Plaintiff's injuries fall under the minor injury cap pursuant to s. 113E of the *Insurance Act,* R.S.N.S. 1989, c. 231 (the "*Act"*) and s. 13 of the *Automobile Accident Minor Injury Regulations*, N.S. Reg. 94/2010 (the "*Regulations"*). Section 113E of the *Act* states:

> Accident claims
>
> 113E (1) In this Section,
>
> (a) "accident" means an accident or other incident arising directly or indirectly from the use or operation of an automobile;
>
> (b) "accident claim" means a claim for loss or damages for bodily injury or death arising from an accident;
>
> (c) "claimant" means a person injured as a result of an accident;

(d) "minor injury", with respect to an accident, means

(i) a sprain,

(ii) a strain, or

(iii) a whiplash-associated disorder injury,

caused by that accident that does not result in a serious impairment.

(2) This Section and any regulations made pursuant to or with respect to this Section applies to any accident claim with respect to an accident that occurs on or after the twenty-eighth day of April, 2010.

(3) In an accident claim, the amount recoverable as damages for non-monetary loss of the claimant for a minor injury must be calculated or otherwise determined in accordance with the regulations.

. . .

[39] The criteria for determination of a minor injury is set out in *Regulation* 11.

Determination of minor injury

11 **(1)** The determination as to whether an injury suffered by a claimant as a result of an accident is or is not a minor injury must be based on the following:

(a) a determination as to whether the injury is a sprain, strain or whiplash-associated disorder injury; and

(b) if the injury is determined to be a sprain, strain or whiplash-associated disorder injury, a determination as to whether the sprain, strain or whiplash-associated disorder injury results in a serious impairment.

[40] Under the former minor injury regulations, applicable to accidents before April 28, 2010, the onus was explicitly stated to be on the injured party to prove that the injury was not a minor injury (former s. 6 of the *Regulations*). That provision was removed from the *Regulations* for accidents occurring on or after April 28, 2010.

[41] In *Gibson v. Julian*, 2016 NSSC 15, Chipman J. found that despite the removal of the provision which placed the onus on the injured person, the onus remained on the injured person:

> [77] Whereas it is correct that the *Old Cap* overtly states that the plaintiff bears the onus (Regulation 6) and the *New Cap* has no such language, I do not accept it therefore follows that the defendant must prove whether a plaintiff has sustained a minor injury. Indeed, the *New Cap* states that the Governor-in-Council may make regulations respecting the onus of proof relating to minor injuries (s.113E(7)(g)); no such regulation has been made.
>
> [78] Absent specific reverse onus wording from the Legislature, I am not prepared to accept that it is for a defendant to marshal evidence to, in effect, prove a negative. Rather, it is my determination that when it comes to the *New Cap* the standard remains the same. That is to say, she who asserts must prove (on a balance of probabilities).

Robertson, J. came to the same conclusion in *Warnell v. Cumby*, 2017 NSSC 88. Recognizing that judges should generally be bound by a decision of another judge of this Court (*Giffin v. Soontiens*, 2010 NSSC 438 para. 59) and with great respect to the learned judges in *Gibson* and *Warnell*, I cannot come to the same conclusion.

[42] Legislative debates and speeches can be used to determine the background, context and purpose of legislation (*R. v. Morgentaler*, [1993] 3 S.C.R. 463). When the *Act* was amended in 2010, the removal of explicit reference to the burden of proof was referred to in the Nova Scotia Legislative Assembly, *Debates*, 30 April 2010, at 1727:

> We also propose to remove explicit reference to the burden of proof from the regulations. The 2003 regulations put the burden of proof on the plaintiff. By removing this provision from the regulations, it is the intention of the government that ordinary common-law rules respecting onus should apply.

The Legislature removed the provision placing the burden of proof on the injured person and expressed the intention that "the ordinary common-law rules respecting onus should apply." The ordinary rules respecting the burden or onus are set out by Fichaud J.A. in *MacNeil v. Kajetanowicz*, 2019 NSCA 35:

> [47] In *Snell v. Farrell*, [1990] 2 S.C.R. 311, at p. 321, Justice Sopinka for the Court stated two principles for assigning the legal burden of proof:

> ... The legal or ultimate burden of proof is determined by the substantive law "upon broad reasons of experience and fairness": *9 Wigmore on Evidence*, # 2486, at p. 292. In a civil case, the two broad principles are:
>
> > 1. that the onus is on the party who asserts a proposition, usually the plaintiff;
> >
> > 2. that where the subject matter of the allegation lies particularly within the knowledge of one party, that party may be required to prove it.
>
> This remains the test: e.g., see *Braile v. Calgary Police Service*, 2018 ABCA 109, para. 23.

[43] It is the Defendants who assert that the Plaintiff's injuries fall under the minor injury cap. The ordinary common law rule, as set out in *MacNeil* and *Snell*, would place the burden on the Defendants (principle 1 in *Snell)*. The former s. 6 of the *Regulations* contained a reverse onus by requiring the Plaintiff to prove that the injury was not a minor injury.

[44] Is this a case where the subject matter of the allegation lies particularly within the knowledge of one party? The Plaintiff bears the burden of proving the extent of her injuries and damages. The question is whether the Plaintiff has particular knowledge of whether her injuries fall under the minor injuries cap? She does not. Placing the onus on the injured party or Plaintiff puts her in a position to prove a negative – that her injuries do not fall under the cap. The Defendants have been provided with all of the medical records of the Plaintiff. The Defendants can have an independent medical assessment of the Plaintiff. Therefore, I do not find that the subject matter of the minor injury cap lies particularly within the knowledge of the Plaintiff, requiring her to prove that her injuries are not minor injuries.

It is the Defendants who assert and rely on the minor injury cap under s. 113E of the *Act* not the Plaintiff. I therefore find that the ordinary common law rule or principle applies. The onus is on the Defendants to prove, on a balance of probabilities, that the Plaintiff's injuries fall under the minor injury cap.

Pain and Suffering/General Damages:

[45] The medical evidence and the assessments in the medical records show that Ms. Laybolt suffered from what are described as strain injuries to her neck,

shoulder, and back. She was also diagnosed with a whiplash-associated disorder injury (WADII).

[46] Section 8(2) of the *Regulations* define strain and whiplash-association disorder injury as:

> "strain" means an injury to one or more muscles;
>
> "whiplash-associated disorder injury" means a whiplash-associated disorder other than one that exhibits one or all of the following:
>
> (i) neurological signs that are objective, demonstrable, definable and clinically relevant,
>
> (ii) a fracture to the spine or a dislocation of the spine.

[47] Based on the definitions and the medical evidence, Ms. Laybolt's physical injuries are strains and a whiplash-associated disorder injury. While she suffered low back pain from this accident, she was being treated for low back pain from the 2013 accident just two months prior to this accident.

[48] The next question is whether the strains and whiplash-associated disorder injury resulted in a serious impairment. A serious impairment is defined in s. 8(2) of the *Regulations* as:

> "serious impairment", in respect of a claimant, means an impairment of a physical or cognitive function that meets all of the following:
>
> (i) the impairment results in a substantial inability to perform any or all of the following:
>
> (A) the essential tasks of the claimant's regular employment, occupation or profession, despite reasonable efforts to accommodate the claimant's impairment and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's employment, occupation or profession,
>
> (B) the essential tasks of the claimant's training or education in a program or course that the claimant was enrolled in or had been accepted for enrolment in at the time of the accident, despite reasonable efforts to accommodate the claimant's impairment and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's training or education,

(C) the normal activities of the claimant's daily living,

(ii) the impairment has been ongoing since the accident, and

(iii) the impairment is expected not to improve substantially,

[49] At the time of the accident, Ms. Laybolt was on stress leave from her job at a call centre. Two weeks after the accident Ms. Laybolt started working in a pizza shop. Her work there was physical, and she did not miss any time from work because of the accident. Complications with her pregnancy resulted in her leaving that employment 14 months later. Ms. Laybolt testified that her back was sore while she worked at the pizza shop.

[50] I accept that Ms. Laybolt did not have the luxury of not being employed, she had to feed her family. However, based on the evidence, I cannot find that her injuries from this accident resulted in a substantial inability for her to perform the essential tasks of her regular employment. Neither can I find that her injuries from this accident resulted in a substantial inability for her to perform the normal activities of her daily living.

[51] I find that Ms. Laybolt's physical injuries fall under the minor injury cap and result in a damage award of $8,352.

[52] Ms. Laybolt's mental injury does not fall under the minor injury cap. Section 14 (2)(b) of the *Regulations* requires me to:

(2) If a claimant suffers one or more minor injuries and one or more non-minor injuries as a result of an accident, the assessment of damages for non-monetary loss for all injuries suffered by the claimant is subject to the following rules:

(a) if the non-minor injury or injuries, when assessed separately from the minor injury or injuries, would result in an award for non-monetary loss of not more than the minor injury amount, the total amount recoverable as damages for non-monetary loss for all injuries suffered by the claimant must not exceed the minor injury amount;

(b) if the non-minor injury or injuries, when assessed separately from the minor injury or injuries, would result in an award for non-monetary loss of more than the minor injury amount, the total amount recoverable as damages for non-monetary loss for all injuries suffered by the claimant must be calculated as the total of all of the following:

> (i) the amount of damages assessed for non-monetary loss for the non-minor injury or injuries,
>
> (ii) subject to Section 13, the amount of damages assessed for non-monetary loss for the minor injury or injuries.

[53] Ms. Laybolt took a job as a bus driver a little over two years after this accident. She did not leave the bus driving job because of anxiety but because she was not getting enough hours and she obtained another job with more hours. I also must consider what part the two other accidents played in Ms. Laybolt's anxiety while driving mental injury. I award Ms. Laybolt $5,000 for her mental injury. Because the award for her mental injury is not more than minor injury award, the total amount cannot exceed the minor injury amount.

[54] The damages for the mental injury and the physical injuries are $8,352.

Past Lost Income:

[55] Ms. Laybolt started a new job two weeks after the accident and from then on did not miss time at work because of this accident. Therefore, there is no award for past lost income.

Diminished Earning Capacity:

[56] After this accident Ms. Laybolt worked for the pizza shop for over a year until she was put off work for pregnancy complications. After her child was born, she was off of work waiting for childcare. Rather than returning to the pizza shop she trained and then worked as a school bus driver. She was not getting a lot of work, so she left there to take a full-time job cleaning at the IWK, which she left for a better cleaning job with Dalhousie University. The evidence shows that Ms. Laybolt left jobs for better jobs or for health reasons. Ms. Laybolt stopped working after the stress of her spouse's death in 2019.

[57] I am not satisfied that Ms. Laybolt suffered diminished earning capacity as a result of this accident.

Loss of Valuable Services:

[58] The evidence shows that Ms. Laybolt participated in the same or more recreational activities after the accident. There were heavy lifting tasks around the home which were done by her partner that she must try to do now. I accept Ms.

Laybolt's evidence that it takes longer for her to do chores and that she struggles to do the heavier tasks that her spouse had done prior to his death. I will award Ms. Laybolt $5,000 for loss of valuable services.

Prejudgement Interest:

[59] The Defendants submit that prejudgment interest should only be awarded for four years as the trial was adjourned due to COVID-19. Trials are adjourned for many reasons. The purpose of prejudgment interest is to provide compensation for not having the award of damages from the date of injury to the date of judgment. I see no reason to limit the prejudgment interest to four years.

Conclusion:

General Damages	$ 8,352.00
Prejudgment Interest (2.5% for 67 months)	1,165.80
Loss of Valuable Services	5,000.00
TOTAL	$14,517.80

Lynch, J.