Date: 20010927
Docket No.: CA 166751

NOVA SCOTIA COURT OF APPEAL

[Cite as: Miller v. Fokerstma Farms Ltd., 2001 NSCA 129]

Freeman, Flinn and Oland, JJ.A.

BETWEEN:

FOLKERTSMA FARMS LIMITED, a body corporate, and
VICTOR MURRAY CRAWFORD

Appellants

- and -

CAROL LAVERNE MILLER

Respondent

REASONS FOR JUDGMENT

Counsel:	R. Malcolm Macleod, Q.C., for the appellants Anne-Marie MacDougall and Linda Wood, for the respondent
Appeal Heard:	April 4, 2001
Judgment Delivered:	September 27, 2001
THE COURT:	Appeal allowed in part as per reasons for judgment of Oland, J.A.; Freeman and Flinn, JJ.A. concurring.

OLAND, J.A.:

Introduction

[1] This is an appeal from an assessment of damages by Justice M. Heather Robertson of the Supreme Court of Nova Scotia. In her decision dated August 25, 2000, the learned trial judge found that the respondent had planned to continue working until retirement at age 65 and that, as a result of injuries suffered in a motor vehicle accident, it was unlikely she would be able to work past age 60. Among the awards assessed and awarded by the judge were ones for loss of future income and loss of domestic services. The appellants appeal those two damage awards.

Background

[2] The motor vehicle accident happened on April 11, 1995. The vehicle the respondent was driving was struck from behind and the respondent suffered a whiplash injury. The appellants have admitted liability.

[3] At the time of the accident, the respondent was 46 years old and employed by the Royal Bank of Canada (the Bank) as assistant manager, personal banking in its Elmsdale, Nova Scotia branch. She had started in banking in 1968 but after a year and a half left the workforce to rear her children. After she and her husband separated, she returned to work at the Bank in 1978.

[4] Following the accident in the spring of 1995, the respondent commenced a course of physiotherapy prescribed by her physician, Dr. Mary-Anne Fraser which continued until the beginning of that August. For six weeks in August and September, she attended treatments two mornings a week at the Canadian Back Institute in Halifax.

[5] In July of 1995, the respondent started back at the Bank working three mornings a week. She returned to full-time work that October and thereafter did not miss any time from work due to her injuries. The respondent continued to complain of symptoms such as neck pain, muscle spasms, headache, non-restorative sleep, and fatigue.

[6] In April of 1996, the respondent obtained a position with the Bank in

Moncton, New Brunswick as leader of a telephone-banking group. After moving to that city, she was treated by a general practitioner and returned to a conditioning program with the Canadian Back Institute there. Dr. Fraser had recommended that she see Dr. Thomas Loane, a specialist in physical medicine, and he examined her in Halifax that July.

[7] The respondent then successfully applied for her present position as manager of the Hunter River, Prince Edward Island branch of the Bank. Years ago she had lived on the Island for over two decades and when she relocated to Hunter River in April 1997, two years after the accident, the respondent returned to the care of Dr. Brodie Lantz who had been her family physician earlier. She continued to complain of headaches, neck and shoulder pain, chronic pain and fatigue. In November 1997 she was examined by Dr. Eugene Nurse, a family physician with an interest in occupational medicine. Just over a year later she was examined by Dr. William Stanish, an orthopaedic surgeon, at the request of the appellants.

[8] At the assessment of damages, the judge heard the testimony of the respondent, two long-time friends, and her daughter. The respondent also called Drs. Fraser, Lantz, and Nurse and an actuary, Paul Conrad. The appellants called a single witness, Dr. Stanish.

[9] The learned trial judge concluded that the respondent had planned to work to age 65 but was not likely to work beyond age 60. She awarded $45,000 in general damages, $196,255 in lost future income, $20,000 for loss of domestic services, and an amount for special damages. The parties agreed on the quantum for loss of past income. The appellants appeal the awards for lost future income and loss of domestic services.

Grounds of Appeal

[10] The appellants raise the following grounds of appeal:

> (i) That the trial judge made overriding and palpable errors in the construction of the evidence which led her to erroneously conclude that the respondent's injuries would cause her to prematurely retire at the age of 60 and, had it not been for her injuries, the respondent would have worked to the age of 65;

(ii) That the judge made overriding and palpable errors in the construction of the actuarial evidence which led her to erroneously assess the respondent's future lost income to be $196,255;

(iii) That the judge erred in failing to consider whether or not a lump sum award for diminution of earning capacity would be more appropriate;

(iv) That the judge erred in failing to consider whether or not a contingency reduction ought to be made on the award for lost future income; and

(v) That the judge made overriding and palpable errors in her construction of the evidence regarding loss of domestic services and in arriving at an award of $20,000 under this head of damages.

Standard of Review

[11] The position of an appeal court considering an assessment of damages is that expressed by McIntyre, J. writing for the Supreme Court of Canada in **Woelk v. Halvorson,** [1980] 2 S.C.R. 430; 33 N.R. 232; 114 D.L.R. (3d) 385 (S.C.C.) at p. 388:

> It is well settled that a Court of Appeal should not alter a damage award made at trial merely because, on its view of the evidence, it would have come to a different conclusion. It is only where a Court of Appeal comes to the conclusion that there was no evidence upon which a trial Judge could have reached this conclusion, or where he proceeded upon a mistaken or wrong principle, or where the result reached at the trial was wholly erroneous, that a Court of Appeal is entitled to intervene. The well-known passage from the judgment of Viscount Simon in *Nance* v. *British Columbia Electric R. Co.*, [1951] 3 D.L.R. 705 at 713, [1951] A.C. 601 at p. 613, 2 W.W.R. (N.S.) 665, approved and applied in this Court in *Andrews et al.* v. *Grand & Toy Alberta Ltd. et al*. (1978), 83 D.L.R. (3d) 452, [1978] 2 S.C.R. 229, [1978] 1 W.W.R. 577 provides ample authority for this proposition.

Retirement Age

[12] The respondent had sought a sufficient award for loss of future earnings to allow retirement at age 55, the earliest date she could retire from the Bank with a

pension and full medical benefits. On the issue of her probable retirement age, the trial judge concluded:

> [44] I find and agree with the medical evidence that Ms. Miller suffers from chronic pain. I accept that this pain arose as a result of the injuries she received in the motor vehicle accident. I find that her injury and subsequent pain have caused her depression and anxiety. As a result of the injuries she has suffered, I find that on the balance of probabilities she will not be able to continue working to her planned retirement age of 65.
>
> [45] On the evidence before me I cannot conclude however that the probable age of this necessitated early retirement is age 55. This is the wish expressed by the plaintiff herself, who has in part, chosen this date as the earliest possible date in accordance with her financial planning. I cannot accept the evidence of Drs. Lantz and Nurse that by age 55 her condition will have so deteriorated by reason of osteoarthritis, to necessitate early retirement at that age. Neither physician has offered any further evidence beyond their opinion and speculation. However, I agree with them that the plaintiff's condition of chronic pain is wearing her down and taking its toll on her general health. I find that it is therefore unlikely on the balance of probabilities that she will be able to work past age 60.
>
> [46] . . . The average retirement age of Royal Bank employees is 58.2 years but I accept the plaintiff's evidence that she planned to work beyond average retirement age as she had in fact resumed her working career later in life.
>
> . . .
>
> [49] I accept Ms. Miller's evidence that she would have continued to work to age 65 and I find that on the balance of probabilities her condition of chronic pain is such that she will not likely be able to work beyond age 60. I have set the probable retirement age at 60 having regard to the plaintiff's own evidence and the supporting evidence of Dr. Lantz and Dr. Nurse as their evidence relates to her condition of chronic pain and the toll it is taking on her general health and her capacity to carry on with her working career. (Emphasis added)

[13] According to the respondent, before she was injured she had planned to retire at age 65. She testified that her responsibilities as a single parent to two children and her other circumstances had been such that she had only been able to start saving when she was in her 40's, and that as a banker she was well aware that she would be working until age 65 to have the retirement that she dreamed of.

[14] The appellants challenged the respondent's evidence of her planned age of retirement by pointing to a particular exchange during her cross-examination. In

my view, the question posed to the respondent was lengthy, convoluted, and confusing. Her answer "yes" could be read in different ways. The question was not part of any sequence that gave the answer a context that would aid in interpretation. Consequently that exchange cannot be relied upon to establish that the respondent had no plans to retire at any set age.

[15] I can see no basis for interfering with the judge's acceptance of the respondent's evidence on this point and her finding that the respondent planned to retire at age 65.

[16] The learned trial judge also determined that the respondent would have to retire prematurely at age 60. The appellants submit that the preponderance of the evidence leads to the conclusion that the injuries she suffered will not cause the respondent to retire early and that there was no medical evidence to support the finding of likely retirement at age 60. They point out that the respondent has held responsible positions at the Bank since the accident and continues to do so. They urge that the judge erred in failing to appreciate the evidence of Drs. Loane and Stanish.

[17] The respondent argues that every physician acknowledged that she suffered a whiplash injury causing chronic pain, stiffness, difficulty sleeping and fatigue. She also notes that Dr. Lantz had seen her numerous times and that each of Dr. Loane and Dr. Stanish had examined her only once.

[18] I am unable to accept the appellants' submission that since the trial judge rejected the evidence of Drs. Lantz and Nurse that the respondent would retire at age 55, it must follow that their opinions are equally useless in considering whether or not she would retire at age 60. The judge reviewed and summarized the medical evidence given by those physicians. She noted that while both diagnosed osteoarthritis there was no clinical evidence which showed changes other than those due to normal aging. She therefore considered their views that the respondent would have to retire at age 55 because of osteoarthritis as speculative. However those physicians also gave evidence about the chronic pain suffered by the respondent and its effect on her ability to continue working. In these circumstances the judge did not err by accepting that part of their evidence relating to chronic pain even though she rejected that which related to osteoarthritis.

[19] The fact that no one at trial gave evidence or tendered an expert report specifying that the respondent was likely to retire at age 60 did not, as the

appellants submit, preclude the trial judge from reaching that conclusion. It was clearly an issue requiring determination. As shown in the review which follows, there was evidence to support the judge's determination of age 60 as the respondent's likely retirement age.

[20] In her decision, the trial judge recounted the course of the respondent's medical treatment and summarized the evidence of medical experts and of the respondent. She noted that in the months after the April 1995 accident, Dr. Fraser observed a chronic pain syndrome developing in her patient. In January 1996 Dr. Fraser wrote that the respondent suffered chronic pain and that, in that doctor's opinion, she would always suffer from stiffness and chronic pain in her neck and trapezius muscles.

[21] Dr. Nurse wrote a lengthy report on November 25, 1997 following his examination of the respondent. The trial judge quoted his conclusions which read in part:

> This lady sustained a moderately severe accident on April 11, 1995. This could best be described as a myofascial pain syndrome leading to chronic pain syndrome. Her injuries were, for the most part, related to her C-spine and L-spine and are best described as acceleration-deceleration injury to her neck and hyperextension injury to her lumbar spine. She has been left with permanent recreational, social and occupational impairment that in my opinion can be classified as an ongoing disability.
>
> . . .
>
> My opinion therefore would be that this lady's symptomatology, findings and the length of time that she has had these symptoms would lead me to believe that she is unlikely to progress beyond her present status. She may in fact deteriorate as she develops post-menopausal syndrome with possible osteoporosis. Certainly she is a candidate for long term osteoarthritis of her cervical spine with increasing signs and symptoms into old age. She is able to function now by shear (sic) determination where lesser people would be accepting partial disability. (Emphasis added)

[22] Asked for his opinion, based on his 1997 findings, how long the respondent would be able to continue working, Dr. Nurse wrote on October 13, 1999:

> In terms of this lady's ability to continue remaining in the work place, it is my contention that she has remained in the work place at this point beyond what would normally be expected of the average individual because of her

> determination and her sense of dedication.
>
> Even with this determination, however, eventually time will take its toll. It is unlikely that this lady will be able to continue working much past the age of 55 and the chances of her continuing to age 60, in my opinion, would be slim to none.
>
> . . .
>
> She does have osteoarthritis and there is no question that osteoarthritis will continue to take an ongoing toll and eventually make it almost unbearable for her to remain in the work place.

[23] In a February 16, 1999 letter Dr. Lantz, the respondent's family physician on the Island, wrote that the respondent would not be able to maintain her present work past another five years. In court he explained why he felt she would be unable to continue full time employment past the age of 55:

> ...she's in such distress carrying out her work from day to day. She...she has to go home and rest and go to bed early. She doesn't...she doesn't sleep well when she tries to get rest. She's not rested when she wakes in the morning and this is wearing her down.

The trial judge summarized his evidence as follows:

> [27] Dr. Lantz's *vive* [sic] *voce* evidence is very sympathetic to Ms. Miller's position. He finds that she suffers from chronic pain syndrome, all of the pain being focussed [sic] in her neck, right shoulder and trapezius muscle. He also indicated that she suffered from some osteoarthritis of the degenerative variety that would make it very difficult for her to work past age 55. Unfortunately, Dr. Lantz did not provide any clinical evidence of such arthritic change and the Court is left with the report of x-rays taken in August 1995 which showed only minimal change due to arthritis. (Emphasis added)

[24] The trial judge heard that the respondent's condition had deteriorated over the year or two prior to trial. The respondent testified that her condition had become worse over the year before trial. She was more fatigued and in more pain, and had become depressed. She has had more difficulties sleeping and finding medication to help her cope. According to Dr. Lantz, since January 1999 the respondent has had more pain and discomfort and a worsening of her symptoms. He attributed this to the wear and tear of trying to maintain her life while enduring chronic pain syndrome.

[25] The judge accepted the evidence that the respondent's chronic pain resulted from injuries arising from the accident and that she was unlikely to work as planned to age 65. She correctly distinguished the evidence relating to osteoarthritis and chronic pain, discarded the estimates based on osteoarthritis for reasons she articulated, and focused on the effect her chronic pain had on the respondent. While neither the respondent nor any of the medical experts identified age 60 as the likely age of retirement, it was open to the judge on the evidence to make this determination.

[26] The appellants contend however that the learned trial judge erred by failing to meaningfully consider the evidence of Drs. Loane and Stanish. Dr. Loane did not testify. At trial the respondent introduced the report of this specialist in physical medicine dated August 20, 1996. The trial judge summarized it in her decision as follows:

> [19] Following her appointment with the doctor on July 25, 1996, Dr. Loane's correspondence of August 20, 1996 confirmed that sleep deprivation was an aggravating factor in her ongoing complaints of headaches, neck pain, decreased energy, problems with fatigue, poor memory and loss of concentration. He recommended a regime of self-directed light aerobic or conditioning programme in a community gym or health facility, a change in the sleep medications, Elavil to Flexeril, to counter memory problems and a return to recreational horseback riding. He noted that Ms. Miller would not be able to perform the actual physical work of mucking out stalls, carrying water, etc. He did not recommend any further investigations or clinical treatment at the time.

The report concluded:

> I imagine that she will continue to improve over the next year. If she is not improving as expected, I would be happy to see her again.

The appellants stress that Dr. Loane did not arrange to see the respondent again nor indicate that she would have to retire early and that, although her complaints continued, the respondent did not ask to see him again.

[27] Dr. Stanish, an orthopaedic surgeon, reviewed the respondent's medical history, examined her, and prepared a report dated December 5, 1998 which was tendered into evidence. The judge quoted the following extract which followed the heading "Comment and Summary" in his report:

> Objectively there is evidence of a moderate to severe soft tissue injury to the

> cervical spine, manifesting itself with distinct diminution in the range of motion, paravertebral spasm, coupled with the subjective complaints.
>
> Currently Ms. Miller continues to function in a most professional capacity and I do not believe that her injuries will curtail that pursuit to natural retirement.
>
> . . .
>
> Prior to the accident, Ms. Miller was functioning at a normal level as it relates to her spine function - that is now permanently disturbed.
>
> It is unlikely to worsen in the future and thus will not curtail her recreational activities, nor her very important task as a senior person in banking.

[28] Dr. Stanish gave evidence at trial. He testified that the respondent's disabilities were not progressive and had plateaued. Asked his views as to the theory that work is wearing the respondent out and eventually she will succumb and be unable to work, he responded that exercise and activity is a "must."

[29] The trial judge referred to Dr. Stanish's testimony in her decision. She stated:

> [37] Like most orthopaedic surgeons, Dr. Stanish subscribes to the view that once injured, the individual should exercise, recondition and then strengthen the injured muscles to restore them to good health. Although he does acknowledge that soft tissue injuries are never restored fully to the pre-injury state. But if the patient works through their initial pain and discomfort, they will in time recover to good health.
>
> [38] Dr. Stanish found Ms. Miller to be an honest and forthright person. Upon examination, he found her to have a limited range of motion in the injured area, due to spasmed muscle tissue. In conversation with her, he found that she understood the necessity to stay as physically fit as possible through exercise and the pursuit of her usual activities such as gardening and baking. He saw no progressive problem that would curtail her ability to carry on through to retirement age or beyond.

[30] Dr. Loane is a specialist in physical medicine and Dr. Stanish a highly qualified orthopaedic surgeon while Drs. Nurse and Lantz are general practitioners. The appellants submit that while the trial judge did not reject Dr. Loane's report or Dr. Stanish's testimony that injuries such as those suffered by the respondent would respond best to continued work and activity, she erred by failing to meaningfully consider that evidence.

[31] I respectfully disagree. I am not persuaded that the judge failed to consider evidence or misunderstood its significance in this case. A trial judge has the advantages that flow from hearing and seeing the witnesses first hand. Here among other witnesses the judge heard the respondent, her current physician Dr. Lantz, Dr. Nurse, and Dr. Stanish testify under direct and cross-examination. She considered Dr. Loane's 1996 report, Dr. Stanish's 1998 report, and Dr. Nurse's 1997 report and 1999 letter.

[32] The evidence discloses that Dr. Stanish found objective evidence of the respondent's injuries when he examined her in 1998. Among other things he also found that she had considerable paravertebral spasm. He recommended exercise and acknowledged that the respondent was committed to an active exercise program. Dr. Stanish also agreed that the subjective aspects of pain, as well as the objective findings, were important in determining whether a person is disabled.

[33] The weighing of evidence and the assessment of credibility in determining the existence and extent of an alleged injury or disability are matters for the trial judge. In the absence of obvious error, an appeal court should be reluctant to interfere. I can see no error of such magnitude that would justify intervention in the learned trial judge's determination after considering all the evidence that the respondent was likely to have to retire by age 60.

Assessment of Lost Future Income

[34] Having determined that the respondent would retire prematurely at age 60, the trial judge considered the actuarial evidence and awarded $196,255 for loss of future income based on that evidence. I agree with the appellants that she erred in her interpretation of the actuarial evidence which led to an erroneous assessment under this head of damages.

[35] The Actuarial Report dated July 15, 1999 prepared by Paul G. Conrad reads in part:

> ***Loss of Future Income***
>
> . . .
>
> A report prepared by Ms. Miller's physician indicates that she will not be able to work beyond age 55. During my conversation with Ms. Miller she agreed with her physician's diagnosis and said she did not believe she would be able to

continue working past age 55. Had the accident not occurred Ms. Miller expected to continue working until age 65.

The table that follows sets out the capitalized value of Ms. Miller's lost future employment income of $48,992 per annum commencing at age 55 and continuing until her retirement age shown in the table. The table also provides multipliers per $1 per annum of future income loss, should it be decided that Ms. Miller's annual loss of income is some amount other than $48,992.

Capitalized Value of $48,992 per annum Payable From Age 55 Until Retirement

Normal Retirement Age	***Value***	***Multiplier per $1***
60	$196,255	4.00586
61	231,203	4.71920
62	264,784	5.40464
63	297,024	6.06270
64	327,941	6.69376
65	357,549	7.29811

. . .

Other Contingencies

The calculations presented herein make allowance for the contingencies of mortality and disability. There are other contingencies, both positive and negative that are not dealt with directly in the calculations. For example:

* the possibility Ms. Miller would have retired earlier than age 60 had the accident not occurred;

* the possibility that Ms. Miller would have been promoted to a higher paying position;

> * the possibility that Ms. Miller can work beyond age 55.
>
> (Emphasis Added)

[36] In his testimony Mr. Conrad confirmed that the entire loss of future income section of his report was based on the assumption that the respondent would be forced to retire at age 55. He stated that he had made no calculations for scenarios where she might retire at any other age. The actuarial evidence was clearly premised on retirement at age 55.

[37] The trial judge concluded that the respondent would have to retire at age 60, five years later. She referred to the actuarial evidence and its basic assumption of retirement at age 55 in her decision:

> [42] Paul Conrad, an Actuary gave evidence of the capitalized value of the plaintiff's lost future income from age 55 until normal retirement age 60 through 65. To the extent that the accident causes Ms. Miller to retire earlier than her expected retirement age, his evidence also provided the capitalized value of lost pension income. ...

but in assessing damages for loss of future income stated:

> [50] I have considered the actuarial evidence. I have also considered the possible contingency of job loss or early retirement forced upon Ms. Miller by the Royal Bank in a climate of institutional downsizing. However, the latter would be speculative on my part. Accordingly, I assess the sum of $196,255.00 for loss of future income based on the actuarial evidence provided. I treat this loss of future income as the loss of a capital asset easily ascertained from the evidence before me. [Emphasis added]

[38] As shown on the table from the Actuarial Report, the amount awarded for this head of damages represented the present value of future lost income assuming early retirement at age 55 and normal retirement at age 60. However the judge had determined that the respondent would retire at 60 rather than at 55 as assumed by the actuary. Her failure to recognize that having rejected his underlying premise of retirement at age 55, the actuary's calculation of the present value of future loss was no longer reliable, constitutes a palpable and overriding error.

Contingency Deduction

[39] As indicated in § 12 of this decision, the learned trial judge found that as a result of her injuries on the balance of probabilities the respondent will not be able

to continue working to her planned retirement at age 65 and that on the balance of probabilities it is unlikely she will be able to work past age 60. She also found that on the balance of probabilities the respondent's condition of chronic pain was such that she will not likely be able to work beyond age 60. The judge then set the probable retirement age at 60 and assessed lost future income.

[40] In an assessment of damages for physical injury the plaintiff is not required to prove on a balance of probabilities that future loss will occur but only that there is a reasonable chance of such loss occurring: see **Schrump et al. v. Koot et al.** (1978), 82 D.L.R. (3d) 553 (Ont. C.A.) quoted with approval in **MacKay v. Rovers et al.** (1987), 79 N.S.R. (2d) 237 (S.C.A.D.) at § 6. In assessing damages as to what will happen in the future the court must estimate what are the chances that a particular thing will happen and reflect those chances, whether they are more or less than even, in the amount of the damages awarded: **Mallett v. McMonagle**, [1970] A.C. 166 at 176 (H.L.) quoted with approval in **Janiak v. Ippollito**, [1985] 1 S.C.R. at p. 146; 16 D.L.R. (4th) 1 at 19-20 (S.C.C.).

[41] The appellants submit that the judge's determination that premature retirement was proven "on the balance of probabilities" indicates that she misunderstood the law. They argue that she erred by failing to estimate the chance that the respondent would retire at 60 and to reflect that chance in her assessment of lost future income.

[42] The trial judge awarded damages for loss of future income based on her conclusion that the respondent would be forced to retire early. She described the likelihood of premature retirement in various ways, most often "on the balance of probabilities" but also on occasion "likely" and "probable retirement age." While such wording gives rise to the possibility that the judge incorrectly assumed that she had to weigh the evidence of future loss on the balance of probabilities, it is apparent from her decision that she did incorporate an estimation of the chance of early retirement at age 60 in assessing damages. As the appellants acknowledge, the contingencies of early mortality and disability were factored in by the judge's use of the Actuarial Report. As set out in § 50 of her decision quoted in § 37 above, the judge also specifically considered the negative contingencies of job loss or forced retirement by institutional downsizing before she determined the amount of the damage award. In doing so, she estimated the chances that early retirement would happen, took into account appropriate contingencies and reflected them in the award for loss of future income. I see no basis for interfering with this award.

Global Award for Diminished Earning Capacity

[43] The appellants submit that, if the learned trial judge found the respondent entitled to compensation for lost future income, then in the circumstances of this case she ought to have considered a global award for diminution of earning capacity. This, they maintain, would have been the proper approach in a chronic pain case where, the appellants say, the claim was speculative and remote and where there were contradictions in the evidence.

[44] The appellants rely upon **White v. Slawter** (1996), 149 N.S.R. (2d) 321 (C.A.). There the 27 year old plaintiff, who had been earning an average of $30,000 annually, was injured in an accident and was disabled with chronic pain. The trial judge who had not been provided with actuarial evidence awarded $550,000 for loss of earning capacity. In reducing the award to $120,000 Freeman, J.A. writing for this court stated at p. 352:

> It is common practice in assessing general damages for lost future income in chronic pain cases to make a global award without attempting to link it directly to an arithmetical calculation of annual income times the number of years until the conventional retirement age of sixty-five.

At p. 353, after noting that at the time of trial the plaintiff's income earning capacity had been substantially reduced and the assessment of the value of his chance of loss made particularly difficult, he continued:

> It appears necessary to resort to a global approach because there is little prospect of arriving at a realistic assessment by any meaningful arithmetical calculation. The cases referred to above suggest the options of going directly to an estimate of the final figure or to an estimate of the number of years of disability and applying a multiplier. Even though all relevant factors are considered, either approach yields a result that is arbitrary to a degree. This was implied in the judgment of Lord Simon in **Nance** when he suggested a need to adjust a result that was either inordinately high or inordinately low, and appears to have been accepted in the jurisprudence. [Emphasis Added]

[45] I am unable to agree with the appellants' submission that a global approach ought to have been taken in this case. **White v. Slawter**, supra does not establish that global awards are always preferable in chronic pain cases but rather only that

such an approach may be appropriate in certain circumstances which are not present here. In particular, it is noteworthy that in that case the court was unable to consider any actuarial figures in arriving at an appropriate award as no actuarial evidence had been presented.

[46] As indicated in **White v. Slawter**, supra the trial judge in this case had the option of estimating a lump sum amount or estimating the duration of the disability and applying an appropriate multiplier before considering whether the initial result needed adjustment. She established the period of loss as that from early retirement at age 60 to the original planned retirement age of 65 and was provided with actuarial evidence to assist with any arithmetic calculation she might choose to make in the course of assessing lost future income. In establishing the amount of an award of damages, a trial judge may consider expert evidence but is not constrained by it. In **Lewis v. Todd** (1980), 14 C.C.L.T. 294 (S.C.C.) Dickson, J. stated at p. 308:

> ... the award of damages is not simply an exercise in mathematics which a Judge indulges in, leading to a "correct" global figure. The evidence of actuaries and economists is of value in arriving at a fair and just result. That evidence is of increasing importance as the niggardly approach sometimes noted in the past is abandoned, and greater amounts are awarded, in my view properly, in cases of severe personal injury or death. If the Courts are to apply basic principles of the law of damages and seek to achieve a reasonable approximation to pecuniary restitutio in integrum expert assistance is vital. But the trial Judge, who is required to make the decision, must be accorded a large measure of freedom in dealing with the evidence presented by the experts. If the figures lead to an award which in all the circumstances seems to the Judge to be inordinately high it is his duty, as I conceive it, to adjust those figures downward; and in like manner to adjust them upward if they lead to what seems to be an unusually low award.

[47] In choosing to approach the assessment of loss of future income in the manner she did in the circumstances of this case, the learned trial judge did not err by proceeding upon a mistaken or wrong principle. While she adopted the actuarial figure of $196,255 for loss of future income, she compared this to a global award for loss of a capital asset and apparently found no inconsistency. Her error, as noted in § 38 of this decision, consisted only in adopting the actuarial figure for a presumed retirement age of 55 and applying it without further adjustment to a presumed retirement age of 60. It is not entirely clear what factors the actuary took into account in deriving an appropriate multiplier to capitalize Ms. Miller's then current income of $48,992 but it seems that a reasonably accurate

figure for loss of future income may be arrived at by subtracting the figure for a presumed retirement age of 60 ($196,255) from the figure for age 65 ($357,549) when Ms. Miller intended to retire. The difference of $161,294 should be further adjusted by deducting some $45,000 for retirement anticipated at age 60 rather than 55 taking into account the actuary's testimony at trial as to how the figures might change for retirement ages other than 55 and by adding approximately $20,000 for loss of pension income as set out in his report and evidence. This would result in a capitalized value of income, the standard which the trial judge had adopted as the appropriate measure of damages, of $136,294 rounded to $137,000. There was no other actuarial evidence before the trial judge, nor anything to suggest that this method would not yield a reasonably accurate result. I would allow the appeal and reduce the damages for loss of future income from $196,255 to $137,000.

Loss of Domestic Services

[48] The respondent claimed loss of housekeeping capacity. The judge's reasons for awarding $20,000 for past and future domestic services reads:

> [53] I cannot fully accept the plaintiff's claim for this loss, in the amount of $43,597.00. It represents the present value of an annual expenditure of $2,872.00 from now until the plaintiff reaches the age of 75. The actuarial figures relied upon assume housekeeping services of $1,560.00, outside contracting costs of $740.00 and the cost of replacing Ms. Miller's own weekly domestic activities at $11.00 per hour, in the sum of $572.00 annually. In four and one half years since the accident the plaintiff's own evidence is that she has expended $2,950.00 on domestic services.
>
> [54] It is not possible in this case to quantify the loss of domestic service with actuarial precision, given the evidence before me. The plaintiff would no doubt purchase some degree of service such as snow plowing, and heavy garden work. There is little evidence to support an actual annual expenditure for inside domestic service. I award the sum of $20,000.00 as I believe this sum best reflects the amount required to cover the annual expense of past and future domestic service.

[49] Loss of capacity to perform homemaking or housekeeping tasks is to be compensated separately whether or not replacement help has been paid in the past: **Carter v. Anderson** (1998), 168.N.S.R. (2d) 297 (C.A.). I am unable to agree with the appellants' submission that there was insufficient evidence upon which the trial judge could conclude that the respondent had suffered such a loss. The

respondent testified that she found housework very, very difficult. The judge heard that she cannot vacuum and has difficulty cleaning the floors and bathtub and that her daughter helps with various household tasks. Since the accident she can no longer do the grass cutting and snow removal and now pays for spring cleaning. Dr. Lantz testified that the respondent's constant pain, especially in the neck and shoulder areas, markedly restricts her activities of daily living.

[50] In her assessment of damages the learned trial judge noted weaknesses with the actuarial calculations submitted by the respondent and took a cautious approach in regard to the evidence for certain annual expenditures. Having reviewed the evidence presented to her and the submissions of the parties, I am not persuaded that in awarding and assessing damages for past as well as future loss of housekeeping capacity the judge proceeded upon a wrong principle or reached a result which was wholly erroneous.

Disposition

[51] The appeal should be allowed in part. I would reduce the award for lost future income to $137,000. In all other respects, the determinations and assessments made at trial should stand. Since success has been divided, I would direct that there be no costs on this appeal.

Oland, J.A.

Concurred in:

Freeman, J.A.

Flinn, J.A.