**SUPREME COURT OF NOVA SCOTIA**
**Citation:** *MacDonald v. MacVicar*, 2018 NSSC 271

**Date:** 20180907
**Docket:** SYD No. 413101
**Registry:** Sydney

**Between:**

Kim MacDonald

*Plaintiff*

v.

Ralph MacVicar

*Defendant*

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## LIBRARY HEADING

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| **Judge:** | The Honourable Justice Patrick J. Murray |
| **Heard:** | October 25, November 14, 15, 16, 17, 20, 21, 30, December 4 & 8, 2017, in Sydney, Nova Scotia |
| **Written Decision:** | September 7, 2018 |
| **Subject:** | Personal Injury, Motor vehicle accident. |
| **Issues:** | Liability, Causation, Damages.<br><br>Whether the Plaintiff is totally disabled?<br><br>Rule 55 medical experts testifying re: causation. |
| **Result:** | [1] Defendant driver found to be at fault for the accident, a rear end collision. Plaintiff's injuries found to be caused by the MVA. Plaintiff found to be totally disabled.<br>[2] Damages awarded for 1) Non-pecuniary (General damages); 2) Past lost income; 3) Loss of Valuable services; 4) Loss of future income; and 5) Pension loss.<br>[3] Decision includes a ruling that damages for future loss of income should be awarded on a gross and not net basis. Court considered s. 113BA(1) of Insurance Act of Nova |

Scotia and s. 2(1) of the Automobile Tort Recovery Limitation Regulations.

**Cases cited:** [4] ***Clements v. Clements***, 2012 SCC 32; ***Gillis v. Roy Stutley Plumbing and Heating Ltd***, 2012 NSSC 244; ***Athey v. Leonati***, [1996] 3 SCR 458; ***Bumstead v. Dufresne***, 2017 ABCA 122; ***Bezanson v. Sun Life Assurance Company***, 2015 NSSC 1; ***MacEachern v. Co-Operative Fire and Casualty Co***, (1986), 75 N.S.R. (2d) 271; ***Young v. Sutherland***, (2000), 188 N.S.R. (2d) 112; ***Dillon v. Kelly***, (1996) 150 N.S.R. 102; ***Smith v. Stubbert***, (1992), 117 NSR (2d) 118; ***Dominey v. Doucet***, 2013 NSSC 54; ***Marinelli v. Keigan***, (1999), 173 N.S.R. (2d) 56 (C.A.); ***Dillon***, ***White v. Slawter***, (1996), 149 N.S.R. (2d) 321 (C.A); ***Leddicote v. Nova Scotia (Attorney General)***, 2002 NSCA 47; ***Monk v. Duffy***, 2008 NSSC 359; ***Hollett v. Yeager***, 2014 NSSC 207; ***Conklin v. Smith***, [1978], 2 S.C.R. 1107; ***Graham v. Rourke***, (1990), 74 D.L.R. ($4^{th}$) 1 (Ont. C.A.); ***Gaudet v. Doucet***, (1991) 101 N.S.R. (2d) 309 (N.S.S.C.T.D.); ***Lewis v. Todd and McClure***, [1980] 2 S.C.R. 694; ***Kern v. Steele***, 2003 NSCA 147; ***Keizer v. Hanna and Buch***, [1978] 2 S.C.R. 342; ***Desrosiers v. MacPhail***, (1998), 170 N.S.R. (2d) 145 (C.A.); ***Tibbets v. Murphy***, 2015 NSSC 280; ***Newman (Guardian ad litem of) v. LaMarche***, (1994), 134 N.S.R. (2d) 127, [1994] N.S.J. No. 457; ***Briffett v. Gander and District Hospital***, (1996), 137 Nfld. and P.E.I.R. 271, [1996] N.J. No. 34 (Nfld. C.A.); ***Campbell-MacIsaac v. Deveaux***, 2004 NSCA 87; ***W.E.D. v. Rice***, [1999] NSJ No. 254; and ***Gibson v. Julian***, 2016 NSSC 15.

***THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION. QUOTES MUST BE FROM THE DECISION, NOT THIS LIBRARY SHEET.***

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| **Judge:** | The Honourable Justice Patrick J. Murray |
| **Heard:** | October 25, November 14, 15, 16, 17, 20, 21, 30, December 4 & 8, 2017, in Sydney, Nova Scotia |
| **Final Written Submissions:** | Defendant - January 31, 2018<br>Plaintiff - February 20, 2018<br>Defendant - March 8, 2018 |
| **Written Decision:** | September 7, 2018 |
| **Counsel:** | Hugh McLeod, for the Plaintiff, Kim MacDonald<br>Lisa Richards, for the Respondent, Ralph MacVicar |

**By the Court:**

## Introduction

[1] The Plaintiff, Kimberly MacDonald, (KMD), is a registered nurse. On September 4, 2012, she was involved in a motor vehicle accident in Glace Bay, NS. The vehicle in which she was a passenger, was hit from behind while stopped to make a left hand turn. The owner and driver of the second vehicle was Ralph MacVicar who is now deceased.

[2] At the time of the accident the Plaintiff was returning with her mother-in-law and her young son, Curtis, from an appointment at the Glace Bay General Hospital. Her husband's mother, Sarah MacDonald, was driving the Plaintiff's vehicle. Her son (age two at the time) was a passenger in the back seat (child's seat), located directly behind the Plaintiff, who was seated in the front passenger's seat. A fourth occupant, an elderly lady by the name of Margaret MacDonald, was a passenger in the back seat.

[3] Ms. MacDonald claims she was jolted twice when the collision took place. She further claims to have suffered serious injuries that have left her totally disabled. She says she is unable to return to the nursing profession, in which she had worked since 1999, a period of thirteen years.

[4] KMD said she felt excruciating pain in her neck. The report of the EHS responders is in evidence. The Plaintiff was removed from the vehicle and taken by ambulance to hospital. This took some time.

[5] Ms. MacDonald was wearing a seatbelt at the time of the collision. She said when her mother in law's vehicle was struck it had moved ahead about four to five feet on impact.

[6] KMD had not been working at the time of the accident due to a broken ankle which occurred in late 2010. There were complications with her recovery from the ankle injury, which required surgery. She had been off work as a result.

## Overview

[7] KMD maintains that since the accident she has suffered from, among other things, right side neck pain and upper limb pain. Further, that these symptoms warranted major surgery, a spinal fusion at the C 4-5, C 5-6, and C 6-7 levels.

[8] At issue in this case is causation. The Defendant maintains that KMD had ongoing neck problems prior to the accident. These pre-existing degenerative changes, says the Defendant, would have resulted in the difficulties being experienced by KMD in any event.

[9] Another major issue is whether Ms. MacDonald is totally disabled. She maintains that the motor vehicle accident changed her life, irrevocably, and that she is totally disabled.

[10] Three medical experts, specialists in their fields, have given opinion evidence. Two have been qualified as experts in the field of orthopaedic surgery. A third has been qualified as an expert in the field of neurology. The opinions differ as to whether the accident caused the injuries suffered by the Plaintiff.

[11] The Defendant strenuously maintains that KMD is not disabled. The Defendant says the medical evidence points to the accident worsening the symptoms that already existed, but is not the cause of her difficulties.

[12] The Defendant maintains that the injuries claimed are exaggerated and have not been proven, and that the Plaintiff is not totally disabled as claimed.

[13] In addition, there are differing versions of the accident as between the parties. The Defendant says the impact was minor, with little damage to the Plaintiff's vehicle. There was almost no damage to the Defendant's vehicle, only a scraped bumper. The Defendant refers to the EHS report and the photographs to support its position.

[14] Further, the Defendant says there was no violent jolt, and argues that this is critical in assessing the damages that are alleged to have arisen from the accident.

[15] Dr. Reardon and Dr. King are both of the opinion that Kim MacDonald's current medical difficulties were caused by the accident. Dr. David Alexander is of the opinion that Kim MacDonald's condition was not caused by the accident, but that the accident contributed to a worsening of her medical condition.

[16] The evidence of these medical experts is central to this case and will be reviewed in more detail.

[17] The Defendant says the opinions of the Plaintiff's experts are based on "self-reported" symptoms described by KMD, and not on objective evidence.

[18] Credibility, and in particular, the credibility of the Plaintiff is a key issue. The Defence maintains that KMD's evidence is neither credible nor reliable.

[19] KMD submits this procedure was recommended and supported by Dr. Malik and Dr. Christie, who in fact performed the extensive operation in May of 2015.

[20] KMD maintains that her physical abilities have been severely restricted. She claims what had once been an active life, participating in outdoor activities has been reduced to watching television, making a sandwich, and picking things off the floor. She is medicated throughout the day to deal with the pain. Marital relations have been affected. Her husband is left to perform the household tasks while operating his business.

[21] The damages claimed by KMD as a result of the accident are significant. The largest component of the damages claimed is for loss of income, both past and future. The Plaintiff had planned to retire at age 65.

[22] The Defendant maintains that there is a psychological component to Ms. MacDonald's condition. They maintain this has a negative impact on her recovery as does the fact that this is a "third party liability" situation.

[23] The experts are in agreement says the Defendant. If the information provided by KMD to the physicians is inaccurate, then their opinions as to her disability could change.

**Issues**

1. How did the accident happen?
2. Who is at fault for the accident ?
3. Did the motor vehicle accident cause Kim MacDonald's injuries?
4. Do those injuries/symptoms cause her to be totally disabled?
5. What is an appropriate measure of damages ?

**Facts – The Accident**

[24] KMD testified that her mother in law had driven her to a medical appointment at the Glace Bay General Hospital. When returning home they drove "up" Commercial Street in Glace Bay, toward the Town. Their vehicle was hit from behind by the Defendant's vehicle while waiting to make a left hand turn on Commercial Street. KMD testified she was looking left, in the direction they were heading, towards the A&W.

[25] KMD said the collision felt as though she had been "slammed into a fence and knocked flat ". Her immediate concern was for the welfare of her young son who was seated at the back. She had been wearing a seat belt. She said EHS had difficulty removing her. They placed her on a longboard before placing her in the ambulance.

[26] The Defendant driver was 81 at the time and has since died. His statement was admitted as a business record under the *Evidence Act.* (Exhibit 19). Phil Harris, an experienced insurance adjuster, had been asked to obtain Mr. MacVicar's account and did so two weeks after the accident, on September 18, 2012. Mr. Harris testified that the statement is in his handwriting, having written down what Mr. MacVicar told him. Mr. Harris had no personal knowledge but said it accurately reflected what Mr. MacVicar told him.

[27] The key elements of the statement are that Mr. MacVicar had left his home and was driving to the drug store in the Sterling Mall. He was seat belted. He described what happened:

> On Brookside Street, I just didn't notice the car ahead of me had stopped when I did realize the car ahead of me had come to a stop, I applied my brakes, but it was too late, and I hit the rear of the vehicle.

[28] Mr. MacVicar stated: "It was just a light hit. I don't believe I even pushed the car ahead". After the impact he spoke to the other driver, who was out of her car. They pulled off

the main street to a side street. They waited for the police to arrive and when they did, they "took our information".

[29] In his statement Mr. MacVicar said he "couldn't see any damage to the other vehicle" and said "there is no damage to mine". He said he was not injured. He concluded that his statement was true and accurate to the best of his knowledge.

[30] Mr. Harris testified there were no issues with Mr. MacVicar as far as comprehension or reading. He was satisfied that Mr. MacVicar knew the purpose of the statement and that it was customary in such circumstances.

[31] Sarah MacDonald also testified. She is 73 years old. She testified it was late lunch time, around 1:30 – 2:00 p.m. on September 4, when the accident occurred. She identified on a map (Google) the area where it happened, as circled and shown in blue on Exhibit 21. She confirmed her vehicle was struck from behind by Mr. MacVicar

[32] Sarah MacDonald testified that she crossed the bridge on South Street and proceeded on Commercial Street. She was stopped with her signal light on, waiting to turn left. There was oncoming traffic in the opposite lane and she was waiting for the traffic to clear before making the left hand turn. She was asked how long she had been waiting. She said:

> A minute to a minute and a half maybe. There was 4 or 5 (cars) anyway and they were coming down Commercial Street, I had to wait 'til they cleared.

[33] She went on:

> They got jolted, slammed from behind and I got caught in my seat belt, and then a second hit, just seconds later. And it was like, oh my god, we got hit, put the brakes on looked around, got out of the car and here was this Grand Marquis behind me. An old fella getting out of his car.

[34] She was asked whether there was a second hit. She said it was "a second or less than a second afterward, it was very quick, not as severe as the first one. But there was a second impact". She said it took five or six minutes to remove her daughter in law, stating that they had a "quite a job to manage that".

[35] On cross-examination Sarah MacDonald said she did not see the vehicle approaching from behind before impact. She was asked if she knew how fast it was going. She did not see it but assumed he was travelling at the same speed of every other car. It was suggested that she did not observe any damage to the Defendant's vehicle. She replied: "Actually, I did, there was a crumple and there was chips of paint or whatever".

[36] Sarah MacDonald's own vehicle was driven from the scene. She was asked about the damage to it and she confirmed the damage was to the back bumper. In direct she said the car "jumped" three to four feet ahead after the first impact. After the second one she put on the brakes and checked to see if everyone was "in one piece". She was asked if she took

measurements at the scene. She replied "of course not". She also said in cross there were no cars ahead of her and she did not hit anything herself.

[37] No expert evidence was called in relation to the accident itself. The photos of the MacVicar vehicle and the EHS report are in evidence as Exhibit 20 and Exhibit 15 at Tab 1.

[38] The photos of the MacVicar vehicle were taken two weeks after the accident. This affects the weight to be assigned to them. They show some scraping, but otherwise the bumper of the Defendant vehicle appears to be intact on that later date.

[39] The EHS report of the accident, which would have been prepared in close proximity to it, notes "rear damage to the rear of the vehicle" and also states "the front passenger was complaining of neck soreness". The report indicates the driver of the second vehicle "was good" and that "it was at a low speed". The EHS attendants did not testify.

[40] In his statement, Mr. MacVicar says the accident occurred on Brookside Street. The Police Incident Report indicates the accident took place on Commercial Street as does the Plaintiff's and the other evidence.

[41] Mr. MacVicar was unsure if he pushed the car ahead, "I don't believe", he said. "I applied the brakes but it was too late", he said. He also said he "didn't see any damage to the MacDonald vehicle", but there was "no damage to mine". The evidence confirmed that the repairs to the MacDonald vehicle totalled $1,401.97. He did not mention his rate of speed, other than saying it was a "light hit".

[42] I accept that the MacVicar statement was given to the best of his knowledge. There are some concerns with the timing of it, as it was taken two weeks after the accident. The gentleman could not be challenged on it in cross-examination.

[43] By comparison Sarah MacDonald was a confident witness and quite certain and sure of her evidence. She was stopped to make a left hand turn, with her signal light on. She was aware of the oncoming cars, her braking, the oncoming traffic, and what was happening in her vehicle before she was hit. She stated that KMD had been leaning forward and looking left.

[44] Sarah MacDonald described the hit as unexpected and spoke about the time taken to remove KMD, which is confirmed in the EHS report. She knew that the Defendant was elderly and she knew the make of his car, a Grand Marquis.

[45] In cross examination she gave sensible answers saying, for example, that "she did not measure" how far her vehicle moved or the speed of the other vehicle, saying, "I assumed the same rate as other vehicles".

[46] Sarah MacDonald was as an alert and prudent driver. She stated that her wheels pointed "the way you are supposed to". There was little hesitation in her evidence. She is KMD's mother-in-law, but I found she did not overstate. She described the hit as being "jolted", with the

second one being not as big an impact as the first. In cross-examination her evidence was basically unchanged.

[47] The basic facts are that the MacDonald vehicle was hit from behind by a large vehicle that was travelling at an unknown rate of speed. By the time the Defendant driver realized the MacDonald vehicle was stopped, it was too late.

[48] In the circumstance, I find little weight can be given to the MacVicar statement. On the other hand, I find the evidence of Sarah MacDonald to be credible. She said her vehicle was moved ahead several feet or more.

[49] The police report in evidence as Exhibit 25 contains details of the accident. It states "the driver of the second vehicle attempted to hit the brakes to come to a stop, however he hit the gas pedal". While I am cautious about placing weight on this report, that statement of "hitting the gas instead of the brakes" would explain the reason for the first hit being more severe than the second.

[50] As little weight is attributed to the Defendant's statement, this leaves the evidence of Sarah MacDonald (and Kim MacDonald) largely uncontradicted as to the number of impacts. The speed is unknown but the Defendant's vehicle was large and had been unable to stop. I am satisfied the vehicle likely moved ahead and that the collision was more than a light hit, especially the first impact. Although the damage estimate was not extensive, the MacDonald vehicle required a new bumper.

[51] In the circumstances, it is more likely than not that the MacDonald vehicle was struck twice by the Defendant vehicle.

[52] I am also satisfied that the Defendant was entirely at fault for the accident. As the driver of the Defendant's vehicle, Mr. MacVicar owed a duty of care to the Plaintiff, to operate his vehicle in a careful and prudent manner. He breached that standard of care.

**Events following the Accident**

[53] At the time of the accident the Plaintiff complained of soreness in her neck. This was stated in the EHS report, the police report, and by KMD herself.

[54] Following the accident Ms. MacDonald consulted with her family physician, Dr. Salma Haleem. The treatment records show that the Plaintiff was suffering from neck pain and arm weakness. She was referred to Dr. Malik, a neurosurgeon. Dr. Malik ordered an MRI which was completed in January of 2013. The MRI showed that Ms. MacDonald had multi level disc herniation.

[55] Dr. Malik met with KMD and discussed possible surgery with her. She was referred to Dr. Christie. He discussed the options available to her. Dr. Christie explained the limited prognosis for recovery, as well as the risks associated with the surgery being contemplated.

[56] Ultimately, Ms. MacDonald did have the operation performed in May, 2015. The surgery which was a tri-level spinal fusion involving cervical discs 4-5, 5-6, and 6-7 and the insertion of a plate.

[57] Three (3) medical experts were qualified in this matter to give opinion evidence as to the cause of the problems developed by KMD following the accident. A summary of their qualifications and opinions is as follows:

**Dr. Gerald Reardon – called by the Plaintiff**

[58] Pursuant to Civil Procedure Rule 55.09, Dr. Gerald Reardon was qualified as an expert in the field of orthopaedic surgery capable of giving opinion evidence in that field, including evidence as to how any injury that KMD suffered would create a disability, limitation, or lack of function for her.

[59] It is Dr. Gerald Reardon's opinion that but for the accident, the Plaintiff would not be experiencing the symptoms she now has, which are disabling. Prior to the accident she had "normal, mild disc degeneration, but nothing of the extent so as to require the kind of surgery recommended for her, a fusion at three levels of the cervical spine".

[60] There are areas of contention among the experts. For example, Dr. Reardon describes the degenerative changes as mild, while Dr. David Alexander is of the opinion that the degenerative changes were extensive and long-standing.

[61] A further issue is whether the pain suffered by Ms. MacDonald was moderate or severe prior to the accident, as well as the location of her pain. It is Dr. Reardon's view that following the accident the location of the pain changed to the right side.

**Dr. David King – called by the Plaintiff**

[62] Pursuant to Civil Procedure Rule 55.09, Dr. David King was qualified as an expert in the field of neurology capable of giving opinion evidence in that field, including evidence as to how any injury that KMD suffered would create a disability, limitation, or lack of function or chronic pain for the Plaintiff.

[63] Dr. David King is an experienced neurologist. In his thorough report he provided a pain diagram and extensive literature to support his conclusion that KMD's difficulties are not spine related. Instead, says Dr. King, the proper diagnosis is Thoracic Outlet Syndrome (TOS). He says that the diagnosis of TOS is consistent with her pain and other symptoms. Essentially, the pain is caused by stretching of the scalene muscles in the neck and shoulders extending to the occipital ridge at base of the skull.

[64] Dr. King's opinion is that the Plaintiff is totally disabled and that the accident of September 4, 2012, is the cause. According to him, TOS is a diagnosis often missed. Her condition is not advanced and therefore would not present as a classic case of TOS in terms of

her symptoms. He indicates that diagnosis would normally be made by a neurologist or thoracic surgeon, not by an orthopaedic specialist.

[65] Dr. King and Dr. Reardon, both state that Kim MacDonald is disabled.

**Dr. David Alexander – called by the Defendant**

[66] Pursuant to Civil Procedure Rule 55.09 Dr. David Alexander was qualified as an expert in orthopaedic surgery, specializing in spinal surgery, capable of giving opinion evidence on the Plaintiff's spinal health and the degree to which the Plaintiff's spinal health issues arose from her September 4, 2012, motor vehicle accident.

[67] Dr. David Alexander is an experienced orthopaedic surgeon with a specialty in spinal surgery. It is Dr. Alexander's opinion that the motor vehicle accident is not responsible for KMD's current condition, but did worsen her symptoms. The reason for his opinion is that she had pre-existing cervical spine issues that may have led to her developing further neck problems, resulting in the need for surgery to relieve those symptoms.

[68] Dr. Alexander believes there is a psychological component to the symptoms being experienced by the Plaintiff. He points out that this is a third party liability situation, which, he suggests, often impedes recovery.

[69] Dr. Alexander does not take serious issue with the opinion of Dr. Reardon, but acknowledges a difference of opinion.

[70] A key component of Dr. Alexander's report is his statement that the results shown on the MRI in January, 2013 would likely have been the same had the MRI been completed in June, 2012, when Ms. MacDonald was experiencing problems with her neck.

[71] There is also an issue with an x-ray completed on November 9, 2010, which, in Dr. Alexander's view, is indicative of pre-existing degenerative changes.

[72] These opinions will be further discussed and analyzed in this decision.

**Kimberly MacDonald**

[73] The Plaintiff is a registered nurse. She was 44 at the time of the accident, and is now 49. She was 23 when she received her Bachelor of Science, RN, in 1999. She is a mother of two children, a grown daughter and a young son. KMD was on leave from work at the time of the motor vehicle accident.

[74] KMD sustained a fall in November, 2010 on the front step of her home. The fall resulted in a broken ankle, which kept her off work for an extended period. The ankle did not heal well and she had issues with the medical treatment she received for the injury.

[75] Prior to this, Ms. MacDonald had been off on maternity leave. Her son Curtis was born on January 2, 2010. She left work in October, 2009 due to issues related to the pregnancy. In total she was off for almost three years at the time of the accident.

[76] Ms. MacDonald provided the Court with a work history, entitled "Explanations of Income", from 2002 to 2009, marked as Exhibit 18. In this she attempts to explain the various issues she has dealt with since becoming a nurse. These include being away from work because of raising a child, her mother's death, issues with her daughter, and with family members being ill.

[77] KMD had worked in various places, including early on in Winnipeg (2000-2002) and at hospitals in Baddeck and Inverness (2003 – 2004). She worked in Whycocomagh (2005) before moving to Dartmouth in 2006. She worked at the Dartmouth General Hospital for two years from 2006 to 2008.

[78] While working in Dartmouth the Plaintiff met William (Bill) MacDonald. In 2008 she moved back to Cape Breton and they were married. She was able to secure a job at the Cape Breton Regional Hospital in the Emergency Room.

[79] KMD explained that during these years she was called upon to deal with many issues, not the least of which was custody and access involving her daughter, who eventually went to live with her father in Kentville, NS.

[80] There were also financial issues, as she was struggling while attempting to obtain secure employment. At one point she had lost her car and applied for social assistance to get it back. She needed transportation for work, which at the time was in Baddeck, at the Victoria Memorial Hospital.

[81] The Defendant's view is that KMD's work history is quite sporadic. The Court must consider this in terms of her claim. Among the many issues in this "low impact accident" claim are whether the accident caused the injuries she claims, and whether those injuries have caused her to be totally disabled.

[82] KMD testified that as a nurse, her duties do not begin and end during the work day. She often helped a neighbour or family member. She said, "I had to live" during all those years, referring to her work history.

[83] KMD testified that since meeting and marrying Bill MacDonald her life has become much more organized and stable.

[84] The Plaintiff testified that her son, Curtis, who was two at the time, and her mother-in-law, Sarah MacDonald, both received soft tissue, whiplash type injuries. Her evidence was that Curtis also sustained a concussion. Another passenger, an elderly lady, Margaret MacDonald, was not injured.

[85] The Plaintiff testified as to her injuries:

> I had neck pain, I had headaches developing, excruciating to move around. I had to have a lot of help from my husband and my mother in law because I had a young son. It progressed to pain in my arm and numbness and tingling, loss of grip strength in my right arm.

[86] KMD testified that the pain was “right sided” after the accident. Most of the time her husband would help if she was having a “really bad day”. He runs a plumbing business and would often re-arrange or postpone jobs.

[87] KMD testified that since the accident there has never been day that she is pain free. For example, she said stairs must be taken very slowly. The up and down motion tends to worsen the neck pain and causes headaches. She testified she would have difficulty walking the two blocks from the courthouse to the YMCA. She cannot play ball or throw a frisbee with her son. She gets down because her son has lost an active parent, and her husband an active wife. She has found it very difficult.

[88] She said the pain at times would be so great that her husband would need to help her out of bed. He would get breakfast for her son. Her husband’s mother would be called upon to look after her son. She testified that following the accident her husband would assist her even with simple tasks, such as putting on her bra. She needed help with showers. There was so much pain she could not brush her hair to place it in a pony tail.

[89] A typical day following the accident involved rising at 7 or 8 a.m. The Plaintiff’s son was not in school then. Her husband would make her a cup of coffee and she would sit and drink it waiting for her medication to “kick in”. If it seemed like an “okay day” he would go off to work, having made lunch for their son. He would prepare everything for her for the day.

[90] After breakfast KMD would mostly watch TV, and at noon she would make herself toast and take more medication. Once that took effect she would attempt a few dishes. She could stand for about ten minutes at a time.

[91] Throughout the day KMD’s husband would check on her to see if she was okay or needed help. He would take the laundry downstairs. There was a table nearby. She would place the clothes in the top loading washer and then in the dryer. He would later bring them up the stairs.

[92] In the afternoon it was mostly TV. Her husband would make supper. Since the surgery she will occasionally make supper.

[93] After supper either, KMD or her husband would do the dishes and they would both put Curtis to bed. Bill MacDonald looked after bathing and getting him dressed.

[94] Dr. King’s report dated February 4, 2017, describes a typical day following the surgery. This is more current in terms of the Plaintiff’s progression and prognosis since the spinal fusion operation performed by Dr. Christie on May 12, 2015.

[95] In terms of the timeline KMD was discharged from the hospital on the day of the accident. The ER Department Record indicated a "spine/neck injury with pain occurring shortly after felt head snap". The pain was indicated to be "left side neck into shoulders". An x-ray of her neck taken on September 4, 2012, showed no evidence of a fracture or dislocation.

[96] I would note the EHS report on September 4, 2012 indicated that KMD reported neck soreness and stated as the "Working Diagnosis, sore neck - left side." She had been placed in a neck collar.

[97] Pain medication was prescribed, including Tylenol and Ibuprofen. It was recommended that Ms. MacDonald consult her family physician. She consulted with Dr. Haleem less than a week after the accident, on September 10.

[98] In cross-examination the Defendant suggested that "soreness in neck" is much different than "excruciating pain". The Defence suggested she was quickly assessed and seemed fine with the precautions taken (longboard).

[99] It is noted in the EHS report the paramedics said there were no injuries to other patients in the vehicle. KMD explained the pain she had was excruciating, especially when she tried to turn head.

[100] It was suggested to her the speed limit would have been 50 km per hour. She replied that she did not know. Dr. Haleem's clinical notes indicated her "pain and stiffness in the neck is still present".

[101] There was no radiation of the pain and no numbness or tingling of the arm. Under "Neurological Exam", it stated "normal" and indicated she was "stable". A referral was made for physiotherapy.

[102] The x-ray taken on September 4, 2012 is in evidence in Book 5 Tab 5 of the Plaintiff's book. That x-ray will be discussed in more detail, along with those of November 9, 2010, and June 25, 2012.

[103] In addition to the expert reports, there are the clinical notes of Dr. Malik and Dr. Christie. There was also a consultation on June 14, 2012, with Dr. Haleem in relation to "neck spasms", described in the clinical notes as "neck pain acute".

[104] KMD testified that in February, 2000 she was diagnosed with a right shoulder and neck strain while working at the Burn Unit in Winnipeg. She was lifting a patient and pulled a muscle which resulted in spasms.

[105] There is an entry in the MSI (Book 5 Tab 7) records showing "depressive disorder". Ms. MacDonald testified that as a result of the lifting incident she had been off for two months on Workman's Compensation. She freely admitted being upset and concerned. She was a single mother, away from home, and was worried about finances and her job. In her testimony KMD stated she had never been diagnosed or treated for a depressive disorder. There are some

additional entries in the MSI records related to anxiety. Ms. MacDonald was asked about these by her counsel. One was on February 3, 2011, when her ankle was not healing. She consulted Dr. Haleem. The other was March 31, 2015, in regard to her neck and "wanting it to be fixed basically". These were the financial stressors of being off work.

[106] In regard to another entry, KMD said a reference to marital problems in February, 2002 was in error. She testified that she never saw Dr. Patricia Menard, and that she was in fact, unmarried at the time. A letter to this effect is in evidence at Tab 9 of Book 5.

[107] The reference to "pain in limb" on August 29, 2011, was in relation to KMD's left ankle. She had been referred by Dr. Orrell to Dr. Collicutt. The entry of May 8, 2012, is when Dr. Glazebrook completed the surgery on her ankle.

[108] The evidence at trial includes a prescription note from Capital Health, dated October 19, 2012, stating that "Kimberly MacDonald may return to work on November 1, 2012". KMD gave evidence this was her clearance to return to work. It was signed by Dr. Glazebrook. He made no comment on the accident.

[109] In summary, the Plaintiff's evidence is that the pain she was experiencing from the accident was restricting many areas of her life. She was challenged on cross-examination in many areas, including the suggestion that she has made little attempt to return to work, and has participated in a number of activities that suggest that she is neither disabled or suffering from pain to the extent she claims. Examples are a trip to Montreal with her husband, a trip to PEI with her son and husband, and weekend visits to Ingonish. Ms. MacDonald's evidence is she is quite limited in what she can do. She says participation in such events is quite restricted. She often will just sit and watch.

[110] KMD agreed that at as of the six week report of Dr. Christie, she had seen some improvement, but said she had not been very active other than starting physio. She said "prior to that I wasn't very active at all", following the major surgery. She agreed she was encouraged to do some walking. Following the surgery she attempted to regularly walk to the end of her street and occasionally walk in the mall.

[111] Ms. MacDonald was challenged on other aspects of her evidence. It was suggested she began inquiring about CPP disability in June, 2013, before she even saw Dr. Christie. It was further suggested she was to undertake pool exercises three times per week as recommended in a physio report from September 2016. Her evidence was she attempted this for a time at a friend's pool, but had to stop due to her symptoms.

[112] There was some inconsistency about Dr. Shimone's recommendation to start the prescription "Topomax" to address her headaches. KMD's concern was that she was being followed for increased pressure in her eye. She had discussed this with the pharmacist when she picked up the prescription.

[113] None of these concerns in my view, seriously affected the credibility of Ms. MacDonald. There were a couple of instances, however, where I thought her credibility was compromised. In

cross-examination KMD stated she had been prescribed Dilaudid following the ankle surgery in May, 2012. There was no record of a prescription for this at that time. She was in fact prescribed Dilaudid on June 6, 2012. She was also correct in stating that she had been prescribed Tylenol 3 in June 2011 for her ankle. This is confirmed in Dr. Haleem's notes. She was quite possibly mistaken about the Dilaudid "post op" for her ankle.

[114] The other point was when KMD was cross-examined on her work history. She admitted that there has not been a year since 2006 that she has worked a full calendar year in a full-time position. This did not affect her credibility as much as it is simply a fact.

[115] Apart from these, there are numerous instances where Ms. MacDonald's evidence was credible. This includes the questioning related to the evidence of Dr. Malik and Dr. Christie.

[116] In terms of Dr. Malik's evidence, the thing that "hit home" with her was the not only the risks of surgery, but the risk associated with her present condition. She was pressed on cross-examination, that surgery was only an option but that it was not necessary, or even recommended. It was put to her:

> Q: Dr. Malik never told you, you needed to have surgery immediately on any kind of urgent basis, did he?

[117] Ms. MacDonald answered :

> A: I believe, as you heard him say yesterday, exactly what he said in his testimony later is what he conveyed to me, exactly what he said about, you could walk out the door, cause yes I was nervous about having surgery when he mentioned that and that's when he said about going out the door and slipping on the ice and being paralyzed and informing me that this was a huge, huge surgery, same as he did on the stand, saying that because of the involvement of my spinal cord that this was a very serious situation. That's what he informed me of.

[118] She testified when Dr. Malik said this, "that (it) sent a huge shockwave through me. I was petrified, I definitely didn't want to be paralyzed."

[119] In relation to Dr. Christie's evidence, KMD acknowledged that the prognosis for improvement was guarded and that the surgery may only provide moderate improvement. She acknowledged the option was hers whether to go ahead, knowing the possible benefits and the risks, either way:

> As an option, I don't believe it was presented as an op…the option was mine whether to go ahead with the surgery knowing that there was a limited chance of it improving.

[120] The Defence maintains that while Dr. Malik recommended conservative treatment, he did not place restrictions on KMD from any activities.

[121] The Defence has numerous issues with KMD's credibility. They say for example she knew it would be three to six months after the surgery before it would be determined if the operation was a success. It was then, says the Defendant, that the tremors emerged, indicating that she was not doing as well as before. She was questioned about this by the Defendant.

[122] It was also suggested to the Plaintiff that Dr. Christie placed few restrictions on her in his Discharge Report (Volume 15, Tab 2). She acknowledged that she was encouraged to walk but also knew she could not start physiotherapy until the initial six weeks were over. The restrictions placed on her were read into evidence by Defence counsel as follows:

> 1) Avoid lifting and she must limit to less than 10 pounds. She should avoid doing heavy work overhead. She should be encouraged to walk.

[123] The Plaintiff was also cross-examined in relation to the symptoms caused by the 2012 accident and on those she experienced prior to the accident:

> **MS. RICHARDS:** Sure no problem. So the symptoms you say that this accident has caused you, my understanding is it's a neck pain, correct?
> **A.** Correct.
> **Q.** Arm numbness and pain.
> **A.** Yes.
> **Q.** And headaches, correct?
> **A.** Correct.
> **Q.** And I believe you've mentioned dizziness at some point in time as well, correct?
> **A.** Yes.
> **Q.** Alright. And these are all areas of your body you've had complaints in at some time previous, correct?
> **A.** I also have tremors in my head and right arm.
> **Q.** Sure. The tremors started I believe around November 2015?
> **A.** Yes after the surgery yes.
> **Q.** Alright. So to get back, with the exception of the tremor, neck pain, arm numbness and pain, headaches, dizziness, you've had those kinds of things before this accident at some point or other, symptoms in those areas?
> **A.** I had symptoms similar to that with my arm injury in Winnipeg and I had symptoms in my shoulder relating to the time I was using crutches for my ankle.
> **Q.** Sure so you've had symptoms in your neck before and your arms correct?
> **A.** Um, to correlate them, it's not as simple as that.
> **Q.** It's just a simple question, whether or not you had symptoms in your neck and arms prior to the accident?
> **A.** I've had symptoms yes.

[124] KMD was also questioned about the November 9, 2010, x-ray as follows:

> **Q.** Alright and this would be an x-ray report dated November 9, 2010 and it looks like the two areas that were x-rayed were your left ankle and also your cervical spine which would be your neck. Do you recall getting your neck x-rayed after your fall?
> **A.** Well obviously that's what it says here, but it wouldn't be uncommon to do that because of a fall.
> **Q.** Sure they must have had some concern of your neck, I would suggest.
> **A.** As I said it is not uncommon falling down five steps to issue an x-ray of your neck as well.
> **Q.** Now your originally…
> **A.** If I could just add it's probably because I was complaining of back pain where my back had scraped the steps so they are going to x-ray the spine.
> **Q.** Okay they didn't x-ray your back as far as I can tell on that report though, they x-rayed your neck and your ankle.
> **A.** That might have included I don't know.
> **Q.** Okay it says cervical spine.
> **A.** Correct.

[125] Ms. MacDonald's position is that while there may have been some previous incidents, and health issues, none of those caused her to be disabled. Instead it was the 2012 motor vehicle accident as support by Dr. Reardon and Dr. King.

[126] I turn now to the medical evidence including the surgery by Dr. Christie.

**The Medical Evidence**

*Dr. Hatim G. Malik*

[127] Dr. Malik is an experienced neurosurgeon, who has practised in Sydney, NS for over forty years. Dr. Christie is a neurosurgeon who practices in Halifax.

[128] Both physicians testified at trial but not were not called as "Rule 55" experts. After much contest, counsel agreed on the portions of their reports that would be considered expert opinion. These were summarized in a letter to the Court dated November 9, 2017. Apart from that opinion evidence, it was agreed the physicians would testify as fact witnesses.

[129] Dr. Malik met with the Plaintiff on December 27, 2012, at the request of her family physician, Dr. Haleem. He reviewed with her the circumstances of the accident, that it was unexpected, that it severely jolted her, and that she felt excruciating pain. He reviewed KMD's complaints of pain in her neck, hi-temporal headaches, and tingling and numbness in the right upper limb. He noted that she moved her head and neck "gingerly".

[130] Dr. Malik summarized the x-ray report of the cervical spine completed on September 4, 2012, the accident date, giving the following opinion.

> The images of that study show narrowing of the disc space at the C6-7 level and there seems to be a tendency to reversal of the normal cervical lordosis at the C5-6 level.

[131] Dr. Malik arranged for an MRI study of KMD's cervical spine and lumbar spine to be completed. He advised that she should avoid hypertension and rotation of her head and neck, as well as bending and twisting her back. He recommended a graduated walking program, "keeping pain as her guide." The MRI was completed on January 28, 2013. Dr. Malik summarized the images in his letter of January 31, 2013. He offered the following opinion of the MRI.

> The images of that study show no significant abnormality in the lumbar spine. In the cervical spine there is reversal of the normal cervical lordosis. There is **a disc protrusion at the C6-7 level** with the impingement on the spinal cord flattening it on its ventral aspect with some impingement on the exiting nerve roots and significantly narrowing the cross sectional anteroposterior diameter of the spinal canal with no cerebrospinal fluid column around the spinal cord. There is a smaller **central disc herniation also at the C5-6 level as well as at the C4-5 level** indenting the ventral aspect of the spinal cord. The signal of the spinal cord cannot be clearly assessed due to movement artifact.

[132] Dr. Malik provided the following opinion to the Plaintiff:

> I discussed with her that the findings revealed on the MRI study of her cervical spine may be in keeping with some of her complaints. I discussed with her that while most individuals with disc protrusions do tend to settle with conservative management in six to twelve weeks, she appears to have **a significant problem at the lower three cervical segments including the C4-5, C5-6 and C6-7 levels, especially the latter.**

[133] Following the MRI, Dr. Malik advised KMD that surgical treatment could be considered if she failed to improve. They discussed the risks associated with the surgery as well as the expected results.

[134] Dr. Malik's evidence at trial essentially confirmed his written reports. In cross-examination it was suggested he did not advise the Plaintiff that she could not participate in "any kind of physio program or assessment". He stated that he is "the one who gives direction to the physiotherapist, not the other way around".

[135] It was also suggested that the surgery was not urgent. Dr. Malik stated he showed KMD the images, not at one level but several. He said she was nervous and that it is "only fair to give the patient a choice".

[136] Dr. Malik confirmed the risks associated with the 3.5 to 4 hour surgery, explaining there could be injury to the spinal cord leading to paralysis. Even without the surgery, he said there is a risk of a “slip in the bathroom” or “on ice” that could immediately cause paralysis.

*Dr. Sean Christie*

[137] On May 12, 2015 Dr. Christie performed a C 4-5, 5-6, 6-7 anterior cervical discectomy and fusion (ACDF). Dr. Reardon said this is a very big operation.

[138] Dr. Christie prepared several report letters. They are contained in Book 5 Tab 2. These pertain to visits with the Plaintiff before and after the surgery.

[139] Following his meeting with KMD on December 9, 2013 Dr. Christie provided the his opinion on the January, 2013 MRI and the prognosis for surgery:

> MRI of the cervical spine performed on January 28, 2013 showed mild spinal canal stenosis at the C4-5, C5-6, C6-7 levels, and no obvious signal abnormality in the cord.
>
> There might be a 70-80% chance of improvement in the arm symptoms, but only a 50-60% change of making any difference to the neck pain itself, and a much lower probability of having any effect on the headaches.
>
> We also discussed the risks of surgery, including worsening of the pain, damage to the nerves, failure of the bone graft to fuse, loss of cervical range of motion, and anesthetic risk.

[140] Dr. Christie performed the surgery on May 12, 2015. The Plaintiff’s prescribed medication on discharge included 1000 mg of Tylenol at bedtime and hydromorphone (Dilaudid), 2 – 4 mg, for post operative pain, as well as additional medication, Diphenhydramine, 50 mg, twice daily.

[141] A follow-up visit occurred on June 25, 2015, six weeks after the surgery. Dr. Christie provided the following opinion on a return to work by the Plaintiff.

> I think it is going to be a bit of time yet before we can contemplate her going back to work.

[142] There were three more visits, at the three months, six months, and one year after the surgery. Dr. Christie testified that it would normally be in the three to six month period that the degree of improvement and the general success of the operation could be determined. If there is no progress at that stage, then other alternatives or treatments are considered.

[143] Dr. Christie reported that on September 25, 2015, KMD was a little bit better than the previous visits but that her neck pain and headaches were starting to recur, but not as badly as

before. He noted he was pleased with the early progress in her neck pain, but this progress did not continue. After some early, he suggested she push things a bit more with physio over the next few months. He said this was standard advice given to 90% of his patients, not just the Plaintiff.

[144] On November 13, 2015, approximately six months following surgery, KMD reported that she was swallowing better, but her neck pain had returned. She was still getting headaches. She was tearful, as she had hoped the surgery would work for her.

[145] At this time KMD also reported tremors and numbness in her hands. Dr. Christie was not sure what to make of this. He recommended an x-ray and an MRI, and felt she might have to be seen by a neurologist.

[146] It depends on which path they are on whether a return to work is possible.

[147] The Plaintiff's final visit with Dr. Christie came after the one year mark on May 13, 2016. He noted she was still having neck pain. She was most bothered by the headaches, dizziness, and the new tremors.

**Causation – Did the MVA cause the Plaintiff's injuries?**

**Rule 55 Expert Testimony – Dr. Gerald Reardon**

[148] In ***Clements v. Clements***, 2012 SCC 32, the leading case on causation, Chief Justice McLachlin, for the majority, summarized the law:

> [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.

[149] All three experts in this case are extremely well qualified. Having previously given expert testimony on numerous occasions, they each undertook to provide objective testimony in order to assist the Court.

[150] The Plaintiff called Dr. Reardon, a very experienced orthopaedic surgeon. For six years he was Chief of Pediatrics at the Victoria General Hospital in Halifax, NS.

[151] Dr. Reardon examined KMD and provided a report dated June 27, 2016. He agreed that the patient's history is particularly important. He reviewed extensive documentation concerning her case. He also provided a rebuttal report dated October 12, 2017.

[152] In his report, Dr. Reardon noted that at the time of the collision, KMD was "leaning forward and looking to the side to see where they were going", and that following the collision, "she felt acute pain in her neck". He provided a summary of the procedures that followed:

> 1. She was examined by her personal physician, Dr. Salma Haleem in Sydney, a few days later. Dr. Haleem's chart suggests that the first consultation occurred on September 10, 2012. Dr. Haleem prescribed physiotherapy and asked Ms. MacDonald to return if there was any change in her symptoms.
>
> 2. Subsequently Ms. MacDonald's neck pain increased and she started to feel discomfort and paresthesia in her right arm. Over the next few weeks she developed similar findings in her left arm as well.
>
> 3. Because of the concerning symptoms Ms. MacDonald was referred to Dr. Malik, a Sydney Neurosurgeon, who examined her in December. He had a MRI performed. The MRI was performed on January 28, 2013. This revealed disc bulges at the c4-5, 5-6, and 6-7 levels. Dr. Malik was concerned and suggested that surgical intervention could be considered.
>
> 4. Because of this Ms. MacDonald was referred to Dr. Sean Christie, a Halifax Neurosurgeon. Dr. Christie examined Ms. MacDonald in December, 2013. Surgical intervention was discussed at this time and Ms. MacDonald went away to think about it.

[153] Dr. Reardon's report contains opinion with respect to all of medical documentation referred to in this case.

> 1. She has had numerous Diagnostic Imaging examinations. An x-ray of her cervical spine performed on November 09, 2010, is normal. A subsequent cervical spine x-ray performed in June, 2012, shows narrowing of C6-7 disc space.

> 2. An x-ray of her cervical spine performed on September 04, 2012, the day of the accident, also shows narrowing of the C6-7 disc space, an indication of prior degenerative change.
>
> 3. An MRI scan performed on January 28, 2013, shows disc bulging with some impingement on the spinal sac at three levels, C4-5, C5-6, and C6-7.

[154] Dr. Reardon also discussed the Emergency Department visits in June 2012:

> 1. This is a complicated case. It is clear that Ms. MacDonald had some ***mild difficulty*** with her neck prior to the accident. She presented with neck pain to the Emergency Department in June, 2012. This was three months prior to the accident in question. An x-ray showed some narrowing of the C6-7 disc space at that time.
>
> 2. Ms. MacDonald has a very significant problem with ongoing pain and neurological symptoms which ***have only been relieved in part*** by her major spinal operation. Her symptoms are certainly worse than they were prior to the accident. She had some mild pre-existing degenerative changes with symptoms, ***but it is unlikely that these mild changes would have resulted in a major issue***, such as developed following the accident.
>
> 3. Her present issue is, ***without a doubt,*** caused by the motor vehicle accident of September 04, 2012.

[155] Dr. Reardon concluded that the pre-existing degenerative changes would not have placed the Plaintiff in the position she now finds herself.

[156] Dr. Reardon was thoroughly cross-examined. He agreed with a number of suggestions by the Defendant's counsel. He agreed that a patient's psychological condition is an important factor in their recovery from injury, and that third party liability can negatively impact recovery, as can long absences from work.

[157] The Defendant submits that Dr. Reardon and Dr. King agreed that the radiologic findings on the MRI were not caused by the September 4, 2012 accident. In my respectful view, the evidence of Dr. Reardon does not support this argument. In his report dated October 12, 2017, Dr. Reardon clearly stated his view of Dr. Alexander's opinion that, had an MRI been done in June, 2012, the results would have been the same as the January 28, 2013, post-accident MRI.

> 1. Dr. Alexander suggested that if a MRI had been done back in June, 2012, the findings would be the same as reported in January, 2013.
>
> 2. Whether or not that would have been the case, I feel is a moot point. There is really no way of predicting with certainty that the degenerative changes would have been exactly the same had a MRI been done in June, 2012. The reasons it is

> a moot point is that the patient's symptoms were certainly not severe enough to warrant a MRI at that time. A MRI at that time may well have shown similar changes, but again the patient's symptoms were of such low magnitude that a MRI was not indicated.

[158] In cross-examination, Dr. Reardon was asked if the findings on the January, 2013 MRI were "necessarily surprising" given the findings on the June 25, 2012 x-ray. He replied "no", he would not be surprised but he maintained his opinion that there is really no way of predicting with certainty that it would have been the same. Not being surprised is very different than agreeing that the findings would have been the same.

[159] Similarly, the Defendant argues that Dr. Reardon and Dr. King agreed that strong narcotic medication, as prescribed to Ms. MacDonald in June, 2012, would typically only be prescribed for a patient suffering from severe pain. Dr. Reardon confirmed that Dilaudid is a narcotic and is "fairly potent". His evidence on this point is as follows:

> Q: Yeah Tab 4(a), alright and reading that paragraph at the top, this is a complicated case, it is clear that Ms. MacDonald had some mild difficulty with her neck prior to the accident. She presented with neck pain to the emergency department in June, 2012 this was three months prior to the accident in question. An x-ray showed some narrowing of the c 6-7 space at that time. And then a couple of, three more paragraphs down, it's indicated she had some mild pre-existing degenerative changes with symptoms but it is unlikely that these mild changes would have resulted in a major issue such as developed following the accident. So what I'd like to do is go back and look at Tab 3 starting with page 35.
> A: Okay.
> Q: Okay now this would be the ER report dated June 6, 2012 and in the type written portion at the top says, pain to neck/shoulder blade times two days no specific injury, fingers becoming numb, hand, left hand, recent ankle surgery mid May using crutches taking, and here's the part, taking Dilaudid, Tylenol 3 and muscle relaxants without relief. I know you characterized Ms. MacDonald's pain prior to the accident on numerous occasions I've lost count on how many times the term mild is used, but it's used a lot.
> A: Uh huh.
> Q: In your reports, and I guess my suggestion would be if someone's having a degree of pain that Dilaudid, Tylenol and muscle relaxants are not relieving that that would seem to be something more than, than mild pain. Would you agree with that?
> A: Yeah Dilaudid is certainly usually used for more significant pain than something that you would use Tylenol for.
> Q: Dilaudid is a narcotic correct?
> A: It is a narcotic.
> Q: And fairly, fairly potent.
> A: It is.

Q: Okay and if someone's having a degree of pain that is not relieved by Dilaudid or Tylenol 3 or muscle relaxants that's, that's something beyond mild pain, correct?
A: Yes.
Q: You certainly wouldn't prescribe Dilaudid to a patient who was reporting mild pain to you.
A: That's correct.

[160] In the context the pain Ms. MacDonald experienced in June, the following evidence of Dr. Reardon given in cross-examination is also relevant:

Q: Okay so my, I guess my suggestion would be Dr. Reardon, that we've got an emergency room report where the Plaintiff's reporting that Dilaudid, Tylenol 3, muscle relaxants are not relieving her, her pain that she's having in her neck and shoulder. We have subsequent ER reports the very next day where Dilaudid is actually prescribed. Then we have another visit to the family doctor complaining about the same problem on the 14th. And we also have the x-ray which, and I appreciate your point, but does not use the term mild, it used the term, the only term used is moderate***. So I suggest to you that the problems that she was having in June of 2012 were something more than mild. Taking all of that into account would you agree with that?***
A: So, the symptoms on… in mid June, you're asking me if they were perhaps something more than mild.
Q: My question yes, my question is based on the fact that she is in the ER twice…
A: Yeah.
Q: …reporting that Dilaudid and Tylenol 3 muscle relaxants are not relieving her symptoms, she's back the very next day…
A: Right.
Q: …receives a prescription for Dilaudid, she's back at her family doctor about 10 day or 9 or 10 days later complaining of the same issue and back for an x-ray on the 25th which shows moderate changes, ***I'm suggesting to you that that suggests something a little more than a mild pain issue…***
A: Yeah, so okay…
Q: …***that suggests something more significant.***
A: …***so I just don't want to take anything out of context here. What we're talking about here for the last twenty minutes is symptoms that occurred basically on one day or a couple of days prior to that.*** We're not talking about a long pre-existing problem with whatever mild, moderate or severe neck pain. We're not talking about neck pain at all. We're just talking about this one little out of context episode. Is this what we're dealing with here?
Q: Well I guess what I'm asking is not how long the symptoms had been around, ***but how mild or severe they were,*** my suggestion is these symptoms are something… ***that are being reported during this time frame appear to be something more than mild.***

A: ***Who cares.***
Q: I'm asking you… I do actually.
A: Okay.
Q: That that…
A: ***So on one day, so on one day she had some pain and was prescribed Dilaudid.***
Q: Uh huh.
A: As I recall I looked at the, the medication report somewhere in the medication and she was prescribed Dilaudid on this one occasion, I could be wrong there could be more, but I don't recall any Dilaudid prior to this one day and I don't recall any Dilaudid prescribed after that day until after the accident occurred.
Q: Sure.
A: So perhaps on that one day she is having pain. I think this all started with Dr. Alexander's description the connotation that I gleaned from Dr. Alexander's report he wasn't talking about one day, he doesn't say that specifically, he was talking about severe cervical spine pain, severe neck pain. ***I gather from his report that he meant it was going on for a period of time, not for one or two days.***
Q: Okay and Dr. Alexander will be here on a later date and I'm certain he'll be questioned on that. My only question to you would it appear that the pain she was experiencing at that time was something more than mild. That's the question.
A: ***Sure we can interpret it as that for that one day.***
Q: And if someone was experiencing pain to that degree that they were requiring narcotics, and sent for an x-ray etc, ***it wouldn't be that surprising to you that that pain might continue into the future regardless of the accident, wouldn't it. Not that shocking of a proposition?***
A: ***Well it may or it may not.*** We see many patients who present to an ER department one episode, one time on one day because they woke up with severe back pain or severe neck pain and they get prescribed analgesic to deal with that, ***it doesn't necessarily mean that the next day or the next week or the next month that they're going to present with similar pain. Is it possible? Sure. Anything is possible.*** [Emphasis added]

[161] It was submitted that Dr. Reardon was defensive and argumentative during his evidence at trial. I did not find that to be the case. Instead of being argumentative, Dr. Reardon showed confidence in his opinion, and was attempting to clarify his evidence. He was challenged by Defence counsel and stood up to the challenge.

[162] Dr. Reardon (asking for the Court's indulgence) testified it was "ludicrous" to discount the motor vehicle accident as playing any role in the Plaintiff's situation. In fairness, the Defence suggested that this is not what Dr. Alexander was saying. Dr. Reardon narrowed the issue considerably between the respective opinions, in an objective way, stating as follows:

> Thus to summarize Dr. Alexander and I hold different opinions as to the intensity of Ms. MacDonald's pre-accident neck pain. Dr. Alexander suggested it was severe but there's really no support in the documentation for this position. It is evident that Ms. MacDonald was complaining of some neck pain and did have some obvious degenerative changes in June of 2012. But again, nothing of the magnitude that it would, that would have led one to believe that major cervical spine surgery would be required within three years of this time frame.

[163] Dr. Reardon's final report dated October 26, 2017 stated simply:

> You have asked me if I feel that Ms. MacDonald's injuries would not have occurred but for the accident in question.
>
> It is my opinion ***definitely*** that Ms. MacDonald's injuries would not have occurred but for the accident of September 04, 2012.

**Dr. David Alexander**

[164] Dr. Alexander is an orthopaedic surgeon with forty years experience. He has specialized in spinal surgery. The Defendant submits this is relevant in assessing his evidence.

[165] Dr. Alexander completed an independent medical examination of the Plaintiff on January 30, 2017. Dr. Reardon had seen her on February 18, 2016. Dr. King met with KMD on January 30, 2017.

[166] Dr. Alexander's final report was generated following KMD's consultation with him on March 21, 2017. Like the other physicians, Dr. Alexander stated that his opinion met the obligations set out in Civil Procedure Rule 55.04. Following a *voir dire* the Court ruled that his report would be admitted.

[167] The crux of Dr. Alexander's opinion is that the motor vehicle accident is not the cause of Ms. MacDonald's neck pain and related injuries, including limb, mainly right arm, and headaches. He is also of the opinion that she is not totally disabled, as she claims. The primary reason for his opinion is that Ms. MacDonald had pre-existing pain and neck problems prior to the accident. He concluded that she may have eventually experienced these problems even if the accident had not occurred.

[168] Dr. Alexander was asked to what extent the September 4, 2012, motor vehicle accident caused or contributed to the Plaintiff's symptoms. He stated:

> It would be my opinion that if this person had the MRI of the cervical spine in June of 2012 at the time she had her plain film x-rays, the MRI would look the same as it did after the motor vehicle accident of September 2012. ***Therefore, I would say that the motor vehicle accident did not cause any of the disc issues on the MRI findings.***

[169] Dr. Alexander was also asked about the likelihood that the Plaintiff would have experienced these types of symptoms in the absence of the September, 2012 motor vehicle accident.

> In the absence of the motor vehicle accident, as stated above, ***it is still possible*** that this lady may have gone on to have incapacitating neck pain, and may very well have developed symptoms such that surgical intervention was offered.

[170] These answers were provided following the document review but prior to Dr. Alexander meeting with KMD. The main conclusion from his document review is that the Plaintiff "**had well established degenerative changes at the C 6-7 level requiring narcotic medication and required x-ray examinations prior to the accident".**

[171] In his final report dated March 21, 2017, Dr. Alexander referred again to previous x-ray reports:

> I have reviewed x-rays from the Cape Breton Regional Hospital which included the x-ray of the cervical spine of June 2012. The radiologist reported degenerative disease in the cervical spine with anterior osteophytes, and he indicated that the x-ray was not much different from a cervical spine x-ray of 2010.

[172] Dr. Alexander's key finding is that post accident MRI of January 28, 2013 would have shown similar results, if it had been completed before the accident in June, 2012.

[173] At trial Dr. Alexander testified that if an x-ray is normal the MRI will be normal and vice versa, such that if an x-ray is abnormal, the MRI will be abnormal. It was Dr. Alexander's view that the June 25, 2012 x-ray was abnormal and was an example of the "significant problems" the Plaintiff had with her neck prior to the motor vehicle accident. Dr. Alexander also points to the November 9, 2010, x-ray taken when the Plaintiff experienced her fall.

> I reviewed her x-ray file available on the hospital system. I reviewed an x-ray of the cervical spine which was done in November, 2010 which was approximately two years prior to her motor vehicle accident. The x-ray of the cervical spine showed loss of the normal cervical lordosis, ***and showed quite a significant degenerative disc disease in the lower cervical spine.*** I reviewed an MRI scan of the cervical spine done in January of 2013, which was approximately five months after the motor vehicle accident. It again showed the same findings of the previous injury x-ray in that there was loss of the normal cervical lordosis and evidence of changes in the disc with some bulging in the spinal cord.

[174] In short, Dr. Alexander did not consider this x-ray normal, stating it showed "quite significant degenerative disc disease". From all accounts, the radiologist described the results in his report as normal. The report reads as follows:

> Cervical Spine:
>
> Normal Bone Density. Normal Alignment. Vertebral body heights and disc spaces are maintained. No fracture. Posterior elements are intact. The prevertebral soft tissue spaces are within normal limits. No cervical rib. Normal neural foramina.

[175] I have difficulty with Dr. Alexander's evidence on this point. Dr. Reardon, like the radiologist, described the results of the November, 2010 x-ray as "normal". Yet, Dr. Alexander takes no serious issue with Dr. Reardon's report.

[176] In cross-examination, Dr. Alexander stated that he is aware of what the x- ray report says, but says he viewed the actual x-ray film. He has viewed thousands of reports and x-rays, he stated. The fact is, however, the x-ray itself is not in evidence. Nor was there an MRI in June, 2012, upon which Dr. Alexander bases his opinion. None was completed.

[177] A significant amount of the evidence at trial focused on the two emergency room visits by Ms. MacDonald on June 5 and June 6, 2012.

**Causation - Decision**

[178] The Plaintiff has the burden of proving, on a balance of probabilities that her injuries were caused by the motor vehicle accident.

[179] Two qualified experts have both said that the Plaintiff's injuries and her current medical condition, would not have occurred but for the motor vehicle accident. A third expert, Dr. Alexander, has said the motor vehicle accident has merely worsened her current symptoms.

[180] While he held a different opinion, Dr. Reardon took no issue with Dr. Alexander's competence or expertise. It was suggested by the Defendant that Dr. Alexander's expertise as a spinal surgeon places him in a better position to assess the Plaintiff.

[181] All three experts were qualified to give evidence on the injuries suffered by the Plaintiff in relation to the accident. The Court is not bound to accept any of these expert opinions. As with any witness the Court may accept all, part or none of the evidence of these experts. The areas of contention among the experts include whether the degenerative changes were mild or extensive prior to the accident, and whether the pain was moderate or severe. The location of the pain is also an important factor, before and after the accident.

[182] The Defendant has submitted the case of ***Gillis v. Roy Stutley Plumbing and Heating Ltd***, 2012 NSSC 244, in addressing causation. In ***Gillis*** the plaintiff claimed damages after a hot water heater fell on her in her home. She cited injuries to her head, neck, shoulder and upper and lower back, though the bulk of her claim was lower back related. The court concluded that her lower back injuries had been largely caused by an incident two years prior to the hot water tank matter. The remainder of her medical issues were found not to be related to the hot water heater incident.

[183] The Defendant submits that ***Gillis*** is a Nova Scotia decision applying ***Athey v. Leonati***, [1996] 3 SCR 458, when a plaintiff has a long complicated medical history. Its applicability in the present case is questionable given that the medical evidence focussed on a period three months prior to the accident. In any event, the issue of causation is very dependent upon the facts of the individual case.

[184] On the basis of all the evidence in this case, I have been persuaded that I should accept the medical opinion of Dr. Gerald Reardon and his conclusions.

[185] Regarding the Defendant's assertion that KMD had a pre-existing condition, the evidence focussed mostly on the pain she experienced in June, 2012 during ER visits of June 5 and 6, as well as an x-ray taken on June 25, 2012. Ms. MacDonald's evidence confirms that her complaint on June 5 and 6 was for back pain and shoulder pain that had spread to her neck. The reports themselves bear that out. The pain was "left scapula" and "left arm" on June 6. On June 5 the summary described neck pain, muscle strains, muscle relaxants, stating "dilaudid did not improve pack pain". The June 5 report also mentioned "sensation in C6-C7". There was some restriction of movement of the neck due to the pain. There was normal strength and normal reflexes. The diagnosis was "wry neck". The June 25 x-ray showed "some disc degeneration".

[186] Dr. King's report is instructive in several aspects. He points out that in medicine, not all findings are 100%. His finding very clearly was that the Plaintiff had "right arm dysfunction emanating in the lower neck". He described this as "a C-8, T-1 problem", stating those are "the two lowest nerve roots that pass through the thoracic outlet".

[187] Dr. Alexander's diagnosis is focussed on the Plaintiff's pre-existing condition. In cross-examination he defined "longstanding" as meaning a period of five to ten years.

[188] I concur with Dr. Reardon that the documentation does not support the proposition that the Plaintiff had a longstanding disc degenerative problem leading up to the accident. Even allowing that there was an issue of acute neck pain on June 14, 2012, the time frame is still three months prior to the accident, and nothing approaching five to ten years.

[189] The June 25, 2012, x-ray report, however states that the "appearance" of the cervical spine is "unchanged from the previous x-ray" done November, 2010. This supports Dr. Alexander's evidence that the 2010 x-ray was not normal.

[190] Dr. Reardon noted in his report that Dr. Malik was concerned. I find there is evidence that Dr. Malik was quite concerned with the MRI results. Dr. Malik stated that the January 28, 2013, MRI showed a problem at three levels.

[191] Dr. Alexander also made some valid findings supported by common sense. For example, he stated that in his experience, he has rarely seen this type of pain caused by the use of crutches. The Plaintiff had just started using crutches. Dr. Reardon accepted her explanation. In medicine things are not always 100% clear.

[192] In his report dated September 28, 2017, Dr. King stated that he did not disagree with Dr. Alexander's "radiologic point" that the motor vehicle was not responsible for the "MRI changes". Dr. King says the Plaintiff's pre-existing cervical spine disease does not preclude the accident as causing additional pathology. His opinion, however, is that that the cervical spine features are not the important feature in this case. Dr. Reardon believed that the spinal features were important and that it could not be said with any certainty that the changes would have been exactly the same had an MRI been done in June, 2012.

[193] When pressed in cross-examination about the longstanding, well-established disc disease, Dr. Alexander referred to the incident in Winnipeg in 2000. According to the evidence there were no incidents between 2000 and 2012 that point to neck difficulties, with the exception of an incident in 2003, for which the Plaintiff missed no time from work.

[194] As stated, the diagnosis on June 5, 2012 was "wry neck". Dr. Alexander discussed this diagnosis, explaining that it was pain coming from the neck. When Dr. Reardon discussed the diagnosis of wry neck he explained that it was a term used for a muscle issue.

[195] Dr. Reardon expressed his opinion in a very confident manner. Following a thorough cross examination, his evidence remained virtually intact. He explained the difference between chronic pain and chronic pain syndrome. He said the Plaintiff does not have chronic pain syndrome, because the source of her pain can be determined. There is an anatomical basis for her pain, he said. In the result both he and Dr. King agreed that the Plaintiff suffers from chronic pain.

[196] Returning to Dr. Alexander's opinion, I cannot accept his evidence that there is a strong psychological component involved in the presentation by the Plaintiff. The references in the MSI history were made based on his documentary review. When he did meet with her to examine her and discuss her case, she was quite tearful and crying. I referred earlier to her evidence on this point. She gave a credible explanation for her situation. In my view, it would not be unusual for someone in this situation to display some emotion.

[197] Dr. Reardon and Dr. King are from different fields of medicine. They agree that the September 4, 2012, accident caused the Plaintiff's injuries. I accept the opinion of Dr. Reardon on this issue, which is shared by Dr. King, albeit for different reasons.

[198] Dr. King's opinion is based on there being two collisions, the second occurring after the Plaintiff had "straightened". The evidence of Ms. MacDonald was that "there was something slammed into the back of us and I was jolted forward even further so that even though I was leaning a little bit forward I came very close to the dash". I am satisfied and find as a fact KMD was leaning forward and looking left and that there were two impacts. Whether KMD had straightened before the second one is less clear from the evidence.

[199] Dr. Reardon's evidence was most compelling and in particular the following opinion contained in his rebuttal report dated October 12, 2017:

> The degenerative findings at C6 – 7 evident on x-ray were mild. One absolutely could not extrapolate from the information available at that time, that Ms. MacDonald, had the accident not intervened, would have required surgery for her cervical spine degenerative changes.

[200] The Defendant has argued, citing ***Bumstead v. Dufresne***, 2017 ABCA 122, that the reports of Dr. Reardon and Dr. King have placed reliance on the self-reported and subjective evidence of the Plaintiff. Accordingly, they say this must affect the weight to be attributed. In ***Bumstead***, the court found that the Appeal by the Appellant was to a large extent a challenge to the fact and credibility findings of the trial judge. The trial judge found that the Appellant's evidence lacked credibility and therefore, the medical providers who relied on him.

[201] I have earlier referred to the evidence of Ms. MacDonald and found that except for a few instances her evidence was consistent. In short, I found her to be credible in reporting her symptoms.

[202] In terms of the medical evidence, Dr. Reardon explained the basis of his opinion, which he based on radiographical findings. There was an anatomical basis he said, for his opinion. His view was that there was no support in the documentation for the opinion of Dr. Alexander.

[203] Based on all of the evidence, I am satisfied that it is more likely than not that, but for the motor vehicle accident, the Plaintiff would not have suffered these injuries. Accordingly, for all of these reasons, I find and accept that causation is established. I turn next to discuss whether KMD is totally disabled.

**Is Plaintiff totally disabled?**

[204] The evidentiary burden is on the Plaintiff to prove on a balance of probabilities that she is totally and permanently disabled. The issue is, upon consideration of all the evidence, has KMD discharged that burden?

[205] The Plaintiff described the symptoms she experienced following the accident. She identified numbness and pain, headaches, dizziness, and tremors. The tremors started post-surgery in November, 2015. Included in these symptoms was neck pain. She said the pain was mostly right sided.

[206] Before the accident, KMD injured her right shoulder and arm while working in Winnipeg in 2000. After that there was no incident until the shoulder symptoms in June 2012, except in December, 2003, for which she missed no time.

[207] Dr. Alexander agreed on cross-examination that there had been a period of about twelve years without any neck or shoulder-related issues.

[208] It was suggested to KMD in cross-examination that she had neck and arm issues before the accident to which she replied, "It's not as simple as that, but yes there were some of the same symptoms".

[209] She testified she had headaches when she was 17 years old and they were an isolated incident. She acknowledged some dizziness just prior to the accident.

[210] Dr. Reardon described the operation performed by Dr. Christie to treat her post accident pain as a "big, big operation". He noted that Ms. MacDonald had complained of similar symptoms (neck pain, numbness and tingling in both upper limbs) when she was first examined by Dr. Christie, who ultimately performed a three level discectomy and fusion from C4-C7.

[211] The Plaintiff further testified as to her symptoms following the surgery and whether it helped to alleviate her neck and arm pain and related difficulties:

> Q: Okay. What is your condition now compared to what it was initially after the accident?
> A: It has improved some, not tremendously like I had expected. I know I wasn't given a very good prognosis from the beginning but I kind of truly believed that it would be improved. As far as the headaches go, before the surgery I woke up with them and I went to bed with them. Now it's, it's not like that, I still have them, not every single day do I wake up with them. They could be triggered from just getting out of bed in the morning, if I turn my neck a certain way, that's it, it starts and it's not, I guess I found ways to adapt more when I know I can predict things that will incur the pain and incur the headaches so that I will avoid doing those things. I can usually tell when its going to progress and get worse, so I'll either use the hot pack or the heating pad at home or the collar, things like that.

[212] The Plaintiff gave a further example of the difference in her condition before and after the surgery; in relation to climbing the stairs:

> A: Before the surgery it was really, really tough for me going up the stairs, it still is, but not as bad, it is just the motion like of the step and the up and down motion on my head and my neck that causes me pain, but after the accident, because I was in so much pain, she'd follow me up the stairs with her hand behind my back.

[213] All three medical experts agreed that Ms. MacDonald has chronic pain. "She certainly has chronic pain" testified Dr. Alexander who also said that the Plaintiff's pain was "made worse by the accident."

[214] Dr. King described the pain experienced by the Plaintiff as "a vicious cycle" caused by compression of the nerves in the scalene muscles, causing the muscles to tighten, putting further pressure on the nerves. At page 60 he provided a pain diagram and states her current status as having ongoing neck pain, a pain extending down her right arm to her hand and headaches recurring on a daily basis.

[215] Dr. King was quite specific in his opinion, that Ms. MacDonald's symptoms are disabling, primarily due to right arm dysfunction. He stated:

> I believe Ms. MacDonald is unable to return to work as a nurse because of right arm dysfunction.

[216] Dr. King acknowledged in his opinion that the Plaintiff may have "central pain sensitization" and complicating social factors given the length of time she has had her problem. Examples he cited were a sense of injustice and extended time out of the workforce.

[217] Dr. Alexander was specifically asked in cross examination whether there was literature to support his opinion on the MRI issue. He replied that the majority of his conclusions are based on his experience.

[218] Dr. Alexander was asked in cross-examination whether the November 9, 2010 report referred to "disc degeneration". He replied:

> There is no reference to disc degeneration in the report of 2010, that's correct.

[219] In addition, Dr. Alexander was asked if major surgery would have been warranted in June, 2012, to which he replied:

> There is no indication that surgery was a good idea for her in June of 2012.

[220] In discussing chronic pain, Dr. Reardon explained there was no disagreement between he and Dr. King that KMD had chronic pain. There is a difference he said, in that he does not believe she has "Chronic Pain Syndrome", a situation where there is no explanation for the pain.

[221] Unlike Dr. Alexander, Dr. Reardon (and Dr. King) stated that there is, in the Plaintiff's case, an explanation for her ongoing pain. He explained as follows:

> Q: Alright I'm just going to flip back to 4(b) your rebuttal report, and you're of the view that Ms. MacDonald suffers from… doesn't suffer from chronic pain syndrome is that correct?
> A: That's correct.
> Q: Alright and in that regard, you… I think you I think Dr. King thinks she has a degree of chronic pain correct so you two disagree on that point as well?
> A: Yeah well I would… you know… again with an understanding of what is meant by chronic pain. What I'm referring to there is chronic pain syndrome. She has chronic pain like anybody who has pain for three years has right.
> Q: Yeah.
> A: But that's not what we're referring to. We're referring to chronic pain syndrome. So chronic pain syndrome is… occurs in people who have pain that's difficult to explain why they have it. It's out of proportion to what you would expect based on all clinical findings, etc. I don't think that Ms. MacDonald has

chronic pain syndrome, because in my opinion I think she has a good reason to explain why she has pain. An anatomical reason to explain it. The average patient with chronic pain syndrome you don't really find much wrong with them to be truthful.
Q: And she has findings in her neck, correct? That's the objective sort of issues that you can see…
A: She has findings in her neck and…
Q: …is that what you're referring to?
A: …her upper limbs yeah.
Q: Okay.
Court: She has what, I'm sorry, in her neck?
Q: Findings.
A: Finding, clinical findings.
Q: Objective signs.
Court: Findings.
Q: Yes and for that reason…
A: Yeah.
Q: …you don't…
A: Yeah so I, I would not label Ms. MacDonald as being a chronic pain syndrome patient.
Q: Okay and just so we're clear you feel the issue is with the neck and the disc in the neck as opposed to Dr. Reardon because of the different explanation than a muscular aspect.
A: Dr. King?
Q: Dr. King sorry.
A: Yes.

[222] In terms of her employment and her ability to return to work, Dr. Reardon's report states:

> Employment wise, she has always worked in nursing. She was not working at the time of the September 04, 2012, accident. She had gone off work in November, 2010, because of her ankle injury and had not returned to work at the time of the accident in question. Ms. MacDonald states that she was just about ready to go back to work and was awaiting an appointment with Dr. Glazebrook when the accident intervened.

[223] Dr. Reardon provided additional opinions on Ms. MacDonald's disability, as well as her prospects for a return to work in the future as follows:

> She has always worked in nursing, but it is my opinion that it is not likely that she will be able to return to her nursing profession in the future. She now receives Canada Pension Plan disability benefits in view of her total disability.
>
> The prognosis for the future is poor. It is highly unlikely that she will be able to return to the workforce.

> As a result of the accident in question, Ms. MacDonald has serious and permanent impairment that is substantially interfering with her ability to perform her usual daily activities and the duties of her regular employment. It is more likely than not that Ms. MacDonald will not be able to return to work in the future.

[224] Dr. Reardon stated that KMD "has chronic pain like anybody who has pain for three years straight".

[225] The Defendant argues that the Plaintiff's claim of total disability is based entirely on self-reported symptomology. According to Dr. Reardon, who remained consistent throughout his testimony, the physical findings in the neck supported his opinion that the Plaintiff's claim can be explained. There was therefore, an etiology for the pain being experienced by this patient.

[226] Dr. Reardon referred not only to Dr. Christie recommending a complicated and complex surgery, but also to Dr. Malik. Dr. Malik found that the Plaintiff had "a significant problem at the lower three level cervical segments, including the C 4-5, C 5-6 and C 6-7 levels, especially the latter".

[227] Dr. Malik further cautioned the Plaintiff against the overuse of pain medications such as Tylenol 3, stating "it is not candy", or words to that effect.

[228] In their submission, the Defendant argues that KMD's functional abilities are not known, as no Functional Capacity Evaluation (FCE) was ever completed.

[229] The Plaintiff began physiotherapy treatment almost immediately after the accident. Mr. Aaron Feit of Feit Physiotherapy gave evidence at the trial.

[230] In November, 2012, Mr. Feit attempted a "functional abilities evaluation" on KMD to determine such things as lifting capacity. He wanted to obtain a "snapshot" of a person's physical abilities. In Mr. Feit's view, KMD would need to undergo a work conditioning program at a later stage. This would help to build stamina and endurance.

[231] Mr. Feit testified it was his decision to discontinue the evaluation in November, 2012 due to the Plaintiff experiencing dizziness. Mr. Feit was never told it should not be completed but he was not prepared to risk it, given that she would be seeing a neurosurgeon. He recognized the importance of this.

[232] Up to that point there had been moderate improvements to her complaints in relation to her cervical spine, thoracic spine, lumbar spine and occipital headaches. She did continue to report intermittent pain however, in the cervical and mid scapular regions, as well as the lumbar sacral region.

[233] The Defendant suggested that KMD was likely deconditioned given her time away from the workforce. Mr. Feit agreed with that assessment.

[234] In his report Mr. Feit asked Dr. Haleem for an indication of restrictions or limitations (contraindications) that the Plaintiff could not perform. On the form Dr. Haleem indicated there were "none", but requested Mr. Feit "contact her to discuss further". No discussion took place.

[235] In spite of the issues she was experiencing Ms. MacDonald resumed and continued with physio for a period of three years or more into 2015, averaging about an hour a week.

[236] With respect to the surgery in 2015, Dr. Alexander testified:

> A: The operation is done for the relief of pain so if the patient or if a person is having mild symptoms of pain no surgery is going to be offered. If the patient is complaining of a lot of pain then some people believe surgery is worth trying in that situation.

[237] The evidence at trial showed that the spinal fusion surgery was for the most part, unsuccessful. Dr. Alexander was questioned in direct examination on the results of the surgery, and the Plaintiff's condition.

> Q: Did she give any indication, indication of what if any changes in her condition occurred after her surgery?
> A: Ms. MacDonald told me that after her operation many of the symptoms had improved however the improvement period was not long and when I saw her she said that her headaches were very slightly improved. She said that her neck pain was still very severe with very minimal improvement and that her arm pain had improved very minimally.

[238] The crux of the Defendant's position is that KMD should return to the workforce and seek psychological help. The Defendant, for example, submits, contrary to her evidence, that she is able to sit for long periods of time.

[239] Further, the Defendant says she has failed to seek modified work arrangements or continue with physiotherapy. Further, that she has engaged in family activities which she prefers, while stating she is unable to perform other activities.

[240] There is little medical evidence on whether KMD is unable to sit for long periods of time, but she gave evidence in this regard. Without detailing that evidence at this time, KMD was cross examined vigorously about not returning to work, not contacting her employer, and telling her doctor she could not return to work. She was asked why she could not apply for or attempt to do other jobs in the nursing profession.

[241] KMD's testimony was given in a clear and reasonable manner. She contacted her employer and was advised she would need to be cleared for a return. She testified that most jobs do not allow you to work a day and then be off to recover. Within the nursing profession there are no jobs that do not have a requirement to use both hands, to stand, and to reach overhead. She acknowledged that some have lesser duties, such as a clinical setting or nursing home manager. It has been a mutual discussion with her doctors, she said. In short, she says her

symptoms are preventing her from returning to work. The pain is not under control, and she did not see how she could manage it. Her doctors agree. I found KMD's evidence to be credible in this regard.

[242] Another main argument put forth by the Defence is that the medical evidence is based on the self-reporting of the Plaintiff, Ms. MacDonald.

[243] All of these medical professionals have a wealth of experience in examining patients and taking their personal histories. They are experienced in the questioning of patients and assessing the patient's responses. They review the notes, charts, and x-rays, and medical tests as well as the information given by the patient. There is much responsibility at stake. Determining for example, whether to recommend a three level spinal fusion is part of the physician's role. Dr. Reardon gave evidence in this important role as follows:

> Q: Okay, page 7 the prognosis for the future is poor, it is highly unlikely she will be able to return to the work force, again this is based on the same information we discussed previously, your examination and your conversations with Ms. MacDonald in her… in your office?
> A: Sure, it's a culmination, this, this sentence, this sentence is my opinion that is formatted on the basis of history, physical exam, 35 years of experience having dealt with the same type of patient hundreds, at least, hundreds and hundreds and hundreds of times and again, as I say that's what I do, I determine if a patient goes back to work, not functional capacity evaluation, I determine when a patient goes back to work after I do an operation. I'm used to it, that's my job. And in my opinion, that's my opinion, just my opinion that's all.

[244] In regard to the functional capacity evaluation and whether it is necessary Dr. Reardon gave the following evidence at trial:

> Q: So we've established you didn't have the benefit of any functional capacity evaluation or anything like that, so this would be based on what Ms. Ms. MacDonald was telling you?
> A: So the history is part of it, the physical examination is part of it, and perhaps the biggest part of it is… on top off history and physical examination, radiographic examination, that when you have pretty significant experience in seeing multitudes of similar patients you develop some expertise in determining whether they're going to go back to work.

[245] Dr. Reardon expressed a further opinion with respect to functional capacity evaluations.

> …Functional capacity evaluation you ask a patient to lift 10 lbs and they say oh I can't do it, well how do you know they can't do it. Its based so much on the subjectivity of the patient, so we do not put, I don't put much importance to a functional capacity evaluation. I don't need a functional capacity evaluation for

> me to arrive at an opinion as to whether a patient can go back to work or not. That's what I do for a living, I do it every day twenty times.

[246] The Defendant submits Dr. Reardon's report lacked a detailed discussion and did not consider for example, the Plaintiff's job experience within the nursing profession, the types of placements within the nursing profession, and the job demands at her particular work place. Dr. Reardon stated that he had a "pretty good idea" of what working in the nursing profession entails. He acknowledged that his report did not contain a detailed discussion of the Plaintiff's history in nursing. He noted however and felt it was important to state that "she was awarded CPP disability benefits and as I'm positive that you know you only get CPP disability benefits if you can't work". This was also contained in his written report. Dr. Reardon indicated CPP is a large program and a good program and patients are only eligible for total CPP disability if they cannot return to work because of their medical condition or injury. If a person is able to perform less demanding work then they would not qualify for CPP, he stated.

[247] Dr. King was also questioned by the Defence in cross examination on whether the Plaintiff could return to normal activities. Dr. King pointed out "if you don't solve the underlying problem, she can't return to normal activities". Dr. King was questioned on his finding that the Plaintiff had a class three continuous impairment and that he did not review a job description and did not review the type of job assessment or anything of that nature. Dr. King's evidence in response was, "but there were physical findings". Dr. King continued:

> We are talking about an impairment, this is something we can measure. For example, numbness on examination as opposed to example, headaches and neck pains. Objective evidence of the right arm dysfunction because it can be measured and it was measured and it resulted in physical findings.

[248] Dr. King was challenged on there being no contraindication that the Plaintiff could not engage in an exercise program. He was asked if there was anything to prevent her from attempting an exercise program. Dr. King stated, "normally you would treat the underlying problem first". It would be "problematic for her", he said, "I think she could do some passive things".

[249] Dr. King agreed with the Defendant that third party liability can be detrimental to recovery, as can prolonged time out of the workforce.

[250] In terms of the law and the finding with respect to KMD's disability, the Defendant in its post trial brief stated that the Court should be guided by the comments of Boudreau, J. in ***Bezanson v. Sun Life Assurance Company***, 2015 NSSC 1.

> 154. Pain is a subjective experience. We cannot be in the body of the Plaintiff to experience what she does. Even if we could, would we experience it in the same way? However, a disability assessment requires a measure of objectivity. The Court must be able to correlate her description of the pain, with her objective abilities, and her medical diagnosis.

[251] I note that Dr. Alexander's recommendation that the Plaintiff return to normal activities (Question#5 ) was made following a document review in his letter of February 16, 2017, and before he saw her.

[252] Dr. Alexander further pointed out that results of a cervical fusion are "often disappointing" and in the situation here was "very disappointing indeed".

[253] I have reviewed and read ***Bezanson***, which states the Court should base its findings on objective evidence and not the subjective complaints of a Plaintiff.

[254] In the present case three experienced physicians have all indicated that the Plaintiff suffers from chronic pain and that the surgery intended to relieve that pain for all intents and purposes, was unsuccessful. This was not unexpected.

[255] I have discussed and referred to objective findings in the evidence of Dr. Reardon and Dr. King. Both are of the opinion that not only did the motor vehicle accident caused the injuries suffered but that those injuries have left KMD with a serious and permanent impairment that is substantially interfering with her ability to perform her usual daily activities and duties of her employment.

[256] In terms of the caselaw and what constitutes a total disability, I find that Rogers J. described the relevant inquiry in ***MacEachern v. Co-Operative Fire and Casualty Co***, (1986), 75 N.S.R. (2d) 271, and affirmed at (1978), 79 NSR (2d) 127:

> 63. When we apply the principles enunciated in the foregoing authorities, then, we must determine whether Sharon MacEachern was, because of her debilitating pain, (acknowledged by all of the medical experts) <u>substantially</u> unable to perform her own or any other occupation for an income and with a status which bears some reasonable relationship to the job she was performing as a clerk/stenographer at the Credit Union.

[257] For the foregoing reasons, I am satisfied the Plaintiff has met the evidentiary burden upon her to prove on a balance of probabilities that she is totally and permanently disabled. Upon consideration of all of the evidence I am satisfied, on a balance of probabilities, that the Plaintiff, because of debilitating pain, is substantially unable to perform her own or any other occupation for an income and with a status which bears some reasonable relationship to the job she was performing as a registered nurse.

[258] For the above reasons, I am also satisfied that the Plaintiff has met the burden upon her that her impairment is permanent and is supported by the objective findings of Dr. Reardon, Dr. King and also Dr. Malik.

**Damages**

[259] In terms of the general principle for recovery of damages, in ***Young v. Sutherland***, (2000), 188 N.S.R. (2d) 112, Scanlan, J., as he then was, stated at paragraph 12:

> It is a fundamental principle of tort law that an injured person should be compensated for the full amount of his/her loss, but no more…

**Factual Findings**

[260] I have accepted Dr. Reardon's opinion that the "major issue" that KMD developed following the accident was a direct result of the accident. As he said, the accident caused the majority of her complaints, including right-sided neck pain and right-sided limb pain, totally different from those present in June, 2012 and shown by the radiographic medical evidence. These earlier findings did not suggest she would ever need surgery.

[261] The Defendant has argued that Dr. Reardon did not disagree with the opinion of Dr. Alexander that the Plaintiff may well have gone on to develop further neck problems, in any event. In fact, Dr. Reardon was asked if he would be "surprised" if the Plaintiff had developed further problems, to which he replied "no". That did not change his opinion that it is unlikely she would have had these issues but for the accident. In his report Dr. Reardon explained this distinction. He was asked if it was "possible" and he said "sure, anything is possible", referring to whether she would have gone on to develop a major issue.

[262] Dr. Alexander took little issue with Dr. Reardon's report, except that they disagreed on the magnitude of the pre-existing pain and the Plaintiff's condition pre-accident.

[263] Dr. King also agreed with Dr. Reardon. Their disagreement was only as to the source of the pain. Dr. King identified an area lower in the cervical spine.

[264] Dr. King stated that KMD's preceding neck problems have nothing to do with her current presentation, because he believed her problems are not spine related. Dr. King gave credible evidence, even if he differs from the other experts.

[265] According to the pre-trial brief the Defendant maintains that any continuing disability with respect to employment is minimally related to the accident and that the Plaintiff's failure to return to the workplace arises from some continuation of (a) pre-existing conditions; (b) her unwillingness to aid in her own recovery; and (c) her psychological symptomology, wherein she had convinced herself of her total disability.

[266] I concur with Dr. Reardon (and Dr. King) that the Plaintiff is totally disabled. In assessing damages, I must consider whether her inability to work at all is due to symptoms unrelated to the accident.

[267] I have already addressed the issues of causation and have found in favour of the Plaintiff, and the degree of disability suffered as a result of the accident, namely total disability.

**Mitigation**

[268] A Plaintiff's unwillingness to aid in her own recovery goes to the issue of mitigation. Was the Plaintiff less than an active participant in her own recovery? I find the evidence for the

claim that the Plaintiff contributed to her outcome by failing to actively support any treatment programs recommended to her to be almost non-existent. (See ***Hollett v Yeagher***, 2014 NSSC 207)

[269] Dr. King only touched on the possibility that Ms. MacDonald's symptoms were psychosomatic, referring to pain sensitization and third party liability as "potentially" impeding recovery.

[270] The Defendant's assertion mainly comes from Dr. Alexander. On the issue of psychological symptomology and Ms. MacDonald convincing herself, Dr. Alexander was qualified as an expert in "spinal health and the degree to which the Plaintiff's spinal health issues arose from the September 4, 2012 accident." There was no expert evidence given in respect to the psychological health of the Plaintiff. The explanations she offered for the few references to anxiety and depression are essentially uncontradicted.

[271] That said, I think the concerns expressed by the Defendant regarding the Plaintiff's sporadic work history and lack of "firm figures" in terms of her employment history have some merit.

[272] There is also the issue the Plaintiff's broken ankle, which resulted in her being off for an extended period of time prior to the accident. This, and the fact of her being "deconditioned" in terms of her ability to return must be addressed as part of the damages assessment.

[273] Pain and the subjectivity of pain was discussed in some detail by Boudreau J. in ***Bezanson***. It may be purely subjective or related to a presently, identifiable physical source or injury. In ***Marinelli,*** Moir, J. stated (referring to ***Dillon v. Kelly***, (1996) 150 N.S.R. 102) that chronic pain can be debilitating. In this case the evidence is that the multi-level surgery did not alleviate the pain.

[274] Dr. Malik, in giving factual evidence confirmed that KMD reported pain in her neck and arms. He was asked in cross-examination:

> Q: Okay, you didn't give her any advice…
> A: There was therapy advice… (page 5)
> Q: Okay you didn't tell her she couldn't participate in any kind of physio… or assessment?
> A: I am the one who gives direction to the physio therapist, not the other way around.

[275] I find from the opinion evidence of Dr. Malik (and Dr. Christie), that there is an objective basis for the pain and physical limitations being experienced by KMD. On June 25, 2015 Dr. Christie stated, "I think it is going to be a bit of time yet before we can contemplate her going back to work".

[276] Dr. Alexander says there is no medical basis or explanation for her current presentation, even though he agrees Ms. MacDonald has chronic pain. I reject his evidence that there is no explanation for the chronic pain.

[277] I find there are physical manifestations, in the case of Ms. MacDonald that account for the full extent of her ongoing disability. I have found as a fact that the operation was not successful in relieving her chronic pain.

[278] While the structural formation of the surgery may be sound, the plate in her neck and the manufactured discs resulting from the surgery are evidence in themselves of the severe problems she has experienced subsequent to the accident. I turn now to discuss the specific heads of damage.

**General Damages – Non-Pecuniary Loss**

[279] In accepting that KMD was an outgoing and active woman prior to the motor vehicle accident, it reasonably follows that her quality of life has been reduced by the accident. Add a young, growing child to that equation and loss of enjoyment as a parent can affect a person's emotional state and overall well being.

[280] As stated by Boudreau, J. in ***Bezanson***, pain and suffering is something which cannot always be measured, as was affirmed in the evidence of Dr. King. The evidence of KMD is that she hardly experiences a day which is "pain free".

[281] The Defendant is entirely correct that all injuries must be ***causally*** connected to the accident and those injuries must account for the Plaintiff's disability. From a physical perspective there is the evidence of Dr. Reardon and Dr. King identifying physical impairments, namely right-sided neck and right upper limb function (Dr. Reardon) and right-sided arm dysfunction (Dr. King).

[282] This is not to discount the occipital headaches and neck pain leading both physicians to diagnose the Plaintiff with chronic pain which has been explained earlier in some detail. The fact that pain is more subjective is not a reason for excluding compensation for it. The compensation, however, must be in the range suggested for that type of injury. If this were merely a soft tissue injury which did not resolve in the expected time, then the range in ***Smith v. Stubbert***, (1992), 117 NSR (2d) 118, would be applicable.

[283] The Defendant argues that the Plaintiff's pain is not exclusive to the accident because Ms. MacDonald was experiencing pain prior to the accident, as evidenced by the pre-accident medical history, primarily occurring in June, 2012. Dr. Reardon and Dr. King both stated that degenerative disc disease is very common in the general population and did not cause the significant impairment being experienced by the Plaintiff in her current status and did not result in her present situation. In their view, her present situation was caused by the trauma resulting from the motor vehicle accident of September 4, 2012. I accept their evidence.

[284] I have found the expert evidence to the contrary of Dr. Alexander, while credible in some ways, does not alter my view that the Plaintiff has met the burden upon her of establishing that her injuries, and the pain and suffering which resulted, are attributable only to the accident.

[285] The Plaintiff seeks general damages (non-pecuniary) in the amount of $100,000., on the basis that she has debilitating chronic pain which renders her permanently disabled, and as a result the range of general damages is above those set out in ***Smith v. Stubbert***.

[286] The Defendant submitted that the ***Smith v. Stubbert*** range would be appropriate for non-pecuniary damages in the Plaintiff's case. The Defendant submitted that $50,000. in general damages would adequately compensate the Plaintiff for the pain and suffering she experiences as a result of the accident, which the Defendant said made her symptoms worse and exacerbated them. The Court has made its finding on causation and accepted the medical evidence submitted by the Plaintiff that her injuries were caused by the accident.

[287] This case is unlike the case of ***Dominey v. Doucet***, 2013 NSSC 54, in which there had been pre-existing symptoms and issues extending over a three year period on a consistent basis. Further, this case is also unlike ***Bezanson***, in which the evidence was quite clear that the Plaintiff was able to perform vigorous activity, contrary to what she claimed at trial, with respect to her own limitations and self-reported restrictions.

[288] In this case, I am satisfied that the range of damages awarded in ***Smith*** would not adequately compensate Ms. MacDonald because her injuries and symptoms are more than "persistently troubling but not totally disabling"( para.33).

[289] This is not a case where a soft tissue whiplash injury did not heal within an expected time. In this case the Plaintiff had major surgery in an attempt to alleviate her neck pain and other symptoms. Had the surgery been successful as hoped then the amount of pain and suffering she experiences would likely be substantially less.

[290] The fact is the surgery did not provide the relief sought. Even though the results were not unexpected, the Plaintiff continues to experience pain, which is severe at times, and debilitating so as severely restrict her activities.

[291] The Defendant argues that the Plaintiff has been able to travel to Montreal, to PEI and to the cottage in Ingonish. This, they say, suggests she is not experiencing the type of chronic pain which she claims.

[292] Similarly, a Facebook post showing the Plaintiff sitting in front of a birthday cake where she claims to have made the icing, is not the type of evidence that satisfies me that the Plaintiff can lead an active and pain free life, or that her chronic pain is less debilitating than she reports.

[293] I am satisfied that the Plaintiff takes medication to cope daily and relies upon the assistance of her husband to perform the normal activities of daily life, including the raising of their son. She testified that she is able to sit and stand only for limited periods, and, while she may be present, she now takes a passive role in these activities. She was cross-examined on this

evidence. I accept her evidence because it is consistent with the medical evidence that I have accepted, and also because I have found her to be credible.

[294] On this basis, I conclude that the ***Smith v. Stubbert*** range for non-pecuniary damages is not applicable to Ms. MacDonald's claim because the collision burdened her with disabilities which have precluded employment and substantially curtailed other aspects of her life.

[295] In determining her compensation for pain and suffering, I have reviewed ***Marinelli v. Keigan***, (1999), 173 N.S.R. (2d) 56 (C.A.), decision as well as others such as ***Dillon***, ***White v. Slawter***, (1996), 149 N.S.R. (2d) 321 (C.A.), and ***Smith***. I conclude that an appropriate award for non-pecuniary damages to be $75,000.

**Loss of Past Income**

[296] Having found that Ms. MacDonald has been totally disabled since the collision, she is entitled to recover in damages her lost income plus interest, less Section "B" payments.

[297] The lost income period between the time of the accident and November 14, 2017, the beginning of the trial, is just over five years. Together with pre-judgment interest, and adjusted for inflation this amount has been calculated by the actuary, in her report.

[298] While I question some aspects of the report of Kelley McKeating, I accept her evidence that the past income calculation is "straightforward". The net past lost earnings calculated as shown in Schedule IV of her report of June 28, 2017 is $146,054. plus interest, for a total of $148,451.

[299] I reject the Defendant's submission that the calculable period for past lost income should be from the date of the accident to the date when her Section "B" benefits were terminated, December 16, 2013. This would be approximately fifty nine weeks, instead of sixty two months (September 4, 2012 to November 14, 2017).

[300] The Section "B" benefits received by Ms. MacDonald were terminated on the basis of an opinion letter dated December 3, 2013 from Dr. Edwin Koshi. Dr. Koshi's letter was admitted as part of the record, but he did not testify and therefore was not cross-examined on its contents. As a result, I am not attributing any weight to that opinion.

[301] I have referred to some difficulty with the actuarial evidence. For example, the Plaintiff never made an income approaching the yearly income of $78,954. attributed to her in the first report, dated March 29, 2017.

[302] The closest the Plaintiff came to earning such an income was in 2009, when her gross salary was $66,241. I am cognizant the figure used is what she would have been entitled to under the collective agreement.

[303] In this case the real difficulty with calculating loss of income, is the lack of history of full time work, prior to KMD's pregnancy leave in December, 2009.

[304] Ms. McKeating's opinion is that it would be unusual to calculate the Plaintiff's salary based on a lengthier period of six to ten years, dating back to 2002. She would not have placed any weight on that earnings history as compared to the more recent earnings and employment record. I accept her evidence on this point.

[305] For the purpose of determining past lost income, I am satisfied that the total disability assumption has been proven, and that taking the average of KMD's salary for the three years prior, from 2007 – 2009 is reasonable and the best available option, as she was employed full time during those years.

[306] Based on the evidence of George MacPhail, manager of workforce operations for the Nova Scotia Health Authority, the Plaintiff could have earned up to $75,000, as a full-time nurse, with the potential for overtime. The fact is, however, she never reached that level of earnings prior to the accident.

[307] The Defendant takes serious issue with the Plaintiff's claim for damages, because of the level of uncertainty regarding her career path at the time of and prior to the motor vehicle accident. It is true that while Dr. Glazebrook provided a note stating she could return to work, a return date had not been established.

[308] The Defendant submits that it is far from certain that Ms. MacDonald would have returned to work full time, with regular hours, and without absences. In addition, the defendant argues the Plaintiff's work history is "spotty", and that the broken ankle only complicates matters. There are not "firm figures", says the Defendant, with which to properly measure damages in the Plaintiff's particular case.

[309] On the whole there are considerations in the evidence that are relevant to the ultimate award. An example is the Plaintiff's evidence that her life generally, and her work in particular, became much more stable after she met and married her husband, William MacDonald.

[310] I have weighed and considered these submissions in determining an appropriate award for past loss of income. In particular, I have considered whether the damage award should be discounted for such factors, as has been done in other cases of this kind.

[311] Provisionally, the award for net past loss of income should be set at $148,451. I will later determine whether this and other amounts should be adjusted.

**Loss of Valuable Services**

[312] The Plaintiff is claiming the sum of $104,476. under the actuarial approach for loss of valuable services. This amount is based on the requirement for two hours per day at a minimum wage. When the Plaintiff's son reaches the age of eighteen, the assistance calculated drops to one hour a day, and that continues until the Plaintiff reaches the age of 75.

[313] The Defendant submits that the actuarial approach is not appropriate under this head of damage, because there is no evidence supporting the specific requirement of two hours per day.

The Defendant states for example, that the Plaintiff's son takes the bus to school, and that there is conflicting evidence regarding the amount of narcotic medication being taken by the Plaintiff and how often Sarah MacDonald is required to be at the home to assist.

[314] The leading case in Nova Scotia regarding loss of valuable services has been ***Leddicote v. Nova Scotia (Attorney General)***, 2002 NSCA 47. In ***Monk v. Duffy***, 2008 NSSC 359, LeBlanc, J, provided a summary of the law in this regard.

> 63. In addition to general damages, the plaintiff seeks damages on account of the impact of her injuries upon her domestic activities. She claims for loss of valuable services in accordance with *Carter v. Anderson*, [1998] N.S.J. No. 183 (C.A.). She seeks $10,000.00 under this head of damages. In order to establish such a claim, the plaintiff "must offer evidence capable of persuading the trier of fact that the claimant has suffered a direct economic loss, in that his or her ability or capacity to perform pre-accident duties and functions around the home has been impaired. Only upon proper proof that this capital asset, that is the person's physical capacity to perform such functions, has been diminished will damages be awarded to compensate for such impairment": *Leddicote v. Nova Scotia (Attorney General)*, 2002 NSCA 47; [2002] N.S.J. No. 160, at para. 50. The defendant says there is no indication that the plaintiff is required to pay for housekeeping work that she would otherwise be doing herself but for the accident, nor is there persuasive evidence that she will be unable to perform these tasks in the future.

[315] Unlike the case of ***Hollett v. Yeager***, 2014 NSSC 207, where Coady, J. found the evidence, vague and unconvincing, I found the evidence of the Plaintiff, her husband, Bill MacDonald, and her mother-in-law to be convincing, in terms of the Plaintiff's lack of ability to perform many duties at home.

[316] The Plaintiff provided evidence that following the accident her husband provided personal care to her, including personal hygiene and dressing. Following the accident, she would not take a shower without him being home, but she will now venture to take a shower when he is not home. She further testified that her mother-in-law has been needed and has been a great source of help, assisting her with the stairs, driving and physical work in the house. She is unable to drive a car.

[317] KMD's evidence that her ability to perform personal care, child care and household activities has been affected by the accident, is largely uncontradicted and, is more-or-less confirmed by the evidence of her husband and her mother in law.

[318] The evidence of William MacDonald is relevant to this claim. He testified he has had to step in to complete many of the things that his wife had previously been able to do. This includes meal preparation and caring for their young son.

[319] Gardening in particular, is something which the Plaintiff previously did a lot of, but is no longer able to do, along with such things as assisting with snow removal.

[320] Apart from the hourly estimate in the actuary report the Plaintiff did not provide evidence of direct economic loss. This is not determinative of whether compensation ought to be paid for lost housekeeping services.

[321] This type of claim is difficult to measure with precision. The assumptions of the actuary were given to her. I agree with the Defendant that there is no specific evidence of economic loss equating to two hours per day, and then one hour per day, but I concur with the Plaintiff that there is a basis for an award.

[322] The Court recognizes that Sarah MacDonald and Bill MacDonald are not independent witnesses. I am satisfied in any event, that their evidence both in direct and cross-examination, was consistent.

[323] The Plaintiff argues the amount sought is conservative, and that the Plaintiff could have claimed compensation for three to four hours per day.

[324] On the whole of the evidence, I find the amount of $10,000 suggested by the Defendant as compensation under this head of damage to be wholly inadequate.

[325] I find it is reasonable to compensate the Plaintiff, on the basis of one hour per day until her son reaches the age of eighteen, and thereafter one hour per day until she reaches the age of 75. This results in an approximate amount of $67,349. I conclude that a fair and adequate award is $65,000., inclusive of HST.

**Loss of Future Income**

[326] I have already discussed my finding of total disability and my finding that KMD is unable to return to work.

[327] Recognizing that the Defendant's conduct has caused the Plaintiff's loss, I shall now focus on an appropriate award for future loss of income without the Plaintiff having any residual earning capacity.

[328] I confirm she is absent from employment because of the physical injuries caused by the accident, being those sustained on September 4, 2012. I am also satisfied the Plaintiff is permanently disabled from obtaining other reasonable employment as a result of those injuries.

[329] A key issue is whether to value future loss of income, applying the actuarial evidence, or to make a global award, based on diminished earning capacity, as submitted by the Defendant.

[330] Briefly summarized, the caselaw indicates that the onus is on the Plaintiff to prove loss of future income, but because it is a projection into the future, it is not based on a balance of probabilities. If the Plaintiff establishes a real and substantial risk of future pecuniary loss, she is entitled to compensation. The duty of the Court is to assess such a sum for loss of future income as may be determined from a reasonable appraisal of all of the evidence. (See ***Marinelli;*** Ken

Cooper-Stephenson, *Personal Injury Damages in Canada,*3d edn; ***Conklin v. Smith,*** [1978], 2 S.C.R. 1107; and ***Graham v. Rourke***, (1990), 74 D.L.R. (4th) 1 (Ont. C.A.)

[331] The leading case in Nova Scotia is ***Gaudet v. Doucet***, (1991) 101 N.S.R. (2d) 309 (N.S.S.C.T.D.), where Justice Davison discussed two ways to prove loss of future income, at paragraphs 108 - 109. Where the evidence permits, definitive findings can be made based on the income that would have been earned if the plaintiff had been able to continue with his/her employment, compared to the income if any, the injured party can reasonably expect following his/her injuries:

> 108. In these situations, there is usually evidence of employment history before the accident and evidence of the extent of the present limitations on employment. In these situations, actuarial evidence is helpful as a guide to the court.

[332] The second way, as in many cases, is where there are difficulties establishing the extent of the loss, and it is impossible to determine with any arithmetic precision the extent of the loss:

> 109. In these circumstances, it is my opinion, that the loss should be considered as the loss of an asset - a diminution in capacity to earn income in the future. In seeking damages for future loss, the burden on the plaintiff is not as stringent as that which exist when he attempts to prove losses which occurred in the past.

[333] In the present case, the Plaintiff has sought to prove by way of actuarial evidence, that she is entitled to an award for future loss of earnings. She is entitled to do so if there is a reasonable foundation contained in the actuarial report.

[334] In establishing an award of damages, a trial judge may consider expert evidence but is not constrained by it. In ***Lewis v. Todd and McClure***, [1980] 2 S.C.R. 694, Dickson J., as he then was, stated, for the Court, at page 708:

> Third, 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.
>
> …
>
> 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.

[335] As noted by Oland, J.A., for the majority, in ***Kern v. Steele***, 2003 NSCA 147( par.66), the overall approach is that which best achieves fairness between the parties , referring to ***Keizer v. Hanna and Buch***, [1978] 2 S.C.R. 342. In ***Keizer***, Dickson, J., as he then was, stated:

> At the end of the day the only question of importance is whether, in all of the circumstances, the final award is fair and adequate.

[336] The Defendant also says Ms. McKeating was not provided with Ms. MacDonald's employment file, medical evidence and discovery examination. They say the actuary report makes no allowance for Ms. MacDonald's non-participation in the workforce, or how rarely she worked in the decade preceding the accident.

[337] In ***Kern***, Oland J.A. noted that case was not one where, resort to a global approach should be had because there is little possibility of arriving at any meaningful arithmetic calculation. She further stated that if critical assumptions had not been established in the evidence, that might be a basis for an error in the trial judge using the report. However, she concluded that the report did not lack a reasonable foundation.

[338] Ms. McKeating was instructed by Plaintiff's counsel to base her reports on certain assumptions. These assumptions must be proven in the evidence as factual findings if they are to be relied upon. The Plaintiff introduced several reports from the actuary Ms. McKeating at trial. She expressed expert opinion under the head of Future Loss of Income.

[339] The Defendant argues that the only proper method to determine future compensation is by way of global sum. In particular, the Defendant points to an uncertain career path of Ms. MacDonald and a lack of uninterrupted earnings over the years.

[340] In terms of quantum the Defendant suggests that something less than $100,000 in damages for future income loss is appropriate. The Defendant refers to the November 2, 2017, letter of the actuary where the total loss of income on a net basis was stated as $198,000.

[341] Defence counsel says that she "tried to gross it up". Ms. McKeating in fact indicated it was her opinion (pursuant to section 113BA of the *Insurance Act*, RSNS 1989, C s. 31, and s. 2 of the *Automobile Insurance Tort Recovery Limitation Regulations*; NS Reg. 182/203) that the amounts stated are to be based on gross figures and not net of income tax, CPP, EI and the usual deductions.

[342] In her first report the actuary based her calculation of income loss on what Ms. MacDonald would earn under the collective agreement as a full time nurse. She assumed a retirement age of 67 years, and also assumed that Ms. MacDonald would return to work in November, 2012 following recovery from surgery on her ankle.

[343] Significantly, she assumed that Ms. MacDonald was totally disabled and could not return to her employment or alternative employment.

[344] It has been established on the facts that Ms. MacDonald was a registered nurse and was working full-time prior to taking her leave of absence in 2009. Also, I have found her to be totally disabled so that assumption has been proven. Further, as a registered nurse working in Nova Scotia she falls under a collective agreement.

[345] Mr. MacPhail was independent and knowledgeable of nurse's salaries. According to him Ms. MacDonald would have been capable of earning a salary of $75,000. in 2017, working full-time.

[346] The figures put forth by Ms. McKeating in her March 29 report (#1) assume continuous employment without interruption. Ms. MacDonald was not employed at the time of the accident. In all of the previous years worked starting in 2000, up to 2009, there was not a single year where she completed a full year of employment. She admitted this on cross-examination.

[347] In the result, I find that the first report of Ms. McKeating would not reflect the past employment history or the actual earnings of Ms. MacDonald. She has never made the sum of $78,954., used in the calculation (with the multiplier) to arrive at the income loss for retirement at age 67.

[348] In her evidence the Plaintiff said she wanted to work until retirement and then return to work on a casual basis while collecting her pension. I reject the first report of the actuary, as I have some difficulty accepting it as a real and substantial probability in these circumstances.

[349] The second report of Ms. McKeating dated March 29, 2017 (#2), projects the annual loss of income at the average of the three years of working as a full time nurse between 2007 and 2009. It also assumes total disability and a return to work full time in November, 2012, following recovery from the ankle surgery. In this report the actuary calculates the annual income loss at $58,493 and assumes a retirement age of 67 years. While the annual income loss is more realistic, it is questionable whether Ms. MacDonald would have retired at age 67.

[350] The third report, dated June 28, 2017, once again uses the average of the three year employment history from 2007-2009, but assumes that Ms. MacDonald would have retired at age 59, which is the average age for retirement for nurses in Nova Scotia. (**See** ***Desrosiers v. MacPhail***, (1998), 170 N.S.R. (2d) 145 (C.A.))

[351] There is a fourth report dated June 29, 2017, which is similar to the third with respect to annual income loss but assumes a retirement age of 65. There are in fact two more reports contained in letters dated November 2, 2017. These letters are intended to address the issue of whether income tax and other standard employment remittances should be deducted from an award for future loss.

[352] The relevant provision is 113BA of the *Insurance Act* and s. 2 of the Tort Regulations. The parties take different positions on the legal interpretation of these sections. No case law has been provided by the parties, and the Court was advised this issue has not yet been judicially considered. I will address this issue later in this decision.

[353] On the basis of the third report, dated June 28, 2017, which assumes total disability, a return to full time employment, with uninterrupted earnings, and retirement at age 59, the gross (and not net) figure for future loss of income would be $ 335,514. after deduction for future CPP disability benefits.

[354] Under these scenarios, retirement at age 67, 65 or 59, the future CPP disability benefits are deducted on the basis of the ruling in ***Tibbets v. Murphy***, 2015 NSSC 280, affirmed, 2017 NSCA 35, leave to appeal denied, 2018 Carswell NS 13. Counsel for both parties agree with this ruling and do not take issue with the deduction of CPP disability benefits to be received by Ms. MacDonald in the future. These benefits were also deducted the past income loss calculation.

[355] In terms of the retirement age, I have reservations about Ms. MacDonald continuing full time employment without interruption until the age of 65.

[356] There is evidence that the Plaintiff has incentive to continue working in order to increase her pension benefits. Ms. MacDonald started full-time work "late" and therefore, more pensionable years are needed to finance her retirement. Against this, her career path and employment record must be considered. The Defendant argues it is not a given she would have returned to full-time work in November, 2012.

[357] On the other hand, the evidence supports a finding that Ms. MacDonald's employment situation became more stable after she married William MacDonald. This is evident by her earning her largest salary ever in 2009, when she grossed $66,000. In addition, as her son Curtis becomes older, it is likely she would have had more time to dedicate to her career and full-time employment, which might have resulted in less time missed than in past years.

[358] The longer she would have worked before retirement, the greater her income loss, assuming total disability and no residual earning capacity.

[359] In the history provided by Ms. MacDonald she explained in each year, the reasons for the interrupted earnings during those years. The actuary says it is important to look for "a pattern or a trend". In the years from 2007 to 2009 her income was higher than in previous years.

[360] The fact remains that only in one year did she exceed the sum of $50,000. as an annual income.

[361] The Plaintiff explained what would have been involved in her returning to work in November, 2012. She testified:

> Q: In May. Okay if you turn in Book 5 to Tab 2, there's "may return to work".
> A: Yes.
> Q: Signed by Dr. Glazebrook.
> A: Yes.
> Q: And what does that relate to?
> A: That relates to eh, I felt I was ready to go back to work, physio felt at a certain point I was ready to go back to work, my family doctor said she was okay with me going back to work, but I needed his okay, his clearance.
> Q: Whose clearance?
> A: Dr. Glazebrook who did the surgery.

Q: Okay.
A: So I needed his okay to go back to work, so I made an appointment with him, and seen him and he gave me the okay to go back to work as far as my ankle was concerned.
Q: Did he examine you at all with respect to the car accident?
A: No, we discussed it and he said well, I can't say, comment anything on that, that's up to your doctor, but I can give you your note as far as your ankle is concerned, you're able to go back to work with that.
Q: So this is about two years after you broke your ankle?
A: Yes.
Q: That was in November of 2012.
A: Yes.

[362] The note from Dr. Glazebrook stated that KMD "may return to work November 1, 2012. It also states, "As a graduated program. Hours as symptoms allow".

[363] The actuary report states that prior to the accident KMD intended to return to work full time after recovery from her ankle injury. The assumption of the actuary in the June 28 report is that she would have worked approximately 74% of full time hours without any overtime for the rest of her career if not for the accident.

[364] It is true, as the Defendant argues, that no set date was determined between the Plaintiff and her employer for the resumption of her employment. It appears however, that the report allows for less than full time hours as per the note of Dr. Glazebrook. In its post trial brief I note the Defendant referred to a return on November 1, 2012, or shortly thereafter.

[365] I am satisfied that but for the accident that KMD would have been able to return to work and that it is real possibility it would have been at 74% of full-time hours.

[366] As Chipman, J.A. stated in ***Newman (Guardian ad litem of) v. LaMarche***, (1994), 134 N.S.R. (2d) 127, [1994] N.S.J. No. 457, at paragraph 23:

> All that needs to be established is that there is a change that at some time in the future the victim will actually suffer pecuniary loss.

[367] What all this means is that the more realistic possibility in my view is that in the report dated June 28, 2017. There are a number of reasons for this, including the fact that the age of 59 is considered the average retirement age for nurses in Nova Scotia.

[368] When one considers Ms. MacDonald's circumstances it is a real possibility that she would have retired at that age had she been able to reach that point without further injury or disability. She gave evidence that she wanted to work until 65 and then would have done what others have done, retire and work casual hours.

[369] Nursing is strenuous work, as was stated by Mr. MacPhail. The various incidents incurred by Ms. MacDonald in her employment history are evidence of this. For example, the lifting incident, the back injury, her thumb, and others.

[370] Secondly, the salary used by the actuary, being an annual salary of $58,493. is in keeping with the average salary earned in the only three years of full-time employment Ms. MacDonald had. The Court must be careful not to prejudice Ms. MacDonald by the arbitrary selection of a retirement age and an annual salary with which to compute her loss. These figures were put forth by the expert called on her behalf, who said that a retirement age at 59 is plausible in these circumstances. In my view, those figures provide a reasonable foundation and are preferable to arriving at a global figure for diminished earning capacity.

[371] In terms of the law, when one considers the two ways of establishing future income set out in ***Gaudet***, the Court is faced with a choice. I choose to proceed on the basis of the rationale as stated by Dickson, J. The most important approach is the one that arrives at the fairest and most just result. As such, a judge is not constrained by expert reports and should be given liberty to determine an appropriate amount. Although not a Nova Scotia case, ***Briffett v. Gander and District Hospital***, (1996), 137 Nfld. and P.E.I.R. 271, [1996] N.J. No. 34 (Nfld. C.A.), is instructive. In ***Briffett***, Marshall, J.A. said, for the court:

> 197. Moreover, it should be underscored that resort to one method does not foreclose the utility of the other. Thus, even where sound actuarial evidence affords sufficient basis to frame an award, a judge may still make a global assessment to further test the fairness of the award. If the initial actuarial projection appears out of line, a revisiting of the postulates on which the calculations are made may be in order before arriving at final decisions. On the other hand, where actuarial evidence is insufficient, recourse may well be had to reliable proportions of the statistical evidence in framing the global award. Moreover, reference to the structure provided by the actuarial method may assist in giving a measure of assurance that all relevant factors and contingencies legitimately bearing on the award were addressed. Chief Justice Goodridge, in his decision of the components contained in the actuarial formula in *Dobbin v. Alexander Enterprises Limited* (1987) 63 Nfld. & P.I.E.R. 1 at pp. 9 – 12, outlines a compendium of these relevant elements. **For the foregoing reasons, therefore, neither method should be treated as mutually exclusive, but as complimentary, one to the other.**
>
> 198. … **The method that should have been used depends upon the nature and quality of the evidence available to the assessing judge. [Emphasis added]**

[372] I find this is not a case where the only option available to this Court is to select an award on a global basis. In my view, there is merit in using aspects of the actuarial report that assist in determining a just and reasonable amount for loss of future income for the Plaintiff. In my view it would not be prudent to ignore the figures contained therein. Indeed it is an exercise in

speculation to some degree. However, I take from the report the salary, as being within a reasonable range given Ms. MacDonald's work experience. In addition, I think the earlier retirement age is reasonable given that history, notwithstanding her desire to work until age 65.

[373] I am prepared to accept the loss of income calculation made by Ms. McKeating in her report of June 28, 2017. I find it most likely that Ms. MacDonald would have made an average salary of between $55,000. and $60,000. and that she would have retired at or around the age of 59 years.

[374] This still leaves the question of whether those amounts should be gross as contained in Schedule IV of the June 28 report or net as contained in the letter of November 2, 2017 at page 2. The figures in the November 2 letter are said to be mistaken by the actuary herself. The main point of the letters was to inform the Court of the net figures if it decided the award should be net and not gross.

[375] As stated, it is disputed whether or not section 113BA of the *Insurance Act* and the tort regulation that accompanies it requires these figures to be gross or net of income tax, CPP, and the other deductions.

[376] I have carefully reviewed these provisions and have decided that a proper interpretation of the statute is that the award for future income loss should granted without deduction for income tax, CPP, and the other deductions referred to therein. It is my considered ruling that the award should be stated gross and not be subject to the deductions set out in these provisions. In short, gross and not net.

[377] I shall be providing detailed reasons for this conclusion in a supplemental decision. For now my reasons are summarized in the following three paragraphs:

[378] Section 113BA(1) clearly limits damages for income loss or loss of earning capacity suffered "before the trial of the action" to the net income loss or net loss of earning capacity "suffered during that period". There is no mention of damages for future lost income or future loss of earning capacity. Section 113BA(1) indicates that "net income loss" and "net loss of earning capacity" are "as determined by regulation". The Regulation, however, seeks to expand the reach of these definitions beyond the words of the legislation itself, which limits them to losses suffered "before the trial of the action".

[379] There appears to be a conflict between s. 113BA(1) of the *Insurance Act*, and s. 2(1) of the *Automobile Insurance Tort Recovery Limitation Regulations*. Section 113BA(1) refers only to damages for income loss or loss of earning capacity suffered before the trial of the action. It has no application to damages for future income loss or future loss of earning capacity, as contemplated by the regulation. The scope of the section cannot be enlarged by subordinate legislation. As a result, the common law would apply to any award for future lost income or diminished earning capacity.

[380] Section 113BA(1), should not be construed as interfering with a Plaintiff's common law right to damages for future lost income based on gross before-tax earnings without clear and unambiguous language.

[381] I therefore set damages for loss of future income incurred by the Plaintiff, Kim MacDonald in amount of $335,514., on a provisional basis.

**Pension Loss**

[382] Like future loss of income, and diminished earning capacity, pension loss involves a simple probability standard, whereby chances, estimates, and real possibilities are assessed on a less onerous basis than the usual civil standard.

[383] On its face pension loss seems remote, as it is the next step after a return to work by the Plaintiff, who in this case, had not returned to work prior to the accident. Consequently, a number of assumptions have been made by the actuary who calculated the pension loss amount in the present case. Depending on whether those assumptions have been established by the evidence, the figures provided by Ms. McKeating may prove to be reliable or not.

[384] Once the Plaintiff's pre-retirement income, retirement age, and level of disability are established, the pension loss can be measured with some precision, even though it falls into the future loss category of damages.

[385] The Defendant's position is that based on the McKeating evidence at trial, this head of damage is essentially incalculable.

[386] Applying the test as described earlier by Chipman J.A., there is certainly a chance, a real possibility, that the Plaintiff will actually suffer a future pecuniary loss in the form of lost pension income. But for the accident I have found she would have lost future income, meaning that but for the accident she would have returned to work and paid into the pension plan, which is mandatory.

[387] The main components therefore of what is needed to determine pension loss, have already been determined on the evidence namely: 1) the Plaintiff's 2017 income would have been the 2007 – 2009 average of $58,493; 2) her retirement age would have been 59, as per ***Desrosiers v. MacPhail***; and 3) her disability was total, meaning she was left with no residual earning capacity.

[388] With these determinations made, the most relevant report to calculate pension loss, is therefore Tab 2 of the Exhibit Book 2, dated June 28, 2017, at page 63. The calculation of pension loss is contained in Schedule V.

[389] At page 68, Ms. McKeating discusses a number of considerations that enter into an individual's decision on when to retire. These include the earlier age when the pension would not be reduced for example, when they would receive government benefits such as Old Age Security and CPP at age 65 (or 60), with reduced CPP. Other considerations are retirement

saving levels and family circumstances. Health is an obvious consideration along with the nature of the job, and any injury or disability.

[390] Ms. McKeating confirms she was instructed to assume a retirement age of 59 in the June 28 report. She also states however, “this is a plausible assumption and I have adopted it”.

[391] In her evidence the actuary candidly stated, that calculation of pension loss can be very confusing. That said, there are a number of findings in the report that have been established. First, prior to the accident, the terms of Ms. MacDonald’s employment were collectively bargained. This provides a stable basis for her pre-retirement income calculation, at 74% of full time hours.

[392] As an active member of the plan KMD was required to contribute to her pension, which she did between 2003 and 2009. While she was on an unpaid leave from December 20, 2009, until April 10, 2010, she continue to make contributions to the plan and to accrue pensionable service. She discontinued contributions when she began her unpaid pregnancy leave on April 11, 2010.

[393] If an employer approved leave exceeds two years, a member will be terminated from the plan. This period would not have expired prior to her scheduled return to work on November 1, 2012.

[394] I am satisfied but for the accident that KMD would have been able to return to work and earn a pension by making contributions to her plan as she had made prior to the accident.

[395] Saunders, J.A pointed out in ***Campbell-MacIsaac v. Deveaux***, 2004 NSCA 87, at paragraph 102, that general contingencies may not be easily susceptible to formal proof, allowing some discretion to adjust an award for future pecuniary loss, but with respect to a specific contingency, whether positive or negative, it must be proven and established on the record, if it is to be factored into an overall award.

[396] It is important to note that under the plan in question, continuous service is based on years of employment. There is no adjustment for a member who works less than full-time hours. This would seem to make any recalculation for less than full time hours redundant under this head of damage.

[397] Ms. McKeating in Schedule V calculated the pre-accident pension loss beginning at 59 for life ($255,034.). She added to the loss of the bridge pension ($19,603.) she was entitled to receive at age 65. She then deducted the value of the residual pension ($39,398.) she was entitled to receive at age 65. From there she deducted the pension contributions that were saved for past and future contributions, which totalled $60,849. This left the total amount of lost pension in the amount of $174,390., as shown in Schedule V.

[398] There are some basic principles (about pension loss) that were explained in the evidence given by the actuary. These are for example, that the earlier one retires, the greater the pension

loss. The later one retires the less the pension loss, but the higher the claim for loss of future income.

[399] The object is to, within reason, place the injured party in a position similar to where they would have been but for the event causing the partial or total disability, in this case the latter.

[400] In conclusion, if KMD had returned to work on November 1, 2012, at age 44, and continued to work at 74% of full time hours until retirement at age 59, she would have accrued 15.25 years of pensionable service. After the deductions mentioned earlier are made she would have had a pension loss of $174,390.

[401] In the present case the actuary arrived at the overall negative contingency in the valuation of 35% as explained at page 68 (page 6 of her report). This is considerably more than the 15% allowed in ***Desrosiers v. MacPhail***.

[402] I am satisfied it has been established that at some time in the future the Plaintiff will suffer pecuniary loss in the form of lost pension benefits. As set out in the foregoing reasons, I hereby set the amount of that pension loss at the sum of $174,390., on the basis that the Plaintiff would have retired at age 59 having accrued 15.25 years of pensionable service.

**Contingencies**

[403] The overall contingency applied by the actuary, 35%, accounts for early retirement and disability. At page 67, she states that no allowance has been made for other earnings related contingencies such as layoff, unemployment, or non participation in the labour force.

[404] The earnings calculation for past lost income and future lost income allows 74% of full time hours, under the collective agreement, so her non participation in the labour force has been factored by a 26% reduction in hours. The Court must be cautious in assessing any further contingency.

[405] The Plaintiff never did return to work subsequent to the accident. Having been off for three years prior to it, may suggest the need for a further adjustment. For example, would the ankle injury have led to less than 74% of full-time hours. Further the evidence suggests the Plaintiff has been deconditioned, and this may have had some impact on her participation. Her prior work history, it seems has already been factored into the 74% based on a three-year average.

[406] It seems the record would support a further adjustment to allow for a combination of factors specific to the Plaintiff. In my respectful view, there is support in the evidence for a further contingency reduction to past and future income loss of 15%. Those amounts are adjusted to $ 126,183. and $285,183. accordingly.

**Conclusion**

[407] Below is a summary of the overall damage award in this case, arrived at following an intense and careful consideration of all the relevant factors.

[408] The Court recognizes the Defendant is not required to put the Plaintiff in a position better than her original position. In my view, the evidence does not establish that the pre-existing condition would have resulted in the Plaintiff's injuries, in any event. Instead, I am of the view that the Defendant must accept the Plaintiff in her original position. In short, this case is not one of a crumbling skull. (see ***W.E.D. v. Rice***, [1999] NSJ No. 254; ***Gibson v. Julian***, 2016 NSSC 15.

[409] I am not satisfied on the evidence that a claim has been made out for investment management costs. With respect to future care costs, the court has not been provided with a suggested amount by the Plaintiff., but given that pain medication and possibly physio will be needed I will allow the sum of $ 5000. which is the amount suggested by the Defendant.

[410] Prejudgment interest will be calculated at the rate of 2.5%.

**Summary of Damages Award**

| Loss | Amount |
| --- | --- |
| Non Pecuniary damages | $ 75,000.00 |
| P.J.I. (6 years x 2.5%) | $ 11,250.00 |
| Past Loss of Income with interest ($148,451. minus 15%) | $126,183.00 |
| P.J.I (6 years x 2.5%) | $ 18,927.00 |
| Loss of Valuable Services | $ 65,000.00 |
| Future Loss of Income ($335,514. minus 15%) | $285,183.00 |
| Pension Loss | $174,390.00 |
| Future Care Costs | $ 5,000.00 |
| Total: | $760,933.00 |

**Gross – up**

[411] The Court has not been provided with cogent evidence to establish that an award for "gross up " should be made, in order that future investment earnings will net of tax. The

Plaintiff's position is there is no reason not to award it but no allowance for grossing up the has been made in the valuation of the actuary except that a detailed analysis of the estimated value is available on request. Respectfully for these reasons, I decline to made such an award.

**Costs**

[412] I will hear submissions from counsel on costs and set a date for briefs in due course.

Murray, J.