SUPREME COURT OF NOVA SCOTIA
Citation: *Warnell v. Cumby*, 2017 NSSC 88

Date: 20170330
Docket: Hfx. No. 412959
Registry: Halifax

Between:

Deborah Mary Warnell and Jamie Cyril Warnell

Plaintiffs

v.

David Carl Cumby and Barbara Cumby

Defendants

Judge:	The Honourable Justice M. Heather Robertson
Heard:	October 19, 20, 24, 25, 26 and 31, 2016, in Halifax, Nova Scotia
Decision	March 30, 2017
Counsel:	Peter M. Landry and Craig L. Arsenault, for the plaintiffs Christa M. Brothers, Q.C., Christopher W. Madill and Sara Nicholson, for the defendants

Robertson, J.:

Introduction

[1] This action arises from a motor vehicle accident which took place on July 16, 2010 on Highway 10 near New Germany, Nova Scotia. The plaintiffs Jamie Warnell (the driver) and Deborah Warnell (the passenger) are married to one another. Deborah Warnell's injuries were to her neck, shoulder and back. Subsequent to the accident, problems arose with her hips and although she had returned to work five months after the motor vehicle accident, she was forced to discontinue work as a personal care worker in October 2011 – 15 months after the accident. Jamie Warnell's injuries were to his neck and back. A subsequently identified injury to his wrists impacted his work as a "tool pusher" on various international oil rigs and gave rise to a claim of future loss of income. He asserts uncertainty as to the duration of his work career income. The defence takes the position that both plaintiffs suffered whiplash related soft tissue injuries that are the subject of the legislative cap on general damages (then $7,500 in 2010).

[2] Causation and damages are at issue. Liability for the accident is not in dispute.

Particulars – The Accident

[3] It occurred at approximately 5:30 p.m. on July 16, 2010. The Warnells were driving their 2001 Dodge Pickup R2500 toward home from their camp. They were travelling at or slower than the posted rate of speed (20 mph) approaching a sharp corner on Highway 10 near New Germany.

[4] The defendant David Cumby was driving above the posted speed in the oncoming vehicle, a 2005 Toyota Corolla. He failed to negotiate the sharp turn, but managed to brake his vehicle somewhat before hitting head-on the plaintiffs' truck in the right driver side front tire and fender. The defendants' vehicle was fully on the plaintiffs' side of the road at impact and indeed the plaintiff Jamie Warnell attempted to avoid the collision by driving to the right-hand side of the road beyond the solid white line. The defendants' airbags deployed. The plaintiffs' airbags did not.

[5] Mr. Warnell checked to see if his wife was okay on the passenger side of their vehicle. She confirmed she was okay and both the plaintiffs got out of the

vehicle to assess the damage. Mrs. Warnell took a camera from the trunk and walked around the vehicles taking pictures of the accident scene and the damage, before going to sit on the lawn of an adjacent home. A neighbour who was a paramedic came and attended to her. An ambulance was called. Mrs. Warnell testified. She described her state as one of shock, feeling sore from head to toe, extremely shaken and having a headache. She was taken to South Shore Regional Hospital Emergency Department at Bridgewater, received x-rays, was administered ibuprofen for her pain and sent home at 10:00 p.m.

[6] Mr. Warnell remained at the scene of the accident and directed traffic waiting for the police to arrive. He waited at the scene for the vehicles to be towed away.

[7] His son came to pick him up and took him to the hospital to check on his wife. He was not treated at the hospital although he described his injuries as a severe whiplash head to toe and testified that he was in a lot of pain. He described his wrists as being stiff and sore after the accident, as he was grabbing the wheel with anticipation of the impact of the oncoming defendants' vehicle.

Medical Evidence

[8] The plaintiffs testified as to their injuries. Their family physician Dr. Diane Edmonds also testified. Dr. Michael Gross was qualified as an expert in orthopaedic surgery and gave the only expert evidence properly filed under Rule 55.

[9] Plaintiffs' counsel sought to introduce the expert report of Dr. Ivan Wong, an orthopaedic surgeon, as rebuttal evidence and also sought an adjournment for Dr. Wong to later testify as an expert for the plaintiffs, thus effectively splitting their case. The court found Dr. Wong's report was not compliant with Rule 55 and was deemed inadmissible. The motion for adjournment and rebuttal testimony by Dr. Wong was also denied. A separate decision was rendered orally on October 26, 2016.

Mr. Jamie Warnell's Medical Evidence

[10] I shall deal first with the medical evidence of the plaintiff Jamie Warnell.

[11] As noted earlier, Mr. Warnell was not treated at the emergency department of South Shore Regional Hospital on the day of the accident. He made his first

visit to his family doctor's office on Wednesday, July 21, 2010 – five days following the accident.

[12] The attending physician was Dr. Julite d'Entremont who noted in the narrative:

> Involved in head-on MVA on July 16th, restrained driver, hit by oncoming vehicle going – 80 km/h. Airbags did not deploy. No major injuries, not much pain. Did not seek medical attention initially. Next morning, started having pain left shoulder, left side neck, left shoulder blade. Has been taking ibuprofen 400 mg q6h regularly since then with little benefit.
>
> Reviewed recent blood work. Triglycerides quite elevated. Admits to eating whatever he wants, eats 2-3 eggs daily. 2% milk.
>
> Looks well, NAD
>
> C-spine ROM restricted by pain, ++ tender left trapezius, left side occipitalis muscles
>
> Left shoulder: abduction limited to 60 degrees by pain, no deformity

Assessments	Status	Comments	Updated by
7231-Neck pain	Acute		Julite L. D Entremont 21-7-2010
5829-Shoulder Pain	Acute		Julite L. D Entremont 21-7-2010

Prescriptions

Rx#: 23 Acet Codeine 300 mg-30 mg tablet
1 or 2 Tab(s) PO Q4H for 7 Day(s), (As required).

[13] There was no mention of wrist pain or chest pain in these notes. (Exhibit 2, Tab 16, p. 183)

[14] Mr. Warnell returned to the doctor on July 27, 2010, again seeing Dr. d'Entremont whose notes read as follows:

> Whiplash injury 10 days ago. Continues to have ++ neck and back stiffness, occipital headaches,
>
> Going to physio and massage

Assessments	Status	Comments	Updated by
7231 – neck pain	Acute		Julite L. D Entremont 27-7-2010

Prescriptions

Hydrochloride 10 mg tablet 1 Tab(s) PO HS for 14 Day(s), (As Required),

Rx #69 Cyclobenzaprine

Follow-up as needed

[15] There is no mention of wrist pain. (Exhibit 2, Tab 16, p. 189)

[16] Mr. Warnell's regular family physician, Dr. Edmonds first saw him on Tuesday, August 24, 2010, upon her return from vacation. Dr. Edmonds testified and provided very detailed physician's narratives as well as diagnostic notes. She understood her professional duty with respect to note taking and demonstrated that she was very detailed and disciplined in this activity. Her notes provide a very full medical profile of both plaintiffs. Her notes are so detailed that they often correct the plaintiffs' recall of their own treatment and recovery from the accident, including their levels of recreational activity.

[17] I have relied on these notes extensively to provide an understanding of the extent of the plaintiffs' injuries and recovery. Under physician's narrative dated August 24, 2010, she noted:

In MVA July 16/10 – air bag did not deploy
Job v physical – runs oil rigs
Neck is moving
c/o pain L neck, L shoulder, across belt line in back, both wrists

O/E TOP paracervical muscles, L shoulder, paralumbar muscles, mild decr ROM neck d/t pain

T#3, ibuprofen, flexeril – some effect

Notes/Vital

Blood Pressure:

	150/90	Sitting	Arm (R) (August 24, 2010)

Assessments	Status	Comments	Updated by
8409-SPRAIN/STRAIN SHOULD/UP ARM NOS			Diane Edmonds 24-8-2010
72690-Tendonitis		both wrists	Diane Edmonds 24-8-2010

(Exhibit 2 Tab 16, p. 185)

[18] It is important to note that on July 27, 2010 Mr. Warnell attended the emergency department of the South Shore Regional Hospital complaining of a laceration to his left elbow, sore right leg and wrists. The record notes as follows:

> TRIPPED WHILE GETTING UP OFF CHAIR HAD SHARP PAIN IN WRISTS BACK PULLED AND PT FELL OVER FIRE PIT INTO WOOD PILE, LAC LT ELBOW. NOW ALSO HAVING PAIN IN RT LEG. WAS IS MVC 2 WEEKS AGO – HEAD ON.AND SUFFRED WHIPLASH.
>
> STATES WRISTS WERE NEVER X-RAYED.

(Exhibit 2, Tab 17, p. 218)

[19] The defence suggests that the first mention of sore wrists to his family physician Dr. Edmonds, was on August 24, 2010, following this fall into the fire pit. The plaintiff maintains that his wrists were injured in the accident.

[20] Mr. Warnell next attended Dr. Edmonds on Monday, September 13, 2010. The physician's narrative read:

> Improving but sore . . . 40%
> First starting physio
> Wrists main problem, still some prob
> With neck, thinks Naproxen helping
> No gut grief

(Exhibit 2, Tab 16, p. 186)

[21] Dr. Edmonds assessed Mr. Warnell with tendonitis of the wrists and "sprain/strain should/up arm nos."

[22] She arranged consultation with an orthopaedic surgeon Dr. David Johnston and noted that her plan of treatment included continued physio, and CTS splints for the wrists.

[23] Mr. Warnell next saw Dr. Edmonds on November 4, 2010. She notes in the physician's narrative:

> back, neck, shoulder getting better
> only occ analgesic (naproxen)
> finished physio
> incr physical work, readying for winter
> pain shoots up to R elbow when pressure in wrist extension > flexion

O/E good AROM neck, shoulders; - Tinel's wrists, elbows

Saw Dr Johnston – to have dye injected R wrist

(Exhibit 2, Tab 16, p. 187)

[24] On his January 6, 2011 visit to Dr. Edmonds she noted:

Exercising – has treadmill
Still off due to accident
R wrist still troublesome – has not heard from Dr. Johnston yet re: dye test

(Exhibit 2, Tab 16, p. 188)

[25] On his next visit, February 25, 2011, Dr. Edmonds noted:

exercising daily, treadmill, weights

(Exhibit 2, Tab 16, p. 189)

[26] On his next visit, April 11, 2011, Dr. Edmonds noted:

finished excavator course, but no work locally
had CT arthrogram R wrist; saw Dr. Johnston – needs surgery

need work clearance to work overseas
feels can do requirements of job

(Exhibit 2, Tab 16, p. 190)

[27] On June 13, 2011, Dr. Edmonds reported to Mr. Warnell's Section B provider noting:

. . . physical and mental findings and limitations/restrictions: pain left should, left side neck, left scapula; little relief with ibuprofen; ROM of neck restricted by pain; left should abduction limited by pain; neck, shoulder improved; right wrist remained problematic through fall to February. What is the impairment: initially limited function due to pain; did improve over months; right wrist most of limiting late fall to February 2011. Primary diagnosis of cervical strain (WAD II), right scapholonate [sic] dissociation. Secondary diagnosis of low back strain, left shoulder strain. Cleared to return to previous employment April 11, 2011.

[28] Mr. Warnell next saw Dr. Edmonds on July 6, 2011. He was treated for high blood pressure as his pills had run out. She noted his work was stressful. There are no complaints respecting soft tissue injuries or wrists.

[29] Mr. Warnell was seen again by Dr. Edmonds for hypertension, July 20, 2011, again on September 28, 2011, and again on December 21, 2011. On this last date Dr. Edmonds notes:

> feeling well
> returns to Saudi Dec 26

Again, the only issue during the visit was high blood pressure.

[30] Mr. Warnell's own testimony confirms that he had contemplated a change in career from offshore oil rig manager to heavy equipment operator and had used some insurance funds received for the value of his truck to complete a heavy equipment course.

[31] However, with no immediate prospect of work in this field he returned to the offshore. He was cleared medically to return to work on April 11, 2011. Before being sent to the Iraq oil fields in July 2011, as an oil rig manager with a pay increase of 30 per cent, Mr. Warnell testified that he had in fact been in the Congo for 35 days before going to Iraq.

[32] In any event, it is clear Mr. Warnell returned to work full time before the first anniversary of the motor vehicle accident of July 16, 2010.

[33] Upon returning home from his offshore work schedule (more or less 30 days on 30 days off) he continued to visit his family physician for the usual prescription renewals relating to high cholesterol and hypertension.

[34] On May 7, 2012 visit, Dr. Edmonds noted "wrists, back a bit sore, but coping" and no pain meds were prescribed from 2012-2013. There is one reference to wrist pain in February 2013 when Dr. Edmonds noted in her narrative.

> Coming to end of time at home – currently working in Iraq
> Still smoking – ½ ppd
> ran out of Crestor for a while
> lipids TG not at target
> still pain R wrist.
> Concerned ins company saying wrists pre-existing

> However, no Sx prior to MVC
> Sx both wrists since – shooting pain eg when hitting with sledge hammer

but no pain meds were prescribed.

[35] In two subsequent visits in 2013 on April 15 and June 4, there is no mention of wrist pain.

[36] On January 8, 2014 in a visit to Dr. Edmonds she comments "wrists unchanged – still bothers him, but still able to work." On his October 28, 2014 visit, Dr. Edmonds notes "R wrist occ aches" but no pain meds are prescribed. Prescriptions through 2015-2016 relate to smoking cessation and hypertension treatment.

[37] During the acute phase of Mr. Warnell's whiplash injury he also attended physiotherapy on September 8, 2010 and extensive massage therapy from July 26, 2010 to October 27, 2010, when his therapist noted he was doing well. He exercised daily, used a treadmill and lifted weights, as was noted by his physician. All of these records and notations are in evidence.

Mrs. Debbie Warnell's Medical Evidence

[38] Mrs. Warnell described in her testimony how she got out of her truck after the accident and was in a state of shock. A paramedic who lived nearby and heard the accident came and attended to her and remained with her on a nearby lawn, but she was taken to the South Shore Regional Hospital by ambulance. However, she also acknowledged under cross examination that it was she who took numerous photos of the accident scene from all angles, after the accident occurred, walking all around the accident site.

[39] Mrs. Warnell described being "sore from head to toe" after the accident and having a headache.

[40] She was treated at the hospital in emergency, with some oxygen, taken to x-ray, given ibuprofen and released at 10:00 p.m. The Emergency/Ambulatory Record is found at Exhibit 2, Tab 3 which list the patient's complaints as sore abdomen and chest pain, stiffness in lower back. No mention of hip or groin complaint.

[41] She described how the pain progressed at home in the evening and feeling of being bruised inside and out. She described pain in lower back and in ribs. Mrs.

Warnell agreed that her neck pain did resolve itself after the accident by October 2010, but that back pain and hip pain persisted. There is no question that Mrs. Warnell suffered whiplash type injury as a result of the motor vehicle accident. In December 2010, Mrs. Warnell returned to work at first part-time, but quickly resumed almost full-time employment.

[42] Mrs. Warnell was employed at an assisted living seniors complex from March 2010. She worked seven shifts every two weeks, five shifts in week one and two shifts in week two. Each shift was 12 hours. Her duties included, cleaning, food service, helping bathe and clothe residents and performing other care tasks such as helping do their hair and nails.

[43] In October 2010 after a period of recovery from the motor vehicle accident, Mrs. Warnell returned to work doing four shifts in every two-week period, each 12 hours in duration. By January 2011 she was up to six shifts per two-week period, just one shift short of her full-time pre-accident work load.

[44] This employment record is documented in Exhibit 3.

[45] The real issue for Mrs. Warnell is a labral tear to her hips, which arose in the spring of 2011 and interfered with her ability to work, causing her to retire in October 2011.

[46] After the accident of July 16, 2010, Mrs. Warnell recovered at home for a few days and first attended her family physician's office on July 21, 2010. Dr. d'Entremont noted in the narrative:

> head-on MVA on July 16th, restrained passenger, hit be oncoming vehicle going – 80km/h, Airbags did not
>
> Taken to hospital immediately by ambulance, xrays of chest, spine, US abdo all normal. Since then, ++ plain back and neck, right shoulder. Taking ibuprofen 400mg q6h regularly, not finding it helpful. Not able to go because of pain.

[47] She diagnosed neck pain and acute whiplash injury and prescribed codeine, 1-2 300mg tablets per day for seven days. Returning to Dr. d'Entremont on July 27 the narrative reads:

> Follow-up on whiplash injury from 10 days ago. Says pain is no better, has been off work and would like more time off. Has been to physio and massage, says she

> felt worse afterwards. Says she is having ++ difficulty sleeping, no comfortable position.
>
> Looks uncomfortable.

She is prescribed a muscle relaxant.

[48] On August 24, 2010, Mrs. Warnell returned to the family practise and saw her regular physician Dr. Edmonds who was just back from vacation. Her narrative reads:

> MVA July 16 – "whiplash"
> had whiplash – 8 yrs ago – only sig relief when had injections "cortisone"
> taking T#3; no relief with Flexeril
> Nausea, lightheaded, dizzy
> Massage no help; has not tried physio yet (waiting for approval)
> ice terrible makes it worse, more of a headache
> Works as PCW – off work since MVA

She is prescribed a non-steroid anti-inflammatory naproxen and tramacet for pain relief.

[49] Mrs. Warnell's next visit to Dr. Edmonds was on September 13, 2010. The narrative reads:

> "I still have a lot of pain…no better"
> has started gym, physio – ROM better, ++pain (only 2 sessions to date)
> Tyl #3, Tramacet, Naproxen didn't help, physio active
> Still headaches
>
> O/E ROM neck and back sig improved

[50] Her next visit to Dr. Edmonds is on October 29, 2010. The narrative reads:

> "I've come to the conclusion that I'm always gong to have some pain and discomfort"
>
> would like to try back to work 2d/wk
> finished massage, gym, physio this week
> active around home
> headaches better

[51] On her next visit to Dr. Edmonds on December 16, 2010, Dr. Edmonds writes in the narrative:

headaches better – only occ
back to work 2d/wk – tough, hard to lower back, hips
Massage weekly – helps

[52] On the next visit to Dr. Edmonds, January 25, 2011, the narrative reads:

Incr work – 3d/wk, 12 hrs/shift; never more than 2 days in a row, doesn't think can do 3
Some nights, some days, nights easier on back
Tridural – headaches, constipation, no relief for day
1st day of work ok; 2nd day – pain starts in afternoon; finishes day, then home with massage, heat
On nortriptyline in Sept. didn't give fair trial
Aching post massage – sent to physio R/A

[53] Mrs. Warnell saw Dr. Edmonds next on February 25, 2011. The narrative reads:

took nortriptyline 10 mg qhrs x 1 wk, 20 mg ghs x 1 wk – no improvement in pain
finished 2dn night this AM – "lot of pull in my back"
physio has given exercise to increase core strength
work still 3d/wk, 12 h/shift – still can't do 3 d in a row
pain in lower back, bilat; neck not bad
finds has to more moderate in activities
Mar 1 prob last physio, then will have home program

She is prescribed a renewal of nortriptyline for back pain.

[54] Returning to Dr. Edmonds on April 18, 2011, the physician's narrative reads:

on nights at present (2 wks d, 2 wks n)
back hold its own, back – same – still strain
neck feels stretched, hips feeling like coming out of alignment – limp and waddle
done physio; some exercise at home; heat helps
moderation at work
incr nortriptyline up to 50 mg hs, but found it strong; feels draggy next day
not taking nortriptyline daily, advised max pr 20 mg

[55] Mrs. Warnell returned to Dr. Edmonds on Monday, May 30, 2011. The physician's narrative reads:

a little bit better
seeing Osteopath – "fantastic"; rev'd letter with pt

no longer needs reg pain meds
cont on same work schedule (3 shifts/wk)
pm Advil for headache

[56] On July 20, 2011, one year following the motor vehicle accident, Mrs. Warnell sees Dr. Edmonds and the narrative reads:

"something's wrong with my hips" – started – 1 mo ago
Feels d/t osteopathic manipulation
++pain R hip – last few minutes and then subsides, gives out – now decr to 5 shifts at work
Difficulty turning foot in; pain prox inner thigh, TOP

[57] On July 26, 2011 visit, Dr. Edmonds narrates:

had Orthotics assessment July 21 – ready Aug 8; to wear – 1h/d at first
xray neg
physio appt July 29

[58] On August 4, 2011 visit, Dr. Edmonds narrates:

1st Physio July 29 for assessment – Shawn Thorburne
Dx: femoral anterior glide syndrome with medial rotation
To be seen 2x/wk for 6 wks; also has exercises
Currently working 5-12 h shifts/2 wks
Pick up orthotics Aug 8

[59] On Mrs. Warnell's next visit on August 26, 2011, Dr. Edmonds narrates:

physio – 6 sessions to date
"still the same" – hip "still popping out"
daily exercises
still taking ibuprofen, some help – prefers nothing stronger
aches in AM and when lies down
has orthotics – up to 2.3 h/d
remains on 5-12 h shifts/2 wks at work

[60] By the October 12, 2011 visit her condition is notes as follows:

has seen chiropractor 5x
rev'd letter
"extremely sore" – neck, shoulders, down spine, across shoulder blades; hip same
naproxen not effective, gives me heartburn

at present, not taking anything for pain
O/E moves ok; gen TOP down spine, paraspinal muscles

[61] October 26, 2011 Dr. Edmonds narrates:

some progress
seeing chiropractor – to send prog report;
seeing 3x/wk
incr ROM neck, decr headaches,
back feels better & hip unchanged
treadmill stretching
Tylenol #3 max 2/d . . .

[62] On her next visit on November 8, 2011 Dr. Edmonds narrates:

still seeing chiropractor
still has pain, more mobility
still get pain hip that drops her to floor
rev'd chiropractor's prog note
Tyl #3 helping – max 2/d

[63] Subsequent notations indicate Mrs. Warner received injections in her right hip in December 2011, administered by Dr. Stalker. She was fitted for orthotics and referred to an orthopaedic surgeon. By April 2012, Mrs. Warnell noticed the same pain in her left hip. In 2012 she was not working and assumed home care duties for her aging parents. She also flew to Florida in April 2012 to accompany her husband Jamie on a drive home to Nova Scotia, with her mother.

[64] In April 2012, Mrs. Warnell saw orthopaedic surgeon Dr. David Amirault who diagnosed a labral tear in each of her hips.

[65] In her July 18, 2012 visit to Dr. Edmonds she narrates:

"so-so"
Saw Dr. Stalker for reassessment June 21 – referring her Dr Ivan Wong (deals with labral tears)
In meantime doing a bit more at home – ride-on mower, swimming, garden; a bit more pain; pushing self a bit
doesn't like Tyl#3, occ Dilaudid 1 mg helpful
both knees still lock; charleyhorses calves (Dr. Stalker aware)

Dr. Edmonds assessment was hip pain.

[66] Dr. Wong's letters to Dr. Edmonds are in evidence – chronicle degenerative changes and osteoarthritis in the hips.

[67] The medical record from 2012 onward focuses on Mrs. Warnell's hip pain. The expert evidence of Dr. Michael Gross is very clear that Mrs. Warnell's hip problems did not emanate from the automobile accident. Mrs. Warnell's counsel hopes to convince the court that somehow the motor vehicle accident could have pre-disposed his client to the hip event she eventually experienced in July 20, 2011 "something is wrong with my hips – started – 1 mo ago."

[68] This is almost one year post accident. In December 2010, Mrs. Warnell had mentioned to Dr. Edmonds that work was hard on her lower back and hips, not an unusual complaint among personal care workers, yet causation remains the issue, as Mrs. Warnell seeks loss of future income, driven by her hip problems which appear to have more abruptly arisen in the spring of 2011.

Relevant Law

Causation

[69] Causation is established where the plaintiff proves to the civil standard, on a balance of probabilities that the defendant caused or contributed to the plaintiff's injuries, often referred to as the "but for" test, demonstrating that the injury would not have occurred but for the negligence of the defendant.

General Damages

[70] The plaintiff Jamie Warnell seeks general damages in the amount of $65,000. The plaintiff Deborah Warnell seeks damages in the amount of $100,000. The defence believes the plaintiffs suffered minor injuries.

[71] The defendants submit that general damages in the circumstances are properly assessed under s. 113E of the *Insurance Act*, RSNS 1989 c. 231 and the *Automobile Accident Minor Injury Regulations* (NS Reg 94/2010).

[72] The plaintiffs bear the burden of proving their accident related injuries are not minor and must do so with the appropriate medical opinion evidence: *Gibson v. Julian*, 2016 NSSC 15. This is the first case litigated since the 2010 change in the cap regulations.

[73] In *Gibson*, Chipman J. provided a very useful summary of the development of the "cap legislation" at paras. 68-78:

> [68] In late April, 2010, the Legislature introduced a minor injury cap on pain and suffering awards to replace the earlier $2,500 cap (effective between November 1, 2003, and April 27, 2010) (the "*Old Cap*"). The Office of the Superintendent of Insurance's website has this to say about the current minor injury cap:
>
> > In response to concerns about fairness, the government of Nova Scotia conducted a review of the automobile insurance minor injury cap in 2010. The purpose of the review was to develop and analyze alternatives to the cap and assess the fairness of compensation while ensuring that premiums remain affordable.
> >
> > To inform the process, public input was sought through a discussion paper. The Office of the Superintendent of Insurance received and analyzed 220 responses that provided important information on which to base decisions regarding the cap.
> >
> > [Summary of discussion paper responses provided]
> >
> > An actuarial study, commissioned as part of the cap review, also helped inform decision making on this issue.
> >
> > [Actuarial study final report provided]
> >
> > Legislative amendments and accompanying regulatory changes flowing from the cap review were introduced on April 28, 2010 and applied to accidents occurring on or after that date. The amendments and regulatory changes came into force on July 1, 2010.
> >
> > The legislative amendments and the related regulatory changes reformed the cap by:
> >
> > > a) amending the definition of "minor injury" to mean strains, sprains, and whiplash-associated disorders, mirroring the definition already in place in Alberta;
> > >
> > > b) increasing the pain and suffering award limit to $7,500;
> > >
> > > c) indexing the limit to inflation; and
> > >
> > > d) enabling the introduction of an optional full tort product at a later date.
>
> [69] Having regard to indexing, the parties agree, and I find, that the minor injury cap was $7,956 at the time of this accident.
>
> [70] The plaintiff submits that her injuries are not subject to the cap limit and that they warrant general damages of $40,000. By contrast it is the defendant's position that Ms. Gibson suffered a "minor injury". Section 113E of the

Insurance Act, R.S.N.S. 1989, c. 231 (the "*New Cap*") applies to accidents that occurred on or after April 28, 2010. It provides, in part:

> 113E (1) In this Section,
>
> (a) "accident" means an accident or other incident arising directly or indirectly from the use or operation of an automobile;
>
> (b) "accident claim" means a claim for loss or damages for bodily injury or death arising from an accident;
>
> (c) "claimant" means a person injured as a result of an accident;
>
> (d) "minor injury", with respect to an accident, means
>
> (i) a sprain,
>
> (ii) a strain, or
>
> (iii) a whiplash-associated disorder injury,
>
> caused by that accident that does not result in a serious impairment.

[71] Subsection 113E(3) of the *Insurance Act* provides that in an accident claim, "the amount recoverable as damages for non-monetary loss of the claimant for a minor injury must be calculated or otherwise determined in accordance with the regulations." The scope of the regulation-making power is set out at s. 113E(7), which states:

> (7) The Governor in Council may make regulations
>
> (a) providing for the classification of, or categories of, minor injuries;
>
> (b) providing for the assessment of injuries including, without limiting the generality of the foregoing, regulations establishing or adopting guidelines, best practices or other methods for assessing whether an injury is or is not a minor injury;
>
> (c) governing damages, including the amounts of or limits on damages, for non-monetary loss for minor injuries;
>
> (d) providing for or otherwise setting out circumstances under which a minor injury to which this Section would otherwise apply is exempt from the application of this Section;
>
> (e) governing the application of this Section in respect of injuries arising out of an accident if the injuries consist of a combination of minor injuries to which this Section applies and injuries to which this Section does not apply;

(f) providing for or otherwise setting out circumstances under which an injury that results in a serious impairment is a minor injury;

(g) respecting the onus of proof relating to minor injuries;

(h) respecting any matter or thing that the Governor in Council considers necessary or advisable to carry out effectively the intent and purpose of this Section.

(8) A regulation made pursuant to subsection (7) may be made retroactive in its effect to a day not earlier than the day that this Section has effect.

(9) The exercise by the Governor in Council of the authority contained in subsection (7) is regulations within the meaning of the Regulations Act.

[72] The applicable regulation is the *Automobile Accident Minor Injury Regulations*, NS. Reg 94/2010, (the Applicable Regulations) which provide, in part:

8. Definitions for Section 113E of the Act and this Part

8 (1) In this Part, "minor injury amount" means the total amount recoverable under Section 13 as damages for non-monetary loss for all minor injuries suffered by a claimant as a result of an accident.

(2) In Section 113E of the Act and this Part,

"serious impairment", in respect of a claimant, means an impairment of a physical or cognitive function that meets all of the following:

(i) the impairment results in a substantial inability to perform any or all of the following:

(A) the essential tasks of the claimant's regular employment, occupation or profession, despite reasonable efforts to accommodate the claimant's impairment and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's employment, occupation or profession,

(B) the essential tasks of the claimant's training or education in a program or course that the claimant was enrolled in or had been accepted for enrolment in at the time of the accident, despite reasonable efforts to accommodate the claimant's impairment and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's training or education,

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

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

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

"sprain" means an injury to one or more tendons, to one or more ligaments, or to both tendons and ligaments;

"strain" means an injury to one or more muscles;

"whiplash-associated disorder injury" means a whiplash-associated disorder other than one that exhibits one or all of the following:

(i) neurological signs that are objective, demonstrable, definable and clinically relevant,

(ii) a fracture to the spine or a dislocation of the spine.

9. Injuries must be assessed separately

9 If a claimant suffers more than one injury as a result of an accident, each injury must be assessed separately to determine whether the injury is or is not a minor injury.

10. Injury must be primary contributing factor

10 For a sprain, strain or whiplash-associated disorder injury to be considered to have resulted in a serious impairment, the sprain, strain or whiplash-associated disorder injury must be the primary factor contributing to the impairment.

[73] The *Applicable Regulations* go on to deal with minor injuries in greater detail, and to address the determination of damages:

11. Determination of minor injury

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

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

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

(2) For the purpose of clause (1)(b), the determination as to whether a sprain, strain or whiplash associated disorder injury results in a serious impairment must take all of the following into account

(a) the claimant's pre-existing medical history;

(b) the matters referred to in subclause (i) of the definition of "serious impairment" in subsection 8(2) that relate to the claimant.

12. Treatment not followed

12 (1) If

(a) a claimant suffers a sprain, strain or whiplash-associated disorder injury as a result of an accident;

(b) the claimant has, without reasonable excuse, not sought and complied with all reasonable treatment recommendations of a medical practitioner trained and experienced in the assessment and treatment of the personal injuries; and

(c) the sprain, strain or whiplash-associated disorder injury results in a serious impairment, the sprain, strain or whiplash-associated disorder injury is a minor injury unless the claimant establishes that the sprain, strain or whiplash-associated disorder injury would have resulted in a serious impairment even if the claimant had sought and complied with reasonable treatment recommendations of a medical practitioner trained and experienced in the assessment and treatment of the personal injuries.

(2) Subsection (1) does not apply to a claimant who is a person described in provision (3) under the heading "Subsection 3 - Special Provisions, Definitions and Exclusions of this Section" in the Automobile Insurance Contract Mandatory Conditions Regulations made under the Act.

13. Damages recoverable for non-monetary loss for minor injuries

13 (1) Except as provided in this Section and clause 14(2)(a), for the purposes of subsection 113E(3) of the Act, the total amount recoverable as damages for non-monetary loss for all minor injuries suffered by a claimant as a result of an accident is $7,500.

(2) Subject to subsection (3), for 2011 and subsequent calendar years, the minor injury amount is increased annually, effective on and after January 1, by the annual average percentage change for the all-items Consumer Price Index for Nova Scotia, not seasonally adjusted, published by Statistics Canada, for the previous calendar year.

(3) If the annual average percentage change referred to in subsection (2) is a negative number, there is no change in the minor injury amount.

(4) The minor injury amount for a calendar year applies only in respect of accidents that occur during that calendar year.

(5) For 2011 and subsequent years, the Superintendent must publish the minor injury amount for the calendar year by January 31 in a form and manner that ensures that the information is accessible to the public.

14. Damages recoverable for non-monetary loss for minor and non-minor injuries

14 (1) In this Section, "non-minor injury" means an injury other than a minor injury.

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

> (a) if the non-minor injury or injuries, when assessed separately from the minor injury or injuries, would result in an award for non-monetary loss of not more than the minor injury amount, the total amount recoverable as damages for non-monetary loss for all injuries suffered by the claimant must not exceed the minor injury amount;
>
> (b) if the non-minor injury or injuries, when assessed separately from the minor injury or injuries, would result in an award for non-monetary loss of more than the minor injury amount, the total amount recoverable as damages for non-monetary loss for all injuries suffered by the claimant must be calculated as the total of all of the following:
>
> > (i) the amount of damages assessed for non-monetary loss for the non-minor injury or injuries,
> >
> > (ii) subject to Section 13, the amount of damages assessed for non-monetary loss for the minor injury or injuries.

Comparison of the *Old Cap* to the *New Cap*

[74] When I examine the legislation, I note the most significant changes between the *Old Cap* and *New Cap* as follows:

> 1. An increase in general damages for "minor" injuries to $7,500 (with indexing this amount is currently $8352);
>
> 2. The presumption that an injury is "minor" has been removed;
>
> 3. The definition of "minor injury" has been narrowed to only include sprains, strains, or whiplash-associated disorder injuries caused by the accident, that do not result in "a serious impairment"; and
>
> 4. Serious impairment is now defined as an impairment of a physical or cognitive function, ongoing since the accident and not expected to improve substantially, resulting in the substantial inability to perform any or all of the following:
>
> > a. the essential tasks of one's regular employment, occupation, or profession, despite reasonable attempts at accommodation;

b. training or education (either enrolled or accepted) despite reasonable attempts at accommodation; or,

c. the normal activities of the claimant's daily living.

[75] In the case at Bar, there was no motion made before the trial under s. 113E(4) and (5) of the *Insurance Act* as to whether Ms. Gibson suffered a minor injury. Accordingly, having regard to s.113E(6), the Court shall determine whether the plaintiff has suffered a minor injury.

Onus

[76] It is perhaps trite to state that my findings in this civil lawsuit are based on a balance of probabilities and it is the plaintiff who has the onus of proving her case on this standard of proof. Nevertheless, I feel compelled to make mention of this because in her counsel's brief and in his oral submissions, Mr. Jones argued for a reverse onus to apply in respect of the *New Cap*. For example at p.12 of the plaintiff's brief it is submitted:

> The Regulations have also removed from the Plaintiff the onus of establishing that the injury was not minor. Under the old cap scheme, the Regulations (s.6) placed the burden of proving the injuries were not minor squarely on the Plaintiff. The new scheme has no such provision. Under the new cap regime, it is submitted that it is clearly the Defendant who must prove that the cap applies to limit the Plaintiffs general damages. The Defendant must show that the Plaintiff has suffered a sprain, a strain or a whiplash injury which does not result in a serious impairment. These terms (sprain, strain, whiplash-associated disorder, serious impairment) are all further defined in the Regulations above and the Defendant must prove the injury falls within the definition. So for example, the Plaintiff may have been diagnosed with a whiplash injury, but in order to be a minor injury, the Defendant must prove that the whiplash does not involve a fracture or dislocation of the spine, nor any neurological signs that are objective, demonstrable, definable and clinically relevant (Regulation 8(2)).

[77] Whereas it is correct that the *Old Cap* overtly states that the plaintiff bears the onus (Regulation 6) and the *New Cap* has no such language, I do not accept it therefore follows that the defendant must prove whether a plaintiff has sustained a minor injury. Indeed, the *New Cap* states that the Governor-in-Council may make regulations respecting the onus of proof relating to minor injuries (s.113E(7)(g)); no such regulation has been made.

[78] Absent specific reverse onus wording from the Legislature, I am not prepared to accept that it is for a defendant to marshal evidence to, in effect, prove a negative. Rather, it is my determination that when it comes to the New Cap the

> standard remains the same. That is to say, she who asserts must prove (on a balance of probabilities).

Analysis – Claim of Mr. Jamie Warnell

General Damages

[74] Having regard to the totality of the evidence before me, I do find that general damages in the circumstances are properly assessed pursuant to s. 113E of the *Insurance Act*, RSNS 1989, c. 231 and the *Automobile Accident Minor Injury Regulations* (NS Reg 94/2010).

[75] As the accident occurred after April 28, 2010, the "new cap" applies.

[76] In *Gibson v. Julian*, *supra*, the relevant sections of the *Act* and *Regulations* are extensively referenced.

[77] I find that Mr. Warnell's injuries as a result of the accident to be a "minor injury" defined as a "strain" "sprain" or "whiplash associated disorder injury" that did not result in a serious impairment. Section 113E(1)(d) of the *Act*.

[78] I have moreover considered each injury separately to determine whether the injury is minor or not, as I am required to do so.

[79] I find that Mr. Warnell's injuries were soft tissue injuries and did not result in serious impairment as defined in the following criteria:

(a) the impairment has been ongoing since the accident,

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

(c) the impairment results in substantial inability to perform one or all of:

(i) the essential tasks of his regular employment; or

(ii) the normal activities of Mr. Warnell's daily living.

[80] Nine months following the accident Mr. Warnell was cleared to return to his work in the international oil fields; work characterized as medium to heavy work. He returned to work shortly thereafter and continues to work on a full-time basis having enjoyed further promotion and advancement.

[81] With respect to Mr. Warnell's wrist injury, I would say there is some suggestion that his wrist issues were of a pre-existing nature arising from years of work in the oil fields, wielding heavy sledge hammers and using other heavy equipment. Certainly, it appears that his accident of July 27, 2010, wherein he tumbled into the fire pit really aggravated his wrists. It is, also possible that the motor vehicle accident of 2010 aggravated an old injury. Mr. Warnell declined a surgical intervention. He can use the assistance of a wrist splint when his right wrist is aggravated. This seems the most troublesome wrist, which flares up from time to time.

[82] I am however unable to find that the wrist injury is a serious impairment. Mr. Warnell manages well and is not now in his senior position required to do heavy sledging.

[83] Mr. Warnell is entitled to recover $7,500 in general damages.

Past Loss of Income

[84] Mr. Warnell did sustain a loss of income between the date of the accident and the date he returned to the oil fields.

[85] However, the war in Libya affected Mr. Warnell's ability to work. The last date he worked in 2010 was June 24, and his layoff notice states "lack of work." Mr. Warnell testified that his employer would have found him a new rig, although the evidence is somewhat unclear. He has however continuously worked in the oil fields for many years. I assess his loss of income to be for a nine-month period after the motor vehicle accident. He was scheduled to return to work one week after the motor vehicle accident and was cleared to return to work in April 2011, although it appears his first assignment was not given him until early June when he traveled to the oil fields in Iraq.

[86] His 2010 income tax return (line 150) shows an income of $32,544 for half of the year less income tax paid $7,746.17 for a net of $24,797.83. This figure would correspond with this loss income for the balance of 2010.

[87] In 2011 his income tax return (line 150) shows an income of $82,624 to which I applied a rate of 30 percent for tax payable for a net of $57,836.80 for seven months of work in 2011.

[88] I estimate his income loss for 2010 to be $25,000 rounded up and for four months in 2011 to be $33,000 for a total of $58,000 less Section B benefits of $6,020.60.

Future Loss of Income or Diminished Earning Capacity

[89] The leading case on proof of loss of earning capacity is *Leddicote v. Nova Scotia (Attorney General)* 2002 NSCA 47 Saunders, JA at para. 58:

> The analysis to be undertaken when evaluating a claim for loss of earning capacity was explained by Chipman, J.A. writing for this court in *Newman, supra,* at ¶22-26:
>
> We must keep in mind this is not an award for loss of earnings but as distinct therefrom it is compensation for loss of earning capacity. It is awarded as part of the general damages and unlike an award for loss of earnings, it is not something that can be measured precisely. It could be compensation for a loss which may never in fact occur. All that need be established is that the earning capacity be diminished so that there is a chance that at some time in the future the victim will actually suffer pecuniary loss.
>
> ...
>
> In making an award for loss of future earning capacity the court must, of necessity, involve itself in considerable guesswork. Indeed, in many cases where there is less than total disability and the loss of earning capacity cannot be calculated on the basis of firm figures, the diminution of earning capacity is compensated for by including it as an element of the non-pecuniary award. See *Yang et al v. Dangov et al* (1992), 111 N.S.R. (2d) 109 at 126; *Armsworthy - Wilson v. Sears Canada Inc.* (1994), 128 N.S.R. (2d) 345 at 355.

[90] In *Kern v. Steele*, 2003 NSCA 147, Justice Oland articulated the principles relating to an assessment of future loss at para. 56:

> It would be helpful to begin my analysis by reviewing how a court is to assess damages for future loss. *Halsbury's Laws of England*, vol. 12, 4th ed. (London: Butterworths, 1975) at p. 437 reads:
>
> > **1137. Possibilities, probabilities and chances.** Whilst issues of fact relating to liability must be decided on the balance of probability, the law of damages is concerned with evaluating, in terms of money, future possibilities and chances. <u>In assessing damages which depend on the court's view as to what will happen in the future, or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will happen or would have happened and reflect those chances, whether they</u>

> are more or less than even, in the amount of damages which it awards. (Emphasis added)
>
> This passage is founded upon the well-known statements of Lord Diplock in *Mallett v. McOnagle*, [1970] A.C. 166 at p. 176 which was explicitly approved by the Supreme Court of Canada in *Naylor Group Inc. v. Ellis-Don Construction*, [2001] 2 S.C.R. 943. It has been cited with approval by this court in decisions such as *MacKay v. Rovers*. (1987), 79 N.S.R. (2d) 237.

[91] Mr. Warnell has not presented any evidence to support a future loss of earning capacity, other than he opined in his direct evidence that he wondered if his wrist issues would cause him to retire a few years before he planned to. There is no medical evidence to suggest this might happen. No treatment providers suggested he will have to leave the workforce early.

[92] Therefore, I find no basis for an award under this head of damages.

Loss of Housekeeping/Valuable Service

[93] In *Leddicote v. Nova Scotia (Attorney General), supra*, the Nova Scotia Court of Appeal state as follows at para. 50:

> The question becomes to what extent, if at all, have the injuries impaired the claimant's ability to fulfill homemaking duties in the future? Thus, in order to sustain a claim for lost housekeeping services one 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. . . .

[94] Mr. Warnell has returned to performing all of his pre-accident duties and functions around his home. His claim under this head of damage is denied.

[95] Finally, he has not made a claim for cost of future care, but did claim for an out-of-pocket expense of $6,060 for the excavator's course that he took. He was looking for other career options at the time. I do not find this is an accident-related expense.

Analysis – Claim of Mrs. Debbie Warnell

General Damages

[96] Having regard to the totality of the evidence I find that Mrs. Warnell suffered a whiplash and strain injuries to her neck, shoulders and back as a result of the accident. There is a lack of any causal connection between the accident and the hip problems which Mrs. Warnell developed nearly a year after the accident. This was confirmed by Dr. Michael Gross, an orthopaedic surgeon, in his Rule 55 expert report filed by the defence in this proceeding.

[97] Dr. Gross stated:

> . . . It is quite apparent from my review of the records that Ms. Warnell did not suffer any injury to her hips in the motor vehicle accident. It was not until some time afterwards that she developed pain in both hips, left and right, and the right hip stayed predominantly painful.
>
> It is also clear from my review of the records that the arthroscopic findings in the hip were of a degenerate situation with a synovitis and osteophyte formation, and that this is the cause for her pain on the right and one can presume there are similar degenerative changes in the left hip.
>
> There is no evidence that this hip pathology and the subsequent treatment of the hip pathology has anything to do with the motor vehicle accident. Ms. Warnell did not have any complaints of hip pain at the time of the motor vehicle accident. There was no evidence of any injury, indirect or direct, to the hips at the time of the motor vehicle accident. She was able to get out and ambulate, and had immediate complaints of neck pain, and then the subsequent complaints of neck pain or low back pain. This is all clearly demarcated and documented in the doctors' charts.

[98] During Dr. Gross's testimony and cross-examination there was considerable evidence about the effect of the labral tear to the hip and the immediacy of its occurrence. A labral tear upon impact from a motor vehicle accident would have been felt immediately, impaired her mobility immediately and resulted in a complaint about her hip pain at the emergency department. This did not occur. Nor do I accept the suggestion advanced by plaintiff counsel that the car accident may have affected Mrs. Warnell's hip and predisposed her to a labral tear at a later time. There is no evidence to support such a hypothesis, which was categorically rejected by Dr. Gross in his testimony.

[99] Dr. Gross also testified it was hip pain not related to the accident that caused Mrs. Warnell to leave her employment, saying that her neck and low back pain were substantially resolved between July 2010 and January 2011, but certainly by March 2011.

[100] I must consider whether the injuries Mrs. Warnell did suffer in the motor vehicle accident (whiplash and strain injuries to her neck, shoulder and lower back) considered separately have led to "serious impairment" that

> (a) has been ongoing since the accident
>
> (b) is not expected to improve substantially
>
> (c) results in a substantial inability to perform one or all of:
>
> > (i) the essential tasks of regular employment
> >
> > (ii) the normal activities of daily living.

[101] Mrs. Warnell's own testimony narrates the efforts that she made to recover from the associated injuries she suffered. She attended her family physician. She attended physiotherapy therapy and massage, assumed a home exercise regime and took regular exercise and resumed the activities of daily life. She "was always going to have some pain and discomfort" and returned to work and to her daily routine.

[102] I do not find her injuries constitute a serious impairment as contemplated by s. 113E(1). Her whiplash and strain injuries did not result in a substantial inability of the plaintiff to perform the essential tasks of her regular employment or normal activities of daily life. I find that her injuries fall with the classification of a "minor injury" as defined by the new cap and applicable regulations. Accordingly, she may recover $7,500 in general damages.

Past Loss of Income

[103] Mrs. Warnell was in receipt of Section B benefits and was paid $13,563.20 in weekly income replacement. These payments exceeded Mrs. Warnell's past loss of income which I accept did not exceed $6,930.80. By operation of s. 146(2) of the *Insurance Act*, Mrs. Warnell has not sustained any loss of income.

Future Loss of Income/Diminished Earning Capacity

[104] As earlier referenced the leading cases are *Leddicote v. Nova Scotia (Attorney General), supra* and *Kern v. Steele, supra*.

[105] Having regard to all the evidence before me, I do not find that Mrs. Warnell's accident-related injuries played a role in her inability to continue working. Her hip problems, which I consider to be a discreet event unassociated with the motor vehicle accident caused her to cease employment.

[106] Accordingly, I find there is no basis for an award under this head of damages.

Loss of Housekeeping/Valuable Service

[107] Mrs. Warnell was able to resume most of her housekeeping duties after the accident, such as sweeping, vacuuming, hanging clothes on the line, attending to the woodstove in the basement. She testified that she can perform these tasks, but simply does them more slowly.

[108] She does require help with the lawns and snow removal particularly in the months her husband is working offshore. I award $15,000 under this head of damage.

Cost of future care/out-of-pocket expense

[109] Mrs. Warnell listed a number of physiotherapy and massage therapy expenses at Exhibit 1, Page 123 for the year 2014 onward.

[110] Mrs. Warnell did not expend all of her Section B benefits on treatments following her accident.

[111] I do not have any medical evidence before me to suggest that she would benefit from future treatments for her whiplash related injury. I understand that these treatments that she did take recently may be hip-related. I do not therefore award any amount under this heading of damages.

[112] Counsel agree both plaintiffs are entitled to pre-judgment interest which they set at 2.5 percent to October 2015.

[113] In the absence of agreement, I will be happy to hear submissions on costs.

Robertson, J.