SUPREME COURT OF NOVA SCOTIA
Citation: Awalt v. Blanchard, 2011 NSSC 111

Date: 20110316
Docket: Hfx.No. 285106
Registry: Halifax

Between:

Linda Awalt

Plaintiff

v.

Chris Blanchard

Defendant

Decision

Judge:	The Honourable Justice Kevin Coady
Heard:	October 18-26, 2010 in Halifax, Nova Scotia
Decision:	March 16 , 2011
Counsel:	Barry Mason and Don Pressé, for the plaintiff Michelle Kelly, for the defendant

By the Court:

BACKGROUND:

[1] Linda Awalt is a 52 year old personal care worker who seeks damages for personal injuries incurred in a September 20, 2004 motor vehicle accident. Ms. Awalt was the only party to testify and the following represents her description of the accident.

[2] On the day of the accident Ms. Awalt was driving home from work in her 1988 Pontiac Bonneville. The weather was fine. She was alone in the vehicle and wearing a seat belt. Ms. Awalt followed Mr. Blanchard's one-half ton truck into an intersection. He made a left hand turn and Ms. Awalt followed him. There were no other vehicles in the intersection. The defendant's truck then stopped, reversed and collided with Ms. Awalt's vehicle. It was pushed back behind the stop sign. Ms. Awalt reports that the sudden collision caused her body to go back, then be thrown forward and then gripped by the seat belt.

[3] Ms. Awalt testified that she was moving forward when Mr. Blanchard struck her vehicle. She described Mr. Blanchard as backing up "pretty fast." She says

that after contact Mr. Blanchard got out of his vehicle, opened her door and asked her if she was okay. He then provided his documents and left the scene. Ms. Awalt noticed damage to the left front side of her vehicle but was able to drive it to her home. Once at home she arranged for her husband to drive her to the local health centre.

[4] The plaintiff's motor vehicle sustained $1,914.00 in damage and was "written off" due to its age and appraised value.

[5] Ms. Awalt reports that immediately after the collision she felt nauseated and experienced a headache. On the way to the health centre she started to get stiff on the left side of her neck and in her left shoulder. The emergency department record described the chief complaint as an "injured left shoulder/neck" and described the diagnosis as "whiplash - mild." The attending physician noted "mild tenderness left side neck/shoulder" and prescribed Ibuprofen.

[6] The following day Ms. Awalt was sore on the left side of her neck down to her shoulder. Two days later she went to see Dr. Langley, her family doctor, who recommended physiotherapy. The intake form at Renova indicates that Ms. Awalt

described her major complaint as “neck and shoulder (left side)” and described her area of pain as her “neck”. Ms. Awalt testified that these initial sessions “helped a little bit.” She returned to employment approximately 1 week after the accident. It is Ms. Awalt’s evidence that she worked through the pain with the assistance of medication and hot packs. It is her evidence that her employment was physically demanding and that her pain would increase with the number of days at work. She reported having to ask for assistance when in the past she could do an activity alone. She also testified that she could not work the kind of overtime she did before the accident.

[7] Ms. Awalt continued with her employment and physiotherapy into 2005. Dr. Langley’s records indicate that by February 11, 2005 she was “going to physio and the shoulder has plateaued, it can radiate into the left anterior pec muscle.” Dr. Langley’s October 24, 2005 record reported “now having ++ pain, tingling/burning through arm.” Ms. Awalt reports that these symptoms continued into 2006.

[8] Dr. Langley’s records for March 13, 2006 indicate that “physio thinks cortisone injections in her shoulder would be helpful.” Ms. Awalt received these injections and found they only helped for a couple of days and created an allergic

reaction. Dr. Langley then referred Ms. Awalt to Dr. Alex Finlayson who was a pain management specialist. On May 11, 2006 Dr. Finlayson first saw Ms. Awalt and concluded that she might have a rotator cuff tear. On May 31, 2006 he recommended a CT scan of the left shoulder. The scan did not show a tear but showed the joint in a degenerative condition. Dr. Finlayson was of the view that something else was going on with the shoulder and referred her to Dr. Douglas Legay, an orthopedic specialist.

[9] Dr. Legay first saw Ms. Awalt on March 9, 2007. On examination he found "a bit of a forward shoulder posture" and tenderness in the left shoulder. He conducted a CT scan with dye and concluded there was no evidence of a rotator cuff tear. He found that she had good strength and good range of motion. Dr. Legay's diagnosis was "shoulder A/C joint pain tendinitis."

[10] Ms. Awalt next saw Dr. Legay on June 11, 2008. He concluded that her neck extension had improved and that her left shoulder hurt during exercises. Dr. Legay recommended an MRI of the shoulder area and arrived at the following conclusion:

> "Over the interviewing 15 months since our last visit she has had frequent intermittent flare-ups of the left shoulder pain."

[11] It was Dr. Legay's view that these flare-ups occurred as a result of lifting at work. He felt that the left shoulder injury was "serious and presently permanent." He felt the only remaining option was surgery.

[12] Ms. Awalt next saw Dr. Legay on October 23, 2008. He reported that since their last appointment she had persistent left shoulder tendinitis and A/C joint arthritis. He found that her left shoulder remained painful and that she was quite tender off the anterior acromion and at the A/C joint. Dr. Legay recommended surgery in the hope that it would give Ms. Awalt an 80% chance of eliminating shoulder pain. In his report dated December 16, 2008 Dr. Legay described the surgical task ahead:

> "Paulette is coming in for surgery at the beginning of January at the Halifax Infirmary. We are looking at her left shoulder. She has a rotator cuff tendinitis and distal clavicular arthritis. We will examine the shoulder at the time and if there are any rotator cuff problems we will deal with those.

[13] The surgery occurred on January 5, 2009. Ms Awalt reported a lot of post operative pain. She testified that she had trouble sleeping and required daily

medications. She reported that after the surgery she experienced a reduction in her level of pain. Ms. Awalt remained off work until September 14, 2009.

[14] Dr. Legay's "operative report" dictated on January 6, 2009 described the preoperative diagnosis as "left shoulder 50 per cent tear, intra-articular subscapularis." He reported that when he looked at the shoulder during surgery "it did appear that half the inner aspect of the subscapularis was torn and therefore I considered that I should repair it." In relation to the A/C joint he shaved 1cm off the clavicle and "were happy with a size 8 resection." A further bursectomy was carried out which indicated that "the rotator cuff otherwise was intact."

[15] Dr. Legay reported that three weeks after the surgery Ms. Awalt reported that her pain is now different but still painful. He reported that two months after surgery she seemed to have pain at night and she experienced a throbbing in her arm. He found that Ms. Awalt was a little slow to progress.

[16] Dr. Legay reported that four months after surgery "she is complaining of some pain and some limited range of motion." He felt that she had to push

strengthening and range of motion. In a report dated June 23, 2009 Dr. Legay reported:

> "Linda is now 5 months since her left shoulder surgery. Her pain is truly getting better. She is still in physiotherapy. She cannot lift as much. She needs to go back to full-time."

[17] Ms. Awalt was advised that it was unlikely she would ever have a perfect left shoulder.

[18] Ms. Awalt returned to work at the Northwood Care Facility on September 14, 2009. She testified that she was nervous about the lifting involved in her job and would get help from her co-workers. She reports that pre-accident she never required assistance. She stated that she used stored vacation time to rest. At the time of this trial Ms. Awalt was reporting that her employment continued to cause her shoulder pain, limited her ability to care for herself and her family and limited her social and athletic activities. Ms. Awalt stated that pre-accident she planned to work until she was 65 years old but testified she doubted that she could do her job for another 13 years.

POSITIONS OF THE PARTIES:

[19] Ms. Awalt claims that the accident has taken a terrible toll on her life. It is her position that the collision was significant and caused the rotator cuff tear in her left shoulder. She seeks general damages within the *Smith v. Stubbert* range and argues that her injuries are not caught by the **Automobile Insurance Reform Act**. Ms. Awalt also seeks damages for loss of valuable services, loss of income and diminished earning capacity.

[20] The defendant claims that this was a minor motor vehicle accident. While he acknowledges that he is liable for the accident, Mr. Blanchard denies there was any causal link between the accident and the plaintiff's shoulder injury that led to shoulder surgery. The defendant submits that if Ms. Awalt suffered any injury as a result of the accident, it was a mild whiplash and is caught by the cap. Consequently, general damages are limited to $2500. The defendant submits there can be no award for loss of income because there is no evidence to suggest the accident caused the injury that led to the surgery and the ensuing 8 months off work. The defendant argues that Ms. Awalt is back to work full time and has not

suffered any diminishment in her earning capacity. He also submits that the evidence does not support an award for loss of valuable services. Of course it is the defendant's primary position that the plaintiff has not established causation and, as such, no damages can flow.

[21] The defendant attributes Ms. Awalt's injury, and ensuing surgery, to the accumulated physical demands of her employment. She argues that both the left shoulder rotator cuff tendinitis and the distal clavicle arthritis are degenerative conditions inherent with someone who performs a physically demanding job.

THE PLAINTIFF'S EMPLOYMENT:

[22] In order to assess the evidence of trauma/causation against degenerative/non causal, it is necessary to review Ms. Awalt's employment history.

[23] In 1978 Ms. Awalt went to work as a cleaner at the Victoria General Hospital. She was approximately 20 years old with a Grade 11 education. She worked at this job for a "few years" and found it to be "medium" in terms of physical demands. Ms. Awalt's next employment was at a local fish plant where

she packed fish off a conveyor belt. She remained at this job for 2 years and found the work to be a little bit heavier than the cleaning job.

[24] In approximately 1980 she took a job as a chamber maid at a local hotel. This job lasted for 5-6 years. She described her duties as "not really heavy-basically cleaning rooms." Ms. Awalt became pregnant and was off for one year followed by a year of working just week-ends. After that Ms. Awalt went to work with a residential cleaning company for "a couple of years." She testified that this job was demanding and involved the use of her left arm.

[25] In 1988 Ms. Awalt was involved in a motor vehicle accident. She suffered neck injuries and was placed off work. She was treated by a physiotherapist and a chiropractor for 1 ½ years after which her injuries resolved. She was then retrained as a personal care worker. In 1991 Ms. Awalt accepted a position at Northwood as a personal care worker. She was responsible for 6-7 residents. It was her task to "get them up and around" and to get them to their appointments. She testified that the facility used mechanical lifts to get patients in and out of their beds and as a result 80% of her duties were physically demanding. She remained at Northwood until the 2004 accident.

[26] Ms. Awalt did shift work over these years. In addition she reported working a lot of overtime. In 2003 she was working 2-3 extra shifts every two weeks. She says that she had no difficulties carrying out her duties in the year before the accident. Ms. Awalt was off work for one week after the accident and for eight months after the surgery. She returned to Northwood on September 14, 2009. She reports that she was unable to work overtime until April, 2010. At the time of the trial Ms. Awalt was working one or two extra shifts every two weeks.

[27] It is very obvious that Ms. Awalt's career as a personal care worker involved much heavy lifting. It is also obvious that Ms. Awalt has always prided herself in her ability to handle heavy, physically demanding tasks without the assistance of co-workers. Even with the introduction of more effective lifts, Ms. Awalt's position required ongoing heavy lifting. The evidence discloses that she has suffered several injuries at work and that these injuries required some degree of medical intervention.

[28] On March 24, 1994 Ms. Awalt suffered a right hip strain that was reported as "while transferring a resident from bed to wheelchair resident refused to take her

weight on her legs and knees buckled causing staff member to strain (r) hip area during the pivot."

[29] On December 10, 1994 Ms. Awalt injured her right leg. The WCB accident report states "after assisting resident from toilet, was leaving to assist other staff person - fell on water in resident's room."

[30] On April 7, 1999 Ms. Awalt injured her lower back while lifting a patient at work. She experienced pain in the lower lumbar that worsened as her shift progressed. The diagnosis was "acute muscle strain."

[31] On March 31, 2000 Ms. Awalt injured a finger that was reported as "attempting to stop resident from falling, caught finger against resident and pushed it back."

[32] On August 11, 2000 Ms. Awalt injured her right lower back while transferring a resident from the toilet to a chair. "In process of pivoting residents leg buckled and staff had to place resident in chair quickly - felt burning sensation

with pain." She was referred to physiotherapy where the clinical impression was "lumbar sprain secondary to lifting at work."

[33] On December 20, 2000 she caught a falling patient. She experienced a pulled muscle in her back. The Workers Compensation Board accident report described the incident as follows:

> "Employee getting resident who is one person assist up from the chair, felt he was going to fall, legs buckled. Employee lowered resident to the floor - felt pull in upper mid back area now tender to palpate. Feels stiff at base of neck."

Ms. Awalt states that this injury recovered after treatment by medication and work hardening. She did not miss work throughout this injury but was placed on modified duties.

[34] On May 25, 2002 Ms. Awalt suffered an injury at work. She reported that she had to catch a patient who was falling and in doing so she injured her back. She attended at her family doctor's office where she was prescribed medication and referred to work hardening. This incident did not result in time off work.

[35] On December 31, 2003 Ms. Awalt suffered an injury to her back. The WCB report states that "when getting ready to transfer resident 215B from br railing to wheelchair - resident let go of bar and let herself go and fell back on employee. Both fell with employee jammed between resident and toilet. Mid back thoracic area very painful."

[36] On June 29, 2005 she injured her left forearm as a result of "pivoting resident from toilet to chair. Resident did not bear weight and staff was required to support full weight of resident." Ms. Awalt lost 32 hours of work as a result.

[37] On July 24, 2007 Ms. Awalt was injured while carrying a large water jug at work. She felt pain in her left shoulder and experienced limitations in her range of motion. She was referred to physiotherapy and missed several shifts at Northwood.

[38] On November 9, 2007 Empower Physio conducted a spinal assessment in which they stated:

> "3 weeks ago stopped resident from falling at work - wrenched left shoulder ... pain has persisted and heaviness in left shoulder."

On February 5, 2008 Ms. Awalt injured her right lower back while transferring a resident.

[39] On April 6, 2008 Ms. Awalt suffered in injury to her left shoulder. The WCB report described the injuring activity as "ceiling lift malfunction. Emergency button would not work while resident was still in lift. Staff had to assist co-worker in lowering resident to bed." She did not miss work as a result of this incident.

[40] I have reviewed these incidents of injury for two purposes. One purpose is to determine how physically demanding Ms. Awalt's employment has been over the years. The second purpose is to determine whether any of these injuries affected her left shoulder. Both considerations are necessary to determine the issue of causation.

THE MEDICAL EVIDENCE - CAUSATION:

(i) Dr. Christine Langley:

[41] Doctor Langley was called by the plaintiff. She has been Ms. Awalt's family doctor since 2002. The court qualified her as an expert witness in family medicine permitted to give opinion evidence on the diagnosis, prognosis and treatment of injury of all parts of the body, including neck, back and shoulder.

[42] Dr. Langley testified that prior to the 2004 accident she was not aware of Ms. Awalt having any shoulder history. Her evidence and records are replete with left shoulder concerns post accident and to the present time. Dr. Langley's report dated February 13, 2005 reflects the diagnosis of a mild to moderate soft tissue injury. Given the fact that the examination occurred shortly after the accident, it was reasonable to assume that the injury was caused by the accident. The examination was cursory in terms of looking beyond what seemed obvious. After reviewing all of the evidence, I am unable to conclude that Dr. Langley's evidence establishes the causal link.

(ii) Dr. Douglas Legay:

[43] Dr. Legay was called by the plaintiff. His first involvement came about as a result of referrals by plaintiff's counsel and Dr. Langley. He treated Ms. Awalt

and ultimately performed her shoulder surgery. The court qualified Dr. Legay as an expert in orthopedics able to give opinion evidence on the diagnosis, treatment and prognosis of injuries to the musculoskeletal system and in particular to the shoulder, neck and back.

[44] Dr. Legay's first report was dated March 7, 2007, some 2 ½ years post accident. The majority of that report addressed Ms. Awalt's level of pain and the occupational limitations caused by that pain. He stated that "a CT scan with dye shows no evidence of any rotator cuff tear." Under summary and diagnosis Dr. Legay writes:

> It is now approximately two and a half years since Ms. Awalt was involved in a head-on collision and the damage was primarily to the driver's side of her vehicle. She initially would have hyperflexed her neck. As a result she has been left with persistent headaches with trapezius spasm and ongoing left shoulder pain and weakness associated with the pain.

[45] And further:

> "The diagnosis here is A/C joint inflammation with persistent rotator cuff tendonitis ..."

[46] There is nothing in this report that links Ms. Awalt's condition to the 2004 accident. Dr. Legay obviously assumes that link but does not establish a medical link between the two.

[47] Dr. Legay prepared a second report date June 11, 2008. In addition to his previous involvement he had access to an MRI of the cervical spine and the left shoulder. He reported as follows:

> Over the intervening 15 months since our last visit she has had frequent intermittent flare ups of left shoulder pain ... Her flare ups have occurred as a result of lifting at work.

[48] This report left me with the clear impression that Dr. Legay accepted that Ms. Awalt's injuries, including the left shoulder, were caused by the 2004 accident. However, I could not find an opinion to support this causation in relation to the shoulder. Dr. Legay does attribute her whiplash symptoms to the accident but nothing more.

[49] Dr. Legay's third report is dated October 23, 2008. He reported that "she was involved in a motor vehicle accident and she has had persistent left shoulder

tendonitis and A/C joint arthritis since that time." Obviously Dr. Legay felt that all of Ms. Awalt's shoulder issues were the result of the motor vehicle accident.

[50] Dr. Legay's fourth report dated December 16, 2008 was provided in advance of surgery. He comments as follows:

> Paulette is coming in for surgery at the beginning of January at the Halifax Infirmary. We are looking at her left shoulder. She has a rotator cuff tendonitis and distal clavicular arthritis.

[51] The operative report dictated January 6, 2009 provided the following post operative diagnosis:

> Left shoulder debridement of the supraspinatos tear with repair of the intraarticular subscapularis tear, followed by subacromial decompression and distal clavicular excision.

[52] Dr. Legay's consultation report dated January 27, 2009 stated as follows:

> Linda is now 3 weeks postop left shoulder debridement of a small intraarticular superspinatis tear with repair of the subscapularis, which is a bit unusual.

[53] These reports are silent on the causative link between the shoulder tear and the 2004 motor vehicle accident. Subsequent postop reports are similar.

[54] On direct examination Dr. Legay stated that he felt the injuries were consistent with the facts of the accident. It was his opinion that if there was no history with the shoulder pre-accident, then it is more probable than not that the car accident is the cause.

[55] On cross-examination Dr. Legay stated that he has seen many rotator cuff injuries and they are quite different than a whiplash injury. He stated that repetitive tasks can cause a tear in the rotator cuff. It was Dr. Legay's view, on cross-examination, that heavy lifting, pushing, pulling and reaching can cause partial tears but less commonly in sub scapularis tears. He testified that lifting a water jug, or catching a falling resident could cause such a tear. He stated that he was not aware of Ms. Awalt suffering work place injuries when he prepared his main report.

(iii) Dr. Ross Leighton:

[56] The plaintiff called Dr. Ross Leighton who was qualified as an expert, and able to give opinion evidence "in the field of orthopedic surgery." He was retained

to conduct an independent medical examination and did so on October 30, 2006, in advance of Dr. Legay's involvement. He produced a report dated October 30, 2006. Dr. Leighton offered the following assessment at page 3 of his report:

> This patient suffered a whiplash type injury involving her neck, with some shoulder discomfort, more on the left than the right. She is certainly more inhibited on the left side than the right side, both on physical exam and clinically.

[57] He recommended an intensive physiotherapy program, the use of anti-inflammatories and a specific exercise program.

[58] I have reviewed Dr. Leighton's report and oral evidence. I do not conclude that his evidence establishes the causal link between the shoulder injuries and the 2004 accident. I was left with the distinct impression that Dr. Leighton felt that the accident was the only known factor that could effect her shoulder. That view did not address long term degeneration caused by the demands of her employment. In his report Dr. Leighton does not suggest that the shoulder issue be further explored. He focuses on treatment of the whiplash symptoms.

(iv) Dr. Alexander Finlayson:

[59] Dr. Alexander Finlayson was also called by the plaintiff and was qualified as an expert in anaesthesiology and pain management able to give opinion evidence on the origin, diagnosis, treatment and prognosis for pain. Dr. Finlayson filed two reports dated May 11, 2006. In the report to Dr. Langley he describes Ms. Awalt's pain symptoms and posits "I wonder if she has a rotator cuff tear?" In a referral letter to Dr. Legay he states "I felt that she probably has a rotator cuff tear and wonder what your opinion on that is."

[60] Dr. Finlayson's oral evidence establishes that he saw Ms. Awalt on three occasions after the initial consultation. He testified that on May 31, 2006 Ms. Awalt was experiencing ongoing shoulder pain and tenderness at the lip of the shoulder. He recommended a CT scan with dye which did not show a tear but rather showed a degenerative joint. The entirety of Dr. Finlayson's evidence did nothing to establish the causative link between the shoulder injury and the 2004 accident.

(v) Dr. William Stanish:

[61] The defence called Dr. William Stanish who was qualified to give opinion evidence in the field of orthopaedic surgery, and specifically orthopaedic injuries, their causes, diagnosis, prognosis and treatment options. He filed a report dated March 25, 2010 in which he identified his principle task as follows:

> Further, I have been asked to provide an opinion as to what led Ms. Awalt to have shoulder reconstructive shoulder surgery in January of 2009, as conducted by Dr. Douglas LeGay. Specifically I have been asked to provide an opinion as to whether any of the incidents outlined in the medical documentation can be found to have caused the injury that led to the surgery of 2009, what is the likelihood that there was a direct connection between the motor vehicle accident (2004) and the tear that led to the surgery.

[62] Dr. Stanish reported that the rotator cuff is made up of four tendons. He indicated that these tendons will naturally degenerate and change their biochemical/biomechanical characteristics throughout their life span. Further, he described that degenerative process as follows:

> The degenerative process of the rotator cuff, or any tendon for that matter, will generally demonstrate more rapid degeneration with increased day-to-day challenge; i.e., a laborer versus and IT technician, scallop fishermen versus a machinist, baseball pitcher versus a second baseman.

> Mitigating factors include age, level of fitness, years on that particular job and presence/absence of a systemic disease, i.e., diabetes, smoking.

> When a tendon is torn, either partially or completely, there must be a level of violence sufficient to disrupt the tendon. The magnitude of force must be sufficient to disrupt the fibers of the tendon and the individual usually has immediate pain associated with loss of function. Clinically there is tenderness, impaired range of motion and evidence of inflammation (i.e., heat and swelling).

[63] Dr. Stanish reviewed fourteen factors gleaned from all of Ms. Awalt's medical and occupational history.

[64] Dr. Stanish reported the following conclusion and opinion at pages 6-7 of his report:

> In my opinion, the evidence demonstrates that Linda Awalt suffered a whiplash type of injury to her neck in the accident of 2004.
>
> Quite appropriately she was treated with mild analgesic, physiotherapy and rapid return to the workplace. This approach to a whiplash disorder is evidence-based in terms of dictating the most favorable outcome for such an ailment.
>
> In terms of her left shoulder tendinosis, I do not see any compelling evidence that suggests the accident in 2004 caused, or exacerbated an injury to her left rotator cuff.

> As suggested in my preamble, the rotator cuff is very robust and if injured with a single episode of macro trauma, the usual presentation is immediate pain, loss of function and positive findings on clinical examination. Such was not the case with Ms. Awalt.

[65] Dr. Stanish acknowledged that his opinion was based on a paper review and not on an examination of Ms. Awalt. I accept that this is not an uncommon practice and I do not find that this factor affected the strength of his opinion. He firmly established that the tear was to the supraspinatus and subscapularis tendons (the top and front tendons of the rotator cuff) and that these tears were repaired by Dr. LeGay's surgery. It was his opinion that these injuries were caused by repetitive trauma. He testified that even a partial tear is a "pretty dramatic injury."

[66] Dr. Stanish opined that the 2004 accident caused a legitimate whiplash injury with discomfort into the left shoulder. He stated that after the accident "no ripping and tearing" of the shoulder were detected. He said that he was unable to connect the rotator cuff injury with the accident because there was no pain associated with it. Dr. Stanish testified that if there was a partial tear as a consequence of the accident, major medications would be required to manage the pain.

[67] He testified that a tear to the subscapularis tendon is usually associated with young athletes suffering a violent injury. He stated that if there is only "fraying," such is the result of degenerative change over time. He further testified that the "fraying" of the superspinatis was also caused by wear and tear. Dr. Stanish was of the opinion that the facts of the 2004 accident were inadequate to cause tearing in these tendons.

CAUSATION:

[68] I have carefully reviewed all the evidence of the 2004 accident and the events that followed. When Mr. Blanchards truck entered the intersection Ms. Awalt followed and stopped. He turned left and she started to follow him. He suddenly stopped and backed up into her vehicle. The evidence clearly establishes that Ms. Awalt was moving slowly (10km) when contact occurred. While the speed of the truck is not in evidence, I have concluded that its speed was relatively slow. The damage to Ms. Awalt's vehicle was minimal. The truck had only limited space to pick up speed. Ms. Awalt's vehicle was pushed back one car length. At no time was Ms. Awalt subjected to a forceful or jarring impact with

the interior of her vehicle. In making these remarks I am well aware that serious injuries can result from low speed collisions.

[69] I have concluded that Ms. Awalt's initial medical contacts did not disclose symptoms that are consistent with a rotator cuff injury. The only consistent theme is whiplash. I find as a fact that the tear and fraying in Ms. Awalt's left shoulder were caused by a series of injuries incurred at work over a number of years. I also find as a fact that degenerative changes developed before and after the 2004 accident. The plaintiff has not proven on a balance of probabilities that she suffered anything other than a whiplash injury as a result of the 2004 accident.

THE WHIPLASH INJURY:

[70] Ms. Awalt attended at Dr. Langley's office within days of the 2004 accident. She testified that the diagnosis at that time was soft tissue injuries, mild to moderate severity. Dr. Langley testified that on September 22, 2004 Ms. Awalt had a sore and stiff neck. She then diagnosed a mild to moderate whiplash. That diagnosis has not been displaced by any of the other medical evidence. Dr.

Leighton, in 2006 assessed a whiplash type injury involving her neck and some left shoulder discomfort.

[71] I have concluded that Ms. Awalt's whiplash injury is caught by the **Minor Injury Regulations** which were in force on September 20, 2004. The following legislation and regulations apply:

> Section 113B(1) of the *Insurance Act* states:
>
> In this section,
>
> (a) "minor injury" means a personal injury that
>
> > (I) does not result in a permanent serious disfigurement,
> >
> > (ii) does not result in a permanent serious impairment of an important bodily function caused by a continuing injury which is physical in nature, and
> >
> > (iii) "serious impairment" means an impairment that causes substantial interference with a person's ability to perform their usual daily activities or their regular employment.
>
> The *Regulations* state as follows:
>
> 2(1) For the purposes of Section 113(b) of the *Insurance Act* and these regulations,
>
> ...(f) "resolves" means
>
> > (I) does not cause or ceases to cause a serious impairment of an important bodily function which results from a continuing injury of a physical nature to produce substantial interference with a

> person's ability to perform their usual daily activities or their regular employment, or
>
> (ii) causes a serious impairment which results from a continuing injury of a physical nature to produce substantial interference with a person's ability to perform their usual daily activities or their regular employment where the person has not sought and complied with all reasonable treatment recommendations of a medical practitioner trained and experience in the assessment and treatment of the personal injury;
>
> (g) "substantial interference" means, with respect to a person's ability to perform their regular employment, that the person is unable to perform, after reasonable accommodation by the person or the person's employer for the personal injury and reasonable efforts by the injured person to adjust the accommodation, the essential elements of the activities required by the person's pre accident employment;
>
> (h) "usual daily activities" means the essential elements of the activities that are necessary for the person's provision of their own care and are important to people who are similarly situated considering, among other things, the injured person's age.
>
> . . .
>
> 3. For the purposes of Subsection 113(b)(4) of the *Insurance Act*, the total amount recoverable as damages for non monetary losses of a plaintiff for all minor injuries suffered by the plaintiff as the result of an incident must not exceed $,2500.
>
> . . .
>
> 5. On a determination of whether an injury is a minor injury under subsection 113(b)(6) or (8) of the act, the onus is on the injured party to prove, based upon the evidence of one or more medical practitioners trained and experienced in the assessment and treatment of the personal injury, that the injury is not a minor injury.

[72] I have interpreted these provisions in the same way Associate Chief Justice Smith interpreted and applied them in *Farrell v. Casavant* 2009 NSSC 233. My

conclusion is that the injuries caused by the accident are minor and that Ms. Awalt's damages are capped at $2,500.

LOSS IF INCOME CLAIM:

[73] The evidence establishes that Ms. Awalt missed nine months employment in the wake of her shoulder surgery. Given my ruling on causation, no damages may be awarded for this time off. Time lost due to the accident is limited to one week, lost overtime and vacation time. She does not seek lost past earnings.

[74] Ms. Awalt's loss of income analysis claims $10,590. I find as a fact that only part of her lost vacation and overtime can be attributed to her whiplash injury. The evidence does not lend itself to a breakdown between shoulder related losses and whiplash related losses. I am exercising a generous discretion in awarding her $5,000.

DIMINISHED EARNING CAPACITY:

[75] Ms. Awalt argues that she intended to work until age 65. She now feels that she will have to retire early because of her shoulder. She seeks an award of $200,000. She relies on the authority in *Mawdsley v. McCarthy's Towing & Recovery Ltd.*,2010 NSSC 168, and particularly the words of Chipman, J.A. in *Newman v. LeMarche*, [1994] N.S.J. No. 457.

> 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.
>
> I keep in mind the fact that any loss to be sustained by the appellant would occur some time into the future and perhaps never.

[76] With respect I cannot accept the plaintiff's submission that the whiplash injury supports an award for diminished earning capacity. Any diminishment of income will flow from a lifetime of shoulder degeneration caused by the rugged demands of her employment.

LOSS OF VALUABLE SERVICES:

[77] Ms. Awalt seeks $30,000 under this head of damages. Most of this figure is tied to a loss of housekeeping capacity. She testified that since the accident she has had to rely on family and friends to carry out the heavy aspects of her household duties.

[78] In *Monk v. Duffy*, 2008 NSSC 359, LeBlanc J. stated the following at paragraph 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, and 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 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 . . .

[79] Given that authority, I cannot conclude that the shoulder injury was a limiting factor in performing Ms. Awalt's household functions. The evidence does not establish that the whiplash injury resulted in a loss of valuable services.

SPECIAL DAMAGES:

[80] Ms. Awalt seeks $2,978 which is an outstanding balance on her account at Empower Physical Rehabilitation. While the evidence is uncertain as to whether this account relates to shoulder or whiplash injury. Once again, in a gesture of generous discretion, I award this amount to Ms. Awalt so that she can satisfy that account.

CONCLUSION:

[81] I award Ms. Awalt $2,500 in general damages, $5,000 in lost income and $2,978 in special damages for a total of $10,478.00

J.