COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Mariano v. Campbell,* 2010 BCCA 410

Date: 20100921
Docket: CA036865

Between:

Angeline Castaneto Mariano

Respondent
(Plaintiff)

And

Deborah Marie Campbell

Appellant
(Defendant)

Before: The Honourable Mr. Justice Lowry
The Honourable Mr. Justice Tysoe
The Honourable Mr. Justice Groberman

On appeal from the Supreme Court of British Columbia, February 2, 2009
(*Mariano v. Campbell,* 2009 BCSC 98, New Westminster Registry No. M111075)

Counsel for the Appellant:	Alison L. Murray, Q.C.
Counsel for the Respondent:	Robert D. Holmes Leslie J. Muir
Place and Date of Hearing:	Vancouver, British Columbia June 2, 2010
Place and Date of Judgment:	Vancouver, British Columbia September 21, 2010

Written Reasons by:
The Honourable Mr. Justice Groberman

Concurred in by:
The Honourable Mr. Justice Lowry
The Honourable Mr. Justice Tysoe

Reasons for Judgment of the Honourable Mr. Justice Groberman:

[1] The plaintiff was injured in a motor vehicle accident on February 11, 2006. The defendant admitted liability for the accident, and a trial proceeded on the issue of damages alone. The defendant took the position that the plaintiff's injuries had substantially resolved within a month of the accident, and that the plaintiff had completely recovered within a year. The plaintiff, on the other hand, took the position that she

continued to have pain at the time of trial, some three years after the accident, and that that pain resulted from the accident.

[2] On one hand, the plaintiff's medical expert was of the opinion that the plaintiff suffered chronic neck pain that was attributable to the accident. On the other hand, the defendant's expert was of the view that the plaintiff had degenerative changes to her intervertebral discs that commenced long before the accident, and that any pain at the date of trial was unrelated to the accident.

[3] An important question in resolving the issue at trial was whether the plaintiff's neck pain had continued from the date of the accident, or whether it had ceased and then re-emerged. The credibility of the plaintiff was critical in answering that question.

[4] Another important issue at trial was whether the plaintiff's decision to train to become a licensed practical nurse ("LPN") was a result of difficulties in physically coping with her work as a health care aide or simply a choice made in order to improve her career prospects. Again, the answer depended on the credibility of the plaintiff's evidence.

[5] The trial judge found the plaintiff to be a "very credible witness". The judge determined that the plaintiff's continuing pain was caused by the accident, and that her decision to retrain was a result of accident-related difficulties that she encountered in working as a health care aide.

[6] The defendant's main ground of appeal is that the judge made palpable and overriding errors in assessing the plaintiff's credibility. The defendant also puts forward other grounds of appeal relating to the amounts awarded in respect of the plaintiff's retraining and in respect of loss of earning capacity. As I am persuaded the defendant's main ground of appeal must succeed and that a new trial should be ordered, I need not address these other grounds.

Factual Background

[7] The plaintiff was 44 years old at the time of the accident. She had worked as a health care aide since 1999. Her primary job was taking care of the personal needs of two patients with disabilities at a group home. The job was physically demanding, as her duties included lifting the patients in order to change their diapers and transferring them from their beds to their wheelchairs and walkers.

[8] In addition to her full-time job, the plaintiff also held down two part-time jobs at other care facilities. These jobs also involved physical work, including yard work and lifting garbage bags, groceries and large pots and pans. The plaintiff worked up to a total of 75 hours per week at the three jobs.

[9] The plaintiff was a front seat passenger in an S.U.V. driven by her husband when the vehicle was rear-ended by a car driven by the defendant. The plaintiff's head struck the headrest, and she felt immediate pain. She attended a walk-in clinic that day, reporting that she felt pain in her neck and right shoulder, tingling in her fingers, and that she had a headache and felt dizzy and nauseous. She was prescribed ibuprofen at that time.

[10] She attended at her family doctor's office on February 14 and 22, 2006, suffering from neck pain on the right side extending into the shoulder. She also had pain radiating down the right arm and suffered from headaches. The doctor diagnosed a cervical strain injury. She received prescriptions for a muscle relaxant, an analgesic, and anti-inflammatory medication, and was given stretching and strengthening exercises to perform at home. The doctor recommended physiotherapy, and suggested that she stay away from work until the second week of March.

[11] The plaintiff attended physiotherapy on three occasions, but by March 6, she discontinued the therapy. The judge found, at para. 6 of the trial judgment, that the plaintiff "decided she felt better and that she did not need any more physiotherapy." The plaintiff subsequently saw her doctor on March 9 and April 5, 2006, at which time she continued to suffer some neck pain and stiffness, as well as headaches and intermittent dizziness. At the March 9 appointment, she told her doctor that she considered herself ready to return to work. She returned to her full-time job on March 12, and to her other jobs on March 19.

[12] Although she attended at her family doctor on April 12 and on December 8, 14, and 20, 2006 for other matters, it does not appear that the plaintiff made any mention of headaches or neck pain during those appointments. She had a full physical examination on March 10, 2007, and again did not give any indication that she was continuing to experience headaches or neck pain. Indeed, the plaintiff did not see her doctor in respect of headaches or neck pain between April 5, 2006 and February 13, 2008, one week after she commenced the action.

[13] At the end of 2006, the plaintiff decided that she would retrain to become a LPN. She commenced online studies with the College of the Rockies in June 2007, and completed the Access to Practical Nursing program in December of that year. She then applied to Vancouver Career College to complete a program to qualify as a LPN. She was accepted, and began classroom studies in March 2008. At the time of the trial, in November and December 2008, she was completing the final stages of her practicum.

[14] At trial, the plaintiff described continuing pain in her neck on the right side, as well as headaches. She said that she had continued to suffer pain from the date of the accident. Though she had been able to perform her duties at work, she said that she found it difficult, and eventually decided to retrain in order to obtain a less physically demanding job. The plaintiff's testimony was corroborated, to a limited extent, by witnesses who worked with her, who described her as less energetic, or as showing signs of pain after the accident.

[15] The defendant did not dispute that the plaintiff had suffered a soft tissue injury in the accident, but took the position that it had resolved within approximately one month, and that the plaintiff had completely recovered by March of 2007. Any subsequent pain, the defendant contended, was a result of degenerative damage to her discs, and not caused or exacerbated by the accident. The defendant maintained that the plaintiff's decision to retrain was a career choice – one that would allow her to make more money or cut down her hours of work.

The Insurance Application

[16] There was documentary evidence supporting the defence theory that the plaintiff had fully recovered from her injuries by early 2007. On February 2, 2007, the plaintiff applied for mortgage life and disability insurance. Among the questions on the application form was one asking whether she had been treated for back or neck problems in the past 36 months. She answered in the affirmative, and provided the following details:

Type of Illness/ Condition	Date of Diagnosis	Date of Last Episode	Duration of Illness/ Condition	Type of Treatment / Medication Provided (Including Referrals)
Neck Pain Due to Car Accident	Feb/06	March/06	1 month off from work	Pain reliever

[17] On March 12, 2007, the insurer agreed to provide the insurance, but only with a disability exclusion in the following terms:

> [T]he disability insurance ... shall not cover ... any ... disability due to ... disease or disorder of the spinal column, including the vertebrae, intervertebral discs, surrounding ligaments and muscles ....

[18] The respondent wished to have the exclusion removed, and visited her doctor on March 22, 2007, for the purpose of obtaining a note indicating that she had recovered from the accident. She advised the doctor that she felt "very well", though it appears that she also stated that she suffered muscle pain on and off, especially after working a long day or standing for a long time. Her doctor wrote a note, which the plaintiff forwarded to her insurer. The note stated:

> This is to confirm that Angeline has recovered from her injuries sustained in an MVA Feb 2006 and has no complications or *sequelae* of this accident.

[19] The plaintiff was cross-examined about her statements on the application for insurance, but was evasive:

> Q Okay. Now, let's talk about that. You've said, well, the reason I answered date of last episode is I went back to work then.
>
> A Yes.
>
> Q Let me suggest this to you, you said date of last episode because you had recovered then?
>
> A It's not recovered. Because even I went back to work, I still -- still all those symptoms, I still feel the -- I still feel my head ache, my neck, my neck pain, and my shoulder pain. But because I went back to work, that's what I thought, I went back to work and I am not disabled, like, I still work anyway, so I just put down there March '06.
>
> Q Ms. Mariano, it says "Date of illness" -- or, sorry, "Duration of illness/condition", and you've written "One month off of work". Were you -- did you believe you were still suffering from this illness or this condition as of February '07?
>
> A Yes.
>
> Q Okay. So why did you not, for example, put in there "Ongoing" or "I still have it"?
>
> A The duration, it says "Duration", I put one month. That's what I (indiscernible).

THE COURT: I'm sorry, what did you say?

A It says duration of illness. I put down there one month from work, and I didn't get any here anyway, they didn't -- they didn't cover me, so what's the point of the question, I mean...

[20] Counsel attempted further cross-examination on the issue, but was ultimately admonished by the judge:

Q Okay. So you were applying for disability insurance in the event you were disabled and you wanted to have your mortgage paid, right?

A Yes.

Q And so would you agree with me it was important to be truthful to Life Investors?

A Yes. That's why I told them I had neck pain and I had car accident.

Q And you agree with me in filling this form out you were truthful with Life Investors?

A I tried to be truthful.

Q Okay. And would you agree with me that you, in making those statements, you truthfully told them you had recovered from this car accident, agreed?

A I'm -- you said I'm recovered?

Q Yes. That you truthfully --

THE COURT: It doesn't say -- you're putting words that don't exist on the form.

MR. PETTIT: Okay.

THE COURT: I don't want you to do that.

[21] Counsel then attempted to cross-examine the plaintiff with respect to the note that she obtained from her doctor and forwarded to the insurer. Again, however, the judge limited the cross-examination:

Q Okay. You sent that note intending to be honest with Life Investors, didn't you?

A Yes.

Q You were not trying to mislead Life Investors?

A I don't try to mislead. Can I explain? Can I explain with this one?

Q Yeah, absolutely.

A Yeah, because they want to -- there is a rider in my -- in my whole spinal column, spinal --

THE COURT: There is a...?

A It says rider, exclusion, exclude my whole spinal, but I had in my -- in my -- for myself why the whole spinal column, it's only I'm complaining my neck and my headache and my -- my shoulders. So I said why the whole spinal column? So that's why I complained for that, why they needed to exclude the whole spinal, it is only I have my neck pain, right? That's why I asked Dr. Darby if she can give me this one.

MR. PETTIT:

Q This note?

A Note.

Q Okay. Now, the note says that you had recovered from the car accident injuries, right?

A That's what -- yes, that's what the note says.

Q And the note said with no complications, right?

A Yes.

Q And no sequelae, which are following up problems for --

A Yes.

Q Okay. And you gave that note intending for Life Investors to rely on it to modify your coverage, right?

A Yes.

Q Okay. And you again, when you gave that note to Life Investors, you were not trying to mislead them, were you? You weren't trying to fool them or trick them, were you?

A No, I just, because -- that's why I told you, why did they exclude my spinal. I have only my neck pain on my shoulder pain, so they exclude the whole spinal to me, also for me. It's like I don't have any, like, I wasn't hit in the back. I It's in my -- it's my leg and in my shoulders.

Q Right. So what you said --

A But I'm not trying to lie or whatever. I just asked them to -- why -- I tried to be honest, I mean...

Q Ms. Mariano, is what is in this note true?

A Yeah, I asked for the -- for that -- for the (indiscernible).

Q It's true.

A It's true.

Q You stand by it?

THE COURT: The doctor wrote the note.

MR. PETTIT: Yes.

THE COURT: All right?

MR. PETTIT: I understand.

THE COURT: You can ask the doctor about that.

MR. PETTIT: Okay.

THE COURT: She's already -- you've asked her several different ways, and she -- she keeps agreeing with you and you keep coming at it again.

MR. PETTIT: Okay, thank you.

THE COURT: All right?

[22] In her reasons for judgment, the judge referred to the insurance application form and doctor's note only briefly:

> [39] The defendant points to Ms. Mariano's application for mortgage life and disability insurance where she filled in "March 2006" as the "date of the last episode" of neck pain and that Dr. Darby wrote a note to the insurance company indicating that Ms. Mariano had fully recovered from the accident with no complications or sequelae.
>
> [40] The statements may not have been entirely accurate but it was understandable. Ms. Mariano tried to put herself in the best light she could so that she could obtain, as she did before the accident, mortgage disability insurance with no exclusions. The defendant's negligence caused the insurance company to dramatically limit the mortgage disability insurance available to Ms. Mariano through no

fault of her own. The defendant should not be heard to be complaining too loudly.

The Applications for Admission to LPN Programs

[23] The plaintiff's applications for admission to the College of the Rockies and the Vancouver Career College also suggested that the plaintiff had fully recovered from her injuries. The application form for the College of the Rockies included the following note:

> Some medical conditions may affect your ability to complete the Access to PN program and work in some parts of this field. The items listed below will not prevent your entering the program, but any that affect you should be discussed with the instructor. Please answer carefully and honestly, answering yes will not cause you to be deemed inadmissible to the program ....

[24] There followed the question, "Have you ever had, or do you now have, any of the following condition[s]"? Among the listed conditions were "frequent or severe headaches", "back trouble or pain" and "muscular-skeletal problems that may interfere with lifting, carrying or transferring patients". The respondent answered, "No" in respect of each of the listed conditions, and reported that she had no other present medical conditions or symptoms, and was not taking any drugs or medication. In response to a question asking her to "List by approximate date any serious illness, injury, or surgery", the respondent replied "None".

[25] In order to gain admission to the LPN program at Vancouver Career College, the plaintiff was required to obtain and provide a "Doctor's Certificate of Good Health". Her family doctor completed the form, which contained the following statement: "I hereby certify that to the best of my knowledge, this individual is free from ... back problems, and I feel that ... she is physically ... capable of performing the work of a LPN".

[26] The trial judge did not refer to the college application forms in her judgment.

Judge's Comments on Cross-Examination

[27] The evidence supporting the plaintiff's case, apart from her own testimony, consisted of testimony from some persons who worked with her, and the evidence of her family physician and a medical expert.

[28] In respect of the co-workers, the trial judge observed:

> [26] None of the witnesses who work with Ms. Mariano and observed her before and after the accident were challenged on their credibility.

[29] The testimony of these witnesses was brief and largely non-specific as to the timing and duration of any problems that the plaintiff had at work. It is correct to say that the defence did not mount a "full-frontal attack" on them. The cross-examination did, however, address credibility. Ms. Perez, who supervised the plaintiff in her full-time job, testified in chief that she herself was on a medical leave at the time of the plaintiff's accident, and did not return to work until October 2006. She said that when she returned to work, the plaintiff gave up shifts and was no longer "going that extra mile" by taking on extra work or volunteering

for additional shifts. On cross-examination, however, she was shown an evaluation form that she had prepared for the period from October 2006 to September 2007, in which she had given the plaintiff a very positive appraisal, and had specifically commented that the plaintiff was “very reliable” and “willing to work extra shifts when needed”.

[30] With respect to the medical witnesses, the judge said:

> [46] Neither Dr. Darby nor Dr. Apel was seriously challenged on cross-examination.

[31] This statement is not supported by the trial transcript, which discloses serious challenges to the testimony of both doctors.

[32] Dr. Darby had, as I have described, written a note to the plaintiff’s insurer in March 2007, stating that the plaintiff had fully recovered from the motor vehicle accident. She was cross-examined at length on the letter. For the most part, she took the position that the note was accurate, and that she had concluded, in March 2007, that the plaintiff had fully recovered from the accident. This evidence was inconsistent with her written report.

[33] Dr. Darby’s evidence in cross-examination was also not completely consistent in respect of the note. At one point she testified that what she had really meant to say in the note was merely that the plaintiff was not disabled, and was capable of doing her job without limitation.

[34] The cross-examination was sufficiently effective that plaintiff’s counsel chose to take the unusual step of challenging the doctor in re-examination, putting a leading question to her to contradict what she had said in cross-examination:

> Q Is it fair to say that you really did not have a basis to say -- to write that note to say that she was completely recovered?
>
> A Yes.

[35] Dr. Darby was also challenged in cross-examination with respect to her Certificate of Good Health on the Vancouver Career College form. She attempted to limit the import of the form, saying that she did not consider the neck problems suffered by the plaintiff to be “back problems”, which she interpreted as meaning lower back problems. She also contended that the neck problems would be unimportant to the plaintiff’s performance as a LPN.

[36] In cross-examining Dr. Apel, defence counsel concentrated on information that had not been provided to her, as well as on certain misstatements of fact that the plaintiff had made to her. Dr. Apel agreed that the diagnosis in her report was not consistent with some of the information put to her in cross-examination. Although she did not, ultimately, resile from her view that the plaintiff’s ongoing pain was attributable to the accident, the basis for that view was substantially modified.

[37] At times, Dr. Apel appeared to take on an advocacy role on behalf of the plaintiff, postulating justifications for her failure to provide full and accurate information, or minimizing the import of false

statements. Of course, the question of whether the cross-examination undermined Dr. Apel's opinion was one for the trial judge. In making her assessment, however, the trial judge was required to consider all of the evidence. Her statement that Dr. Apel was not seriously challenged indicates that she either misapprehended or ignored significant parts of the cross-examination.

Analysis

[38] This appeal concerns assessments of witness credibility and findings of fact. It is well-settled that an appellant court must exercise great restraint in reviewing such matters. They are properly the province of the trial judge. In the absence of palpable and overriding error, this Court must defer to the findings of fact of a trial judge (*Housen v. Nikolaisen*, 2002 SCC 23, [2002] 2 S.C.R. 235).

[39] The function of a trial judge in determining credibility, and the limited role of appellate courts in respect of credibility findings were discussed by the Supreme Court of Canada in *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3:

> [49] While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness's evidence is rejected may involve the judge saying unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence and convicting him, but adding negative comments about his demeanor. In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization.
>
> [50] What constitutes sufficient reasons on issues of credibility may be deduced from *Dinardo* [*R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788], where Charron J. held that findings on credibility must be made with regard to the other evidence in the case (para. 23). This may require at least some reference to the contradictory evidence. However, as *Dinardo* makes clear, what is required is that the reasons show that the judge has seized the substance of the issue. "In a case that turns on credibility ... the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt" (para. 23). Charron J. went on to dispel the suggestion that the trial judge is required to enter into a detailed account of the conflicting evidence: *Dinardo*, at para. 30.
>
> [51] The degree of detail required in explaining findings on credibility may also, as discussed above, vary with the evidentiary record and the dynamic of the trial. The factors supporting or detracting from credibility may be clear from the record. In such cases, the trial judge's reasons will not be found deficient simply because the trial judge failed to recite these factors.
>
> ...
>
> [55] The appellate court, proceeding with deference, must ask itself whether the reasons, considered with the evidentiary record, the submissions of counsel and the live issues at the trial, reveals the basis for the verdict reached. It must look at the reasons in their entire context. It must ask itself whether, viewed thus, the trial judge appears to have seized the substance of the critical issues on the trial. If the evidence is contradictory or confusing, the appellate court should ask whether the trial judge appears to have recognized and dealt with the contradictions. If there is a difficult or novel question of law, it should ask itself if the trial judge has recognized and dealt with that issue.

[40] This case involved a soft tissue injury. Because of the lack of purely objective evidence for such

injuries, the evidence in support of the plaintiff's case necessarily derived solely from her own reports of her injuries – either to the court, to her doctors, or (to a lesser extent) to her work colleagues. In the circumstances, the plaintiff's credibility was critical to the judge's assessment of the case. In *Maslen v. Rubenstein* (1993), 83 B.C.L.R. (2d) 131, [1994] 1 W.W.R. 53 (C.A.) at para. 15.1, this Court commented on the correct approach to cases such as the one before us:

> With respect to the evidence required in order to meet the onus lying on a plaintiff in such cases, Chief Justice McEachern (then sitting as a trial judge) in *Price v. Kostryba* (1982), 70 B.C.L.R. 397 (S.C.), repeating his observations in *Butler v. Blaylock*, [1981] B.C.J. No. 31 (B.C.S.C.), put it thus [p. 399]:
>
> > I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.
> >
> > An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrong-doer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence – which could be just his own evidence if the surrounding circumstances are consistent – that his complaints of pain are true reflections of a continuing injury.
>
> So there must be evidence of a "convincing" nature to overcome the improbability that pain will continue, in the absence of objective symptoms, well beyond the normal recovery period, but the plaintiff's own evidence, if consistent with the surrounding circumstances, may nevertheless suffice for the purpose.

[41] In the case before us, then, a critical issue was whether the plaintiff's evidence at trial about the course of her recovery was credible. To make that determination, the judge had to examine the plaintiff's various statements and the other evidence.

[42] It is my view that the reasons for judgment do not demonstrate that the judge "seized the substance of the critical issues". There are several indications that she did not do so.

[43] First, in a case such as the present, the cross-examination of the plaintiff on her previous statements was of great importance. Unfortunately, the trial judge appears to have been reluctant to allow the defence to fully cross-examine the plaintiff on inconsistencies in her statements. As I have indicated, the judge intervened to bring to an end defence counsel's cross-examination on the insurance application and on Dr. Darby's note. She also intervened when counsel attempted to cross-examine the plaintiff on her false statements to the expert witnesses to the effect that she had been in physiotherapy for several months after the accident:

> Q Now, you've agreed with me that you told Dr. Schweigel, physiotherapy for several months, and Dr. Apel, for four months. Can you advise the court why you told the doctors that you were in physiotherapy for a number of months when in fact you were only there for three visits?
>
> A Because the -- those are a long time -- those, it happened a long time ago. So the exact -- exact date or the exact number of times, I can't -- I can't remember any more because there are lots of things happening to me. It wasn't just like I just concentrate in that part only. So when I say something like that, probably I'm not sure, but, well, I already said it, what can I do, right? It's my fault. I said it.

Q You feel you made an error?

A I made, like that one, yeah.

Q And they are based on --

THE COURT: I'm sorry, you said "I can't concentrate"?

A Yeah, because there are lots of things happening to me, so I can't just remember everything like that. Like, every day it's every number of things happening to me.

MR. PETTIT:

Q You -- you feel that you were unable to recall the amount of physiotherapy correctly?

THE COURT: I think you should move on.

MR. PETTIT: Okay.

[44] It is, perhaps, understandable that the judge wished to move the proceedings forward, particularly as the trial extended well beyond the parties' time estimates. It is unfortunate, however, that the cross-examination of the plaintiff was curtailed. It indicates that the issue of the plaintiff's credibility may not have been fully canvassed. That said, I do not suggest that the judge's interventions, in and of themselves, constituted reversible error.

[45] The trial judge's treatment of the application for insurance and the applications to the colleges is also problematic. The documents, as previous statements by the plaintiff, were admissible for the truth of their contents. Indeed, strong arguments can be advanced for accepting the documents as true, particularly given the evidence of Dr. Darby in cross-examination. The judge, however, does not appear to have considered the possibility that the documents were truthful in stating that the plaintiff had fully recovered by March 2007. Instead, her reasons suggest that she assumed that the statements to the insurer were false, and that their only value was in respect of an assessment of the plaintiff's general credibility. She dismissed them as being of little moment in that assessment. She did not even mention the statements in the applications to the colleges.

[46] As I have already observed, the trial judge's statement to the effect that the doctors' were "unchallenged" on cross-examination (and, to a lesser extent, her similar statement with respect to the lay witnesses) also suggest that she misapprehended or ignored critical evidence.

[47] The judge provided the following reasons for accepting the plaintiff's evidence:

> [38] The defendant tried unsuccessfully to attack Ms. Mariano's credibility and argues that because of the minimal impact, Ms. Mariano can only have suffered minimal injuries. However I find Ms. Mariano a very credible witness. She continues to work despite her symptoms. The pain in her neck and shoulders prevents her from working the way she used to work, and from doing the things she used to enjoy doing. She was unable to buy her sons a big pumpkin for Halloween as she had always done before because she is now unable to carry a big pumpkin. Ms. Mariano became quite visibly distressed when she described the activities she can no longer participate in with her children because of her injuries or because she is now simply too tired at the end of the work day to do anything else.

[48] In my view, the reasons are problematic. The fact that the plaintiff continued to work despite her

symptoms does not, on the face of it, have any relationship to her veracity. The issue in this case was not whether the plaintiff was exaggerating symptoms, or even whether she experienced pain at work at the time of trial. Rather, it was whether her pain had been ongoing since the time of the accident.

[49] Similarly, the plaintiff's emotional reaction to her neck problems had no bearing on the question of whether she was being completely forthright with the court in respect of the course that her pain took.

[50] I conclude that, looked at in their entire context, the reasons do not suggest that the trial judge "seized the substance of the critical issues". She did not deal with important contradictions in the evidence, and appears to have misapprehended or ignored parts of the cross-examinations of the plaintiff's witnesses. This constitutes the kind of error that compels this Court to set aside her order.

[51] In saying this, I do not suggest that there was no evidence supporting the plaintiff's case, or that the judge was required to reject her evidence. There was a body of evidence supporting the plaintiff's contentions, and a judge would not err in accepting that evidence, provided that he or she fully appreciated and considered the evidence before reaching that conclusion.

[52] The parties are entitled to have the evidence fully appraised by a trial judge. This Court is not in a position to determine a proper assessment of damages in this case. Accordingly, I would set aside the judge's assessment of damages, and order a new trial on that issue.

"The Honourable Mr. Justice Groberman"

I agree:

"The Honourable Mr. Justice Lowry"

I agree:

"The Honourable Mr. Justice Tysoe"