30.8.2000

CIRCULATE

IN OPEN COURT

IN THE GRAND COURT IN THE CAYMAN ISLANDS

CAUSE 594 OF 1997

BETWEEN: G.E. PLAINTIFF

AND: M. A.H. DEFENDANT

Appearances:
Mr. Ward Sykes of Collins Broadhurst & Furniss for the plaintiff
Mr. Delroy Murray of Samson Murray & Jackson for the defendant

Before: Justice Anthony Smellie

Date: 21 &22.8.2000 and 5th September 2000.

JUDGMENT

The action arises out of a motor vehicle collision in which a car driven by the defendant was struck from behind by a Daihatsu "jeep" driven by the plaintiff.

The plaintiff's vehicle was struck while stationary awaiting a break in oncoming traffic to make a right hand turn.

The plaintiff testified to having been struck very forcefully from behind twice by the defendant's car, which suggests that the defendant was travelling at some speed.

The first strike was forceful enough to severe the bolts of the driver's seat from the chassis pushing the plaintiff with the seat with great force to the left and forward. She

said the second strike was also with force enough to again push her sideways and forward.

She was not wearing the seat belt with which her vehicle was equipped.

The defendant testified that she was driving slowly but struck the plaintiff's vehicle - because of momentary inattentiveness.

She does not accept that the collision involved the degree of force described by the plaintiff.

A peculiarity of this case is that there is no independent physical evidence of the accident. The vehicles were repaired and there are no photographs, nor evidence from any other source, as to the condition of either vehicle or the nature of the collision.

There is however a good deal of medical evidence about the nature of the injuries sustained by the plaintiff.

They are consistent with the collision she described involving being struck from behind with force. They are of the kind commonly referred to as whiplash injuries. There are, however, complicating features of the injuries which require that they be regarded as being of the most severe kind. In the end this was accepted by Mr. Murray for the defence, except for certain of the plaintiff's conditions which he submitted could not be attributed to the injuries sustained in the collision.

These are the uncontrollable or physiological tremors which the plaintiff experienced immediately after and during the several months following the accident.

Despite extensive examinations by neurologists and other specialists; and including MRI's and laboratory tests, no pathological cause has been indicated. The tremors have been recorded at above 9 hertz which unquestionably establishes their involuntariness in

the doctors' opinions. They have been and are likely to be exacerbated under stress or anxiety. Fortunately, this condition has responded to medication and for the past several months has come to be regarded as under control. Although it is a physiological condition and can be, in one doctor's opinion, related to the collision as manifest by its immediate onset due to the stress and anxiety of the accident; the condition is not regarded any longer as interfering with the plaintiff's functional capacity.

In the words of Dr. Caroline Quartly, the Professor of Physical Medicine and Rehabilitation who has had primary care of the plaintiff since the accident; the diagnosis of the cause of the tremors is not relevant except to rule out sinister pathology; ie: "some form of seizure, hyperthyroid or something metabolic that should be managed differently --- there is no neurological region of concern -- we are here in the realm of cervical concerns".

The cervical concerns Dr. Quartly described as related to a complicated and interrelated number of neurological and bio-mechanical factors which bear a direct relationship to the whiplash injuries.

When first examined after the accident, the plaintiff presented with pain to the upper fibres of the trapezious or shoulder muscles. She also presented with paid to the posterior aspects of the left shoulder and upper arm and parathesias (pins and needles) in the outer three fingers of the left hand, as well as lower back pain. The plaintiff had never experienced these symptoms before.

These areas of pain suggested to the doctor that neurological examinations were required.

Those examinations revealed that the 3rd and 4th nerve roots which come between the 2rd, 3rd 4th and 5th cervical vertebrae of the neck (C2, C3, C4 and C5) are being compromised by the narrowing of the spaces between the bones through which they exit to enervate the muscles of the shoulder.

This has been the result of the strain placed by the whiplash injuries upon the ligaments and joints of the neck and the effect that has had upon a pre-existing degenerative condition.

This degenerative condition - described as a natural result of the ageing process in a middle aged person such as the plaintiff - has involved the narrowing of the space in the joint through which the nerve roots and the spinal cord pass in the area of C3 -C4.

This, in the plaintiff's case, has happened due to a combination of factors: the deterioration of the cervical discs which serve as shock absorbers between the cervical joints and the intrusion into the spaces the spinal cord canal of exuberant bone or osteophytes. These osteophytes have grown to compensate for the loss of stability in the neck structure resulting from the deterioration of the discs.

The effect of the strain upon the neck resulting from the whiplash injury acting upon this pre-existing condition has been to hamper the biomechanical functions of the ligaments and joints of the neck resulting in increased pressure upon the nerve roots and spinal cord. This is the cause of the recurring pain earlier described. The whiplash injuries have rendered and the plaintiff more prone to this becoming a chronic condition.

The latest prognosis is that the mid-cervical spine is already close to being fused and is likely to become fused; either naturally or by surgical intervention and the resultant further decrease in mobility of the spine would result in increased pressure in the

segments above and below. Surgical intervention would, therefore, only be taken if there is direct impingement upon the nerve or the spinal cord.

The problem is that as there are already known degenerative changes with the increased bio-mechanical stress resulting from the injury and from the restriction in mobility; there is a very real risk that with the increased wear and tear particularly at C3 - C4, there will either be increased referred pain radiating out to the shoulder or increased osteophytic projection into the canal and consequently the possibility of nerve damage to the exiting nerve root to the trapesious muscles.

Dr. Quartly emphasised the significance of the relationship between the trauma of the whiplash injury to the onset of the pain and the subsequent possible deterioration in the bio-mechanical functions of the neck. She testified that by contrast with the condition of the plaintiff it is very common to find people in their 60's and 70's with extensive degenerative changes shown on x-rays who are functioning normally - such as narrowing of the disc spaces, exuberant bone and osteophytic projections.

In her opinion had the accident not occurred, there is absolutely no reason to expect that that the plaintiff would be in a different condition.

It is of course settled law that a tortfeasor takes his victim as he finds him. It is not necessary that he reasonably anticipates the extent of the injury or its exact type, only that injury could be foreseen: Smith v Leach Brain & Co.Ltd.[1962] 2 Q.B. 405.

Here liability is admitted on the basis that whiplash injury was a reasonably foreseeable outcome of the collision. The exact extent and complications of the injury need not be shown to have been foreseen.

I find that although the degenerative condition of the cervical structure of the plaintiff's neck was not a result of the accident, it pre-disposed her to her present condition; described by Dr. Quartly as a chronic non-restorative pain pattern.

In this case, this means that the plaintiff becomes liable in respect of the onset of the complications. This involves the predisposition to chronic referred pain now being experienced by the plaintiff, the foreseeable expectations for the future and, in particular, the likely limitations upon her ability to work.

The doctor testified that the plaintiff had attained her maximum level of medical rehabilitation some two years ago, a level she has maintained until now.

She described the plaintiff as having been able to achieve this because she is an "extremely compliant patient", who has assiduously followed her regime of treatment. This has included extensive physiotherapy, medication, reduced working hours, the need to maintain a suitable ergonomic environment at work (to minimise the strain on the ligaments and joints of the neck), special exercises and avoiding physical activities in which she frequently participated - such as deep sea fishing, snorkelling and dancing.

The pain will continue and become exacerbated unless the plaintiff continues to pay close attention to this regime. She is regarded as being always at risk for developing a chronic non-restorative pain pattern. This could involve an inability to get restorative sleep which could result in a down-ward spiral of increased vulnerability to trauma and even depression. Everything depends on how successful the plaintiff remains in avoiding the recurrence of chronic pain. At present she describes a constant numbness, not the pronounced referred pain associated with the nerve roots being compromised.

I now turn to consider the heads of damage which I accept flow from the injuries described. These heads of damage are admitted as to liability but not as to quantum. I proceed on the basis that the plaintiff, within the limits of human reasonableness and frailty, must continue with her strict regime so as to be taken as making every effort to minimise her losses.

General Damages: pain and suffering and loss of amenities

The plaintiff, who is now 55 years old, described her very active life style prior to the accident. She was socially and physically very active but must now forego any physical activity that could aggravate her condition. She testified that she has difficulty sleeping, must lie on her back and suffers a constant dull pain. Her sexual relationship with her partner has been affected. Fortunately their commitment to each other remains strong. Dr. Quartly testified that the plaintiff is at her maximum medical recovery but will continue to suffer from a limitation of movement and a level of pain which will never go away. She must constantly be on guard against non-restorative sleep leading to sleep disorders and possible depression. Despite her extreme compliance with her regime, she will continue to need constantly to be on guard against the possibility of the worsening of her condition which can happen in a myriad of ways such as while driving and from bad ergonomics at work.

Her case is to be regarded as one of severe whiplash injury resulting in continuing pain and significant loss of amenities. Hers are comparable to the injuries described in the case of Camus v Williams in the English High Court in 1997 (reported in Kemp & Kemp

1999 Ed) and in which £13750 was awarded by way of general damages. In present day values that would be CI$18750.

I find however, that the loss of amenities described in the present case is more severe and the risks of a worsening of the plaintiff's condition more acute. The sum I award under this head of damages is CI$30,000.

Special Damages to date of trial

Medical expenses

Apart from those associated with the investigation of the cause of the tremors, Mr. Murray accepted liability for the expenses attributable to the treatment of the whiplash injuries and its diagnosis.

He described the tremors as unrelated to the accident

I regard that as to confined a view of the problem.

Although Dr. Quartly has found no neurological or physiological explanation, she did conclude that the tremors are related to the stress and anxiety of the accident. They had never occurred before the accident.

It was reasonable of the doctors to require the MRI, laboratory and other tests, in seeking to diagnose the cause of the tremors and to rule out 'sinister pathology'.

At the election of the specialists, one of the MRI scans was used to examine the brain rather than the spine and Dr. Quartly expressed the view that although the MRI was called for, that particular use was unnecessary. The plaintiff had been referred for the symptoms she was experiencing, which did not require an examination of the brain.

There was a significant cost involved of over 4000 USD. This was not however a cost unreasonably incurred by the plaintiff who had no control over the actual procedure or the decision to undertake it. The plaintiff was entitled to and was in fact acting on the advice of reputable medical practitioners when she submitted herself to both MRI examinations. She is entitled to recover the costs: See Munkman, Damages for Personal Injuries and Death, 10th ed.(1996) at 76:

> "where the plaintiff takes advice in good faith from a reputable medical man the expense of taking advice and acting upon it is admissible, notwithstanding that the diagnosis proves to have been mistaken: Ruebens v Walker 1946 SC 215".
>
> This dictum was applied by this Court in Allen v Ebanks 1998 CILR 190.

The claim for special damages to date of trial for medical expenses is allowed in the amount of $18,515.

This sum includes the costs of the plaintiff having been accompanied by her partner when she travelled to Memphis, Tennessee for the first MRI examination. On that occasion, which was shortly after the accident, she certainly was in no condition to travel alone. On the second occasion for an MRI, she was able to travel alone but cited the stress she would have experienced had she been required to travel alone to Miami, Florida; a city she regards as unsafe. I do not regard her misgivings as justifying passing the costs of her partner for the Miami trip on to the defendant (whose position here is occupied by the insurers). I allow the companion's costs of travel to Memphis as reasonably necessary to promote or encourage her recovery See Yates v Ratke 1997 CILR 448 at 459. The sum mentioned above includes those costs.

Car rental

A sum of $1457 was claimed for loss of use of the plaintiff's vehicle while it was being repaired as attributable to the cost of having a car from the 20th of July to the 5th of September 1996. I award those costs incurred over that period as reasonably reflecting the actual time it took to obtain the replacement parts for the repair of the plaintiff's vehicle.

Loss of earnings

It is not challenged that the plaintiff has suffered loss of earnings because of the injury. Her condition has required her to work shorter hours to avoid the strain which can exacerbate her condition.

Her evidence, supported by the testimony of her employer - the principal of Bayside Watersports where she works - was that prior to the accident her average monthly earnings were CI$3110. This was comprised roughly fifty percent as to salary (based on an hourly rate of pay of six dollars per hour) and fifty percent as to commission on business written by the plaintiff (fishing charters, scuba diving trips, snorkelling trips and the like).

The plaintiff testified that prior to the accident she worked an average of 10 - 11 hours per day – from 7.a.m until 6 p.m.. This was supported by the evidence of her employer Mr. Eugene Ebanks although no independent records of Bayside Watersports were tendered in evidence in support.

Since the accident, the plaintiff has had to curtail her hours of work to far fewer hours per day, and more recently, to an average of 7 hours per day. This has resulted in a drop in

income to an average of $1600 per month, roughly one-half her earnings prior to the accident.

In order to be assured of even that level of earnings, the plaintiff with the agreement of the employer, changed her terms of pay to one based on salary only; but at the increased rate of $12. per hour up from $6 per hour.

Notwithstanding the absence of the records to verify her earnings prior to the accident, the records since then do verify her average monthly earnings post-accident and the post-accident average number of hours worked and hourly rates of pay.

The plaintiff testified that she now has no savings and needs to maximise her income to maintain the standard of living she had prior to the accident and to provide for her retirement. She had been able to share the expenses of her household and other commitments equally with her partner with whom she lives.

I accept that the available post-accident records show her working only half days notwithstanding her financial needs.

I accept that but for the accident she would now be working the longer hours of which she testified.

No increase in salary is assumed for the pre-trial period given the historical absence of such increases over the years prior to the accident.

I accept her evidence of the pre-trial loss of income and award the amount claimed for the period July 19th 1996 to date of trial in the sum of CI$82,000. This figure is to be adjusted upwards to reflect pension contributions based upon earnings which the employer would have been required by law to contribute since the National Pensions Law came into effect in June 1999.

I regard pension contributions as payable on all earnings whether generated as salary or as commission, as the plaintiff's income partially was prior to the accident (see definitions of "pensionable earnings" in the National Pensions Law). Five per cent (the statutory rate of contribution by the employer) of the sum to be awarded as loss of income since January 1999 brings the sum of lost income award to CI$83350.

Household help

Before the accident the plaintiff and her partner had been able to do their own housekeeping. The plaintiff is now unable to and they have had to employ a part-time helper at an average cost of $1150 per year. This is for 5 hours every two weeks at $7.50 per hour.

I regard this as a reasonably incidental cost to be allowed. To the date of trial this amounts to the sum of CI$4600.

Future Losses

Future loss of income

I accept Mr. Sykes' submission that I should adopt as the base figure the sum representing lost income for the year immediately preceeding the trial; ie: 1st August 1999 to 31st July 2000. This I accept - having regard to the factors discussed above - should be the difference between what the plaintiff earned over that period and the average earnings prior to the accident. The amount is $18040. That represents an average of 57 hours per week or 9.5 hours per day. While I accept that the plaintiff would still now be working at that level but for the accident, I do not accept that she would have maintained that level

for the rest of her natural life as Mr. Sykes argued, or even for the rest of her working life.

Notwithstanding her declared need to maximise her income, I do not think it reasonable to assume she would have maintained that level of intense work beyond age 65. This is all the more reasonable having regard to her active, recreational and sociable life style which she declared she and her partner had every intention to pursue. I regard her as likely to have maintained her pre-accident level of work and level of income to age 65. Age 60 will be the age at which pensions contributions from her employer will cease ("the normal retirement age" under the National Pension Law) and would have ceased therefore in respect of contributions as a percentage of the lost earnings. The multiplicand to age 65 will be $18040 per annum for lost earnings and $902 per annum for lost pension contributions to age 60. That with the multiplier of 10 for the lost earnings and 5 for the lost pension contribution yields $184910.

Mr. Sykes invited me to adopt a multiplier of 17.55 years beyond age 55 as representing the number years of expected working life for the calculation of this head of damages. This he did by reference to the Ogden Tables presented in Kemp and Kemp at Chapter 8 Table 2 headed "Multipliers for pecuniary loss for life (females)". This table and the suggested figure is in my view inappropriate for arriving at the multiplier here. It is intended to provide a multiplier for the calculation of a loss to continue until the end of the expected natural life. I do not accept that the plaintiff should be regarded as needing or able to work for the rest of her natural life. Her injuries aside, I must make allowances for the vicissitudes of life which would typically suggest an average working life of shorter duration than natural life, which from the Ogden tables would be 72.5 years. I

have adopted a multiplier which would project the plaintiff working until age 65; ie: for 10 more years.

The multiplicand of $18040 lost earnings per annum was accepted by Mr. Sykes although it is based on the assumption that the plaintiff would have continued not to receive any increase in her rate of salary. I consider this to be wholly unrealistic when projecting over the rest of working life. I consider a net increase of 10 per cent - as a rough and ready estimate of accumulated increases over the projected period of 10 years - to be reasonable.

This would be $18491 and gives a total of $203401 for loss of future earnings including pension contributions to age 60.

Future Cost of Household help

I will accept that the plaintiff would have continued to do her own housekeeping but for the injuries, until age 65. This calls for a further award of those costs (at $1150 per annum) for 10 years; ie: an award of $11500.

Future Cost of Care

Dr. Quartly opined that with the best will in the world and the most disciplined compliance with the advised regime, all patients in the plaintiff's position are likely to require occasional physiotherapy and some medication.

The plaintiff must of course be taken as obliged to mitigate her losses by sticking to the regime by which she would avoid a relapse or exacerbation of the pain symptoms. I therefore may not make an award to cover the costs of all probable treatments. I will

however make an award to allow for one course of physiotherapeutic treatment per annum over her life expectancy of 18 years at $300 per annum giving a sum of $5400. A nominal sum representing her likely unavoidable costs for medication (having regard to costs incurred so far) I award at $2000.

Handicap or Disadvantage in the job market

("Smith v Manchester" damages - (1974) 1.K.I.R.I.C.A.)

This kind of claim requires the Court to look at the nature of the plaintiff's injuries and to ask the question whether they create a disability which probably or likely will result in the plaintiff losing her job and not being able to obtain comparable employment in the market place. If so, then the Court must make the best estimate it can of the degree of the risk and reflect that risk of loss in an award of a sum which it estimates would be the lost income resulting from unemployment or lack of comparable employment.

I do not consider the risk to be likely in this case for several years to come. Although there are risks of the plaintiff's condition deteriorating in particular due to strain while at her sedentary job the exacerbation of those risks can be avoided while at the workplace. Nothing about her job makes it impossible to maintain ergonomic safeguards. Although Dr. Quartly has avoided prescribing the use of a collar for the very good reasons she explained, the plaintiff can with care and alertness structure her working day to avoid aggravating the injury.

However the risk increases with age, and I must recognise the probability that in her more advanced years her debilitating condition could worsen so as to make work unbearable. If that were to occur at any significant period of time before age 65 (the age at which I treat

the plaintiff as likely to have retired in any event) the loss to her could be very substantial. I award the sum of $15000 now as compensation for that risk in the future.

Contributory Negligence

The law is now settled that failure to wear a seat belt will be taken as prima facie proof that a plaintiff contributed to her own damages. In this case there is the issue whether wearing the seat belt would have lessened the injury and so the damages having regard to the uncontested evidence that the force of the collision severed the driver's seat from the chassis of the vehicle.

Mr. Murray argued that it is to be inferred that the seat belt would have aggravated the injuries.

Given all a court must now notice about the effectiveness of seat belts, I feel constrained to conclude that on a balance of probabilities they would have lessened the severity of the whiplash injury.

That being so, a reduction to reflect my views of the degree of mitigation is required. In the words of Lord Denning from the leading case of Froom v Butcher [1976] 1 Q.B. 286 at 292 "--- in seat belt cases the cause of the accident is one thing. The cause of the damage is another. The accident is caused by the bad driving.

The *damage* is caused in part by the bad driving of the defendant, and in part by the failure of the plaintiff to wear a seat belt --- the plaintiff -- must bear some of the share in the responsibility for the damage: and his damages fall to be reduced to such extent as the court thinks just and equitable".

That same case advises from its survey of other cases that the range of reduction is usually between 15 – 25 per cent.

Here I regard the lesser reduction of 10 per cent to be appropriate to reflect the debatable extent to which the seat belt would have operated in the way designed and intended given that the drivers' seat did separate from the chassis of the vehicle.

The sum of the awards will therefore be as follows:

1. General damages:	$ 30000
2. Special Damages:	
a) medical expenses pre-trial:	$ 18515
b) car rental	$ 1457
c) loss of earnings pre-trial:	$ 83350
d) Household help pre-trial	$ 4600
3. Future losses:	
a) Future loss of income:	$203401
b) Future household help:	$ 11500
c) Future cost of care:	$ 7400
4. "Smith v Manchester" damages:	$ 15000
	$375223.
Less 10% for contributory negligence	- 37522
	$337701

Interest on loss of income to the date of judgement is awarded at the applicable statutory rates. Interest on general damages award of $30000 awarded at 2% per annum from date of service of the writ until judgment This is the low rate of interest advised as appropriate by the House of Lords in Wright v British Railway Board [1983] 3 W.L.R. 211. Post judgment interest will apply also at the statutory rates.

Costs to the plaintiff to be taxed if not agreed.

The interim payment of $40000 made on behalf of the defendant by her insurers is to be taken into account both as to the principal and interest of the judgment sum.

Anthony Smellie

Chief Justice

DATED THIS 30TH DAY OF AUGUST 2000.