C.A. No. 118453

NOVA SCOTIA COURT OF APPEAL
Cite as: Slawter v. White, 1996 NSCA 76

Freeman, Roscoe and Pugsley, JJ.A.

BETWEEN:

Edgar Slawter	)	W. Dale Dunlop
	)	Murray E. (Ray) Wortman
Appellant	)	for the Appellant
	)	
- and -	)	
	)	
	)	
Perry White	)	E.A. Nelson Blackburn, Q.C.
	)	for the Respondent
Respondent	)	
	)	
	)	
	)	Appeal Heard:
	)	January 16, 1996
	)	
	)	
	)	Judgment Delivered:
	)	March 27, 1996
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THE COURT: Appeal allowed per reasons for judgment of Freeman, J.A.; Roscoe and Pugsley, JJ.A., concurring.

Freeman, J.A.

The respondent, Perry White, suffered ligamentous and soft tissue injuries when the right side of his vehicle was struck by the appellant who failed to yield the right of way entering Dunbrack Street in Halifax from an on ramp. The appellant admitted liability. He appeals from the assessment of damages of $892,000 plus pre-judgment interest.

The unusually high damages resulted from the disabling effects of Mr. White's extreme emotional reaction to his physical injuries and his refusal to accept and follow medical advice, which the trial judge excused on the basis of his emotional reaction. Mr. White concluded that he would never again be able to work or engage in activities he had previously enjoyed. This was not supported by medical evidence of his initial physical injuries. These were described as acceleration deceleration, or whiplash-type injuries and medical opinion as to their initial seriousness varied from mild to major. There was consensus that he had substantially recovered from these by the time of trial; they could not account for the degree of disability he claimed. His psychological response to them, however, appears genuine in that he believed himself to be in pain, and to be disabled. The key diagnosis is chronic pain syndrome.

Mr. White failed to co-operate in measures that might reasonably have led to his recovery and his condition has become chronic. Dr. David P. Petrie, an Orthopaedic surgeon who has seen him on numerous occasions, noted in a report dated November 16, 1990, that "he feels frustrated and obviously has taken a very negative position with regard to his subsequent rehabilitation". He exaggerates his

symptoms and there is evidence of hypochondriasis. The tragic consequence is that, whether deliberately, inadvertently, or inevitably, a young man may have ruined his life because of injuries from which he could have been expected to make a full recovery. The underlying issue is the degree of responsibility the appellant should be made to bear.

The trial took place in February, 1995. The appellant's position is that the trial judge erred in finding permanent total disability when no doctor and no witness other than Mr. White himself had testified that he was so disabled. The appellant's grounds of appeal also include the allegation that the trial judge erred in excusing Mr. White's failure to mitigate his damages on a subjective rather than an objective standard, and in the calculation of the various heads of damages.

The accident occurred on March 16, 1990, while Mr. White was travelling at about 80 kilometres per hour on his way to pick up a friend and make a payment at his insurer's office. He was thrown against a window but suffered no injuries apparent at the time. His vehicle, a recently purchased 1981 model with a book value of $1,200, was written off after the accident, but Mr. White was able to drive from the scene, pick up his friend and visit his insurer's. He said he was feeling "weird", so he went home and lay down. He began feeling pain a day or two later, but hoped it would be temporary. His first visit to a doctor was on March 23, 1990. He had been laid off as a construction labourer prior to the accident but, expected to be rehired; he has not attempted to return to work since the accident.

Mr. White

Mr. White was born in Trinity Bay, Newfoundland, on September 22, 1963, one of six children of a heavy equipment operator and his wife. The family moved to the Halifax area where Mr. White attended high school, dropping out just before his grade 12 examinations. He later took one year of a machinist's course, worked as an apprentice machinist for a period in Ontario, and tried a variety of other jobs before apparently discovering his niche as a heavy construction labourer with a specialty in concrete form work. He appears to have had a good work ethic, no criminal record, and a pleasant, "bubbly" personality.

Mr. White testified that he came from a normal family, but his psychiatrist, Dr. C.E.Taylar who saw him on a number of occasions, said he had a "rather unsatisfactory upbringing". He wrote:

> My impression has been that of a young, adult male who has always been somewhat insecure. He has compensated for this over the years by body building and earning good money and therefore being able to spend a lot. All this seems to have helped him overcome any underlying feelings of insecurity and inferiority. He was therefore able to raise his self esteem. Since his accident, this has all changed for him. He has not been able to body build or work and his income level has fallen dramatically. He has not been able to maintain his macho image. He has become resentful, distressed, anxious, and reactively depressed.

There was no diagnosis that prior to the accident Mr. White was suffering from any infirmity of a pathological nature, physical or psychological, or that he was not capable of making rational decisions. His past medical history of attending on a doctor on several occasions for minor problems is not significant except for his denial of it; he said he had not been prescribed pain-killers in the past, and when confronted with medical records, insisted they were in error.

The following passage from his cross-examination is illuminating as to how Mr. White regarded himself:

> Q. Okay. And do I take it that you actually preferred the sort of heavy physical labour to the machinist work?
>
> A. Oh, I preferred being physical, yeah.
>
> Q. Okay. How as the--
>
> A. And plus it paid really well and I got a lot of overtime and it kept me in tremendous shape.
>
> Q. Okay.
>
> A. And I was always safe with my body. Like if I went down to pick up something, I'd go down to my knees and keep my back straight. Like say, for example, a 4 x 4. I worked properly all the time and never went above the limits of what you're allowed to lift, because I knew that I had to have my body for life, to protect it. And like at the time of the accident, like I was strong as a horse basically.
>
> Q. Okay.
>
> A. Like Dr. Petrie would tell you I have remarkable hips, and I feel that's because in the morning before work like I would eat chicken and pasta and muscle-building and body-building foods. Right?
>
> Q. Um-hmm.
>
> A. And like I was 185 pounds with over 18-inch arms at 5' 9 1/2". Right?
>
> Q. Um-hmm.
>
> A. And that's a really good size and shape. Right?
>
> Q. Okay.
>
> A. I had no fat hardly ever on my body.

About six months before the accident, Mr. White began a relationship with Dana Belliveau, who had her Grade 12 and worked as a hair stylist. She moved in

with him after the accident, and they had been living together 3 1/2 years at the time of the trial. She described Mr. White and their relationship prior to the accident:

> He was a really a happy-go-lucky person. He loved life. He loved to have a good time. He was like a real hard worker, ambitious. We talked about saving money together to build a house in the future and he was just--he was very independent. He was really motivated. . . . He was a really strong guy and he really liked being physical like and he was proud of that. . . . Well, we went dancing all the time. We loved to dance. We really had a good time dancing. . . . We went downhill skiing. . . . And he never downhill skied before so I took him and he did better than me for the first time. And we went bowling. We played--on Sundays we'd go and play pool and we had--well, we had a great like love relationship, I guess you'd call it. I don't know. We communicated a lot, like we talked together a lot. I'm just trying to think. We just really had a good time together. We really had fun.

Asked to describe her view of Mr. White after the accident, she testified:

> He's really moody. He's really like depressed. He's angry. You know, I see him in a lot of pain. I see him very uncomfortable. I feel mean but I tell him not to complain to me all the time about it because, I mean, it's hard when I'm working because now I'm having to support him and when I'm working I find it hard to--when he's complaining to me all the time, so I ask him not to complain. Let me think. He's just not a happy person and he's--sometimes he's really down.

She said the change began "right after the accident" and worsened as he grew more angry. She said Mr. White had been living with her for three and a half years. She supported him and he contributed nothing financially to the home. She sometimes asked Mr. White to perform light household duties such as dishes or dusting but depending on how he felt, they did not always get done. In her direct examination she stated:

> . . . I work all day. I work a lot. The only times I'm really home are Sundays and Mondays and on Mondays I do all the housework. I

> really--he doesn't really do a lot. I--you know, I try to get him to, you know, get up and do things but I--you know, I see him in a lot of pain and I find, you know, he doesn't really do a lot.

Their relationship had suffered:

> Oh, it's affected our relationship drastically. I find--you know, I would love--like for--sometimes I feel like just walking away from it, because if I walk away from it I don't have to--it's over for me. You know what I mean? I don't have to deal with it, I can live a happy, normal life. For Perry, he's forced with this for the rest of his life and I find that really hard.

Stresses in the relationship and financial worries played a major role in Mr. White's emotional state. There can be little doubt that the quality of Mr. White's life worsened significantly following the accident. The damage which had been done to his body and the pain and discomfort he suffered became the dominant elements in his life, to the virtual exclusion of all others. He brooded on his condition and the conclusions to which this led him are at considerable variance from the medical opinions and other evidence.

Mr. White emphasized repeatedly that he was going 80 kilometres per hour at the time of the accident. He asserted he was hit with:

> . . . over 20 tonnes of force, which is definitely enough to take a man out of commission permanently for life. . . . We're talking major speeds here. . . . We're talking enough force to cut a man right in half. . . .

There was no other evidence of the physical forces involved in the accident because liability had been admitted. Both cars were travelling in the same general direction when Mr. White's was sideswiped, so the relevance of his forward speed is unclear.

Several days after the accident, Mr. White discovered blood on a swab he was using to clean his ears. He showed this to Ms. Bellieveau but could not recall reporting it to his doctor whom he saw for the first time a few days later. However, he attached great significance to this incident in his evidence and concluded that he had suffered brain damage. Neither bleeding from the ears nor brain damage were confirmed by medical examination. However, Mr. White stated on cross examination:

> . . . Dr. Erdogan looked in my ears 2 months after the accident and I noticed when Dr. Erdogan looked in my ears with that little thing he had with the lights, he looked in both ears and he moved away from it very quickly. And I know for a fact--I swear on my mother's life he saw blood in my ears. . . . I'm claiming I am incompetent. My brain damage is messed up, my sight, everything. . . . If all these things are affected and I get it proved, naturally my brain has been affected . . . and my neck and my body and everything. . . . Your man almost killed me and I know you understand that and you're defending a man that accelerated through a stop divided highway sign and trying to make a fool of me. And since this accident he put over 30 injuries inside of my body. . . . Can you imagine living with 3 injuries? Well, try imagining over 30, baby, because I know you can't.

Mr. White was asked if there was anything about his physical condition which a policeman at the scene of the accident might have noticed. He replied they would have seen he was dazed and that he walked awkwardly:

> A. Because I have a permanent limp since this accident--and I can't use a cane because all my joints are messed up in my neck, midback, lower back, so I'm always walking off balance. I feel like a zombie. And this is the truth. . . .
>
> Q. Okay. Would there have been any noticeable bruising or bumps on you?
>
> A. I don't bruise easily so--and plus I was fully clothed.

Q. Okay. So, is your answer no, that there would have been--there was no bruising or swelling to see?

A. I didn't say there wasn't no bruising or swelling, I said the officer wouldn't have seen it.

Q. Okay. Did you see it?

A. My head swelled up. I felt like my brain wanted to come out right underneath my head.

Q. Um-hmm. Okay. No, obviously a policeman wouldn't see that.

A. And numbness and confusion and memory loss and it affected my eyesight.

Q. Would a policeman have noticed that you were immediately in pain, excruciating pain?

A. I don't know.

Q. Okay.

A. I was but I didn't know it. Hey, I was in total shock. Wouldn't you feel shocked if somebody hit you, you're going 80 kilometres an hour on a wet highway and a guy accelerates going 60?

Mr. White testified that the first day after the accident he "felt weird in the head like I didn't know what was going on". On the second day, he started having pain in his neck and buttocks and weird feelings he agreed could be described as numbness going down his legs. He said he felt "tremendous pain at the base of the skull" soon after the accident. He still had headaches at the time of the trial. He said his head felt swollen, but he could recall no exterior lump or bump. When he went to his family physician, Dr. McWhirter, he told him he had discomfort in his neck and back but did not remember telling him of blood in his ears. Dr. McWhirter diagnosed a sprain of the lumbar spine, and prescribed moist heat and Tylenol 3.

He recommended x-rays and an appointment with Dr. M. Erodgan, an orthopaedic surgeon.

Mr. White did not like Dr. Erdogan:

Q. Okay. You didn't like him personally?

A. Oh, not personally, I just didn't like what he was writing.

Q. Well, what was he writing that you didn't like?

A. Well, that I could go back to heavy construction after having a serious highway collision, and that put a lot of mental stress on me.

Q. Sure. Dr. Erdogan--

A. That put a lot of mental stress on me, and my girlfriend was confused why some back specialist was saying I could do heavy construction after my rib popped out on my back and I have nerve damage and my vision is messed up and I found blood in my ears and brain damage and I'm always off balance.

(The reference to the "rib popped out" had to do with what Mr. White referred to as a "subluxed rib" which he said had occurred while he was sleeping some months after the accident but which was not confirmed by clinical examination.)

The Medical Evidence

Dr. Erdogan examined Mr. White on May 28, 1990, about two months after the accident, and conducted a number of tests with results in the normal range. He wrote Michael Owen, the first of several lawyers who represented Mr. White:

> Clinically, he appears to have sustained a soft tissue injury at the neck as well as at the lower lumbar spine level. At the present time, clinically, there is no evidence of any nerve root irritation involving the nerves coming from his neck or the nerves coming from the lower

lumbar region.

After reviewing x-rays he followed up with a letter dated June 14, 1990, in which stated:

> I believe at the time of the accident, he had injured his neck as well as his lumbar spine, however, I believe that the injuries were relatively mild because they did not cause any fracture or dislocation and similarly, they did not cause any evidence of nerve root irritation either at the cervical or at the lumbar spine levels. There is no evidence of a herniated disc either at the neck or at the lower lumbar spine level. Therefore, on the long-term prognosis I believe that the prognosis is good, the discomfort that he is having is caused by paravertebral muscle tightness involving his cervical as well as lumbar spine.
>
> On long-term to get relief it is important that he should be doing shoulder-lifting exercises to relieve the paravertebral muscle spasm at the neck level as well as lumbar flexion exercises of the lower lumbar spine.

Confronted with Dr. Erdogan's findings on cross-examination, Mr. White offered a simple explanation: "he lied".

The various medical findings are summarized in the independent specialist's report of Dr. David B. King, a neurologist who thoroughly examined and tested Mr. White on October 29, 1991, and reviewed the findings of other doctors and specialists, including those of Dr. Erdogan; Dr. Petrie, the International Rehabilitation Associates; Scotia Physiotherapy; Dr. Taylar; Ms. Jill Henderson, the Canadian Back Institute; and Dr. Thomas Loane, a specialist in physical medicine.

Dr. King's tests disclosed normal visual acuity and a full range of eye movements; hearing was "normal bilaterally to whisper". He wrote a 12 page report to Mrs. C. A. Messervey of Marsh Adjustment Bureau Limited in which he stated as

part of his conclusions:

> 1. Diagnosis: This man was involved in what must have been a frightening motor vehicle accident. Perhaps this fear was more so in a young man very conscious of his body image and whose accomplishments in life have been largely related to the exercise of that body in manual tasks. The flavour of a number of observers supports the fact that he was very concerned about his body function. There is no evidence from any of the physicians that have seen him that there has been any neurologic injury. My exam found none. There have been no bony injuries. This is confirmed

on the x-rays that were taken of neck and back. Everyone who has evaluated this man agrees that his injuries were largely soft-tissue in nature.

It has become, I think, increasingly clear that what started off as a simple strain that might have been expected to pass in the time that it takes soft-tissue injuries to heal has now become a much more complex psychological problem. Dr. Taylar is better qualified to comment on how this injury might have altered this man's self-perception. Even when this soft-tissue injury was at its height the physical findings were minimal. Dr. Erdogan found none. Dr. Petrie found very mild findings of a little tenderness over the spine and perhaps some paravertebral muscle spasm. When Dr. Loane examined him and when I examined him there was absolutely nothing to find in the way of physical abnormalities. I cannot see how anyone can maintain that this man has an on-going mechanical problem with neck or spine that came about as a result of the accident. It is very easy to suggest that this man has an on-going chronic sprain problem to his back because he continues to complain of pain but there is no clinical data to support that. The only information that supports that is his subjective complaints and I think that these are totally out of keeping with the degree of organic injury that this man has suffered. . . .

His assessment is also complicated by the number of complaints that he has in different body regions. Tingling in a leg, chest pain, and a variety of other symptoms that suggest a significant degree of hypochondriasis. I think that his current problems largely stem from that. I think that this young man, who has always been concerned about his physique is terrified of doing himself some serious injury and feels that every time he gets an ache or a pain he is going to be incapacitated. I have little doubt that this is deep-seated and no amount of simple reassurance is going to change that perception.

I would have felt his original injury was minor and that there are little or no physical concomitants of his accident at this time. . . .

4. Prognosis: From the physical point-of-view I don't see that this man is going to have any consequence of his accident what-so-ever. It is not quite the same from the psychological point-of-view and that largely depends on the psychiatric diagnosis. If the problem is simply one of malingering then settlement of his claim will resolve his difficulties. If on the other hand he has a hypochondriacal disorder based upon disturbed body image then his prognosis may be guarded. Short of observation of this man in his usual circumstances, I see no

> way of determining the difference between these two entities in an absolute sense.

Mr. White had become dissatisfied with Dr. McWhirter, his family physician who had referred him to Dr. Taylar as psychiatrist. Mr. White transferred to Dr. K. Cheah, Dr. McWhirter's associate, as his family doctor. Dr. Cheah referred him to Dr. John W. MacDonald, another psychiatrist.

Mr. White did not return to Dr. Taylar after he refused to recommend him for Canada Pension Plan disability benefits; this resulted in an angry confrontation in which Mr. White threatened to throw Dr. Taylar out the window. In a letter dated November 18, 1993, to Jo-Anne Lawrence, a disability adjudicator with the Canada Pension Plan, Dr. Taylar wrote:

> In summary, this man had a rather unsatisfactory upbringing. He has never felt particularly secure but has compensated for this. I cannot conclude that he has major mental illness that is permanent and irreversible. However, he is not able to function effectively at the present time because of his emotional difficulties. Hopefully through ongoing psychiatric treatment, management through a pain clinic and vocational rehabilitation he can eventually re-enter the work force. I do not see him as totally disabled in terms of the Canada Pension Plan definition. However, as I have indicated he is not capable of working at the present time.

Dr. Taylar found Mr. White difficult to treat because of "his preoccupation with bodily symptoms". He summarized his diagnosis as follows:

> I felt he had an insecure personality make-up and I felt that he was suffering from a chronic pain syndrome.

On cross examination he agreed with the following question:

> Q. So, the net effect is the physical specialists are saying he needs psychological or psychiatric help and the psychiatric specialists are

> saying he needs physical help. Each one is saying go to the other.

For that reason, Dr. Petrie, in 1993, had begun recommending to Mr. White that he attend the Pain Management Clinic at Victoria General Hospital where the approach is cross-disciplinary. There was a long waiting list but he was confident he could have Mr. White seen earlier. Neither Mr. White nor Dr. Cheah followed up on these recommendations and Mr. White had not been seen by the clinic at the time of trial.

Dr. MacDonald saw Mr. White on September 23 and October 7, 1993. In his letter of October 14, 1993, to Dr. Cheah he said Mr. White described "an amazing number of physical complaints" and noted from a letter of Dr. Petrie's that "there was some question" about some of them. "I decided that it would be pointless for me to go into them to any great extent, and stuck solely to his psychological status." He found some signs of a post-traumatic stress disorder but Mr. White "wasn't all that easy to figure out". He changed his medication and arranged to see him again.

On March 28, 1994, Dr. MacDonald wrote Dr. Cheah that he had seen Mr. White on a few occasions since October and found that he was responding favourably to a 150 mg. dose of Amitriptyline at bedtimes. "I noted in our meeting of January 12, 1994, that he had made quite a bit of progress and was better than he had been." He went on:

> Certainly there is no question in my mind that Mr. White did have a post traumatic stress disorder, that he has responded well to therapy, and I would anticipate he would continue to improve at the rate he is improving now which will mean that of course, he is not totally out of

the woods, he will still have some sequelae but there is no reason that he can't make a full recovery.

In his testimony at trial, Dr. MacDonald distinguished between post-traumatic stress disorder and a psychological component to his pain which is still continuing. The following passage is from his cross-examination:

Q. Okay. Now, as I read your reports, you've seen Perry 10 times and essentially now he's cured.

A. By and large.

Q. Yeah. Okay. So, you diagnosed a condition, you treated it with both drugs and psychotherapy and that is no longer a problem. You said it's not completely cured but 95%.

A. It is no longer a major problem. There are these sequelae which I expect to slowly resolve over the months and years.

Q. Okay. And so Perry, if he ever did, certainly is not reliving this thing or having nightmares about it and the other symptoms of post-traumatic stress disorder?

A. Not now.

Q. Okay. Now, you mentioned a psychological component to his pain. That's not related to the post-traumatic stress disorder?

A. Well, it's related to the same origins as the post-traumatic stress disorder.

Q. Okay. Now, is that cured as well?

A. No, and I don't expect it to be. . . .

Q. Okay. Why is that?

A. Usually, when something like this sets in, there's a line somewhere around the period of 2 years that, if after 2 years the response has not changed much, you're unlikely then to get much of a response.

Q. Okay. Even though the injuries are largely psychological?

A. Well, I don't know if they are, but the psychological component of them at least is unlikely to change.

Q. Okay. Do you plan on seeing Perry in the future, the long-term?

A. It'll be up to him. If he still feels some benefit from it, I'd be happy to. I expect that the psychological side of it is by and large going to be taken over in the Pain Clinic, but I don't know that. That's just an assumption.

Q. Okay. You described Perry's reactions as exaggerated. Is that fair to say?

A. Yes, it seemed that way to me.

Q. Okay. In fact, I think in discovery you said he has a big, exaggerated reaction to his injuries.

A. I'm not sure if it was just his injuries or to things in general, but certainly to his injuries, yes. . . .

Q. Okay. Where does that come from in a person's personality? Is there any reason that some people react that way and others don't?

A. Usually--and it's usually a product of learning in childhood.

Q. Okay. Is Mr. White fixated on his injuries?

A. Yes, he is.

Q. Okay. To the exclusion of almost everything else in his life?

A. That's a bit much but certainly more so than he's fixated on anything else. . . .

Q. Okay. And do we know why he's fixated on his injuries? Is there a psychiatric or psychological reason why Mr. White would be--

A. Well, I--it--I believe that it is the following. He's always been a person who has had--who has needed things to be relatively on line and in control. . . . Sort of a rail moving straight ahead, relatively controlled. And when this incident happened, this accident happened, there was quite a threat to that need of his to have things fixed in that way.

In his examination, Dr. MacDonald said the sequelae he referred to were a

tendency to startle more than usual and feeling uncomfortable driving in a car. He said he was also treating Mr. White for anxieties arising out of his relationship with his girlfriend. When asked if there was "anything else", he said that:

> A. Because of the way he reacts to stresses of this sort, he's also going to have quite a psychological component to his back pain and will probably have that on a chronic basis.
>
> Q. And can you give him any treatment for that?
>
> A. Minor supportive treatment, yes, but I suspect that most of that will continue on a chronic basis, probably without really abating. Although it's my understanding that he's recently been referred to the Pain Clinic . . . where we have some hope that through their ministrations he may get better.

Dr. MacDonald was not asked if he considered the psychological component to Mr. White's back pain to be disabling, and he did not suggest that it would be.

Dr. Petrie was familiar with the reports of the other specialists and attempted to deal with the complex interrelationships of Mr. White's physical injuries and his reactions to them. Dr. Petrie had reported on November 16, 1990, that his physical examination was reasonably good with only mild restriction in lumbar motion and no neurological deficit or objective weakness. He agreed there were no significant physical findings at that stage. The following passage is from his cross examination:

> Q. And I just want to--when you first saw him, doctor, he had clearly--and nobody's arguing with it--a soft tissue injury, probably a serious one. But here a few months later it appears that the objective signs are dissipating, but what we see coming on are these psychosomatic complaints in its place. Now, is that a fair reading of it?
>
> A. I think that's a reasonable description of patients in this situation where they don't seem to get the physical response to their earlier complaints, then they develop these psychological aspects of their disability which are not borne out on actual physical examinations.

He said injuries to muscles and bones and tendons heal after a period of time, but Mr. White did not believe he was healing.

He was asked:

> Q. Well, is there, in fact, doctor, confirmatory medical evidence that he has a serious physical problem?
>
> A. That is a very wide, broad-based question, and my response, I guess, in summing up the various medical reports and investigations would be that there's never been any significant evidence that Perry has had a "serious medical problem". He's had some problems and these have gone on for a long period of time and they've been, unfortunately, aggravated and affected by his psychophysiological status over the years. And to him he's quite disabled. I mean, his pain is very real and very disabling. And that's the thing about phychophysiological pain, is that to the patient it's very real, but to me, who's doing objective testing and so forth, it might not bring out a great deal in the way of abnormalities. But I think the answer to your question is no, there's never been any major pathology identified.

He agreed that on discovery he had stated that Mr. White's problems were 90% psychological and 10% physical. In response to a question by the trial judge he estimated that:

> . . . his permanent, partial disability related to his spine injury is probably somewhere around 25%, and then there's probably another 50% of his total disability related to the psychological situations, and then there's probably another 15% to 20% of it is just personality, the way that he is as a person, his own built-in phobias, concerns, fears, and so on.

The trial judge asked him:

> Q. We don't really know, do we, how much the accident triggered and how much would have been there whether or not there would have been an accident?
>
> A. Yeah. No, I think that question is a hypothetical that we really can't

answer.

Earlier he had been asked on cross-examination:

Q. . . . there's a car accident there and there's a sprain, but that's one of a number of factors, is it not?

A. That's one of a number of factors. But then you say, "If he didn't have the car accident, would he be in this present predicament?" I don't know. You know, this is like--you know, well, you just can't--you can't anticipate what would have happened if Perry White had never had this car accident. Certainly we wouldn't all be sitting here today, but, you know, he did have the accident and he then developed these unusual somatic complaints and it's in a very complex sort of circle of symptoms which I, as a non-psychiatrist, find difficult to sort out, although I see it frequently.

Chronic Pain Syndrome

On August 12, 1991, Dr. Erdogan wrote a reply to an insurance adjuster's inquiry stating that he could find little in the way of physical findings in keeping with the symptoms that Mr. White was complaining of and said his condition was called chronic pain syndrome. Because of its psychological implications, he suggested that Mr. White see a neurologist. From an orthopaedic standpoint, "he should be able to return to work".

In his testimony, he explained that if Mr. White's soft tissue injury had been serious it would have caused muscle or ligament rupture which would have resulted in ecchymosis, or internal bleeding. The tissue quickly swells, causing nerve root irritation at the facet joints.

If a person following an accident gets up and walks, there is no rupture, deep rupture of the ligament. Literally this is impossible. It just

can't happen.

He said he, therefore, tried to explain to Mr. White that his injuries were not serious and would go away. He explained the importance of exercising to get relief:

> . . . [I]t would cause pain but no harm, unless he overcomes that, you know, he will always have pain. Obviously, in his mind, he was convinced that, "No, that's not it. There must be something wrong there." So, therefore, I felt that, you know, we'd better have someone else's opinion, better a neurologist, a neurosurgeon, to see whether or not he has done any significant injury.

He said chronic pain syndrome was concerned not with the pain associated with an injury but pain as an after effect. Pain as an after effect could be caused by arthritic changes, instability, nerve damage or a slipped disc, but when such causes were ruled out "we go back to the muscles".

Earlier he had given a detailed explanation of the after effect of injuries on muscles. Serious injuries rupture the tissues, causing pain from nerve irritation and swelling and discoloration from ecchymosis or bleeding. Recovery time was six to eight weeks. After that time, pain was not the result of the initial injury but of muscle tightness. If the muscles are not moved constantly but are held in one position they get tired and tighten up, and if they are not moved at all, they tend to get shortened; circulation is diminished, metabolites build up and soreness occurs. Exercise was essential to avoid this discomfort. It stimulated the incoming blood supply from the heart and caused the muscles to pump it back to the heart through the veins. Blood stagnating in the tissue loses its oxygen and has a high carbon dioxide content, often showing a bluish tinge. When muscles get tight, anxiety may follow.

> And when the anxiety comes over the top of it, if a muscle gets tight--if a person, let's say, moving his neck says that it causes pain. Now, in his mind he is conscious of the fact that it is causing pain, number one, something must be wrong. Number two, when it's causing pain it is much better not to move it, to protect it. When you protect it, you are not doing any good, you are doing harm. It's just the opposite. This is the important thing to appreciate why people, so many people after accidents have pain year after year after year, because this is a built-in mechanism. You become anxious. You are worried that something must be wrong because it hurts you. When you move it, it hurts you. Therefore, it hasn't healed. There's something there wrong. But, in fact, motion alleviates the discomfort. As you move it, it limbers upon the muscles, it limbers up the joints, it gets the circulation going. When the neck cricks, cracks, so much the better. If someone moves the neck, it feels cricking, it doesn't do any harm. Similarly, joint cartilage gets nutrition through the motion. And this is fundamental. If your joint cartilage does not improve and just gets soft and it just gets sore. If you move it, it cracks, but once it cracks the joint circulation, synovial fluid within the joint, gets nutrition to the joint cartilage, it gets better, it feels better. So, it is fundamental that in any injury--right now even very acute injury even, the tendency right now is to move. . . . So, therefore, motion following injuries is very important. That should be done to protect from the long-term effects.

He was asked if the lumbar flexion exercises he described for overcoming the long-term effects of back injuries would hurt.

> It hurts, yes. This is true. This is the dilemma we are facing. If someone does the exercises, it will hurt. This person must have to overcome this apprehension, anxiety. That hurt does not cause harm. This is the thing. You know the famous saying that "either use it or lose it" is very much true. In other words, those muscles--unless you use it, you get atrophy, you get, you know, cramps and everything else. So, it is very important that patient must be told that moving will hurt. He must overcome that discomfort, you know, to overcome that tightness of the muscles. Unless he overcomes that tightness of the muscles, he will just continue to have pain because those muscles are tight. They are in--literally in cramp. They are in cramp position.

He said muscular tightness did not explain everything about chronic pain syndrome.

> . . . Clinically it has been established 100% pain medication does not give relief. . . . This has been established. You give pain medication, they say it doesn't touch. You give physiotherapy, it doesn't give relief. What gives relief is usually--if you give medication that relieves his anxiety, relieves the depression, they get relief.

He said it was also well established that work environment made a big difference:

> In other words, if a person like their work environment pain goes away, if he doesn't like work environment they have a lot of pain.

In Workers' Compensation cases, he said, only fifty percent of those who took off a year for a back injury would get back to work, and that figure dropped to one or two percent, perhaps five, if they took two years off. He said current Workers' Compensation Board policy in back injury cases was focused not on medication or physiotherapy but on getting the worker back on the job.

Rehabilitation

Dr. Cheah referred Mr. White to the Canadian Back Institute for a comprehensive Rehabilitation Assessment where he was examined on June 11, 1991. The report signed by John Jefferson, the registered physiotherapist who is the managing associate of the Institute, is consistent with Dr. Erdogan's explanation of chronic pain syndrome as it applies to Mr. White. It observed that:

> Mr. White provided constant reminders that he was in pain as well as constant reminders that he was "disabled" and was unable to return to his previous job in construction. He exhibits poor exercise tolerance and a poor tolerance to work through his pain, as is evidenced by his only being able to lift a relatively small weight (40 lbs.) considering that he has normal thigh strength.

Its findings included:

> A significant overlay of chronic pain syndrome, with decreased exercise tolerance, movement apprehension, and anxiety.

Under "Prognosis" the report stated:

> Mr. White's prognosis is guarded by the chronic pain syndrome that has developed since his injury. He appears to be convinced that he is "disabled" and will never return to his former level of function. As such, he is avoiding even simple activities such as walking let alone lifting or significant exercise.
>
> From a mechanical point of view he has back dominant pain with no signs of nerve-root involvement and a fair range of motion. I would not rule out him being able to return to construction or at least similar heavy lifting activities, if he can work himself through his "vicious circle" of chronic pain to try to improve the underlying stiffness and weakness.

While there was a "clear mechanical pattern" to his neck symptoms, "He should be able to regain full function in his cervical region."

The report included the following recommendations:

1. Mr. White needs a better understanding as to the source of his back pain including education to convince him that it may "hurt but do no harm" to progress his current level of function.

2. He should benefit from a fairly aggressive program of stretching and strengthening exercises for his neck and lumbar region. This will require close supervision and encouragement, to demonstrate to him that he is indeed capable of more normal activities. He needs a program that focuses on functional restoration as opposed to pain control.

3. If he can work through the initial period of increased muscle soreness associated with a functional restoration program he could then partake in a program of work conditioning to prepare him to return to non-sedentrary labour.

4. Mr. White needs some sort of case management, for co-ordination with his physician, insurance company and employer regarding returning to gainful employment.

5. The Canadian Back Institute can satisfy all of the above recommendations through its Comprehensive Rehabilitation Program. . . . I think that Mr. White is an appropriate candidate for this comprehensive approach.

Mr. White told Dr. Cheah that the exercises he was required to perform by the Back Institute worsened his pain and caused him nerve damage. He was never entered in the Institute's Comprehensive Rehabilitation Program. Dr. Cheah prescribed no treatment for Mr. White as a result of the Institute's report.

Mr. White said he had not tried to go back to work:

> Because I don't feel I'm capable of getting up. I find it hard to get up from a sitting position to standing up and I have chronic numbness and pains and I have to lay down a lot. In the last over--close to five years, I've laid down over half of my life because of chronic pain and numbness. Because my spine is not aligned properly, I feel off kilter and it's really--it's frustrating because it causes numbness through my whole body and pain.

Dr. Petrie found a physical component to Mr. White's back problem which he estimated at ten per cent on cross examination and at twenty-five per cent in response to a question from the court. He agreed that the source of disability had become largely emotional or psychological in which anxiety, stress, and a failure by Mr. White to understand the nature of his pain played a role. He had urged Mr. White since 1993 to attend the Pain Management Clinic at the Victoria General Hospital but neither Mr. White nor Dr. Cheah followed up on this advice. He was not

optimistic Mr. White would be capable of returning to a job involving heavy physical labour and recommended that Mr. White seek a program of rehabilitation involving retraining.

The evidence does not suggest that Mr. White has made serious efforts to work through his pain, to exercise, or to otherwise rehabilitate or retrain himself; rather, it suggests an irrational refusal to take any step which might improve his condition.

He did take two courses toward his Grade 12 certificate but reported considerable difficulty concentrating on them and said he had to cheat to pass the examinations, which he did. In 1992, he enrolled in a construction administration technology course at the Nova Scotia Institute of Technology but did not persevere. He describes that experience as follows:

> Well, when I got in class I'd try to concentrate on the teacher and I'd go foggy and I'd get big headaches and my right leg would go numb and I'd get spasms in my buttocks and lower back and it was most excruciating pain and there's no way I could sit there. And I couldn't even decipher what the teacher was saying to me. It's like I looked at the teacher and I couldn't understand what he was saying. It was like a mumbo-jumbo. Right? It confused me.

He said he had made no other attempts to get more education because "I keep forgetting things and I feel stupid when I'm in class. It's like I'm not even there. I feel like I'm in space."

Asked if he had tried any rehabilitation programs he replied:

> "Just physio and I'm on my way to the Pain Clinic in the next week or so to learn how to deal with my pain and numbness and

depression."

The latter statement is questionable. There was no evidence that arrangements had ever been made for him to attend the pain clinic.

On November 18, 1990, Mr. White was interviewed by Liz Taylor-Holmes, a rehabilitation specialist with International Rehabilitation Associates Inc. who had also met with Dr. McWhirter and Dr. Petrie. She noted in her report:

> Mr. White was eager to meet with the caseworker and appeared to enjoy the caseworker's visit. The client apparently felt comfortable enough that during the caseworker's visit the client in referring to the motor vehicle accident stated on three occasions that he "had hit the jackpot" and that this was the "chance of a lifetime". He repeatedly asked the caseworker how much she thought he would receive in a settlement. The caseworker explained that she had no knowledge of such matters.

The Findings

After reviewing of the evidence the trial judge made the following finding:

* The plaintiff suffered a moderate to major acceleration-deceleration or flexion-extension soft tissue injury affecting the cervical and lumbar spine and neck.

This is supported by the evidence and acknowledged by the appellant.

* The plaintiff suffered a post-traumatic stress disorder involving a loss of self-esteem which has led to or developed into a chronic pain disorder characterized by major psychological enhancement of his physical symptoms, especially pain and a number of somatic complaints.

The post-traumatic pain syndrome, on Dr. MacDonald's evidence, has responded to therapy and is no longer a factor in assessing damages with a future

element. There is considerable evidence to support the finding of chronic pain disorder. However, again on the evidence of Dr. MacDonald, this resulted not from the post traumatic stress disorder but arose from the same incident.

> * The psychological enhancement of physical symptoms or symptom magnification has not been consciously overt on his part. I accept Dr. Taylar's opinion that he is not consciously malingering.

I take this to be a finding that Mr. White's physical symptoms have been magnified and psychologically enhanced, but not consciously. This may be in conflict with the following finding:

> * The patient's symptoms and present condition have resulted solely from being involved in the motor vehicle collision on March 16, 1990.

This finding tends to foreclose consideration of anything in Mr. White's conduct following the accident as a *novus actus interveniens*, but that does not appear to be a governing consideration in light of Wilson, J.'s analysis of mitigation in **Janiak v. Ippolito** (1985), 1 S.C.R. 146 at p. 167:

> Mitigation has to do with post-accident events. In this respect it should perhaps be contrasted with contributory negligence and perceived as more closely aligned with *novus actus interveniens*. It differs from the latter, however, in that the *novus actus* may be the act of a third party whereas mitigation (or its failure) is exclusively the act of the claimant. Overhanging all three concepts, mitigation, contributory negligence and *novus actus*, are the general principles of foreseeability and remoteness as they apply to post-accidental events.

In the present appeal, the trial judge stated:

> * I find some guarded optimism that the plaintiff will improve,

> especially if he can be moved to begin rehabilitation by means of exercise, retraining, and working. I find that the plaintiff has not complied with medical recommendations and directions to participate in such rehabilitative activities. Like his pain, which to him is real, this inability to participate in rehabilitation was caused by the collision.

Elsewhere is considering mitigation, the trial judge stated:

> * I hold that the plaintiff is not able to overcome his problems by his own inherent resources and, further, that he has followed medical advice with respect to rehabilitation as best as his symptoms allow him to do. On the weight of the evidence, I find that the plaintiff has not failed to mitigate his loss.

He made further findings in considering general damages for pain and suffering:

> * I do not accept that pre-existing psychological problems of the plaintiff necessarily means that his injuries did not arise from the accident, and would have the effect of reducing the amount of his pain and suffering.

These three findings bear on mitigation, which is discussed below. It will be noted they do not include a finding that Mr. White, because of a pre-existing psychological infirmity, was without capacity to make rational choices with respect to following professional advice.

> * The plaintiff's injuries are not merely a soft tissue injury to the neck and, moreover, are totally disabling.

There is clearly evidence that there is a psychological component, in addition to the soft tissue injury:

> * He is permanently disabled.

This may refer to statistical evidence that a person out of the work force with

chronic pain syndrome for two years or more is unlikely to get back in. As noted below, findings of total and permanent disability in the context of chronic pain syndrome are not absolute and can be considered little more than findings that the respondent is at the more serious end of the scale. In this light, there is no serious conflict with the above finding of a possibility of Mr. White's condition improving, a possibility the trial judge again noted in evaluating contingencies:

> * I do not accept that the plaintiff is not credible, and knows that he is not telling the truth. On the other hand, I do find some exaggeration on his part; but that ought not be surprising in the circumstances of his pain and suffering.

This is curious phraseology--a witness need not lie deliberately in order to be found incredible. If pain and suffering can be seen as explanations for exaggeration, they do not excuse it nor improve credibility. However, the trial judge appears to have accepted Mr. White's evidence and it is within his province to do so.

The findings of a trial judge are not reversible merely because a court of appeal may disagree with them. The scope of the principle was stated by McLachlin, J., in **Toneguzzo-Norvel (Guardian Ad Litem of) v. Burnaby Hospital** (1994), 1 S.C.R. 114 at page 121:

> It is by now well established that a Court of Appeal must not interfere with a trial judge's conclusions on matters of fact unless there is palpable or overriding error. In principle, a Court of Appeal will only intervene if the judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it: see P. (D.) v. S. (C.), [1993] 4 S.C.R. 141, at pp. 188-89 (per L'Heureux-Dubé J.), and all cases cited therein, as well as **Geffen v. Goodman Estate**, [1991] 2 S.C.R. 353, at pp. 388-89 (per Wilson J.), and **Stein v. The Ship "Kathy K"**, [1976] 2 S.C.R. 802, at pp. 806-8 (per Ritchie J.). A Court of Appeal is

clearly not entitled to interfere merely because it takes a different view of the evidence. The finding of facts and the drawing of evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal.

With respect specifically to the assessment of damages, the position of an appeal court was expressed by McIntyre, J. writing for the Supreme Court of Canada in **Woelk v. Halvorson** (1981), 114 D.L.R. (3d) 385 at 388:

> It is well settled that a Court of Appeal should not alter a damage award made at trial merely because, on its view of the evidence, it would have come to a different conclusion. It is only where a Court of Appeal comes to the conclusion that there was no evidence upon which a trial Judge could have reached this conclusion, or where he proceeded upon a mistaken or wrong principle, or where the result reached at the trial was wholly erroneous, that a Court of Appeal is entitled to intervene. The well-known passage from the judgment of Viscount Simon in **Nance v. British Columbia Electric R. Co.,** [1951] 3 D.L.R. 705 at p. 713, [1951] A.C. 601 at p. 613, 2 W.W.R. (N.S.) 665, approved and applied in this Court in **Andrews et al. v. Grand & Toy Alberta Ltd. et al.** (1978), 83 D.L.R. (3d) 452, [1978] 2 S.C.R. 229, [1978] 1 W.W.R. 577, provides ample authority for this proposition. He said:
>
> > (1) The principles which apply under this head are not in doubt. Whether the assessment of damages be by a Judge or a jury, the Appellate Court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a Judge sitting alone, then, before the Appellate Court can properly intervene, it must be satisfied either that the Judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. . . .
>
> It is evident from a perusal of the reasons for judgment of the Court of Appeal, that it considered and weighed the evidence, and drew different conclusions from those of the trial Judge. The Court of Appeal made no finding that the trial Judge acted upon a wrong principle, nor did it conclude that there was no evidence to support the trial Judge's conclusion. Weighing and evaluating the evidence lies fully with the province of the trial judge and, where there is evidence to support a finding which he has made, the fact that a Court of Appeal would have preferred to accept other evidence to the contrary, leading

> to a different finding, will not justify a reversal of the trial Judge's conclusion. To interfere, then, with the award made at trial constituted, in my view, an error in principle on the part of the Court of Appeal. . . .

This court has consistently followed the judgment of Viscount Simon in **Nance**. See, e.g., the judgment of Hart, J.A. in **Brown v. Matheson and Von Kintzel** (1990), 97 N.S.R. (2d) 428.

There was some evidence with respect to each of the points on which the trial judge made the findings set forth above. Subject to my comments accompanying the findings, and further consideration of the mitigation issue and the finding of permanent disability, if the trial judge did not commit manifest error, ignore conclusive or relevant evidence or draw erroneous conclusions, it must be assumed that he weighed the evidence and determined that it created a preponderance of probabilities in support of each finding. That assumption may warrant more critical examination with respect to the findings as to the permanency and totality of the disability. Even if all findings are accepted at their face value, however, the amount of damages awarded appears excessive.

The Damages Award

The trial judge awarded the following damages together with pre-judgment interest:

(a) Special Damages

$ 336.62

(b)	General Damages: pain, suffering and loss of amenities	100,000.00
(c)	General Damages: loss of past income	181,760.00
(d)	General Damages: lost future earnings	550,000.00
(e)	General Damages: cost of future care	60,000.00
	TOTAL	$892,096.62

Counsel agreed to interest at the rate of eight per cent per annum as to past loss and to two and one half per cent per annum with respect to amounts awarded at current values. The Order was dated June 28, 1995.

Analysis--General Damages for Chronic Pain Syndrome

The factual and medical evidence have been set out in some detail because this appeal so clearly illustrates the difficulties facing courts in assessing damages when a plaintiff suffers chronic pain syndrome in the aftermath of a tortious accident. By the time of trial, the plaintiff's problems may be overwhelming and very real to him. The problem lies in determining the limits of the defendant's just duty to compensate in damages.

It appears from the evidence that for the purpose of determining damages, chronic pain syndrome consists of three elements:

1. Physical injuries suffered in a tortious accident which do not account for the degree of disability complained of by the plaintiff and, indeed, which may have wholly healed without continuing disabling effect.
2. Continuing physical discomfort from causes secondary to the original injury, which may include cramping, atrophy, shortening or other stresses in the affected muscles and tendons resulting from inactivity during and following the healing process.
3. A psychological overlay, in which depression and anxiety may be factors, resulting in exaggerated symptoms and pain or other sensations such as numbness which may be wholly psychosomatic in origin.

Proof of the first element, the initial injuries, would be similar in any claim of damages for personal injuries, and subject to the same burdens of proof. When it is alleged that part or all of the plaintiff's disability from the initial injuries results from a failure to mitigate, as in **Janiak**. The burden of proof shifts to the defendant. In chronic pain syndrome, the plaintiff is not able to prove his initial injuries account for the full extent of his ongoing disability. The burden would remain on the plaintiff to prove the secondary source of disability. As chronic pain syndrome was explained in the present appeal, there is a distinct possibility it will be avoided if the plaintiff takes an active and positive role in his own recovery. The authorities cited in **Janiak** for shifting the burden of proof to the defendant to prove an absence of mitigation are focused on the initial injuries, not the secondary cause of disability. While the issue does not arise on the evidence in the present case, much of which is

uncontested, it might be argued that a plaintiff relying on chronic pain syndrome should have to show it did not develop because of his own negligence in coping with the initial injuries. The manner in which he responded to medical advice, and his knowledge of how he did so, are entirely under his control and beyond the control of the defendant. It would not be unreasonable for a plaintiff to have to prove that there was nothing he could have done to improve his condition, or, the more likely circumstance, that despite his own reasonable efforts the secondary effects developed as a result of the initial injuries.

The rule that the defendant must take the plaintiff as he finds him (**Hay or Bourhill v. Young** (1943), A.C. 92 at pp. 109-110) is not as broad as it may first appear in the context of chronic pain syndrome. It relates to the time of the accident, not to the later period when secondary effects develop. And it admits of only two broad categories of plaintiff: one who is capable of making rational choices, or one who is not. (See **Janiak**.) The presumption is that the plaintiff will behave like "a reasonable and prudent man" with respect to his injuries: **Asamera Oil Corp. v. Sea Oil & General Corp.** (1979), 1 S.C.R. 633. That is, he will not knowingly make them worse, and he will take all reasonable steps to make them better. A defendant is not required to foresee that the plaintiff will not behave rationally unless the plaintiff can show that he was not a rational person at the time of the accident. The presumption is rebutted if the plaintiff at the time of the accident is suffering from a psychological infirmity that deprives him of the capacity to make rational choices--see **Janiak**. In that case, he is excused from behaving

rationally, that is, he can be excused from his duty to mitigate, and the defendant must bear the consequences.

Otherwise, in chronic pain syndrome cases, the plaintiff's failure to mitigate his damages by following the recommendations of doctors and other professionals as to medication, physiotherapy, surgery, exercise and return to work will relieve the defendant of the duty to compensate. Doctors alone cannot ensure a successful recovery within parameters dictated by the severity of the original injuries without the participation of the patient. Bad medical advice, or failure by the plaintiff to follow good medical advice, skirt close to the concept of *nova causa interveniens*, a matter germane to liability rather than damages. The concept of mitigation is broad enough, however, to encompass the duties of the plaintiff when the issue is the assessment of damages. This is discussed below in light of **Janiak** under the heading, "Mitigation of Damages".

If the plaintiff diligently attempts to mitigate his damages and no improvement results, he will then be entitled to recover damages in full measure for the disabilities that continue from secondary causes related to the initial injuries, even in the event of full recovery from the initial injuries. If, however, there is medical evidence that a substantial improvement could have been expected in the plaintiff's condition if he had followed medical advice, and he failed to follow it, then he will be deprived of damages resulting from his own failure. This will be taken into account in the assessment of damages even if there is only a likelihood falling well short of certainty that the recommended treatment will be successful. See **Janiak**.

The activities--work and/or exercise--required to keep soft tissue injuries from developing into chronic pain syndrome are likely to be painful. This is recognized by the medical profession and summed up by saying that the activities "hurt but do no harm". A diligent plaintiff deserves to be compensated by increased damages for pain and suffering for what he must endure on the road to recovery, but he is not entitled to refuse the necessary discomfort and claim compensation from the defendant for the resulting disability. The governing concept is reasonableness: a reasonable person must be expected to endure a reasonable degree of pain in an effort to avoid long-term disability. The financial disincentives to diligent efforts to bring about one's own recovery mentioned by Dr. Petrie in his evidence may apply to Workers' Compensation cases but they should have no place in tort law.

The psychological overlay usual in cases of chronic pain syndrome appears to initially involve anxiety and reactive depression caused by the persistent pain; thus, it may be a product of the failure to mitigate. The emotional reaction may reinforce the reluctance to mitigate and a vicious circle may develop, but the root cause is not the initial injuries but the plaintiff's failure to behave reasonably. Therefore, following **Janiak**, psychological symptoms which develop in the aftermath of a tortious accident cannot be said to have been pre-existing, and therefore cannot excuse the failure to mitigate. When, however, a plaintiff diligently attempts to follow medical advice to overcome the long-term effects of his injuries, and his efforts do not succeed, depression and anxiety are foreseeable psychological elements of chronic pain syndrome and should be reflected in the award. A defendant, however, has no duty to foresee that a rational plaintiff will develop symptoms that are purely

psychosomatic.

The pre-existing psychological infirmity which may excuse a plaintiff from the duty to mitigate is plainly not, by its nature, an element of chronic pain syndrome. However, the soft skull rule applies, and a plaintiff is entitled to compensation in damages when the initial injuries have a more serious effect upon him than they would have on a person not suffering from his pre-existing infirmity.

Mitigation of Damages

The trial judge's finding that Mr. White "has not complied with medical recommendations and directions to participate in rehabilitative activities", which he excused, could have a significant bearing on damages resulting from chronic pain syndrome. In view of the disproportion between the relatively mild physical injuries suffered by the respondent and the substantial disability he now claims, it would have appeared that at some stages, at least, Mr. White would have been a prime candidate for rehabilitation. This is borne out by the medical evidence.

The trial judge stated:

> It seems to me most unfortunate that the plaintiff was not referred to, and treated by, the Pain Management Clinic at the Victoria General Hospital beginning approximately 6 months after the date of the accident. Its multi-disciplinary approach to treatment is well known to hold out the best hope for achieving improvement in cases of this kind. But that was not done at an early date. Dr. Petriue wanted to refer him to the Pain Management Clinic in 1993, and testified that, in view of a 15-18 month waiting period, he would have pushed for his acceptance. However, he did not do so because Perry White did not

> request him to make the necessary arrangements. The evidence indicates that chronic pain syndrome of five years duration is unlikely to improve. Therefore, the plaintiff's condition now appears to be permanent, and nothing that he can do is likely to yield improvement.

There appeared to be consensus among the doctors and other medical advisors who saw him that Mr. White should have been endeavouring to exercise and to work through his difficulties with the assistance of a variety of rehabilitative techniques which they recommended from time to time. Mr. White was not co-operative. He complained that all types of physiotherapy caused him pain, including acupuncture, traction and light exercise. He said a TENS unit and ultrasound hurt him. On cross-examination he explained his attitude toward physical activity following the accident:

> Can you understand that? Like that's common sense. We're all human beings here. Right? Naturally, if you're in pain, you don't get up and make it worse.

On a preponderance of the evidence, it was his refusal to "make it worse", contrary to his medical advice, which resulted in the chronic pain which he now says disables him and for which he expects compensation from the appellant.

The trial judge excused him in the following findings:

> * I hold that the plaintiff is not able to overcome his problems by his own inherent resources and, further, that he has followed medical advice with respect to rehabilitation as best as his symptoms allow him to do. On the weight of the evidence, I find that the plaintiff has not failed to mitigate his loss.

And:

* Like his pain, which to him is real, this inability to participate in rehabilitation was caused by the collision.

In **Janiak v. Ippolito**, the Supreme Court of Canada considered the effect of a plaintiff's refusal to undergo surgery that had a 70 per cent chance of success, and, if successful, a 100 per cent likelihood of correcting a disabling spinal injury that had been caused by the defendant's negligence. The plaintiff had a great fear of surgery and refused it because success could not be guaranteed. The court, upholding the majority of the Ontario Court of Appeal which in turn had upheld the trial judge, found that unreasonable fear of surgery did not constitute a valid reason not to undergo the operation in an attempt to mitigate damages. As a result, damages for future disability were to be assessed only in a proportion to the likelihood of failure of the operation.

The appellant relies on **Janiak** for the proposition that the reasonableness of a refusal to mitigate must be based on an objective and not a subjective standard and submits:

> The law recognizes that there are psychological thin skulls which may both aggravate the amount of damages the plaintiff is entitled to and possibly excuse a failure to mitigate. However, the psychological thin skull must be pre-existing and not arise simply as a consequence of the accident. Justice Wilson states at page 11 [154 S.C.R.] of **Janiak**:
>
> > A significant distinction has to be made between persons who subsequent to an accident develop an emotional or psychological infirmity and those who bring a preexisting emotional or psychological infirmity to the accident.

Justice Wilson reviewed Canadian, English and American authorities. She

concluded that there were two important elements in determining whether the thin skull rule applied to a plaintiff: the timing of the alleged psychological infirmity and its nature. Timing was important in that the condition had to exist prior to the accident.

She stated at p. 153:

> With regard to timing, it would seem that the very concept of a thin skulled plaintiff embodies within it the notion that the oversensitive condition was pre-existing at the time of the injury. That is to say, where the ultimate consequence of which the plaintiff complains is not due to the impact of the defendant's wrongful act on some existing sensitivity of the plaintiff, but rather arises only subsequent to the injury and independent of any intrinsic physiological or psychological problem for which the tortious act has served as a catalyst, the ordinary rules of recovery apply.

At page 154 S.C.R., Justice Wilson posed a key question for the present appeal:

> The same dichotomy must presumably apply to cases of a psychological thin skulled plaintiff. A significant distinction has to be made between persons who subsequent to an accident develop an emotional or psychological infirmity and those who bring a pre-existing emotional or psychological infirmity to the accident. The question posed by the kind of case we have here is: do persons in the latter group have to meet the objective test of reasonableness when their refusal of medical help is being assessed by the trier of fact or are their subjective attributes to be given due consideration?

After a review of English authorities she answered this at page 158:

> . . . [a] psychological "thin skull" developed subsequent to the tortious act is not a factor that can be considered in relation to reasonableness: the objective test prevails in the absence of any pre-existing condition.

The timing test is not met in the present appeal. The trial judge found:

* Like his pain, which to him is real, this inability to participate in rehabilitation was caused by the collision.

Wilson J. stated at p. 160 S.C.R. that Canadian authorities:

> . . . suggest that a plaintiff in Canada may not be held to an objective standard of reasonableness which it is beyond his capacity to attain. This position would appear to most appropriately complement Fleming;s assertion that where a plaintiff does not suffer from a constitutional incapacity to act reasonably he cannot make the defendant bear the burden of his unreasonable behaviour. Thus, the analytic focus in each case is on the capacity of the plaintiff to make a reasonable choice.

With respect to the nature of the infirmity, Justice Wilson stated at p. 159:

> The other element that has to be considered in determining whether the objective test of reasonableness applies to the decision made by the alleged thin skulled plaintiff is the nature of the pre-existing psychological infirmity. It is evident that not every pre-existing state of mind can be said to amount to a psychological thin skull. It seems to me that the line must be drawn between those plaintiffs who are capable of making a rational decision regarding their own care and those who, due to some pre-existing psychological condition, are not capable of making such a decision. As pointed out by Professor Fleming, a plaintiff cannot by making unreasonable decisions in regard to his own medical treatment "unload upon the defendant the consequences of his own stupidity or irrational scruples": Fleming, *The Law of Torts*, (6th ed. 1983) p. 226. Accordingly, non-pathological but distinctive suggestive attributes of the plaintiff's personality and mental composition are ignored in favour of an objective assessment of the reasonableness of his choice. So long as he is capable of choice the assumption of tort damages theory must be that he himself assumes the cost of any unreasonable decision. On the other hand, if due to some pre-existing psychological condition he is incapable of making a choice at all, then he should be treated as falling within the thin skull category and should not be made to bear the cost once it is established that he has been wrongfully injured.

In the present appeal, there was no finding of fact, nor evidence on which

such a finding could be based, that prior to the accident Mr. White suffered from an infirmity that deprived him of the capacity to make rational choices.

The appellant states in his factum:

> With respect, it appears that the Learned Trial Judge applied the wrong test. He did not make an objective determination, if on the evidence of both the physical and psychiatric practitioners, Mr. White had a pre-existing condition that caused him to react the way he did. Not only was there no evidence of such condition, but the only time pre-existing factors were mentioned they were dealt with as non-pathological subjective attributes of the plaintiff's personality and mental composition such as just described by Justice Wilson. The fact that the Plaintiff might have had an insecure emotional makeup does not mean he had a pre-existing psychological infirmity. In fact far from it.
>
> The consequences of an unreasonable refusal of treatment will mean that the "plaintiff cannot recover from the defendant damages which he himself could have avoided by the taking of reasonable steps".
>
> The end result of the **Janiak** decision is that once it is established that the plaintiff has failed to mitigate, as the trier of fact found in this case, then that failure can only be excused by the absolute proof of some pre-existing psychological condition. Simply to state that the plaintiff's psychological makeup or character is such that it would excuse a failure to mitigate is an error in law.

There is merit in the appellant's submission. The trial judge found, but excused, a failure to mitigate damages. The analysis conducted by Wilson, J. in **Janiak** makes it clear that in the absence of a basis for a finding that Mr. White at the time of the accident suffered from a psychological infirmity making him incapable of rational choice, the trial judge was not justified in excusing his failure to act reasonably. In my view, that was an error of law and the finding must be substituted that Mr. White failed to mitigate his damages.

The effect of that failure is particularly significant because Mr. White was relying on disability resulting from chronic pain syndrome; that is, from secondary effects of his injuries which might have been entirely avoided had he acted reasonably. A reasonable person in Mr. White's circumstances would have diligently followed medical advice in an effort to overcome the disabling effects of injuries that were not shown, clinically, to be disabling in themselves. While speculation is to be avoided, and there can be no guarantee that rehabilitative measures would have succeeded, it is difficult to avoid the conclusion that reasonable efforts by Mr. White to follow his doctors' advice would at least have resulted in a level of disability that was neither total nor permanent, and might well have resulted in his substantial or complete recovery within the first year or two.

The overall impression to be gained from Mr. White's evidence is that subsequent to the accident he made up his mind, contrary to medical advice, that he was permanently disabled. He thereafter refused to countenance views to the contrary, or to take any remedial steps that could lead to a result not in keeping with his self-diagnosis. While in my view Mr. White's pre-existing frailty of character does not meet the test set out by Wilson, J. in **Janiak** for excusing mitigation, it has some significance as a contingency affecting Mr. White's future in the work force.

There is evidence that Mr. White stood an excellent chance of recovering from his initial injuries in two to three months after the accident and he should not have developed a pain syndrome which became chronic after perhaps two years. In my view, he would have recovered if he had diligently followed the advice of his doctors and had not substituted his own bizarre theories as to the nature and effect

of his injuries. Avoiding activities because of an unreasonable fear of pain was not an excuse for the failure to mitigate. The trial judge was in error in excusing failure to mitigate in a person capable of making rational choices; that is, in not following **Janiak.**

Assessment of Damages

In determining the rationale whereby a failure to mitigate affects the assessment of damages in **Janiak**, Wilson, J. considered various theoretical approaches and settled on the concept of avoidable consequences or avoidable loss. At p. 168, she cited with approval the following passage from 22 AM. Jur. 2d. Damages §30, at p. 52:

> Other courts have suggested that the doctrine of avoidable consequence is an extension of the proximate cause principle--that is, if the plaintiff could reasonably have avoided the damages which resulted, then the activity of the defendant can no longer be considered the proximate cause of those damages. While this statement can be accepted as theoretically valid (since "proximate cause" probably means nothing more than the cause which is recognized by law as the cause of the damages), it is not precise enough to express the idea contained in the doctrine of avoidable consequences. For example, if defendant's negligent activity caused plaintiff's broken leg and much of plaintiff's pain could have been avoided by consulting a doctor, it is unnecessarily ambiguous to state that the failure to consult a doctor prevented the negligent activity from being the proximate cause of a portion of the pain, but not from being the proximate cause of the rest of the pain. It is more precise to state that consulting a doctor would have avoided a certain portion of the pain and, thus, damages cannot be recovered for the avoidable pain.

In dealing with the appeal before her, Wilson, J. stated at p. 169 and 170:

> What then counts as an unavoidable loss in a case like this where there has been found to be an unreasonable refusal of surgery? The answer given by MacKinnon A.C.J.O. [in dissent] is that one looks to what would have happened on a balance of probabilities had the operation in fact taken place. The majority approach, on the other hand, is to determine what damages are avoidable by assuming that the plaintiff has agreed to an operation which has not yet been performed. If the majority is correct, then the courts would normally take account of any "substantial possibility" of failure and the amount by which full compensation would be discounted--in this case 70 per cent--would represent his avoidable loss. . . .
>
> In my view the majority approach is consistent with first principles as expressed by Lord Diplock in **Mallet v. McMonagle** (1970), A.C. 166, at p. 176:
>
> > The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would not have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.

In the present case, it is certain only, on a preponderance of probabilities, that Mr. White did not make a reasonable effort to mitigate his loss. It would be unduly severe, and justified neither by the evidence nor the **Janiak** analysis, to find that all of Mr. White's loss, beyond his initial injuries, was avoidable. There is nothing in the evidence which would reduce unavoidable loss to a simple percentage. Therefore, in my view, the proper approach is to factor in a substantial measure of avoidable loss with respect to each of the various heads of damages.

General Damages: Pain, suffering and loss of amenities

In **Smith v. Stubbert** (1992), 117 N.S.R. (2d) 118 (C.A.) Chipman, J.A. considered the range of general damages for pain and suffering in cases of chronic pain syndrome at p. 127:

> I have considered a number of recent cases involving damage awards for injuries not unlike those sustained by the respondent. Most are cases dealing with that small percentage of people who do not recover from soft tissue injuries of the neck but suffer long-term discomfort which almost invariably brings on emotional problems. Some of the cases dealt with other injuries in addition, and others dealt with injuries of a different nature but having the common feature of long-term chronic pain. No two cases are alike and even similar injuries will impact differently on different people. . . . Each case was decided by a different court at a different time and a precise range of awards cannot, with precision, be laid down. In broad terms the range for nonpecuniary damage awards for such persistently troubling but not totally disabling injury is from $18,000 to $40,000.

The trial judge dealt with this case as follows:

> Counsel for the defendant cited **Smith v. Stubbert** (1992), 117 N.S.R. as a leading case in this jurisdiction with respect to the quantum of general damages for a soft tissue injury. The Court held that, in broad terms, the range for non-pecuniary damage awards for "persistently troubling but not totally disabling injury" was between $18,000 and $40,000. This case, while binding, appears to refer to injuries which are much less serious than those in the present case. The plaintiff's injuries are not merely a soft tissue injury to the neck and, moreover, are totally disabling.

In **Smith v. Stubbert**, the initial injuries suffered by Mr. Smith, and his reaction to them, were generally similar to those of Mr. White. With respect, they were not "much less serious". In both cases, the soft tissue injuries had ceased to be a material factor in any long term disability. The issue in this case is, therefore, the same issue dealt with by Justice Chipman in **Smith v. Stubbert**: chronic pain

syndrome.

In **Smith v. Stubbert**, the jury found Mr. Smith was totally disabled. This finding was considered perverse on the evidence by Justice Chipman, who rejected it and considered the disability to be partial. In the present case, the findings of total and permanent disability are undermined by Mr. White's failure to mitigate his damages. In any event, the terms "permanent" and "total" with respect to chronic pain syndrome lack the absolute quality they would have, for example, in the case of a spinal cord injury resulting in paralysis. Chronic pain syndrome in itself, when it is actually disabling, implies long term disability which may be substantial. A further finding of permanent and total disability therefore adds little. Mr. White's chronic pain syndrome is similar to that suffered by Mr. Smith; in my view, the cases cannot be distinguished on this basis.

That is to say, the general damages suffered by Mr. White for pain and suffering and loss of amenities resulting from chronic pain syndrome should be considered within the range of non-pecuniary damages set forth in **Smith v. Stubbert**. The upper end of the range would contemplate severely disabling pain and a prognosis that it would continue indefinitely.

The $18,000 to $40,000 range of general damages for pain and suffering for chronic pain syndrome prescribed in **Smith v. Stubbert** has been generally followed in Nova Scotia courts. In **Hendsbee v. Chaisson** (1994), 132 N.S.R. (2d) 241 affirmed on appeal (1994), 139 N.S.R. (2d) 217) a $39,000 award was upheld; in **Hiltz v. McNab** (1993), 119 N.S.R. (2d) 71, $25,000 was awarded. In **Valencourt v.**

Husain (1994), 132 N.S.R. (2d) 291, involving partial disability, the trial judge considered reduced earning capacity in assessing global general damages of $50,000. Consistent with this range, a chronic pain award of $30,000 was left undisturbed by the Supreme Court of Canada in **Engel v. Salyn** (1993), 1 S.C.R. 308. This court distinguished **Smith v. Stubbert** on the facts in allowing a jury award of $100,000 to stand in **Binder v. Mardo Construction Ltd.** (1994), 136 N.S.R. (2d) 20 in which the plaintiff had unsuccessfully made extraordinary efforts to overcome her disability and had submitted to surgery knowing chances for success were small; it provided no relief but did provide clinical confirmation of the physical source of her disabling bursitis.

In the absence of distinguishing circumstances, and giving effect to the element of avoidable loss, I would apply the upper range in **Smith v. Stubbert** and reduce the award of general damages for pain and suffering and loss of amenities to $40,000, taking note that there has been some inflationary increase since **Smith v. Stubbert** was decided.

General Damages: Loss of Past Income

This head of damages covers the period between the date of the accident on March 16, 1990, to the end of the February, 1995, the month when the trial took place. Mr. White's income tax records for 1987, 1988 and 1989 and other records for the nine-week period he worked in 1990 establish an average income for that

period, by my calculation, of $29,126 which the trial judge approximated at $30,000. There was no actuarial evidence. The trial judge applied pre-judgment interest at an agreed rate of eight per cent per annum to $30,000 for the years 1990 to 1994 and to two twelfths of $30,000 for 1995, deducted Section B insurance benefits, and arrived at an award for lost past income of $181,760. In doing so, he rejected as speculative evidence that the construction industry in Halifax had entered a downturn by 1990 and evidence that Mr. White might have found more lucrative employment with the Hibernia offshore oil project in Newfoundland, from which he was temporarily disqualified by a two-year residency requirement.

Owen White, Mr. White's older brother, was a principal witness as to his earning capacity. Owen White had taught his younger brother his construction skills including form work and had worked in the construction industry in Halifax prior to 1990. He considered that employment opportunities in construction in this area had fallen into a sharp decline about that time and he had made the difficult decision to return to Newfoundland to seek work on the Hibernia project, knowing that he would not meet the residency requirements for a Hibernia job for two years. He was unable to find employment there in the meantime and had to be supported by his wife until he eventually obtained work on the Hibernia project at a considerably higher income than he had enjoyed in Halifax. The appellant submitted that the trial judge had ignored a relevant consideration in dismissing as speculative Owen White's evidence that construction work had dried up in Halifax.

I accept that submission to the extent that there was no basis for ignoring Owen White's evidence of a downturn in the construction industry, which was also a

matter of common public knowledge of which notice could have been taken. Diminished employment prospects should have been considered as a negative contingency in determining Mr. White's lost past income between 1990 and 1995. Avoidable loss is a factor here, particularly after the first two years. So is Mr. White's exaggeration of the effect of his physical complaints, which could have resulted in unavailability for work.

Taking all relevant factors into consideration, I would apply a substantial contingency factor of thirty-three per cent to the amount awarded by the trial judge, resulting in an award of general damages for lost past income of $121,779.20 which I would round to $121,800. I recognize that a contingency deduction equivalent to one year's income out of three is grossly excessive on a statistical basis (see **Personal Injury Damages in Canada**, Cooper-Stephenson and Saunders, Carswell, Toronto, 1981, pp.255-259) but in the peculiar circumstances of the present appeal, I consider it fair and reasonable.

General Damages: Lost Future Earnings

The trial judge stated:

> The proper method of establishing the amount of an award for loss of future earnings is by "determining the present value of a lump sum which, if invested, would provide payments of the appropriate size over a given number of years in the future, extinguishing the fund in the process". **Keizer v. Hanna and Buch**, [1978] 2 S.C.R. 342 at p. 352.

The process of determining that present value is not simply an exercise in mathematics: **Lewis v. Todd** (1980), 115 D.L.R. (3d) 257 (S.C.C.), at p. 267, where it is stated:

> . . . The evidence of actuaries and economists is of value in arriving at a fair and just result. That evidence is of increasing importance as the niggardly approach sometimes noted in the past is abandoned, and greater amounts are awarded, in my view properly, in cases of severe personal injury or death. If the Courts are to apply basic principles of the law of damages and seek to achieve a reasonable approximation to pecuniary *restitutio in integrum* expert assistance is vital. But the trial Judge, who is required to make the decision, must be accorded a large measure of freedom in dealing with the evidence presented by the experts. If the figures lead to an award which in all the circumstances seems to the Judge to be inordinately high it is his duty, as I conceive it, to adjust those figures downwards; and in like manner to adjust them upward if they lead to what seems to be an unusually low award.

Unfortunately, no actuarial evidence was adduced on behalf of the plaintiff. . . .

It is submitted on behalf of the defendant that, because of innumerable contradictions in the evidence, the use of exaggerated projected income figures, and the speculative nature of elements of the plaintiff's claim, the only safe and appropriate approach is for the court to make an award in a global amount. In the circumstances, this submission is accepted.

A claim for loss of future income is more appropriately characterized as a present loss of earning capacity. The Court's task is to establish the value of the present loss. In doing so, it must consider present income, the period of life expectancy, and the potential effect of various positive and negative contingencies. As previously indicated, the plaintiff's income was ascertained and set at $30,000 per year. He was 32 years old at the time of trial so that, therefore, 33 years remain of his life expectancy to age 65. The Court must give consideration to negative contingencies such as the possibility that his earnings might have been interrupted on occasion because of unemployment, illness, accidents and retraining. The Court must also consider positive contingencies such as the possibility that he might, by promotion or changing jobs, obtain a better paying job. His condition might improve so that he period of his disability might be less than his life expectancy to age 65. Consideration must be given to the fact that a lump sum of money is being paid in advance, and allowance must be made for the possible effects of inflation over a lengthy period of time.

In the context of these considerations and against a background of limited evidence, the Court sets the amount of the plaintiff's loss of earning capacity at $550,000, an amount which is not considered to be inordinately high. That amount is set in the expectation that it will be invested to pay income and necessary capital to the plaintiff to age 65 at which time the fund will be

exhausted.

While the principles expressed by the trial judge are the appropriate ones, he offered no further explanation as to how the sum of $550,000 was calculated, or what standard was applied in reaching the conclusion that it was not inordinately high. That amount, invested at the agreed interest rate of eight per cent, which I would take notice was not an unrealistic one at the time of trial, would yield an income of $44,000 a year,

or almost fifty per cent more than the proven income figure, without exhausting itself at any age. In my view, it is inordinately high and must be reduced by this court.

It is common practice in assessing general damages for lost future income in chronic pain cases to make a global award without attempting to link it directly to an arithmetical calculation of annual income times the number of years until the conventional retirement age of sixty-five. This is illustrated by the following sampling of cases, which is far from exhaustive:

In **Brown v. Matheson and von Kintzel**, a 22-year-old woman was severely injured in an accident in which her fiance was killed. Four years after the accident her most significant physical injury was torticollis, a neck dysfunction causing her head to pull, turn and jerk. A still experimental treatment offered some hope in the future. She suffered chronic pain and post traumatic stress syndrome and was seriously but not totally disabled from working at the time of trial with an uncertain prognosis for improvement. She had a business course and had earned $1,500 a month working on her father's farm as bookkeeper, doing farm labour, and caring for her invalid mother. On appeal to this court general damages of $75,000 were upheld and loss of future income was increased from $50,000 to $100,000.

In **Smith v. Stubbert**, the 33-year-old male plaintiff was awarded $625,000 general damages for lost future earnings at trial. This was reduced on appeal to $100,000 on the basis that Mr. Smith should be able to return to work in somewhere between one to six years, possibly beginning with lighter duties. He had been earning an annual income of just over $19,000 a year before the accident; actuarial evidence suggested this should be treated as $23,000 in 1992 dollars. Chipman, J.A. considered the actuary's projections and made a "substantial discount for contingencies".

In **Hendsbee**, a 48-year-old woman seasonally employed as a hotel chambermaid, at an average income of $6800, had a two per cent chance of returning to gainful employment as the result of chronic pain syndrome following a motor vehicle accident in which she suffered back injuries. In awarding damages for lost future income in an amount not arithmetically linked to her average annual income for 98 per cent of the 17 years until she was 65, the trial judge stated at page 264:

> Taking into consideration Mrs. Hendsbee's present physical and mental condition, the possibilities of retraining, job opportunities in the Guysborough area, and the medical opinions as to her future abilities to perform various types of work, I assess her damages for loss of future income at the sum of $78,000.

In **Valencourt v. Husain** (1994), 132 N.S.R. (2d) a 31-year-old seamstress suffered a moderate to severe whiplash injury followed by chronic pain; her claim of total disability was inconsistent with a surreptitiously taken video showing her moving freely. She was capable of light work but had made no effort to prepare herself to rejoin the workforce. Her claim for lost future income of $525,000 was rejected but her reduced earning capacity was taken into account in the assessment of general non-pecuniary damages at $50,000.

Similarly, a general damage award of $55,000 included both pain and suffering and diminution of earning capacity in **Armsworthy-Wilson v. Sears Canada Inc.** (1994), 128 N.S.R. (2d) 435.

In **Fulton v. Eastcoast Oilfield Services Ltd. and Roberts** (1991), 108 N.S.R. (2d) 18, a woman who suffered a knee injury followed by post traumatic shock syndrome resulting from an accident while driving a taxi was awarded $45,200 for lost future income based on $4,000 per

year for 17.5 years. On appeal, it was held that the evidence did not support an annual income of $4,000 per year and the trial judge erred in finding permanent disability. The award was reduced to $9,000 based on $3,000 a year for three years. While this was not strictly a global approach, the estimate of the three year period was consistent with such an approach. Jones, J.A. remarked upon the fact that the original award was more than $100,000 in a case involving essentially a soft tissue injury.

Jones, J.A. stated in **Fulton** at page 26:

> The burden of proof on a plaintiff with respect to further loss or damage in the future was reviewed by this court in **MacKay v. Rovers et al.** in (1987), 79 N.S.R. (2d) 237. The plaintiff need only establish that he has a reasonable, as distinct from a speculative, chance of suffering such loss or damage, and the court must then assess the value of that chance.

There can be little doubt that at the time of trial Mr. White's income earning capacity had been substantially reduced. The factors discussed above make the task of assessing the value of his chance of loss peculiarly difficult. It appears necessary to resort to a global approach because there is little prospect of arriving at a realistic assessment by any meaningful arithmetical calculation. The cases referred to above suggest the options of going directly to an estimate of the final figure or to an estimate of the number of years of disability and applying a multiplier. Even though all relevant factors are considered, either approach yields a result that is arbitrary to a degree. This was implied in the judgment of Lord Simon in **Vance** when he suggested a need to adjust a result that was either inordinately high or inordinately low, and appears to have been accepted in the jurisprudence.

At the time of the trial, Mr. White was not capable of gainful employment, as he had been prior to the accident. The most serious imponderable is the element of avoidable loss; if he had

acted as a reasonable person respecting the medical advice he received, he might never have lost any of his future earning capacity. I would view his exaggeration of pain and injury as a negative contingency rendering it unlikely he would have remained employed for a further thirty-three years at the hard construction labour he enjoyed, with the wear and tear on the body such work entails. It is clear that his initial physical injuries resulting from the accident are not a bar to his return to work. Mr. White was resistant to retraining for less physically demanding work. Nevertheless, the possibility of a return to work was a contingency the trial judge considered, and it is one that could occur sooner rather than later. On the other hand, the possibility that mitigation and rehabilitation might have failed despite his best efforts cannot be ruled out, and it is possible that Mr. White lost his entire future earning capacity as a result of the accident. It must also be considered that Mr. White's future earnings might have increased beyond $30,000 a year.

Bearing these factors in mind, and attempting to strike a fair balance between Mr. White's future requirements and the appellant's responsibility to compensate, I do not consider it unreasonable that Mr. White should be employable again within four years. I would, therefore, assess damages for loss of future income at $120,000. That can be arrived at by multiplying by four the $30,000 annual income figure estimated by the trial judge, all other contingencies both positive and negative having been taken into account in arriving at the four-year estimate.

General Damages: Future Personal Care

There is some evidence that Mr. White will require some painkillers and other medication

in the future but the amount of the special damages award at trial, which included such expenses, suggests this is not a major factor. In my view, the chance that Mr. White will require future care is speculative rather than reasonable on the evidence, and I would reduce damages under this head to $3,000.

Conclusion

I would allow the appeal and reduce general damages for pain and suffering and loss of amenities, lost past income, loss of future income, and personal care, arriving at the following award for damages as of the date of the order of the trial judge:

Special Damages	$ 336.52
General Damages: Pain, suffering and loss of amenities	40,000.00
General Damages: Lost Past Income	121,800.00
General Damages: Lost Future Income	120,000.00
General Damages: Personal Care	3,000.00
Total	285,136.52

The general damages of $121,800 for lost past income include prejudgment interest to the date of the order by the trial judge. Prejudgment interest on the special damages is at the rate of eight percent and on the non-pecuniary general damages, it is at the rate of two and one-half percent from the date of the accident to the date of the order. The amount involved for costs at

trial is $286,000 to be taxed according to Tariff A, Scale 3. I would award the appellant costs equal to forty percent of the respondent's costs exclusive of disbursements at trial, plus disbursements.

FREEMAN, J.A.

Concurred in:

ROSCOE, J.A.

PUGSLEY, J.A.