Date: 20011017
Docket: SH 148977C

1998

IN THE SUPREME COURT OF NOVA SCOTIA

Between:

TROY WHITEHEAD

Plaintiff

- and -

JOHN DAVID PLOUFFE, BETTY BAKER AND FRANK BAKER

Defendants

DECISION

Heard before:	The Honourable Justice M. Heather Robertson, Supreme Court of Nova Scotia, on January 5, 8, 9, 10, 11, 12 and April 2, 3, 4, 5, 6, 9, 10, 11, 12 and 17, 2001, at Halifax, Nova Scotia.
Date of Written Decision:	October 17, 2001
Counsel:	Glenn R. Anderson, R. Lester Jesudason, and Krista Attwood, Articled Clerk, for the plaintiff Michael J. Duggan, for the defendant John David Plouffe David P.S. Farrar, for the defendants Betty Baker and Frank Baker

ROBERTSON, J.:

[1] This is an action for damages for personal injuries resulting from a motor vehicle accident which occurred on September 5, 1996, at the intersection of Woodland Avenue and Micmac Boulevard, Dartmouth, Nova Scotia. The plaintiff Troy Whitehead, driving a 1998 Dodge Shadow, was stopped at a red traffic light on Micmac Boulevard intending to travel in an easterly direction, perpendicular to the direction which was being travelled by the defendants' vehicles. The defendant John Plouffe, driving a 1992 Geo Metro, was travelling in a northeasterly direction outbound on Woodland Avenue. The defendant Betty Baker, driving a 1989 Chevrolet Caprice, owned by and registered to her husband Frank Baker, was travelling inbound in the opposite direction, on Woodland Avenue. Mrs. Baker entered the intersection intending to make a left hand turn onto Micmac Boulevard. In completing her turn, she was struck on the front passengers' door, by the outbound Plouffe vehicle. The force of the impact then pushed her vehicle in the direction of her intended travel on Micmac Boulevard, where she sideswiped the plaintiff's vehicle and another vehicle directly behind in the line of traffic waiting at the red light. At the time of the accident both the road conditions and the weather conditions were excellent. The damage to the plaintiff's vehicle was estimated at $2,400.

[2] Both liability and damages are at issue. The plaintiff, Troy Whitehead bears no liability for the collision between his vehicle and Mrs. Baker's. The liability issue is the apportionment between the defendants. As a result of the accident the plaintiff suffered whiplash type injuries. He seeks general damages for pain and suffering in the amount of $65,000, payment for loss of past income in the amount of $104,000, as well as loss future earnings in the amount of $550,000, an investment administration fee of $20,000, cost of future care of $7,500 and loss of housekeeping capacity of $5,000.

APPORTIONMENT OF LIABILITY

[3] Woodlawn Avenue is a major thoroughfare with three lanes of traffic on either side of a narrow boulevard. There is contradictory evidence as to whether the Plouffe vehicle ran a red light and hit Mrs. Baker's vehicle broadside as she completed her turn through the intersection. As well, the question arose as to Mrs. Baker's obligation to maintain a sufficient lookout to complete the turn safely, in the face of oncoming traffic. *McDougall and Noseworthy* v. *Riedel* (1990), 98 N.S.R. (2d) 164.

[4] The defendant Plouffe gave evidence that he was in the centre lane, as he approached the intersection on a green light, travelling at approximately 50 to 55 kilometres and just as he was four to five feet behind the stop bar painted on the asphalt, the light turned amber. He says he then entered the intersection on an amber light and collided with the Baker's vehicle as it accelerated through a left-hand turn.

[5] An independent witness to the accident, Ronald Parnell gave evidence that he was travelling outbound on Woodland Avenue in the curb lane next to the lane travelled by the Plouffe vehicle. He said he was travelling at approximately 60 kilometres and slowed down to stop at the intersection, when he saw in his mirror a blue Firefly approaching from behind. He also heard the car as it accelerated to approximately 75 to 80 kilometres per hour. He said the light had turned red before Mr. Plouffe's vehicle reached the intersection and then braked, skidding over the crosswalk with tires squealing before colliding with the Baker vehicle. He said that Mr. Plouffe had attempted to run the red light. He described the impact as the Plouffe vehicle struck the right-hand passenger door of the Baker vehicle with enough force to lift it in the air. The Baker vehicle then shot across the intersection on Micmac Boulevard and struck the plaintiff's vehicle and came in contact with a second vehicle just behind it, coming to rest on its bumper. Mr. Parnell said that when he first saw

Mrs. Baker's vehicle she was stopped in the intersection and that he was pretty sure she was already beyond the stop bar when the light had turned full red.

[6] Mrs. Baker's evidence is that she slowed down as she approached the intersection and was then travelling at approximately 20 kilometres or less. She testified that the light was green, but as she crossed the stop bar the light turned amber. She said that after she completed her turn and was going almost in a straight line to Micmac Boulevard when she was T-boned by Mr. Plouffe's vehicle. She did not see the light turn red or the Plouffe vehicle approach although she clearly saw Mr. Parnell's vehicle stop at the intersection.

[7] After reviewing all of the evidence, I am satisfied that the traffic light had turned red before Mr. Plouffe entered the intersection. I accept Mr. Parnell's and Mrs. Baker's evidence over that of Mr. Plouffe. He was in fact running a red light and sped up before entering the intersection. As to Mrs. Baker's potential liability pursuant to Sections 122(3) and 122(5) of the *Motor Vehicle Act,* I find that by her failure to see the defendant Plouffe's vehicle approaching or to observe the light turning red makes her contributorily liable to the extent of 20%. The accident was caused by the defendant Plouffe. Had Mr. Plouffe stopped at the red traffic light as

is required by Section 93(2)(e) of the *Motor Vehicle Act,* the accident would not have occurred. However, I find that Mrs. Baker did not exercise sufficient caution and due care after she entered the intersection and completed her turn. The road was straight and level with excellent weather conditions. She ought therefore to have seen the Plouffe vehicle accelerating as it approached the intersection. Her counsel cited the case, *Lawrence* v. *Bateman* (1996), 162 N.S.R. (2d) 257, to support the premise that she should be relieved of any liability as her actions were not the cause of the accident. However that case is distinguished on its facts, where the defendant therein was driving on a through highway and had no legal obligation to stop other than the common law duty to observe and take precautions in the face of a vehicle approaching from a side street. In the present case the defendant Mrs. Baker, is under a statutory duty when proceeding through an intersection and executing a left-hand turn to satisfy herself that such a turn can be completed in safety. Had Mrs. Baker been keeping a more watchful eye, she might have been able to avoid the collision although her responsibility is diminished by the fact that the defendant Plouffe ran a red light and proceeded into the intersection at an accelerated rate of speed. *McDougall and Noseworthy* v. *Riedel, supra.*

ASSESSMENT OF DAMAGES

Background:

[8] The plaintiff Troy Whithead was born on March 11, 1963. He was 33 years old at the time of the accident and is now 39. As a result of the accident, he alleges he sustained injuries to his neck, shoulder and jaw. Symptoms include arm and hand weakness, pain and numbness. At the time of the accident Mr. Whitehead had just completed a one year machine shop programme at the Nova Scotia Community College. Five days following the accident he began his work as a machinist apprentice at Trans-World Distributing Limited, in Dartmouth, Nova Scotia. He continued employment with Trans-World Distributing Limited until early July 1997, when he claimed that he had to quit work due to the severity of his injuries. He worked for a further five month period as a machinist in late 1998 to February 1999. Mr. Whitehead claims that he is no longer able to pursue his chosen career as a machinist and now suffers a permanent disability from the injuries he sustained when Mrs. Baker hit his vehicle.

[9] Mr. Whitehead sustained injuries in a previous motor vehicle accident in 1986. He was standing behind his car and was struck by another car crushing his legs

between the two vehicles. As a result, he had multiple surgeries which were completed in 1990 with the last procedure, a upper tibial osteotomy which was done to make his gait more even. At the time of this accident he had been working as a heavy equipment repair person and was no longer able to continue that career. The evidence showed that he was then advised to pursue sedentary work due to the seriousness of those injuries. As well, he had to curtail sporting activities such as hunting and bicycling and was required to avoid climbing and other activity that required him to kneel or crawl. He was to avoid lifting weight greater than 35 pounds.

WORK HISTORY AND EARNINGS

[10] Mr. Whitehead has had a checkered work history. Following completion of high school in 1981, he worked at various odd jobs from 1981-1984. From 1984-1986, he attended Dartmouth Vocational School completing a heavy duty equipment repair course. In November 1985, he also completed a 60 hours evening course in welding, gas and arc. In June 1986, he went to work for Metro Transit but left this job as the shift work did not agree with him. He then went to work at Mac Maritime on a co-op programme. In November 1986, he suffered the earlier injuries occasioned by the motor vehicle accident. He did not work again until 1990, but

completed further courses of study. In April 1988 he completed a correspondence course in algebra through the Department of Education. From September 1988 to July 1989, he attended Dartmouth Vocational School and completed a course as an electronic engineering technician. He had the last surgery on his left knee in November 1989. In February 1990, the cast was removed. He did not work in 1990, but in September of that year began an accounting course at the I.W. Akerley campus of the Nova Scotia Community College completing it in June 1991. He agreed, upon cross examination that these changed career plants were in response to the need to train for sedentary work following the 1986 motor vehicle accident. In the summer of 1991, he did not work but attended Dalhousie University Continuing Education for a computer course and also attended the summer session at St. Mary's University to audit a math course. In September 1991 to June 1992, he returned to the I.W. Akerley campus and completed a second accounting course. He did a little freelance work as an accountant, never earning more than a couple thousand dollars a year. However, he did volunteer accounting for the Parkinson's Foundation. In 1994, he completed a course as a real estate sales agent and worked in the field for a brief stint until settling upon the plan to become a machinist in September 1995. He completed that course in June 1996, was unemployed for the summer and commenced work at Trans-World Distributing Limited on September 11, 1996, five days after the motor vehicle

accident; that is the subject of this action. He worked there until July 1997. During this time he completed two night courses, each being 42 hours in length from January through May 1997. The courses were in CNC Machining (levels 1 and 2); programmes designed to teach computerized machining skills. In September 1997, Mr. Whitehead returned to school full time to complete the CNC Machining Technician course at the community college. He completed the course in June 1998. He did not find work in July and August of that year, but began work with Crooks Mechanical in September 1998. He left that job in February 1999, indicating on his letter of resignation that he was returning to school. He returned to community college on February 15, 1999 and completed the level 3 machinist programme at the end of March 1999. He did not make any attempt to work after that date until March 13, 2000, when he began training at the Staples call centre. The training course lasted 12 weeks. After that he began his employment at Staples at an hourly rate of $8.50 per hour, roughly the same wage he earned at Trans-World Distributing Limited in September 1996 and Crooks Mechanical in 1998. During all relevant periods of employment, Mr. Whitehead drove himself to work travelling over two hours per day to and from his home in Kennetcook, Hants County, where he lives with his father.

[11] Mr. Whitehead's historic earnings have been as follows: 1993 - $ 2,288; 1994 - $ 7,559; 1995 - $ 2,576; 1996 - $ 5,311; 1997 - $12,188; 1998 - $ 9,714; 1999 - $ 2,339.

[12] Mr. Whitehead testified that he had planned to leave Nova Scotia and work in Ontario as a machinist, where wages are higher for workers with his advanced training, had he been able to complete the required 8,000 hours of trade apprenticeship. These projected higher wage levels ranging from $17 to $20 per hour have formed the basis of his future loss of earnings claim.

[13] Mr. Brian Burnell gave expert evidence as an actuary in aid of Mr. Whitehead's claim for lost future earnings. Mr. Burnell's report was premised on the assumption that Mr. Whitehead was incapable of working as a machinist. Further, he relied on salary figures provided him by Mr. Whitehead. These figures were retrieved from a Human Resources Development Canada kiosk at Mr. Whitehead's community college. The jobs referred to were in southern Ontario. There is no evidence to prove that any of these positions were open or available to Mr. Whitehead. This material was selectively chosen by Mr. Whitehead and provided to Mr. Burnell. Much of this evidence was hearsay. Mr. Burnell's report was of little assistance to the court.

MEDICAL EVIDENCE

[14] Following the accident on September 5, 1996, Mr. Whitehead first attended his lawyer's office, then his insurance agent's office before attending at the Victoria General Hospital Emergency Department. There he was x-rayed and provided with a soft neck collar, released and told to see his own general practitioner the next day. The notation about the accident in the emergency doctor's notes read "...T-boned on driver's door... ." Mr. Whitehead continued to describe the impact of the collision as a T-bone when he spoke with various physicians. It is clear from the evidence that the impact was a light impact arising when the Plouffe vehicle was sideswiped, not T-boned.

[15] Mr. Whitehead went the following day to see his family doctor of some 20 years, Dr. Jalal Hosein. Dr. Hosein gave evidence of his patient's history prior to the accident and also the active treatment he received. On September 12, 1996, upon examination his range of motion was reduced by 50 - 60% in flexion and extension.

[16] Movement of his neck to the right also caused pain. He was medicated with a combination of Tylenol and a muscle relaxant Robaxacet and sent to The

Physioclinic for treatment. His condition improved when he was examined on two subsequent visits, October 3 and 24, 1996. His neck movement was then only restricted by 25% in flexion and extension. He was tender in the posterior cervical spine. Dr. Hosein diagnosed the injury as a moderate cervical sprain. The correspondence between Dr. Hosein and The Physioclinic reflects the subsequent treatment issues that arose when the plaintiff was reluctant to cooperate with the prescribed physiotherapy treatments.

[17] Claire Biddulph, a physiotherapist working for The Physioclinic, treated the plaintiff from October 11 to November 1, 1996 and again on January 7, 1997. She testified that Mr. Whitehead was a strange man that would not allow her to test his reflexes, nor would he initially remove his shirt when she asked to examine his neck. He "talked excessively about his accident."

[18] Ms. Biddulph described the plaintiff as being "extremely difficult to manage." On one occasion during the application of moist heat treatment on his neck, Mr. Whitehead jumped up grabbing the left side of his neck complaining of excruciating neck pain and spasm. He then walked around the room for 15 minutes to relieve the

pain before allowing Ms. Biddulph to touch him. Moist heat treatment does not ordinarily have ill effect on patients.

[19] Mr. Whitehead resisted all hands on treatment and was therefore treated with interferential electric current which sends pulses through the muscles to treat inflammation of the muscle tissue.

[20] Ms. Biddulph also prescribed a home exercise regime. Ms. Biddulph described Mr. Whitehead's behaviour as being very pain focussed. She felt that pain management was the issue impairing his progress and recommended to Dr. Hosein that he would benefit from pain management counselling. He attended only four of an eight session pain programme at Fenwick Psychological Services in late 1996 and January 1997, due to an apparent conflict with his night school schedule. Mr. Whitehead did not adopt a physical conditioning plan as was recommended to him by Maureen Sullivan, of the Pain Management Programme. He had also resisted the conditioning part of Ms. Biddulph's programme, complaining of leg pain, the result of the earlier motor vehicle accident.

[21] He resumed physiotherapy on March 5, 1997 from Laura MacDonald of The Physioclinic, whose report dated March 7, 1997 is in evidence. That report makes reference to "a severe increase in bilateral jaw and neck discomfort" following three to four root canals performed by his dentist in early 1997 and the necessity of seeing his dentist for referral to a TMJ specialist. The report notes that "key muscle testing was not possible due to high irritability of resisted tests." Further, it notes that "the active cervical ranges were as follows: flexion 70%; extension 10%; right rotation 20%; left rotation 35%." This is in contrast to the test results of October 28, 1996, when according to Ms. Biddulph's testimony, his flexion was 50% and extension normal "he could look all the way up to the ceiling without pain." Side flexion was then at 40% of normal and rotation was 50% of normal. He had then also complained of weakness in the right arm and hand, but a manual testing of the right and left grip showed that his grip strength was then equal.

[22] The inconsistencies in the reported measures of the physiotherapy treatment may be explained by the subjective reporting of pain by the plaintiff versus the objective measures achieved during some testing when allowed by him. In all, Mr. Whitehead received 18 sessions of physio as The Physioclinic ending in April, 1997.

[23] He then attended 26 sessions of treatment with Brian Sutherland, of Physiotherapy Alternatives, between July 3 and December 4, 1997. He was not working during this period. Mr. Sutherland testified respecting the subjective history provided by his patient who had described the accident and said that at the point of impact his head hit his left shoulder and also hit the roof of the car, which had been hit side on and lifted from the ground. This is an exaggerated explanation of impact, based on the evidence before me. Mr. Whitehead has provided varying subjective explanations of the accident and this has influenced the medical reporting of those who have treated him for his injuries.

[24] Mr. Sutherland performs alternate therapies, well beyond conventional physiotherapy programmes. He performed acupressure following what he described as a Japanese model. He felt various pulses in the wrist and followed energy paths and systems. He described how he found the gall bladder energy path blocked over the right side of the head down through the chest to the gall bladder. He described his energy flow as being down 30%. He did, however, measure flexion, extension and rotation of the neck and reported that extension was the biggest loss. On one occasion, Mr. Whitehead could only move his head back approximately one inch and a couple of inches to the right, even less so to the left. Upon cross-examination, Mr.

Sutherland agreed that such measurements involve the subjective response of the patient who determines how far he will move his head. I did not find Mr. Sutherland's evidence to be helpful. He practices an unusual form of treatment that responds to the subjective complaints of the patient and offers little objective analysis of his condition.

[25] Mr. Whitehead had changed physicians in November 1996, first seeing Dr. James Snow, who practiced in East Hants County. His medical records were not available. The evidence showed that he was in semi-retirement, worked two days per week at Kennetcook Medical Centre, before having a stroke in April 1999. He had not maintained an MSI billing number during his work at the clinic. Mr. Whitehead was also seen by Dr. Danuta Kajetanowicz of the Albro Lake Medical Centre, from August 1997 and January 23, 1998, until she moved to Cape Breton. Dr. Danuta treated him with Elavil for the pain and recommended work hardening in October 1997.

[26] From July 3, 1998 to February 15, 2001, Mr. Whitehead was treated by Dr. Christopher Ozere. Dr. Ozere gave evidence. He treated Mr. Whitehead for the continuing complaints of pain in the jaw, right side of the neck and right shoulder, on

July 3, August 9, August 18 and September 13, 1998. He was also concerned about Mr. Whitehead's emotional state and treated him for anxiety, prescribing Ativan to avoid occasional depression. He noted that his anxiety was "more situational" and became more acute when he was concerned about his lack of work, his pain, or when receiving dental treatment. He was also prescribed Propetia for hair loss.

[27] Mr. Whitehead did not visit Dr. Ozere again until January 4, 1999. his medical notes indicate that he was doing well and by then only had occasional headaches. "His right arm had strengthened to almost normal now but if doesn't concentrate on posture gets tight neck and jaw pain ... using a bite plane nightly."

[28] His visits to Dr. Ozere from February 19, 1999 involved other unrelated complaints of groin pain and urinary tract infection. Despite having left work in February 1999, Mr. Whitehead did not seek treatment for injury related complaints until July 13, 1999, when he then told Dr. Ozere that he suffered too much pain and had to leave work in February. In all, Mr. Whitehead made some 38 visits to Dr. Ozere, with recurring frequency from July 1999, when he was then engaged in seeing a series of specialists as he prepared for litigation.

[29] Dr. Eugene Nurse, an occupational health consultant, saw Mr. Whitehead on August 25, 1997. He prepared an assessment for Ms. Janet Hughes of Lindsey Morden. This report was prepared jointly by Dr. Nurse and Mr. Tom Stanley, a physiotherapist, who also testified before the court. His reports are in evidence and as well, Dr. Nurse testified. He noted in that report that Mr. Whitehead was involved in a motor vehicle accident and that "During this time his head and upper body moved back and forth violently, although movement was arrested by his seat belt and he did not make contact with the inside of the vehicle." Dr. Nurse concluded that Mr. Whitehead had "soft tissue injuries to his neck and thoracic spine with resultant spasms of trapezius." He expressed the opinion that this type of injury ought normally be resolved in three to four months, but in Mr. Whitehead's case went beyond this period "in part due to the autonomic/sympathetic dysfunction found in this assessment."

[30] On October 14, 1997, Dr. Nurse again wrote to Ms. Hughes and noted that Mr. Whitehead had "made remarkable progress since my evaluation and consequently appears on the right track." He also noted that Mr. Whitehead showed symptomatology of thoracic outlet syndrome on the right side and recommended that he see Dr. David King. He also recommended further physiotherapy with Laura

MacDonald of The Physioclinic and a programme of work hardening. He attended that Halifax Work Hardening Centre from November 10, 1997 and made substantial progress and was discharged from that programme on March 9, 1998, on the premise that he could return to his normal work place. Both Dr. Nurse and Tom Stanley recognized the presence of chronic pain condition; they initially accepted that Mr. Whitehead would recover from his injuries.

[31] Dr. Nurse did not see Mr. Whitehead again for two years. He prepared a report for Mr. Whitehead's counsel, dated September 3, 1999 wherein he canvassed an extensive medical history describing the persistence and aggravation of his symptoms resulting in his inability to work as a mechanic beyond February 1999. He did suggest "he can be reeducated and retrained in a job which he is capable of doing." Dr. Nurse was however unaware of Mr. Whitehead's extensive resumé which demonstrated that he had been trained for a number of more sedentary job careers. Dr. Nurse was a very sympathetic witness and accepted the subjective history and explanations provided to him by Mr. Whitehead. He, too, believed that Mr. Whitehead had been "T-boned" by the defendant's vehicle. He also accepted Mr. Whitehead's explanation concerning his assessment by Dr. Burton McCann.

[32] On February 1, 1999, Mr. Whitehead had been assessed by Dr. McCann. This appointment was requested by the plaintiff's counsel. The report stated:

> With regard to his right limb and neck and shoulder area symptoms, he indicates that they have dramatically improved and he describes them as "90-95% improved." Normally he reports no impairment or disability secondary to these symptoms. Similarly, with respect to the presumably sympathetically mediated symptoms, these have resolved.

[33] Dr. McCann further noted that the only exception was symptomatology returning when "deburring" at his work. This is the act of using a sharp knifelike tool to clean off metal objects manufactured in the course of his work as a machinist. However, as reported to Dr. McCann, Mr. Whitehead specifically wished to point out that these symptoms were "more of a nuisance." The symptoms relating to "deburring" included numbness and pins and needles in his middle to small finger. These symptoms are also consistent with carpel tunnel syndrome. There is evidence to suggest that he suffered from carpel tunnel syndrome in both hands. Accordingly, Dr. McCann diagnosed a soft tissue injury to cervical spine and right shoulder girdle area. He classified the injury as moderate. He also recognized a TMJ injury and recommended a follow-up as per Dr. ElGeneidy's recommendations.

[34] Mr. Whitehead had been treated by Dr. ElGeneidy and Dr. Clive Creaver for TMJ problems. These were largely resolved by the use of a bite plane. I find that the evidence is far from conclusive that TMJ resulted from any injury suffered as a result of the motor vehicle accident.

[35] The court also heard the evidence of Dr. Garnet Colwell and Dr. David King in support of the plaintiff's claim that he is now totally disabled due to the whiplash injuries suffered. However, again each of these physicians relied on the plaintiff's explanation of the severity of the impact of the collision and his subjective explanations of symptomatology. Their evidence was compromised in this respect. Further, they too were unaware of the plaintiff's extensive training for more suitable work.

[36] In particular, Dr. King had not been provided with significant materials when he made his assessment. He did not have any notes or reports from the plaintiff's family doctors or complete reports from The Physioclinic, nor did he have a detailed medical history of the plaintiff's previous accident. On cross-examination, Dr. King agreed that had he been aware that the plaintiff had provided differing versions of the impact of the accident or had been inconsistent in describing his complaints, his

assessment would be changed. Dr. King had scored his patient favourably on a test relating to under performance or malingering. This was an interesting exercise that defence counsel revisited upon cross-examination. It was clear that Mr. Whitehead would have failed this test accumulating a high score for under performance and malingering had Dr. King been aware of much of the plaintiff's behaviour through the course of his medical treatment. I am unable to accept Dr. Colwell or Dr. King's reports in support of the position that Mr. Whitehead is permanently disabled.

[37] Dr. Michael Gross examined the plaintiff at the request of defence counsel. He classified Mr. Whitehead's soft tissue injuries to his cervical spine as mild. Further, he reported that:

> All investigations to date have revealed no significant abnormalities and doctors have therefore formed their opinions based upon Mr. Whitehead's description of his complaints.

He found Mr. Whitehead to have a "somewhat anxious" predisposition" and suggested that the perception of his injuries is greater than the actual physical damage to his body.

[38] In particular, Dr. Gross found that by far the more significant event was the previous motor vehicle accident that has resulted in significant osteoarthritis in his left knee that would trouble him in future years and limit the type of employment he could ever undertake, such as that of a machinist. He felt that his current sedentary work at the call centre was appropriate.

[39] Dr. Gross also observed his patient during the assessment and determined that Mr. Whitehead showed a good range of motion. Upon examination however, he exhibited a pain response. He too conducted a spurling test, as had Dr. Colwell. This involves placing downward pressure on the patient's head to test for nerve root compression. Mr. Whitehead exhibited the pain response before Dr. Gross even touched him. He could not complete the test. From his objective assessment of Mr. Whitehead's injuries, he felt "his motor vehicle accident of September 1996 was a mild one that resulted in mild injuries which one could reasonably suppose have improved with time."

CREDIBILITY

[40] Based on Mr. Whitehead's own evidence, I have concluded that he is not a credible litigant. He has provided his medical doctors with inconsistent descriptions of the impact of his accident and with very inconsistent recital of symptoms of his actual injuries. It may be that he has been motivated by the litigation process. He provided the court with the extraordinary explanation that he lied to Dr. McCann in February 1999, in describing his full recovery as he was fed up with seeing doctors. This is not believable.

[41] Mr. Whitehead also asked the court to accept that he left work with Crooks Mechanical in February 1999 due to his injuries, when his letter of resignation clearly states that he left to return to school which he, in fact, did. Again, I cannot accept his explanations of this discrepancy. Based on the plaintiff's own evidence and my observation of his demeanor, I find it more likely that he left Crooks Mechanical due to the boring and repetitive nature of the work. As well, his demonstration to the court of the task of "deburring" of metal objects showed that he had reasonable dexterity and observably good range of motion. Further, during the months that he

said he was unable to work, he actually performed strenuous physical labour, rebuilding his aging automobiles and tree cutting with his father.

[42] On the evidence before me I find that Mr. Whitehead was ready to return to work in April of 1998. He did not find employment that summer but began work with Crooks Mechanical in October 1998. He chose to leave in February 1999 to return to school. Neither his departure from this job or his subsequent claims of being disabled from work can be attributed to the motor vehicle accident that is the subject of this litigation.

[43] When Mr. Whitehead chose to be trained and work as a machinist, he was, in fact, entering a workplace where he would be asked to do certain activities prohibited by reason of his earlier injury, such as lifting heavy objects in excess of 35 pounds. As well, a work place with concrete floors would inevitably have aggravated his earlier injuries.

FINDINGS

[44] On the preponderance of evidence before me I find that Mr. Whitehead suffered a moderate whiplash injury. In reaching my conclusion, I make the following findings of fact:

1. Mr. Whitehead was injured in a motor vehicle accident on September 5, 1996.
2. As a result of his injury, he suffered some degree of disability and will continue to suffer some peripheral results of his injury.
3. Mr. Whitehead had been seriously injured in a previous motor vehicle accident in 1986. Following that injury he was advised that he should find sedentary work.
4. Mr. Whitehead trained for and completed courses in accounting, real estate, as an electronic engineering technician and a call centre worker, all more suitable work of a sedentary nature.
5. Mr. Whitehead recovered almost completely from his injuries by the spring of 1998. He found work, again as a machinist apprentice in October 1998 and chose to leave this work in February 1999 to return to school.

6. That although this occupation may have been made more difficult for him, in part by reason of this accident, he was not rendered totally disabled from performing this job. But certainly other more sedentary positions were available to him, including his present employment as a call centre worker, at roughly the same rate of pay as he last received as an apprentice at Crooks Mechanical.

7. That as a result of the accident Mr. Whitehead sustained a minimal loss of past wages of twenty-two weeks.

8. That there is no evidence that convinced me that Mr. Whitehead has suffered an overall loss of future earning capacity. He discontinued his occupation as a machinist by choice. Given Mr. Whitehead's checkered work history, I am unable to make any award in this regard. I will attempt to include in the award for general damages an amount to offset any such claim.

9. Mr. Whitehead continues to undergo treatment for adjustments to a bite plane as the result of TMJ dysfunction. I am unconvinced that this condition resulted entirely from the injuries sustained in the motor vehicle accident and am unable to make an award for costs of future treatment. I will attempt to include in the award for general damages an amount to offset any such claim.

10. That there is no evidence to support a claim for loss of housekeeping capacity.

DAMAGES

[45] *Smith* v. *Stubbert* (1992), 117 N.S.R. (2d) 118 (C.A.) established that for injuries such as those sustained by the plaintiff, general damage awards should be in the range of $18,000 to $40,000. The current range in 2001 would increase the range from perhaps $20,000 to $45,000. *Smith* v. *Stubbert*, *supra*, contemplated that the award would satisfy injuries that were persistently troubling but not totally disabling. Mr. Whitehead's injuries definitely fall within this range.

[46] Other cases cited to me that show the relevant range of damages include *Burke* v. *O'Brien* 125 N.B.R. (2d) 343, *MacLeod* v. *Smits* (1994), 135 N.S.R. (2d) 389, *Gibbs* v. *Archibald* (1995), 139 N.S.R. (2d) 169, *Singh* v. *Swift* (1996), 156 N.S.R. (2d) 194 (N.S.S.C), *Terry* v. *Lombardo* (1998), 167 N.S.R. (2d) 365 (N.S.S.C.).

[47] I award Mr. Whitehead for general damages arising from pain and suffering and loss of amenities of life, the sum of $35,000. That sum includes any claim he may have for loss of future income and for any expenses he has incurred or may incur for future care. That sum includes any inflation award since the date of the accident. Mr. Whitehead is entitled to 2.5% interest on that award for a period of four years.

[48] I award Mr. Whitehead for loss of past income, the sum of $7,000. I further award costs to the plaintiff on the basis of Scale 3 of Tariff "A" of the *Costs and Fees Act* on the amount of $42,000. I will hear counsel as to costs, if necessary.

J.