IN THE SUPREME COURT OF NOVA SCOTIA
Citation: [Berthier v. Horton, 2003 NSSC 198]

Date: 20030925
Docket: S.P. No. 6050
Registry: Pictou

Between:

Donalda Ann Berthier

Plaintiff

v.

Weldon Esling Horton

Defendant

D E C I S I O N

Judge: The Honourable Justice Douglas L. MacLellan

Heard: April 11, 14, 15, 16, 17, 2003, in Pictou, Nova Scotia

Counsel: Jamie MacGillivray, Esq., for the plaintiff
R. Malcolm MacLeod, Q.C., and Paul Morris, Esq., for the defendant

[1] This action involves a claim by the plaintiff Donalda Ann Berthier for damages for personal injuries she alleges she suffered in a motor vehicle accident on August 30th, 2000 at Antigonish, Nova Scotia. The defendant William Horton was the owner and driver of the other vehicle which struck the plaintiff's vehicle from behind.

FACTS

[2] The plaintiff is 47 years old. Prior to the accident on August 30th, 2000 she worked as an office manager for Eastern Sanitation Limited in Antigonish. She is married for 25 years to Joseph Ronald Berthier and they have one child who is 25 years old. He resides with them.

[3] On August 30th, 2000, the plaintiff was at work. She was on lunch break and was driving her 1998 Plymouth Breeze on Main Street in Antigonish. Some time between 12 noon and 1 p.m. she stopped in traffic at a red light. There were some vehicles ahead of her car. Her car was struck from behind by a vehicle driven by the defendant Weldon Horton. The collision caused her car to move forward and strike a truck which was ahead of her in traffic. She said she remembers sitting with her foot

on the brake pedal and the next thing she knew she was seeing smoke and black. She said she was dazed and stunned. She remembers getting out of her car and talking to Mr. Horton, the defendant. She said she was shaking badly and a lady came and told her to sit in her car until an ambulance arrived. She said that she probably did lose consciousness for a short period of time. She said her feet and hand went to sleep.

[4] She was taken to Outpatients at St. Martha's Hospital and saw a Doctor Sutherland. He ordered x-rays taken. She said she had pain in her lower back and up to her neck and across her shoulder. She said she had a large bruise on her left shoulder which the doctor felt came from her seat belt. She said she thought she had hit the steering wheel of her car.

[5] The next day she saw her family doctor, Jean Cameron. She was referred by Dr. Cameron to physiotherapy and went there the next day. She had been given pain medication by Dr. Sutherland and Dr. Cameron changed the prescription. She was told to put ice packs on her back. When she started physio she was told to change to heat packs.

[6] She attended physiotherapy from September 6, 2000 until February 5, 2001 for a total of 53 sessions. Initially, she said it appeared that she would be able to return to work in late October, however, that did not happen. On November 16th, 2000, the physiotherapist reported to Dr. Cameron. [Exhibit 1 - Tab 10 - p. 4]

> **Plan:** Ms. Berthier's progress has been very slow. I am somewhat pleased with the consistency in which her neck has improved. Her back still remains somewhat of a labile situation and easily irritated. I am unable to be more specific and suggest a soft tissue injury for the lower spine. Ms. Berthier reports that she must be back to work by November 27th or she will not have a job to return to. She is therefore very focused to attempt a return to work on that date. We will be working with her next week trying to strive towards that and by trying to increase her time and work simulation to approximately 3 hours per day by the end of next week.

[7] She continued at physio until February 2001 at which time she said she had to stop because of the toll it was taking on her physically. She continued to do some of the exercises at home and at a neighbour's home who had a home gym. She said she has major problems sleeping because of the constant pain in her back. She said she wakes up three or four times a night. She says she wakes up in the morning not rested.

[8] She saw Dr. Andrew Thompson. He is a specialist in Orthodontics. The referral was made by her lawyer. That was done in an attempt to explain why her jaws were sore and why she was having headaches and earaches. She said she would put ice on her forehead and jaw and heat pads on her neck and shoulder.

[9] She also saw Mary Gillis who is a psychologist. That was for help coping with her pain. She met with Ms. Gillis for 14 sessions. Apparently her insurance company paid for these sessions but they stopped after 14 sessions. Ms. Gillis referred her to the Mental Health Clinic at St. Martha's Hospital. She said she talked to a psychologist there who was prepared to meet with her if she needed it. She did not go to see that psychologist.

[10] She indicated that she also saw a psychiatrist, Dr. Rideout. However, the Court has no report from her.

[11] The plaintiff said that during the physiotherapy sessions she would often lose control of her bladder and bowels. She said this was caused by the pain she was in from the exercises. She said did not have any problems like this prior to the accident.

[12] She said that she has basically stopped doing many of the things she did before the accident. She said she used to spend a lot of time outdoors, hiking and riding an ATV. She used to socialize a lot and go to dances. She had to cancel her 25th Wedding Anniversary celebration because of her injuries. She said she does a small amount of

walking now. She said she tried swimming at her cottage but could hardly get back out of the water.

[13] She said she used to drive a lot alone, but since the accident she just drives short distances because she has to stop to get out of the car to stretch. She also said that she tends to be scared in a car.

[14] She said she agreed to have a functional evaluation done by Glen Brann (his report - Exhibit 1 - Tab 5). She described that two day session as “two days of hell” because it caused her so much discomfort. She said that she used to do basically all the housework for her family prior to the accident. Now she does very little housework. She gets some help from her two nieces. She said she has lost about 60 pounds since the accident. She now weights 130 pounds.

[15] The plaintiff was referred by her family doctor to Dr. Robert Mahar and she also saw Dr. Thomas Loane and Dr. David King. They are all specialists working in Halifax. She was also referred for an independent medical examination to Dr. William Stanish.

WORK HISTORY

[16] The plaintiff indicated that prior to her job at Eastern Sanitation she had a number of different jobs. She worked for some time at Sears in Halifax and then with Federal Savings Credit Union.

[17] She was there for four years. Her husband was then transferred to Port Hawkesbury and they moved there. She said she got a job at Central and Eastern Trust Company. She was there for two years and her husband then got a job at Michelin Canada in Granton, Pictou County. They moved to the Antigonish area. She took a cosmetology course in Pictou and worked at that for two years. In 1995, she took a 10 month business course at North Eastern Business College to upgrade her computer skills. She started with Eastern Sanitation in 1998 and works there as office manager. She was paid $13.00 per hour for a 35 hour week.

[18] Her income from January to August 30th, 2000 was $15,097.00. After the accident she got Section B benefits of $140.00 per week.

[19] While at Eastern Sanitation she took some courses in regard to Occupational Health and Safety.

[20] Following the accident she was advised to try doing volunteer work. Arrangements were made for her to attend the Antigonish Heritage Museum to work at imputing data into a computer. When she went there she realized she could not do the work and did not stay. She said she could not sit for any length of time because of back pain.

[21] The plaintiff said that she did not see herself ever being able to go back to work.

[22] On cross-examination the plaintiff was asked about a note in Dr. Cameron's chart note in which Dr. Cameron recorded that she had consulted her on December 9th, 1999 about a sexual abuse problem.

[23] Dr. Cameron had noted that the plaintiff had crying spells for a number of weeks because of a history of sexual abuse by her father involving both verbal and physical abuse. It noted that she had never spoken to anyone about this problem before. Dr. Cameron's notes also indicated that the plaintiff had problems with

appetite and sleeping because of flashbacks about her father's abuse and that she wanted to see a counsellor about the abuse issue.

[24] The plaintiff said that she did not remember ever talking to Dr. Cameron about this issue and that no such abuse ever happened. She said she might have told Dr. Cameron what was noted because she had been watching similar material on a T.V. show. She said she never went to a counsellor about abuse by her father.

[25] She was asked if her head hit the steering wheel when the vehicle struck. She said she did not know if that happened or not. She acknowledged that she did not tell any medical personnel about that at the time of the accident.

[26] She was asked about her evidence on direct where she said she would vomit either during or after doing physio in light of the fact that the physiotherapist's reports did not note any problem with the exercises. She said it had happened as she had described.

[27] Dr. Jean Cameron was the plaintiff's family doctor. She saw her on September 1st, 2000 following the accident. She said the plaintiff was complaining of headaches

and a sore neck and back pain. She referred her to physiotherapy and prescribed Tylenol 3. She saw her again on September 12 with basically the same complaints. On September 21st, 2000 when she saw the plaintiff again, she said that she continued to have back and neck pain with the neck pain improving more than the back pain. Dr. Cameron wrote to the plaintiff's solicitor on October 20th, 2000. [Exhibit 6 - p. 2]

> On Sept. 21/00 I saw her again. She was attending physiotherapy three times weekly and was still using Vioxx 25 mg. po OD. Her neck was still ++painful with range of motion and her trapezius muscles were still very tense and tender. Her lower lumbar area was still tender along the paravertebral muscles.
>
> Donelda has a moderately severe whiplash injury to her neck and musculotendinous injury to her lower back. It will take several weeks to get her settled down with physiotherapy and anti-inflammatory medication. It is too early to guess how long she will be disabled by this injury. I know at this time she will be unable to work until at least November 1, 2000.

[28] In May 2001, Dr. Cameron referred the plaintiff to Dr. Mahar because of her chronic back pain.

[29] Joseph Ronald Berthier is the plaintiff's husband. He testified that his wife used to do all the housework in their home prior to the accident. He said that following the accident when the plaintiff would go to a physiotherapist session that he would pick her up and that she would vomit or wet herself. He said that she could

not sleep at night and would wake him up because of her twisting and turning in bed.

[30] He said that he and the plaintiff do not do much socially since the accident because of the plaintiff's back problems. He said they used to go to dances and parties. He said they also did boating and riding on their ATV. They also used to often hike in the woods. He said they do not do these things anymore and do not garden like they used to. He also said their sexual activity is greatly reduced because of the plaintiff's pain.

[31] Dr. Andrew Thompson was called as an expert witness in the field of orthodontics.

[32] He testified that he saw the plaintiff on a number of occasions starting in the Fall of 2000 and prepared a report for her lawyer. [Exhibit 1 - Tab 3]. His evidence is that the whiplash type injury suffered by the plaintiff caused some injury and his diagnosis was: [Exhibit 1 - Tab 3 - p. 9]

Specific Diagnosis - Cranio - Mandibular Pain Dysfunction:

> (more specific “sub diagnosis” could be provided if further diagnosis is carried out)
>
> Cranio-mandibular pain dysfunction syndrome is now used more correctly to describe what previously (and in a more limited meaning) was referred to as “TMJ” or more correctly as Temporo-Mandibular Joint Pain/Dysfunction Syndrome. TMD is essentially a musculo-skeletal injury of various etiologies. Associated neuro-vascular tissues are involved as is the head and neck (and often shoulder and back). It is well recognized (eg: by A.M.A.) well documented and researched.

[33] Dr. Thomas Loane testified. He was accepted as an expert in physical medicine and rehabilitation. He saw the plaintiff on referral from her lawyer in June, 2001. His report [Exhibit 1 - Tab 4] was introduced into evidence and he testified at trial. He indicated that based on what he knew about the accident that normally 80 percent of people involved in this type of whiplash type of accident recover and do well. He said, however, that 10 to 20 percent do not recover.

[34] He noted in the his report [p. 3]

> **PRESENT CONDITION:** Ms. Berthier states that she has ongoing severe daily pain in the neck, upper back and lower back area with radiation into her left buttock and upper leg. She continues to have headaches but these have improved to a frequency of one or two per week. She associates the headaches with being tense. She says that she has a habit of grinding her teeth. When asked whether this was only since the accident, she responded “pretty much”. Her headaches are in the frontal area above the eye brows with radiation into the eyes and occasionally into the temples.

She does describe aching in the ears and jaws and says that it is occasionally hard to open her jaws. She often feels as if her glands are swollen and on one occasion did have swollen glands. She has not noticed any locking of the jaws but does get crepitation.

She describes aching and stiffness throughout the lower neck and shoulders and feels as if there is a lump at the base of the neck. She describes the pain as being "toothache" like pain which is present all the time. She states that her pain levels are usually better in the mornings, at approximately 4/10 but by the evening and night the pain can be up to 10/10. She experiences numbness and tingling in the arms. She finds that this occurs more if she is over exerting or tired.

She describes her lower back pain as being the worst pain and says that it will "take my breath away". The pain starts at the left lumbar area and moves across into the right side and gradually up into the mid and upper lumbar spine. The pain travels into the left buttock and upper leg and she frequently feels as if the buttock is heavy and dragging.

...

PHYSICAL EXAMINATION: On examination, Ms. Berthier appeared distressed and in pain throughout the interview portion of the examination. She alternated sitting and standing because of pain. She frequently grimaced, sighed and rubbed her lower back and neck. She stood in a rather unusual posture with her back bend forward from the waist with her head flexed to the right. She moved in a rather slow and halting manner. She was able to undress and change into a hospital examination gown for the physical examination and was able to change back independently. However, she had great difficulty moving about the examining room or on the examining table and had difficulty lying down and getting up from a lying position independently.

The general medical examination was unremarkable. Her blood pressure was normal. Screening examination of the heart and lungs was normal. She did not have any enlarged nodes. Her thyroid gland was not palpable. Her peripheral pulses were easily obtainable at the wrists and at the ankles. An abdominal examination was not carried out.

The usefulness of the physical examination was compromised by severe pain behaviours, voluntary guarding, wincing, withdrawal and vocalizations of pain and discomfort throughout the examination.

...

Her extreme pain behaviours suggests a high degree of emotional distress. Other explanations include a desire to impress the examiner with the severity of her symptoms or, less likely, intentional over action.

With the mechanism of accident, it is probable that she experienced cervical sprain symptoms and may also have experienced lumbar sprain symptoms. These symptoms usually improve with exercise and with time. Ongoing symptoms are usually associated with associated problems such as sleep disturbance, chronic pain and emotional distress.

...

Her extreme levels of pain presentation are not entirely explainable on the basis of the types of injuries suffered or on the limited physical examination information that is available. As mentioned above, this type of presentation during the physical examination can be a form of symptom magnification, a means of attempting to communicate stress to the examiner, or an intentionally produced over reaction. I cannot differentiate between these possible scenarios on the basis of my limited physical examination. However, it is distinctly unusual to have individuals who complain of mechanical, muscular or structural pain in the spine and have such severe limitation when voluntarily moving and such exaggerated movements when reacting to pain stimuli. Conversion disorders can also produce this type of clinical picture but this would require a psychiatric evaluation to confirm the presence of this type of clinical presentation.

...

I believe that further psychologic testing is probably warranted and would suggest that this include an MMPI-II, a battery for Post Traumatic Stress conditions and

> validity checks to rule out malingering or inconsistencies in response. This would be primarily to improve Ms. Berthier's credibility as her performance during examination scenarios makes it difficult for the examiner to entirely rely on her physical findings and symptoms.
>
> There are no contraindications to continue on light aerobic exercise programs such as walking, swimming, light weights and stretches. She does not require formal physiotherapy treatment but may benefit from periodic rechecks to monitor her exercise program.
>
> In terms of return to work, the barriers do appear to be her extreme levels of pain and her pain reactions at the present time rather than demonstrable physical impairment. I am unable to determine any medical restrictions for return to work at the present time.
>
> **PROGNOSIS:** Ms. Berthier was examined 10 months post motor vehicle accident. There is potential for further improvement over the next year. However, the behavioural components of her current presentation suggest a high likelihood of developing a chronic pain disability and the factors associated with this need to be further explored.

[35] Dr. Loane was asked on cross-examination was there any medical restriction on her ability to return to work. He answered that there was not. He also indicated that the plaintiff's physical responses were "not consistent with her medical pathology".

[36] Glen Brann testified. He is a physiotherapist and did a functional assessment on the plaintiff. That testing took place over a two day period and was done in March, 2001 in Antigonish. He found that the plaintiff had a tolerance capacity of two to

three hours per day. He said that based on this contact with the plaintiff that she seemed devastated by her condition. He conceded that for the plaintiff to return to work she would need an employer that could accommodate her physical limitation.

[37] Dr. William Stanish testified. He is an orthopaedic surgeon and did an assessment on the plaintiff in March 2001. He filed a report. [Exhibit 2 - Tab 2]. He testified that the plaintiff's main complaint when he saw her was her spine. He said his examine of her was difficult because of her reaction to his requests and the apparent difficulty she was having. He concluded that he could not find anything objectively wrong with her. He felt that she could go back to work and based that on the fact that he could not find any medical reasons why she could not work.

[38] On March 16, 2001, Dr. Stanish wrote to the rehabilitation consultant dealing with the plaintiff's file: [Exhibit 2 - Tab 3].

> Further to our telephone conversation on March 15, 2001, I feel it appropriate that Mrs. Berthier return herself gradually to the workplace.
>
> I do not see that she is in any particular danger doing those types of tasks that are inherent to being an office manager.

> She is deeply convinced that something is being "missed" and this may be the major issue in her persistent disability. I cannot find any source for her continued complaints. In order to clear the air further, there may be some merit in having her seen by Dr. David Alexander, an accomplished spine surgeon.
>
> From my standpoint I would recommend the progressive return to the workplace as the most fundamental treatment strategy for this patient.

[39] He followed that up on April 2, 2001 by indicating: [Exhibit 2 - Tab 4].

> Please note in my summary to you regarding the patient that I really could not find anything very worrisome on physical examination to support her contention of severe and incapacitating pain.

[40] Dr. Stanish was asked on cross-examination whether he could find any evidence of malingering on the plaintiff's part. He indicated that he could not.

[41] The plaintiff was called on rebuttal to Dr. Stanish's evidence. He had testified that the examine he did on her took about an hour to conduct. The plaintiff said she was only in his office for fifteen minutes including the time it took her to dress and undress after the examination.

[42] Dr. Stanish came back on the stand after that evidence to clearly state that her estimate of the examination time was absolutely false.

LIABILITY ISSUE

[43] The defendant testified that he was driving his vehicle on August 30th, 2000, on Main Street in Antigonish. He said he was behind the plaintiff's vehicle and saw her vehicle stop in front of him. He said that he was stopped behind the plaintiff's vehicle and there was about three to four feet between his vehicle and her vehicle. He said that he had his foot on the brake pedal, but that his foot fell off the pedal and his car started forward. He said that before he got his foot back on the brake pedal he had struck the plaintiff's vehicle.

[44] He said that after he struck the plaintiff's vehicle he got out of his car and went to see if the plaintiff was alright. He said her car had struck a truck in front of her and that the hood of her car was folded up in front of her.

[45] He said that when his car started ahead his wife, who was in the car with him, told him that the car was moving and that he then tried to put his foot on the brake.

He said his foot seemed dead for just a couple of seconds and that caused him to not be able to stop his vehicle before he struck the plaintiff's vehicle.

[46] Based on these facts the defendant through counsel has relied on the defence of inevitable accident.

[47] Introduced into evidence by consent of the parties is a medical report from Dr. R. Holness. Dr. Holness had treated Mr. Horton prior to the accident and also saw him after the accident on a referral from his family doctor.

[48] As a result of the report provided to the family doctor, counsel for the defendant contacted Dr. Holness and in June 2000 he wrote to the defendant's counsel as follows: [Exhibit 2 - Tab 1].

> I am replying to your letter of March 19, 2002 and I am enclosing a copy of my clinic notes regarding my evaluation of Mr. Horton two days ago. I'll address myself specifically to your questions as I think you have detailed background information on this man who I have seen before. First of all, I saw him in 1995 when he had unquestionable evidence of compression of his spinal cord leading to cervical myelopathy, ie: damage to the spinal cord in the neck. This led to clumsiness of his hands and lower extremities, he went on to have a decompressive operation done by my colleague Dr. Mendez, I think around 1995-1996. Subsequently, Mr. Horton was shown in 1998 to have severe stenosis of the <u>left</u> internal carotid artery which of course would predispose him to transient ischemic attacks or even strokes involving the left side of his brain which controls the right side of the body. In October 1998

> he was actually admitted to hospital and at that time was found to have palsy of his third cranial nerve and intercranial meningiomas which though not large enough to require surgery, were significant enough to require continued followup.
>
> If one concentrates on the motor vehicle accident of August 30, 2000, it is clear from the history that prior to the accident Mr. Horton developed paralysis of his right lower extremity and clumsiness of that limb which made it impossible for him to apply the brake and operate the motor vehicle. It took about ten minutes for the symptoms to clear. This is consistent with a transient cerebral ischemic attack in the region of supply of his left carotid artery which is documented to be narrow and which is known to predisposed to such attacks. It also could be related to his previous spinal cord damage from cord compression. He is also known to have which is known as a peripheral neuropathy, a disorder affecting the peripheral nerves in his limbs. These combination of effects make it virtually certain that the episode that Mr. Horton described prior to his accident had an organic neurological basis.

[49] The burden to show inevitable accident is on the defendant. It is clear that the collision was caused by the defendant. The plaintiff was stopped in traffic and did nothing to cause the accident.

[50] To establish inevitable accident the defendant must show on the balance of probabilities that there was no negligence on his part that caused or contributed to the accident.

[51] Dr. Holness in his report indicates that he understood that Mr. Horton had developed paralysis in his lower right leg, and that this made it impossible for him to apply the brake. He also understood that it took about ten minutes for the symptoms

to clear. That is not the evidence at trial. Mr. Horton clearly indicated that the problem with his leg only lasted a few seconds and that he was able to get out of his vehicle and walk up to the plaintiff's vehicle.

[52] The defendant also said that he was sent to see Dr. Holness in Halifax by his lawyer and that Dr. Holness told him that he did not know what to tell the lawyers. He said on cross-examination that he never told Dr. Holness that the episode with his foot lasted five to ten minutes.

[53] I believe that Mr. Horton probably told Dr. Holness that the incident lasted ten minutes, otherwise, where would Dr. Holness get that information. I think Mr. Horton changed his version of what happened at trial.

[54] I do not believe Mr. Horton is deliberately misleading, however, I believe his evidence is unreliable. He testified at trial that he did not see his family doctor on the day of the accident, however, the doctor's notes indicate that on that date he saw Mr. Horton who reported to him that he had been involved in a motor vehicle accident.

[55] I reject Dr. Holness' opinion about what caused the accident because it is based on information given to him that is not accurate. I am not able to conclude that Dr. Holness' opinion would be the same if he was advised that Mr. Horton's incident with his leg only lasted a few seconds instead of ten minutes.

[56] I believe that the collision occurred simply because the defendant was not being attentive to his driving and his description of his leg going dead is simply an attempt to explain why his vehicle struck the plaintiff's vehicle.

[57] I conclude that the collision between the defendant's motor vehicle and the plaintiff's motor vehicle was caused solely by the negligence of the defendant Mr. Horton.

DAMAGES

[58] Based on the evidence before me I conclude clearly that the plaintiff did suffer a whiplash type injury when her vehicle was struck behind from the defendant's vehicle. She received treatment from her family doctor and took physiotherapy for

a number of months. She did not improve and it appears she actually got worst instead of better as time passed.

[59] In June 2001 when she saw Dr. Loane, she was complaining of severe pain in her back which restricted her ability to work. It in fact restricted his ability to properly examine her. He felt that "her extreme levels of pain presentation are not entirely explainable on the basis of the types of injuries suffered or on the limited examination information that is available". [Exhibit 1 - Tab 4 - page 8].

[60] Dr. Loane was not able to determine what was basically going on with the plaintiff. He could not determine whether it was an intentional exaggeration of symptoms or some emotionally produced problem that he was not qualified to diagnosis. He found that: "I am unable to determine any medical restrictions for return to work at the present time".

[61] Dr. Stanish is more blunt in his opinion about the plaintiff's condition. He felt basically that there was really nothing wrong with the plaintiff and that the best course for her would be to go back to work.

[62] I conclude that the plaintiff suffers from chronic pain syndrome. I believe that has a significant emotional component and that the chart notes of Dr. Cameron in regard to childhood sexual abuse made in December 1999 and denied by the plaintiff at trial form the basis for her unusual reaction to a relatively minor physical injury to her back.

[63] I believe her failure to acknowledge the emotional issue or even to acknowledge that she discussed it with Dr. Cameron is unfortunate.

[64] It is significant that Dr. Loane suggested the possibility of a conversion disorder without ever being advised that the plaintiff had complained to Dr. Cameron in December 1999 about childhood sexual abuse.

[65] Stedman's Medical Dictionary defines 'conversion' as: (p. 390)

> "An unconscious defence mechanism by which the anxiety which stems from an unconscious conflict is converted and expressed symbolically as a physical symptom; transformation of an emotion into a physical manifestation."

[66] Dr. Loane in his evidence suggested this as a possible cause of the plaintiff's problems, however, felt he was not qualified to give an opinion because appropriate

testing was not done on the plaintiff. Therefore, he concluded that the most likely cause of the plaintiff's significant physical symptoms were an unsophisticated attempt on her part to tell him how bad she felt. He did not feel that she was intentionally exaggerating her symptoms or that she was malingering.

[67] Dr. Loane indicated that he sees this type of reaction in about 10 to 20 percent of people with relatively minor physical injuries.

[68] The Court has not been provided with any psychiatric evaluation done on the plaintiff despite the fact that there is evidence that she was seen by a psychiatrist some time after the accident.

[69] The defendant claims that the plaintiff has not mitigated her damages because she has not undergone psychological testing as suggested by Dr. Loane.

[70] In ***White v. Slawter*** (1996), 149 N.S.R.(2d) 321our Court of Appeal dealt with a case involving a claim made by the plaintiff there based on chronic pain resulting from a relatively minor motor vehicle accident. I believe that case is clearly on point

for this case and therefore I will detail the facts there and the findings made by the trial judge and in the Court of Appeal.

[71] At trial the plaintiff, Mr. White was found to have been involved in a motor vehicle accident. He did not require medical attention on the day of the accident, but some days later attended at his family doctor who diagnosed a sprain of his lower spine. Treatment was by painkillers and moist heat. Later the family doctor prescribed a cervical collar. He was then referred to an orthopaedic surgeon and a psychiatrist.

[72] In the months that followed, Mr. White was seen by 12 different specialists of various kinds. They were not able to help him. At the time of trial there was few objective physical causes of his continuing pain. He was diagnosed as having chronic pain syndrome characterized by emotional distress, anxiety, depression and reduced self-esteem. He was not able to work and he complained about having pain every day.

[73] The trial judge found that Mr. White's psychological problems were the cause of him not being able to go back to work and that they were caused by the accident. He found Mr. White to be totally disabled and assessed damages on that basis.

[74] On appeal the Court reversed the trial judge on all the major heads of damages. Freeman, J. speaking for the Court said:

> 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 disability 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 focussed 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 (**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: **Baud Corp. N.V. v. Brook,** [1979] 1 S.C.R. 633; 23 N.R. 181; 12 A.R. 271. 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 medial 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 hearing. "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.

[75] Justice Freeman then dealt with each head of damages and reduced each of them. He reduced the damages for pain and suffering from $100,000.00 to $40,000.00. He said:

> In **Smith v. Stubbert** (1992), 117 N.S.R (2d) 118; 324 A.P.R. 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 disability injury is from $18,000 to $40,000."

...

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 nonpecuniary 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. Chiasson et al.** (1994), 132 N.S.R. (2d) 241; 376 A.P.R. 241 (S.C.) affirmed on appeal (1994), 139 N.S.R. (2d) 217; 397 A.P.R. 217 (C.A.)) a $39,000 award was upheld; in **Hiltz v. McNab** (1993), 119 N.S.R. (2d) 71; 330 A.P.R. 71 (T.D.), $25,000 was awarded. In **Valencourt v. Husain** (1994), 132 N.S.R. (2d) 291; 376 A.P.R. 291 (S.C), 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 et al.**, [1993] 1 S.C.R. 306; 147 N.R. 321; 105 Sask.R. 81; 32 W.A.C. 81. 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. et al.** (1994), 136 N.S.R. (2d) 20; 388 A.P.R. 20 (C.A.), 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.

[76] Justice Freeman also reduced the award for lost to future earnings and said:

> 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.

[77] He allowed for wages for only four years instead of until Mr. White reached the age of sixty-five. That reduced the award from $550,000 to $120,000.

[78] I believe the approach adopted by our Court of Appeal in ***White v. Slawter*** applies here. The last medical reports are somewhat dated. The plaintiff saw Dr. Loane in June, 2001 and Dr. Stanish in March 2001. It appears that she has not had any specialized care since then. Her evidence at trial is that she is not getting any better. No attempts seems to have been made to get her any significant psychiatric treatment.

[79] The defendant suggests that the plaintiff is not credible. It is suggested that she did not disclose to the health care professionals treating her that she had problems with anxiety and depression prior to the accident. That she failed to follow-up on treatment at the mental health centre after finishing with the psychologist Mary Annette Gillis and that especially she did not get psychological testing done as advised by Dr. Loane. It is also suggested that she did not get the surgery recommended by Dr. Thompson.

[80] I do have some concerns about the plaintiff's evidence in this case. Her explanation about the notes made by Dr. Cameron in December 1999 about childhood sexual abuse is not credible. I conclude that she discussed the sexual abuse with Dr. Cameron and that she now does not wish to acknowledge that.

[81] I also find it surprising that at no time did the plaintiff discuss with Mary Annette Gillis a pain problem in her jaw when in fact she was seeing Ms. Gillis for pain issues and at the same time she was being treated by Dr. Thompson for a jaw pain problem.

[82] I also question her evidence about the examination done by Dr. Stanish. I reject her evidence that the examination only took 15 minutes as she stated.

[83] I conclude that the description of the plaintiff given by Dr. Loane is the one I believe properly reflects her circumstances. I believe she tends to exaggerate her physical problems to a significant degree and therefore it is difficult to rely entirely on her description of how troubling her pain is to her.

[84] The plaintiff's position on damages is set out in counsel's pre-trial brief. The claim is for a general damage award of between $60,000 to $80,000. In addition, the claim is for both past and future lost of wages based on annual wages of $22,158 per year. The claim for past lost to April 2003 at a weekly rate of $426.00 result in a total claim of $57,084. ($426.00 x 134 weeks). The plaintiff acknowledges Section B benefits received of $7,927.00 and requests interest of three percent resulting in a claim for lost wages to April 2003 of $53,437.80.

[85] The plaintiff also claims future lost of wages based on the assumption that the plaintiff would work at her present employment until age 65. She also claims loss of housekeeping capacity of $41,000 and $10,000 for future medical costs.

[86] The actuarial report submitted in evidence to me provides two different scenarios. The first involves a calculation of her future loss based on income of $20,284 which is what she earned in 1999 from Eastern Sanitation. The second scenario assumes that her income for 2000 would be $22,770 considering what she had earned up to the date of the accident.

[87] Mr. Burnell in his report indicates that to properly compensate the plaintiff for future loss of wages and assuming she worked until age 65, she should be awarded under scenario one $289,966 and under scenario two $325,504.

[88] Counsel for the plaintiff acknowledged in his summation that I could validly reduce the award for future loss by 25 to 30 percent based on negative contingencies and possible residual earning capacity.

[89] The defendant's position on damages is that the general damage award should be in the range of $18,000 to $25,000 and that the loss of wages should only be for seven months and that there be no future wage loss award. They suggest $2,500 for loss of housekeeping capacity.

[90] I conclude when I observed the plaintiff at trial in April of 2003, that she could not work. She was not able to sit for any long period of time when testifying and while she was sitting in the courtroom. She regularly stood up and her facial expressions indicated that she had pain in her back. I conclude that the plaintiff is in constant pain as of April 2003. I believe that she has had to curtail her normal activities because of that pain. She has not been able to enjoy the life that she used to have prior to the accident. She is clearly entitled to be compensated for her pain and suffering since August 2000. While I do find that she was disabled at the time of trial, I do not believe that she is permanently disabled.

[91] I believe that the diagnosis made by Dr. Loane in June 2001 should have pushed the plaintiff to seek more psychiatric help. I believe also that she should have made more of an effort to attempt to go back to work. I therefore conclude that she has failed to mitigate her damages by not seeking medical attention as suggested by Dr. Loane and not working through her pain as suggested by Dr. Stanish.

[92] I believe I should approach her case as was suggested by Justice Freeman in ***White v. Slawter.***

[93] I would note that there is no evidence before me as to how long Mrs. Berthier would continue working. She was not asked if she intended to work until she was 65. Because of the lack of evidence I conclude that she would not in fact work to age 65 and that it would be more likely that she would probably stop working at around age 60. She is now 47 years old and therefore I conclude that she would normally work for another 13 years and not 17.71 years as assumed by Mr. Burnell in his report.

GENERAL DAMAGES

[94] I conclude here that considering the evidence presented by the plaintiff that an appropriate award for pain and suffering should be on the upper range of the ***Smith v. Stubbert*** scale, and therefore I would award her the sum of $45,000 with pre-judgment interest of 2.5 percent from the date of the accident to the date of the order.

PAST LOSS WAGES

[95] I conclude that it is appropriate to use the sum of $22,770 as the appropriate amount to determine the plaintiff's past loss and therefore based on the actuarial report

would award her the sum of $61,877 - $8,424 for Section B benefits received for a net past loss award of $53,453. I would award pre-judgment interest of 5.5 percent as suggested by defendant's counsel in his brief.

LOSS OF HOUSEKEEPING CAPACITY

[96] The plaintiff claims for loss of housekeeping capacity. The evidence is that she was not able to do the normal work around the house that she used to do prior to the accident. She indicated that she got some help from her relatives, however, there is no clear evidence as to how that help was valued. The plaintiff's claim as set out in her counsel's pre-trial brief is for the sum of $41,000 for past and future loss of housekeeping capacity.

[97] The defendant suggests the sum of $2,500.

[98] In ***Carter v. Anderson*** (1998), N.S.J. No. 183, our Court of Appeal approved the principle that loss of housekeeping capacity should be a separate head of damages. In that case the Court adopted a suggested amount of five hours per week at about

$10.00 per hour which was set in an actuarial report. The Court found that that amount was reasonable.

[99] In this case there is little evidence except from the plaintiff in which she indicates that she has received help with household chores from a number of relatives. Her husband has basically picked up the responsibility of doing household duties which he had not done prior to the accident. She indicated that she did not pay any of her relatives for the assistance they gave her.

[100] Considering what the Court of Appeal did in ***Carter v. Anderson,*** *supra,* and the general principles under this heading of damages, I would award a global amount of $5,000 for loss of housekeeping capacity.

FUTURE MEDICAL EXPENSES

[101] The plaintiff claims based on the evidence of Dr. Thompson that she might require surgery to her jaw. She has been receiving medical attention for her jaw under

the Section B benefits portion of her insurance, and I am not convinced that she has proven that she will incur expenses of $10,000 as claimed by her counsel.

[102] I would make no award for future medical expenses.

LOSS OF FUTURE EARNING CAPACITY

[103] As I understand the plaintiff's claim she is alleging that she should be compensated at her present rate of wages until she reaches the age of 65. That according to the actuarial evidence would result in an award of $325,504. However, counsel for the plaintiff has acknowledge d that this should be reduced somewhat and he has suggested 25 to 30 percent. That could reduce her claim to about $227,000.

[104] Considering what Justice Freeman did in ***White v. Slawter*** I conclude that the proper approach to this case would be to make a global award. I do so because I am not convinced that the plaintiff cannot recover completely from her injuries and return to employment. I would therefore award her the equivalent of approximately three years wages or $66,000 for future lost wages. I believe that will give her adequate time to recover the extent that she can go back to work.

[105] In summary, therefore, damages awarded to the plaintiff here will be as follows:

[106]	Loss of Past Wages	$53,453
	General Damages	$45,000
	Loss of Housekeeping Capacity	$ 5,000
	Loss of future wages	$66,000

[107] The plaintiff will be entitled to pre-judgment interest of 5.5 percent on her past loss wage claim and 2.5 percent on her general damages.

[108] The plaintiff will be awarded costs based on the total award once calculated by counsel unless there were offers to settle which are relevant to the issue of costs.

J.