

Court of Appeal for British Columbia

BETWEEN:

FRANCISCA MASLEN

PLAINTIFF
(RESPONDENT)

AND:

SAMUEL D. RUBENSTEIN

DEFENDANT
(APPELLANT)

Before: The Honourable Mr. Justice Lambert
The Honourable Mr. Justice Taylor
The Honourable Mr. Justice Goldie

Terence P. O'Grady, Q.C. Counsel for the Appellant
and Michael F. O'Meara

Sidney B. Simons Counsel for the Respondent
and Roxana M. McKenzie

Place and Date of Hearing Victoria, British Columbia
March 26th, 1993

Place and Date of Judgment Vancouver, British Columbia
September 8th, 1993

Written Reasons by:

The Honourable Mr. Justice Taylor

Concurred in by:

The Honourable Mr. Justice Lambert
The Honourable Mr. Justice Goldie

Court of Appeal for British Columbia

Francisca Maslen

- v. -

Samuel D. Rubenstein

Reasons for Judgment of the Honourable Mr. Justice Taylor

1993 CanLII 2465 (BC CA)

1 This appeal is concerned with those post-traumatic phenomena--sometimes identified with and sometimes distinguished from conditions known as "idiopathic pain disorder", "chronic (or chronic benign) pain syndrome", "functional overlay" and "somatoform pain disorder"--which involve continued suffering in accident victims after their physical injuries have healed.

(a) The Background

2 An obvious preliminary question in these cases is whether the pain, discomfort or weakness complained of is "real", in the sense that the victim genuinely experiences it.

3 Those cases in which the trier of fact is not persuaded that the plaintiff does in truth experience the suffering in question have, of course, to be eliminated, for the most part by the ordinary tests of credibility. Cases of the sort which then remain involve plaintiffs who are found by the trier of fact to be

telling the truth in saying that they continue to suffer when no physical reason for continuation of pain, weakness or discomfort can be found. The problems of which these plaintiffs complain must be regarded as having a psychological, rather than physical, explanation, and Mr. Justice Spencer found this to be so in the case of the present plaintiff, Francisca Maslen.

4 The judge found Ms. Maslen's continuing pain to be the result of a psychological condition which was beyond her control and had been caused by the neck and shoulder injury suffered in a motor vehicle accident for which he found the defendant to be wholly responsible. He awarded Ms. Maslen damages totalling \$134,760--being \$35,000 as 'non-pecuniary' damages, \$60,000 for past wage loss, \$3,760 in special damages, \$28,000 for loss of future earning capacity, and \$8,000 for cost of future care. The defendant accepts the judge's findings as to liability and quantum of special damages, but appeals the amount assessed under each of the other four headings. Ms. Maslen also appeals, seeking increases in her awards for non-pecuniary damages, loss of future earning capacity and cost of future care.

5 Ms. Maslen's problem started out as what appeared in the trial judge's words to be a "classic soft tissue injury" resulting from a rear-end collision. At the hospital she was found to have suffered neck and shoulder strain. Shortly thereafter she

developed numbness and tingling in her left arm and hand, and a swelling near the left clavicle. Of her condition at the time of trial, three-and-a-half years later, the judge said:

What makes the plaintiff's case remarkable is that in spite of over 300 therapy sessions, multiple referrals to different specialists, a work-hardening program at a rehabilitation centre and rest and medication, she claims still to be unable to return to her work as a seamstress or to resume her full role of domestic and leisure activities. There are suggestions in the many medical reports, both of her doctors and those called for the defendant, that the symptoms are functional and unrelated to any physical condition. None of the doctors, however, has suggested that the plaintiff is malingering.

The judge went on to define the issues before him as follows:

The issues to be resolved are whether there is any physical explanation for her symptoms, whether there is a psychological explanation, whether she suffers from a chronic benign pain syndrome and whether, whatever the explanation for the symptoms, they have been caused by this motor vehicle accident.

I think it correct to say, summarizing that passage, that the questions were: whether the problems of which the plaintiff complained had a physical or psychological explanation and, in either event, whether they were caused by the accident.

6 No doubt because of the size of the award for what might, on the basis of the initial physical consequences, be regarded as

a 'moderate' soft-tissue injury, the principles which ought to be applied in cases involving psychological complications following such injuries were extensively canvassed before us, and more than 50 authorities were referred to us by counsel in argument.

(b) The Basic Principles

7 I think it useful, therefore, before going further into the facts, to state what, in my view, ought to be regarded as the basic principles applicable to these difficult cases.

8 To meet the onus which lies on a plaintiff in a case of this sort, and thereby avoid the 'ultimate risk of non-persuasion', the plaintiff must, in my view, establish that his or her psychological problems have their cause in the defendant's unlawful act, rather than in any desire on the plaintiff's part for things such as care, sympathy, relaxation or compensation, and also that the plaintiff could not be expected to overcome them by his or her own inherent resources, or 'will-power'.

9 If psychological problems exist, or continue, because the plaintiff for some reason wishes to have them, or does not wish them to end, their existence or continuation must, in my view, be said to have a subjective, or internal, cause. To show that the cause lies in an unlawful act of the defendant, rather than the

plaintiff's own choice, the plaintiff must negative that alternative. The resolution of this issue will not involve considerations of mitigation, or lack of mitigation. To hold otherwise, that is to say to place on the defendant the onus of proving that a plaintiff who suffers from a psychological problem had it within his or her own ability to overcome it, would be to require that the defendant, rather than the plaintiff, bear the onus of proof on the primary issue of causation, and would impose on defendants a heavy and unjustifiable burden. If a court could not say whether the plaintiff really desired to be free of the psychological problem, the plaintiff would not, in my view, have established his or her case on the critical issue of causation.

10 Any question of mitigation, or failure to mitigate, arises only after causation has thus been established.

11 Where the court finds that psychological injury has been suffered as a result of unlawful conduct of the defendant which the plaintiff has not the ability to overcome by his or her own inherent resources, the court must then, if mitigation issues are raised, decide whether the defendant has established that by following advice which the plaintiff received or ought to have obtained, the plaintiff could have overcome the problem, or could in future overcome it. The advice might, for instance, be to eliminate treatment, make 'lifestyle changes' or adopt some

psychotherapy, physiotherapy or exercise regimen. Where appropriate remedial measures would resolve the problem, damages can, of course, be awarded only in respect of the period up to the date when, in the estimation of the fact-finder, the problem ought to have been resolved, or ought to be resolved.

12 Once the principles to be applied are recognized, the rest is a matter for the fact-finder to determine on the basis of the evidence in the case, and it is for this reason that I find little guidance in many of the decisions cited.

13 It is not particularly helpful, in my view, to ask whether a psychological condition such, for instance, as the 'chronic pain syndrome', is 'compensable'. I say this because there seems to be no settled view within the medical community as to what such diagnoses--sometimes, indeed, called 'non-diagnoses'--mean. It is, moreover, unlikely that medical practitioners can answer, as a matter of expert opinion, the ultimate questions on which these cases often turn. The court must decide for itself the critical issues of credibility and the balance of probabilities between explanations for the plaintiff's condition. Views expressed by doctors on the plaintiff's reliability, truthfulness or motivation cannot be decisive, for the law requires that these matters be decided by the court itself, and that they be decided on the basis of the evidence given at trial, which is often more

extensive than, and sometimes differs markedly from, that on which medical witnesses have formed their opinions.

14 For an introduction to the diversity of medical and legal opinion in this field, see the contrasting views canvassed in Wifling and Wing, *Disability and the Medical/Legal Process* (1984), 42 *The Advocate* 183, Davis, *Chronic Pain Syndrome and Somatoform Pain Disorder* (1988), 46 *The Advocate* 877, Gregory and Crockett, *Chronic Benign Pain Syndrome* (1988), 46 *The Advocate* 369, and Gregory, Crockett and Cohen, *A Comparative Examination of the Judicial Treatment of Chronic Pain Syndrome* (1989), 7 *Can. Journal of Insurance Law* 65.

15 Mr. Justice Spencer in my view puts the over-all test quite correctly, in the course of his discussion of the "chronic benign pain syndrome", when he says:

From [the] cases I gather, and Mr. O'Grady frankly conceded, that there may be cases where a chronic benign pain syndrome will attract damages. That will happen where the plaintiff's condition is caused by the defendant and is not something within her control to prevent. If it is true of a chronic benign pain syndrome, then it will be true also of other psychologically-caused suffering where the psychological mechanism, whatever it is, is beyond the plaintiff's power to control and was set in motion by the defendant's fault.

The judge went on to find, on the balance of probabilities, that this was the case with Ms. Maslen's problems.

With respect to the evidence required in order to meet the onus lying on a plaintiff in such cases, Chief Justice McEachern (then sitting as a trial judge) in *Price v. Kostryba* (1982), 70 B.C.L.R. 397 (S.C.), repeating his observations in *Butler v. Blaylock* (October 7, 1981, Vancouver B781505 (B.C.S.C.)), put it thus:

I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.

An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrong-doer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence--which could be just his own evidence if the surrounding circumstances are consistent that his complaints of pain are true reflections of a continuing injury.

So there must be evidence of a "convincing" nature to overcome the improbability that pain will continue, in the absence of objective symptoms, well beyond the normal recovery period, but the plaintiff's own evidence, if consistent with the surrounding circumstances, may nevertheless suffice for the purpose.

16 I must review the material before us to determine whether these principles have been applied.

(c) The Evidence

17 I shall first summarize the evidence essentially as it is
put by Mr. O'Grady in his factum for the appellant.

18 Ms. Maslen was 51 at the time of trial. Prior to the
accident, which occurred on February 13, 1986, she had been
employed as a seamstress, making work clothes on industrial sewing
machines. A year before the accident she won \$500,000 in a lottery
but she continued working and ceased only as a result of the injury
suffered in the accident. At the trial, 3½ years later, she
testified that she was still unable to work, and unable also to
resume many of her domestic and leisure activities. She had been
referred to a variety of medical specialists and had undergone more
than 300 therapy sessions. Apart from visits to her native Spain
she had essentially been convalescing, spending her time watching
television, playing bingo and shopping.

19 In November, 1986, almost ten months after the accident,
Ms. Maslen went to her native Spain with her husband and daughter
for a long Christmas holiday with her family. She was very active
there and attended many functions. On January 12, 1987, shortly
after her return, she was seen by Dr. Gulley, a neurologist, who
reported of the plaintiff as follows:

She says while she was in Spain she had no
problem with her neck at all. As soon as she
came home she started having problems again in
the left side of her neck. I told her she

should return to work and see how she gets along. . . . I think this lady is overreacting.

Ten days later Ms. Maslen saw Dr. C.Y. Brown, who reported that she told him that while in Spain, "in the hot weather and low humidity", she had virtually no pain in her neck or shoulder, but "on arriving back in Victoria as soon as she got off the plane the pain began to recur and has been present since".

20 Four months later, in May, 1987, Dr. P.M. Kuechler, a vascular surgeon, found no evidence of tenderness, no restriction of motion of the cervical spine and no evidence of any neurological deficit in either arm, but that the patient complained of discomfort "in the anterior portion bi-laterally in the lower neck" which radiated "across the anterior upper chest". A week later Dr. Tallan, a physiatrist, reported that Mrs. Maslen had told him that she had no headache, no pain in the right low back, no pain in the left arm or hand, but "mild dull discomfort at the left top shoulder side of the neck". Dr. Tallan recommended that she return to her original job, but on a part-time basis for several weeks, "to allow time for general body rehabilitation and to establish work effectiveness of her muscles which have not been used at their accustomed level in the past months".

21 During the following month Dr. McKenzie, an orthopaedic surgeon, recorded the same complaint of discomfort "in the left side of her neck into the superior aspect of her left shoulder and over the anterior aspect of the left upper chest". He attributed this in part at least to pre-existing degenerative arthritis in the neck, but went on to suggest that Ms. Maslen try to go back to work "at least on a part-time basis at least three or four hours per day". Dr. McKenzie concluded:

 Although there is evidence of degenerative arthritis in her neck and in all likelihood this pre-existing problem is contributing to her continued complaints, I expect that she will show some further improvement and I am optimistic that she will eventually be able to get back to her previous job. However, with the degenerative arthritis that is exhibited on X-ray in all likelihood she will continue to have some recurring symptoms referable to her neck and shoulder probably indefinitely.

 Shortly thereafter, in a report of May 8, 1987, Dr. C.Y. Brown, a rheumatologist, wrote:

 On examination she holds her neck very tensely. Rotation is possible only to 50 degrees in each direction. Flexion and extension are only about 20 degrees and lateral deviation she will not even attempt. The left trapezius muscle is spastic and extremely tender.

 A number of inconsistencies are disclosed by the medical reports in relation to other symptoms, including complaints with respect to her left hand grip, which was described in Dr. Brown's report of

November 13, 1986, as "normal", while his report of July 22, 1989, records: "grip in the left hand is extremely weak". Reports vary also with respect to a "cord" over the left clavicle.

22 On May 19th, 1988, Dr. Roe, Ms. Maslen's family physician, reported that he agreed with other doctors that she should return to "some form of work". On June 21st, 1988, however, he recorded that she was leaving for Spain "for an indefinite period saying that she may return in 3 or 4 months".

23 While in Madrid during the summer of 1988, Ms. Maslen again visited her family, and had an active and pleasant time. Her shoulder did not trouble her and she only had to take tylenol on three occasions. On her return, however, when examined by Dr. Stuart Cameron, a neurosurgeon, she reported several complaints, including "neck pain at the base of the skull, in front of the left side of the neck, and in the region of the clavicle where there is some swelling and in the trapezius area". Her complaints continued thereafter until the time of trial, with continuing emphasis on the unexplained swelling in the region of the clavicle and complaint also of a depression in the top of her head.

24 Dr. O'Shaughnessy, a psychiatrist called for the defendant, identified Ms. Maslen's problems with 'chronic benign pain syndrome'. He said:

In my opinion, there is no evidence of psychiatric illness or pre-existing disorder that would impair her abilities to recuperate from this accident. I think a great deal of her ongoing complaints of pain at this point are indeed psychological in that she believes herself to be injured and as soon as she feels any kind of pain she stops doing what she has been doing. This re-enforces her self-concept as an invalid. I think this concept has also been re-enforced through the over extensive use of physicians referrals on this lady and concur with the other medical opinions that she has been "over doctored". I think, as well, the litigation is a factor in extending this lady's disability.

Dr. Murray, a psychiatrist who testified for the plaintiff, found "no direct evidence of a causative role of psychological factors". In his evidence he attributed Ms. Maslen's continuing complaints to a 'somatoform pain disorder'.

25 The above summary of the evidence is supplemented by Mr. Simons in his factum for Ms. Maslen.

26 Mr. Simons refers in particular to Ms. Maslen's active pre-accident work history, to her efforts to find a cure, and to excerpts from the medical reports which tend to support her accounts of disability and the sincerity of her complaints. He points to the fact that in 1985 Ms. Maslen won \$500,000 in a lottery, gave much of the money away, and continued thereafter to work as a seamstress, and that she was described by her former

employer as someone who worked hard and enjoyed her work. Her inability to read and write English, and limited facility with the spoken language, were described in evidence as a severe handicap to her in seeking alternative employment.

27 Mr. Simons asserts that Dr. Murray's diagnosis of 'somatoform pain disorder' was one from which he later resiled. He notes that Dr. Murray said that he did not believe Ms. Maslen's condition would improve as a result of settlement of her case, and also that "her pain is all too real and must never be dismissed as being 'all in the patient's head'".

(d) The Trial Judgment

28 It is in the context of this evidentiary background that the trial judge assessed damages in excess of \$134,000.

29 Because of the importance which counsel place on the judge's findings, I reproduce several of the key passages of Mr. Justice Spencer's reasons for judgment:

The plaintiff reports that if she exerts herself, particularly using her arms in front of her or leaning her head forward as she must do when vacuuming or operating an industrial sewing machine, her left neck and shoulder get sore with the pain radiating down into the left anterior cervical triangle and up the left side of her head to the occipital area.

She attempted to return to work on three days in October 1987 but could not last more than two-and-a-half hours at most because of pain and exhaustion. Her employer confirms what she says happened to her. From March 1989 she attended a work hardening program at a rehabilitation centre for thirty-five days, but the centre reports that she was unable to carry out the exercises given to her there.

.

The plaintiff's case is that she continues to suffer from the aftermath of this accident even though the medical evidence, subject to what Dr. Murray had to say, cannot explain why. The defendant's case is that the plaintiff made the usual type of recovery from this sort of accident and was practically pain free by Christmas 1986, when she was holidaying in Spain, her native land, and able to return to work when Dr. Tallan saw her in April 1987. The defendant says the return of her symptoms as described by the plaintiff is attributed to a chronic pain syndrome for which the plaintiff is herself entirely responsible.

.

Granted that there is no physical explanation for the plaintiff's ongoing pain, the choice of explanation on the evidence before me lies between a rare psychological explanation advanced rather hesitantly by Dr. Murray, and what has been called a chronic benign pain syndrome. I was assisted by a discussion of the latter phenomenon contained in 43 Advocate, 183, in the evidence of Dr. Murray. The case for it was put forward on the defendant's behalf by Dr. O'Shaughnessy, but in cross-examination he agreed with Dr. Murray that the plaintiff has none of the indicia that generally accompany a chronic benign pain syndrome and none of the usual pre-morbid indicators. I formed the conclusion that Dr.

O'Shaughnessy arrived at his conclusion by default because there was no other medical explanation.

.

For his part, Dr. Murray formed the opinion that the plaintiff may be one of those unusual patients who suffer from a somatoform disorder. I understand that to mean a condition in which the patient creates a feeling of bodily discomfort psychologically and without any physical explanation. It occurs not by conscious intention but by operation of the uncontrolled mind and is classed in the medical literature as a psychiatric illness. Dr. O'Shaughnessy thought it unlikely in the plaintiff's case because such illnesses generally occur at a younger age. I cannot decide that point between the two doctors, but I am not satisfied that the plaintiff has such a disorder here simply on the burden of proof. She alleges and must therefore prove it.

.

I am left then with a plaintiff who suffers unexplained pain for a period of time exceeding what would normally be expected but who, according to the majority of the doctors who have seen her, is quite genuine and not malingering. My own view of her, based on my assessment of her credibility as a witness, is that she is forthright and honest in her complaints. I am satisfied that her pain originated in her physical injuries caused by the accident even though those injuries have since healed. Without naming her exact condition, I am satisfied that her continuing pain and the limitation it causes her in her activities have a psychological component. Should she be compensated for it?

The judge then deals with some of the cases. He continues:

Until her holiday in Spain at Christmas-time 1986, or at the latest when she was found to be practically pain free and able to work by Dr. Tallan in April 1987, there was a direct physical link between her condition and the injuries she suffered in the accident. After that, although she had made a substantial recovery, her condition began to worsen again. although I am unable to demonstrate a psychological mechanism for it, it is significant in my view that this lady is much improved whenever she is holidaying with her family in Spain, but deteriorates when she returns to her home in Victoria. There is no evidence of family pressures at home to explain it. Quite the contrary, the only evidence is of a happy and secure family unit. But there appears to be some relationship between expectations made of her by herself, and the return of pain. Similar to that phenomenon is the fact that she was recovering well until Dr. Tallan freed her to go back to work on part-time basis. When she tried it she was quite unable to do it.

The judge rejects the possibility that the plaintiff has deliberately exaggerated her injuries so as to gain money or avoid work. Noting that the medical evidence is in conflict on this point, the judge resolves the issue on the basis of her psychological profile and his acceptance of her evidence that she would like to return to work and her former strenuous lifestyle; the judge notes also that when she received her large lottery prize she gave much of the money to others.

30 In assessing damages the judge allowed for loss of wages from the date of the accident to trial with a deduction to take

into consideration the likelihood, because of her lottery win, that Ms. Maslen would in any event have taken time off work for the visits which she made to her native land.

31 The judge made no deduction for earnings from a sewing business conducted in their basement by Ms. Maslen's husband and daughter, finding there was no evidence that she participated in this business. With respect to future loss of earnings and cost of future care, he declined to make an award for the 14 years remaining to Ms. Maslen's 65th birthday, limiting the period of recovery to 18 months. The judge said:

I am left with an unexplained psychological result probably caused by the injuries this lady received in the accident. In such a case, I look to the experience common to many other flexion-extension injuries where the cessation of litigation plays a role in the patient's improvement. The two psychiatrists agree that because of the length of time and amount of treatment this plaintiff has undergone, more than the usual amount of time may still be required for her recovery. She should be accorded that. When she has recovered enough to be able to sew productively again, as I think she will, I do not think it will be hard for her to find work. She says her old job would be open to her, and failing that, the evidence shows she can find sewing to do in her home.

He awarded cost of future homemaking assistance, counselling services for pain management, and other costs of care on a declining basis for a period of two years.

32 In assessing general damages the judge assumed that headaches and neck and shoulder pain would continue intermittently but on a declining basis, and probably end within 18 months, with only intermittent discomfort thereafter.

(e) The Defendant's Appeal

33 The defendant says the judge erred (i) in finding a causal connection between the accident and the plaintiff's "unexplained complaints of pain"; (ii) in holding that "the plaintiff's unexplained complaints of pain were compensable"; and; (iii) in awarding damages for loss of earnings for the period subsequent to May, 1987, when Dr. Tallan said she was 'clinically asymptomatic' with respect to the injuries suffered in the motor vehicle accident, or perhaps November, 1986, when Ms. Maslen left on her first post-accident trip to Spain.

34 As to the first of these grounds, the appellant contends that there was no evidence either that the problem lay beyond Ms. Maslen's control or that it was caused by the motor vehicle accident in question. Counsel refers in support to the evidence of Dr. O'Shaughnessy and various cases involving the 'chronic benign pain syndrome'. He urges us to reject 'post hoc' reasoning. I understand Mr. O'Grady to refer here to a spurious form of logic which argues that an unusual happening must necessarily be the

result of whatever extraordinary event happens to have preceded it. But I cannot find that the judge was misled into adopting such reasoning. His findings seem to me to be based on a consideration of reasonable possibilities disclosed by the evidence. I understand the judge to have reached his conclusions as a result of his assessment of the plaintiff's credibility and, in particular, her evidence that she wanted to free herself from the problems she described. The judge found the motor vehicle accident injuries to be the cause of her continuing psychological problem by the rational process of eliminating other possibilities and on the balance of probabilities.

35 There was, in my view, ample basis in the evidence on which the trial judge could reach his conclusions as to the existence of the problem and its causation. I can find no merit in the objection that the judge was unable to put a name on the psychological problem involved. This difficulty seems to be one shared in this area by the medical profession.

36 The second ground raises the question whether the plaintiff's "unexplained complaints of pain were compensable". It raises the same issues already dealt with in relation to the first ground of appeal. It was not, in my view, necessary for the trial judge to assign a name to Ms. Maslen's condition in order to find that she suffered from it and that compensation was due in respect

of it. It was enough that the judge accepted that the plaintiff told the truth in describing her condition, and that he found its cause to be the motor-vehicle accident. Those findings were made on the basis of the evidence before him.

37 The objection made in the third ground of appeal is that the judge erred in finding that the plaintiff was still experiencing disabling pain, weakness or discomfort at the time of trial, and that he ought instead to have found that she was fit to return to work either 2 years and 9 months earlier, when she first went to Spain, or 2 years and 4 months earlier when Dr. Tallan formed the view that she was "clinically asymptomatic" and should try to return to work. This would require that we reject findings of fact made by the trial judge, on the basis of his assessment of the credibility of the plaintiff and his acceptance of the evidence of the plaintiff and other witnesses, that she was at those dates, and continued to be, unable to resume her work. Nothing advanced in argument suggest to me that the judge made any fundamental error in accepting that evidence.

38 I would therefore dismiss the defendant's appeal.

(f) The Plaintiff's Appeal

39 By her cross-appeal Ms. Maslen's counsel assert that the trial judge erred in finding: (i) that the weight of the medical evidence was against a physical explanation for her complaints; (ii) that she suffered a soft-tissue injury of the sort which generally heals in a matter of months; (iii) that Dr. Murray made a diagnosis that she suffered from a "somatoform disorder"; (iv) that cessation of litigation commonly plays a role in improving the condition of flexion-extension injury patients; and (v) in his application of the evidence for the purpose assessing loss of future earning capacity.

40 I see no merit in the first two grounds of appeal because there was much conflicting medical evidence before the judge from which he was plainly entitled to form the opinion which he did concerning the nature of the plaintiff's injury, and that it had a psychological basis. With respect to whether or not Dr. Murray's diagnosis of a somatoform disorder was qualified or withdrawn by him, I am unable to understand the significance of this, having in mind that the judge did not accept that diagnosis. The fourth ground, which questions the judge's view that cessation of litigation commonly plays a role in improving the condition of whiplash victims, seems to challenge a belief so logical and generally-held as to amount to common sense. Certainly in cases where the remaining problem is wholly psychological, termination of the forensic process, with its adversarial stresses, hazards and

uncertainties, would seem bound to have some benign influence on the patient's condition. This has, of course, nothing to do with the plaintiff's sincerity, or truthfulness, in advancing the claim. It was for the judge to gauge as best he could how significant the change was likely to be for this particular plaintiff.

41 The final ground is that to which the thrust of Ms. Maslen's appeal seems to be directed: an attack on the finding that Ms. Maslen, rather than being an invalid for life, would, in fact, recover and be fit to work again within about 18 months. In this regard her factum says:

The trial judge found that the plaintiff's symptoms would disappear within 18 months; he describes her symptoms as functional, notwithstanding his findings of fact that her symptoms had their origin in a physical injury caused by the defendant, and that if a psychological component was involved, it was attributable to physical injury and is compensable.

It is respectfully submitted that the respondent has established, on a balance of probabilities, that she could never return to her former employment and was not qualified to take alternate employment. Her loss of future income is total, and should be awarded on the basis of the cases submitted at trial.

It is on the basis of this submission that her counsel seek substantial increase in the award for loss of future earning capacity, future cost of care and non-pecuniary damages.

42 In my view the finding of a psychological basis for Ms. Maslen's continuing problem makes the possibility that it would continue permanently considerably less likely than might otherwise have been the case. The fact that the psychological problem developed from her original physical injury seems to me to make no difference in this context. I find it impossible to say that the judge erred in finding that the probabilities pointed to her ultimate return to work, or that the anticipated period of continued convalescence on which he based these aspects of his award was other than reasonable.

43 I would therefore dismiss the cross appeal.

(g) Conclusion

44 The principles set out at the beginning of these reasons appear to me to have been applied in the resolution of the issues raised in this case, and the resulting award, although very much higher than would normally be expected to result from such an injury, has not, in my view, been shown to be excessive in the unusual circumstances of the case. I find no merit in the plaintiff's contention that the award is low.

45 I would dismiss both the appeal and cross-appeal, and direct that the parties bear their own costs.

"The Honourable Mr. Justice Taylor"

I AGREE: "The Honourable Mr. Justice Lambert"

I AGREE: "The Honourable Mr. Justice Goldie"