

## JUDGE FINDS WHIPLASH INJURY PROGRESSED TO CHRONIC PAIN SYNDROME AND WAS MADE WORSE BY DEPRESSION.

M vs. T

2020 ABQB 76

The Reasons for Judgment of the Honourable Mr. Justice A.D. Macleod were given on February 3, 2020 at Calgary, Alberta.

The Plaintiff, Mr. M, was involved in two motor vehicle collisions. They occurred in Calgary on November 10th, 2009, and February 28, 2011. He claims damages for pain and suffering, loss of earning capacity, cost of future care, loss of housekeeping capacity and special damages. The Defendants have admitted liability; however, they argue that the collisions were low impact and the injuries complained of are out of all proportion to the severity of those impacts. Further, they claim that the effects of any whiplash injuries would have long since dissipated. They also contend that some of Mr. M's symptoms relate to pre-existing conditions, and they contest Mr. M's credibility. To the extent that Mr. M alleges loss of income, they say that the evidence does not establish that Mr. M is unable to work as a realtor at least part time. Finally, they argue that a subsequent unrelated accident in January, 2018 exacerbated his symptoms and caused lower back pain.

Mr. M was born and raised in Halifax. He trained as a painter and then a plumber and converted that skill into relatively high earning jobs in Western Canada. In the early 80's he was living in Calgary during a downturn in the oil industry and decided to take a real estate course. He was very successful in this line of work and very involved in his community. He testified that he loved his job and he was very good at it. He sold lots of homes and he also bought homes, improved them and resold them. He claims that he was "in robust health. He worked out faithfully virtually every day either at the gym or by running or swimming." Imaging prior to the accident showed considerable evidence of arthritic changes. There is evidence that he was symptomatic, certainly in his low back prior to the accident but also in his neck and shoulder area from time to time. However, this was very intermittent and, he says, did not cause



him any difficulty with this active lifestyle prior to the first accident. This is largely supported by the medical evidence.

After the first accident Mr. M said that all of that changed. He suffered pain in the neck between his shoulders and severe headaches. On the day of the accident the pain was so intense that he vomited. He had difficulty sleeping and developed chronic insomnia. He received physiotherapy treatments, IMS needling, prolotherapy, cervical facet joint injections, medial branch block injections and nerve ablation therapy. None of these treatments provided any significant long-term relief. He was also taking anti-depressant medication, struggling with poor sleep, and experiencing increased headaches and “zingers” (pain radiating from his neck into his left arm region). He was working very little. In the summer of 2013, the M’s sold their home and moved to their property on Vancouver Island.

On Vancouver Island Mr. M found a new family physician, Dr. Bakshi. Dr. Bakshi noted Mr. M’s ongoing neck pain, upper back pain and headaches, poor sleep, cognitive difficulties and depressed mood. He referred Mr. M to the local chronic pain clinic; a psychologist, Dr. Loray Daws; and a neurologist, Dr. Wayne Shtybel. He also referred Mr. M to Dr. Barbara Fehlau for trigger point injections, to Dr. Tanja Daws for neural prolotherapy, and to Dr. Richard Reid, a neurosurgeon who performed cervical spine surgery on November 30, 2016. Despite these treatments and surgery, when he saw Dr. Bakshi in August 2017, some nine months after the surgery, Mr. M continued to have neck pain, headaches, poor sleep, and anxiety. With the support of Dr. Bakshi, Mr. M applied for and received Canada Pension Plan disability benefits. Dr. Bakshi described Mr. M’s daily headaches, neck pain, insomnia, depression, fatigue, and cognitive issues in the context of his inability to maintain employment. Mr. M has been receiving CPP disability benefits since 2014.

In January 2018 Mr. M was involved in another motor vehicle accident which was more severe in terms of impact. His symptoms were exacerbated and that accident is the subject of another law suit. According to Mr. M, the accident of January, 2018 made things worse but, by the time of the trial, things were back to the way they were prior to 2018.

It is now ten years after the first accident and eight years since the second. Mr. Justice Macleod notes that “The symptoms which he suffered from are still present although with varying severity. He has frequent headaches, upper back and neck pain, and pain in his left shoulder. His sleep is still troubled and he complains about impaired memory and depression. Soon after the accidents, he complained about an inability to carry on his real estate business because of lack of sleep, persistent headaches and pain. He eventually found his situation overwhelming to the point that he had no motivation to carry on with his real estate career.”



Mr. M continues under the care of his family doctor. He attends his psychologist Dr. Loray Daws for counselling every week and has been doing so since April 2014. He finds this helpful in coping with his current situation. “The most difficult thing to deal with for Mr. M is that he can no longer do what he used to do in terms of physical and mental activity because of his chronic pain and inability to sleep. He claims that these also affect his memory and his appetite for work or any sustained activity requiring focus and concentration. He has become clinically depressed. Dr. Daws believes that Mr. M likely requires an additional 12 to 18 months of counselling. To deal with Mr. M’s ability to cope with his present condition they have gone back to issues involving his childhood and upbringing. This is consistent with the medical evidence that chronic pain syndrome usually has with it considerable psychological overlay that involves complex issues which emanate from a person’s childhood.”

Ms. M, Mr. M’s wife since 1986, testified that she knew Patrick as outgoing and energetic with an enthusiastic attitude towards work and community charity. When she retired from her career as a French teacher she began to work as Patrick’s assistant. There was a considerable change following the first accident. He needed a lot more rest and suffered a lot of pain. He gradually become very reclusive and solemn. He was often in ill humour. She testified that “He stopped doing as much exercise and he seemed not to be motivated to do his work or any sustained activity. His memory seemed to be affected and while he was very organized before the accident he became forgetful. He became inattentive to her. Their income was significantly reduced and both had to dip into their savings until eventually they sold their house and moved to Black Creek on Vancouver Island in British Columbia. The original plan was to continue in the real estate business there and to buy properties, improve them then sell them. But that never happened. Recently, they have been sleeping in separate bedrooms and their relationship has suffered considerably because of this change to Mr. M.”

### MR. JUSTICE MACLEOD NOTES

[23] Because the symptoms suffered by the plaintiff are largely subjective the most important issue in terms of assessing damages becomes the reliability of Mr. M. Chronic pain or Chronic Pain Syndrome usually carries with it a significant psychological overlay. Virtually all of the medical witnesses confirm that the existence and extent of chronic pain is different for every individual because a victim’s personality and upbringing impacts their experience differently.

The Defendants say that that Mr. M is a victim of his own personality. They contest his credibility, pointing to “inconsistencies and, in some cases, untruths related to several issues, the most important of which is loss of income.” They say he was untruthful in describing his inability to work and less than candid about prior symptoms and medical conditions; stating that he tended to mask his improvement since the accidents.



## THE COURT STATES:

[27] I do not share the Defendants’ assessment of Mr. M’s credibility or reliability. I agree that his evidence is ultimately self-serving but I did not expect anything else. Some of the medical witnesses do confirm that Mr. M is preoccupied with the extent of his injuries and the devastating effect he perceives that they have had upon his health. But they do not question that he sincerely suffers as he complains. Nor do I.

[32] I found Mr. M to be a truthful witness. Also, I found his evidence to be consistent with the objective evidence. I agree that often we are left with his version of the facts but I am not of the view that his word is unreliable.

The Court accepted that soon after the collisions of November 2009 Mr. M began to feel the symptoms of which he has complained ever since.

## THE MEDICAL EVIDENCE

The Court heard from “nearly every doctor or caregiver who has treated Mr. M... In addition, there were a number of expert medical witnesses who were called to give their expert opinions on the cause and the extent of Mr. M’s injuries.”

[49] I have already reviewed many of the symptoms and treatment of Mr. M following the accident. Almost all of the medical witnesses opine that the source of Mr. M’s discomfort can be traced back to the initial accident. The second accident appears to have exacerbated the symptoms at least for a while. The physiatrists called by each side agree that Mr. M’s development of chronic pain was as a result of the collisions. They also agree that the accidents were responsible for his surgery. Dr. Flaschner was called by the plaintiff and Dr. Crossman was called by the Defendants.

The Court rejected the evidence of Dr. Hu, Orthopedic Surgeon who testified for the Defence, preferring the evidence of the other experts and “...on my view of the facts, Mr. M suffered more than a whiplash and the effects of the injury or injuries he has suffered have not dissipated.”

[51] I am also satisfied that the chronic pain syndrome suffered by Mr. M was made worse by depression as identified by several of the doctors including Dr. Dalby, a psychologist, and Dr. Spivak, a psychiatrist.

[53] The medical consensus is that the chronic pain syndrome and the symptoms presently suffered by Mr. M may be permanent. He has undergone some improvements following his latest surgery but subject to the vagaries of psychology and his ability to deal with this syndrome there is not much else that can be done for Mr. M. Some have opined that he may improve once he can “move on” psychologically.

In discussing general damages, the Court took into account that Mr. M may have been visited by some of the symptoms at some point during his life regardless of whether he had been involved in either of



the accidents. The effects of the January 2018 accident were also noted as well as the fact that “once he puts this event behind him he may improve somewhat.” Mr. M was awarded general damages of \$165,000.00 which includes the housekeeping claim.

When assessing loss of income, the Court found that, while there is little question that the accidents caused Mr. M a loss in earning capacity, at some point Mr. M should have realized that the accidents were having a lasting effect on his ability to earn income and he ought to have considered carrying on his career, at least at a reduced level. The experts seem to agree that, at least physically, he can do the tasks necessary to carry on at least a limited real estate practice. He has baled hay, mowed lawns, taken daily long walks with his dogs and participated in exercise, demonstrating that he is not incapable of performing physically as a real estate agent, at least on a part time basis.

## CONCLUSION

The Plaintiff shall have judgment for the following:

General damages including future housekeeping plus interest under the Judgment Interest Act	\$165,000.00
Damages for loss of earning capacity plus interest under the Judgment Interest Act from the date of these Reasons	\$500,000.00
Cost of Future Care plus interest under the Judgment Interest Act	\$35,000.00
Special damages [to be agreed upon or assessed] plus applicable interest	
Costs	
<b>FOR A TOTAL AWARD OF</b>	<b>\$700,000.00</b>
plus applicable interest, special damages and costs.	

The full Reasons for Judgment of The Honourable Mr. Justice A.D. Macleod [CAN BE FOUND HERE](#)

**WRITTEN BY STELLA GOWANS, PARALEGAL**

**IF YOU WOULD LIKE TO BOOK AN ASSESSMENT WITH DR. DAVID FLASCHNER, PHYSIATRIST, DR. MITCHELL SPIVAK PSYCHIATRIST, OR DR. THOMAS DALBY, PSYCHOLOGIST, PLEASE CONTACT US AT INTEGRA**