

CHRISTENSON v KENNERT; Muskegon County Circuit Court; Docket No. _____
87-23232-NI; November 8, 1988; MTLA File No. _____

This was a judge-tried automobile tort case in which the (Plaintiff suffered whiplash described as "severe" by his treating chiropractor.

Plaintiff initially suffered muscle spasm and 50% limitation in range of motion. However, after six months (during which time he was off work), these problems subsided to the point that he was no longer disabled. The Plaintiff continues to suffer some residual pain, but the spasm and limited range of motion are gone.

Michael E. Kobza, after reviewing the case in light of the factors set out in DiFranco, concluded that, although the treatment required was slight and the severe impairment was not permanent, the Plaintiff had suffered "serious impairment of body function", and was therefore entitled to sue in tort.

Since Defendant's liability was admitted, Judge Kobza went on to assess damages. He awarded the Plaintiff \$50.00 per day for non-economic loss during the six months of Plaintiff's disability, for a total judgment of \$10,150.00.

(Comment: One might infer from the damage award that damages are payable only during the time that the serious impairment lasts. However, since such a conclusion would conflict with Byer v Smith, a more logical assumption would be that Plaintiff's damages were insignificant to the point of non-existence after six months).

S T A T E O F M I C H I G A N
I N T H E C I R C U I T C O U R T F O R T H E C O U N T Y O F M U S K E G O N

DANIEL LEE CHRISTENSON,
Plaintiff,

vs.

File No: 87-23232-NI

MICHAEL A. KENNERT,
Defendant.

_____/
ROBERT J. VAN LEUVEN
400 Comerica Bank Bldg.
Muskegon, MI 49440

WILLIAM J. HIPKISS
297 Clay, Suite 106
Muskegon, MI 49440
_____ /

TRIAL OPINION

Trial was held in the above case September 8, 1988. At the time of trial Defendant stipulated to liability, his client colliding in the rear of the Plaintiff's automobile, causing a "whiplash" injury. The dispute, therefore, was to determine whether or not this was a serious impairment of a body function.

This Court concludes that the Plaintiff has suffered a serious impairment of a body function, and awards damages in the amount \$10,150, as his damages for non-economic losses.

FACTUAL BACKGROUND

This Court adopts the factual background of the Plaintiff's brief from paragraph B on page 5 through the third paragraph on page 7, except as modified by the observations and findings of this Court.

On June 11, 1987, Plaintiff's car was struck quite hard in the rear by Defendant's automobile. He suffered a hyperflexion-extension injury of the cervical spine (whiplash).

Doctor Arthur Durham, a chiropractor, identified and treated the injury on the day following the accident. He indicated his diagnosis was a whiplash, and objectively detected severe muscle spasms in the neck and back area. He diagnosed a mild loss of cervical curve, a loss of part of the rotation in C-2, T-2, and T-3, and trauma to the muscle. He diagnosed damage to the muscles, and described the injury as "severe".

His treatments consisted of spinal/pelvic adjustments, kinetic exercise therapy, hot and cold water, and physical therapy. There was some improvement, and restrictions on activity, such as a long term "looking down" job, nor could he lift anything "heavy", nor could he push or pull any objects. He described him as disabled at first, but not later, although limited at the time of trial. He indicated the muscles still get tight, and the range of motion has improved; but recommends no heavy lifting or looking down type jobs. He indicates he will never be back to "normal", and indicates his body was seriously impaired after the accident.

He referred the Plaintiff to Dr. Schneeberger for treatment in July, beginning July 20, 1987. He also noted objective symptoms of damage to the muscles in the cervical spine area. He identified strain and sprain of the muscles and ligaments. He recommended physical therapy, ultrasound, isometric neck exercises, and shoulder strengthening. A cervical collar was continued, along with continued manipulative treatment by the chiropractor. Some medication was prescribed. Upon subsequent examinations, range of motion improved substantially, and by September 3, 1987, no muscle spasm was noted. Subsequently, by September 24, 1987, he indicated the Plaintiff could return to

work on the following Monday, that being September 26. He anticipated pain and soreness in attempting to go back to work, which was experienced.

Plaintiff complained of so much soreness in working that he had to quit after a half a day, and went back the next day and again worked a half a day and had to quit. He left work by October 1, 1987, and was referred for an examination to Dr. John LeClaire. The last visit by Dr. Schneeberger was November 9th, and he indicated the patient should continue working. He noted in his office notes that the cervical sprain had resolved by October 29th.

Dr. LeClaire examined the Plaintiff on October 21, 1987, and he indicated he had a full range of motion of his neck, but with some tenderness of certain muscles. He also had a full range of motion in his shoulders and normal sensation reflexes and strength.

On March 14, 1988, Defendant had an independent medical taken with Dr. Robert C. Mahaney. The physical indicated no evidence of swelling, tenderness or muscle spasm. He also demonstrated a full range of motion in the neck area. He was described as being entirely normal objectively. Subjectively, there was a minimal amount of tenderness in the upper dorsal spine and a questionable decrease in sensation of the left hand.

With the exception of a brief period in February, 1988, Plaintiff has been returned to work subject to limitations at work.

Previous to this accident Plaintiff had an unremarkable work history, lifting and pulling approximately 100 pounds. He is 35 years of age, and has been employed at his present employer for sometime. He also enjoyed camping and boating, yard work, did leaf removal work about the house, as well as shoveled the snow. Subsequent to this injury, he can do almost none of the above.

Additionally, he has a 50 pound weight limit for lifting, with no pushing or pulling, and no job that requires an extensive amount of looking down. He has returned to full time employment almost continuously since January 2, 1988.

THE LAW

The Court refers the reader to DeFranco v Pickard, 427 Mich 32 (1986), which has substantially changed the law. The case name is only the lead case, there being several cases which were considered by the Supreme Court. One of the most significant changes brought about by that case was that in the determination of whether or not a person had suffered a serious impairment of a body function, the Court previously looked to the effect the injury had on the person's general ability to live a normal life. The Court replaced that test with what they considered to be a more objective approach. They sought the answer to two essential questions:

- (1) What body function, if any, was impaired because of injuries sustained in a motor vehicle accident?
- (2) Was the impairment serious?

The Court reviewed several factors which the trier of fact can and should take into consideration which I now enumerate:

- (1) The extent of an impairment;
- (2) The body function impaired;
- (3) The length of time of the impairment of the function;
- (4) The nature and extent of treatment required to rectify the impairment.

The Court also advised that additional factors may be relevant in determining seriousness. I shall now compare the

factual circumstances of several cases considered by the DeFranco court.

(1) DeFranco vs Pickard

Plaintiff's vehicle was struck from the back and he suffered a whiplash. Muscle spasms were observed, and initially a reduction of range of motion to the 40%-50% level in the lower back and 30%-40% limitation in neck motion. Plaintiff returned to his job two months after the accident without work restrictions. Although the original accident occurred in May, 1978, muscle spasms were still noted in an examination shortly before trial, January 17, 1983. Degenerative arthritis was likewise detected, and the range of motion had improved, but still had a 5% to 15% loss neck motion and a 10% to 15% loss of lower back motion.

The issue in the case was whether the District Court denied plaintiff's motion for directed verdict. The Supreme Court indicated that the motion was properly denied and that although Plaintiff suffers a permanent residual impairment, that the Supreme Court could not say all persons would conclude the plaintiff's impairment was not serious. The jury found no serious impairment, and the finding was not against the great weight of the evidence. Judgment affirmed.

(2) Burk v Warren

Plaintiff, on a motorcycle, was struck by defendant's truck and suffered a fractured right clavical and abrasions. He wore a cast for up to 6 weeks, which fracture healed without complications. All former activities were gradually resumed, including jogging, tennis, and yard work. He still experienced

pain at the time of trial. No restrictions were placed on his activities.

The jury concluded plaintiff's injuries did not cause a serious impairment of a body function. Plaintiff moved for a judgment NOV, which was denied. The Court of Appeals reversed holding plaintiff, as a matter of law, sustained a serious impairment of a body function. The Supreme Court reversed, the jury finding that plaintiff did not sustain a serious impairment, which was not against the great weight of evidence and should not be disturbed.

(3) Paupore v Rouse

Plaintiff was a passenger in a car involved in an accident and sustained a severe fracture of right and left lower jaw. Complications occurred requiring the removal of wisdom teeth, infection, extensive orthodontic work, and extensive difficulty with a temporary loss of hearing. Although the orthodontic work lasted for up to 24 months, much of the initial work in treatment occurred in the first month and a half, during which time his life style did not change significantly. At trial a motion by plaintiff for directed verdict on the serious impairment issue was denied. A jury found, however, plaintiff had not suffered a serious impairment, and the Court of Appeals affirmed. The Supreme Court affirmed, concluding:

We note that plaintiff's ability to work on his van, go to the beach, and dance at a local bar was not relevant to the question whether he had sustained a serious impairment of his mouth function. Unlike the 'general ability to live a normal life' test, the focus of the threshold inquiry must be on the extent a particular body function was impaired, not on how the impairment affected plaintiff's daily life. (pg 85).

(4) Kucera v Norton

This case is remarkably like the case before this Court. Plaintiff was struck by defendant's truck from the rear, causing a whiplash, giving rise to muscle spasms and a partial dislocation. He treated with a chiropractor and limitations on his ability to work were imposed, including a prohibition against lifting more than 25 pounds. Later the limitation was 30 to 35 pounds. Originally the job of plaintiff entailed lifting 60 to 120 pound motors. An independent physical in preparation of the trial was performed February 11, 1982, which uncovered no evidence of muscle spasm, nerve damage, fracture, or disc disease. The chiropractor had placed a permanent limitation on plaintiff to lift no more than 25 pounds, indicating the condition was permanent. Prospectively, his condition would degenerate and arthritis developed.

The court found, as a matter of law, plaintiff had not sustained a serious impairment of a body function. The decision was affirmed in the Court of Appeals, and the Supreme Court reversed indicating their reasonable minds could differ. The jury's finding was not against the great weight of evidence. Again, the Supreme Court indicated the Court of Appeals incorrectly focused on plaintiff's lack of absenteeism and his wage loss. The Supreme Court also noted that there was 70% impairment of lifting ability, and a permanent condition which could deteriorate.

FINDINGS

The Court will now analyze this case and apply the principles it has learned from the DeFranco case.

- (1) What body function was impaired, if any?

The Court determines that the Plaintiff suffered a loss of an important body function, namely, the ability to move the head and upper shoulder area of his body for a period of at least three to six months. His employment record never indicated any significant problems with his ability to work in the past, until the accident, after which he was off work for almost three full months. Upon attempting to return to work he suffered so much pain that he was required to go back off work. He finally returned to regular employment January 2, 1988, approximately six months after the accident. He had tried to go back to work approximately four times prior to the final return to work.

(2) The extent of the impairment.

Originally the impairment and the injury was described as "severe". Likewise, the range of motion was "severely restricted", there was a tear in the ligaments and, ultimately, a diagnosis of pulled, stretched and possibly torn muscles. Dr. Schneeberger's first examination of July 20, 1987, indicated a loss of range of motion of 50%. He notes almost two months later for the first time that no spasm or radiculopathy was observed. A month after that, on October 29, indicates the cervical sprain problem is resolved. However, he also notes complaints of pain, which he anticipated upon the return to work, but reflects the pain prevented the patient from returning to work full-time.

The final examination taken by everyone indicated that Plaintiff had pretty much returned to normal by the end of the six month period, although he was still suffering pain and there were limitations placed on his ability to work. The limitations continued to exist, being a weight limitation of 50 pounds lifting, no pulling or pushing, and no looking down type work. The patient self imposed a limitation which precluded his ability to do yard work, recreational activities, and shoveling, raking,

etc.

Although all physicians indicate a full range of motion has been restored, upon cross-examination, one physician did indicate that continuing complaints of pain may indicate permanent scar tissue is present on muscle, which was damaged in the accident. He, however, could find no objective proof of the existence of that by the very nature of the injury.

(3) The length of time of the impairment of the body function.

It is admitted that although there were the above restrictions on work activities, the main impairment of the body function of the neck and upper shoulders lasted approximately six months. There is a continued permanent restriction with a possible permanent condition caused by scarring of muscle tissue, which cannot be verified. The Plaintiff still suffers some pain to this date.

(4) The type of treatment required to rectify impairment.

Admittedly, the type of treatment necessary to repair the injury, this being a soft tissue injury, was slight in comparison to more violent nature injuries caused by trauma, such as broken bones, cuts, concussions, etc. The only treatment available was given him in the form of extensive chiropractic manipulations, sound treatment, physical therapy (extensive), and pain medication during the course of the first six months. Chiropractic treatment is still required on a bi-monthly basis.

In conclusion, the Court is faced with weighing the competing interest of two major principles found in the No-Fault Law of Michigan. First, the No-Fault Law should be construed in a light most favorable to the plaintiff when making initial decisions, such as the question of a serious impairment.

However, the fact finder test is only to be allowed to consider the degree of serious impairment, if reasonable men could differ on the question. The Court must always balance its analysis of the nature and extent of the injury against the term "serious".

I believe that the injury was severe, and serious, but for a modest period of time, in this case six months. However, the injury need not be permanent to be compensable. During this period of time he suffered extensively, and was severely restricted in all of his activities when there was no evidence of any restrictions prior to the injury. The limitations on his activities were all pervasive, running through his recreational life, through chores around the house, to his ability to work.

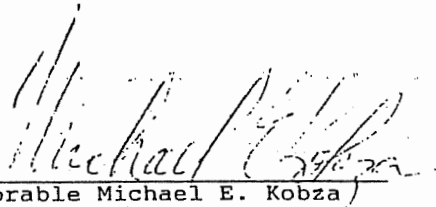
This type of case is extremely close in judging the extent of the seriousness, but I believe that the pain and suffering and limitations which continue to this date, constituted a serious impairment and are compensable under the No-Fault Act of Michigan.

Because of the severe restrictions on his activities and the pain and suffering he has suffered during the period of almost total restriction on such activities, that a sum of \$50.00 per day for the period of time he was impaired is a reasonable compensation for his injuries. The Court determines that such injuries lasted from June 11, 1987, through January 2, 1988, a period of approximately 203 days. At \$50.00 per day, the Court determines damages in the amount \$10,150.

Although the Plaintiff continues to suffer some permanent damages, they do not constitute a serious impairment after the above date, nor does the proof by a preponderance of evidence that such limitations he has at this point constitute "a serious impairment of a body function".

Additionally, Plaintiff shall receive his costs.

Dated: November 7, 1988
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Honorable Michael E. Kobza
Circuit Judge
P16100