UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

OLLIE McADOO,
Plaintiff,

vs.

UNITED STATES OF AMERICA, and HARTFORD INSURANCE COMPANY, a foreign insurance company, Jointly and Severally,
Defendants.

Case No. 87-CV-74128-DT

HONORABLE PAUL V. GADOLA
UNITED STATES DISTRICT JUDGE

OPINION

This action is brought by Plaintiff pursuant to the Federal Tort Claims Act, 28 U.S.C. Section 2671 et seq, and being a personal injury action arising from a collision in Michigan is governed by Michigan law, and specifically by the provisions of the Michigan No-Fault Act, MCLA Section 500.3101 et seq.

Plaintiff is a sixty-eight year old man who is now retired due to physical disability caused by injuries which he suffered in an automobile accident of May 16, 1981, and for which he is being paid work-loss benefits, under the Michigan No Fault Act, until he attains the age of seventy. See, coincidentally, McAdoo v United States of America, 607 F.Supp.788, E.D.Mich1984.

NEGLIGENCE ISSUE

On November 14, 1985, when Plaintiff was sixty-five years of age, Plaintiff's vehicle was struck in the rear by a postal vehicle owned by the Defendant and being operated by Defendant's employee, LaJuana Kimber. Plaintiff's Chrysler automobile was at a stop at a stop sign in the City of Detroit when the collision occurred.

Defendant's driver testified that she had experienced prior difficulties with the postal vehicle, a Jeep, initially on September 19, 1985 when the Jeep suddenly and without warning "lunged out" and came to a stop in the middle of Woodward Avenue while she was stopped at a red light, with her foot on the brake pedal. She testified that she made a written report of this incident to the Defendant. Subsequently, so she testified, she was at a collection stop on Greenview at Woodward Avenue on a later date when the same vehicle, again while her foot was on the brake pedal "lunged out" into Woodward Avenue. Again, she says, she prepared a written report to her superiors in the employ of the Defendant. She stated further that there may have been a third such instance which she experienced with the vehicle prior to November 14, 1985, although she cannot recall for certain.

A Vehicle Repair Tag, dated September 19, 1985, regarding the subject postal vehicle, from Defendant's business records, has a check mark next to the word "Transmission" under the heading "Check

Repairs Needed and Explain Under Remarks", and under the caption "Remarks" is written the following: "Jeep will not move forward or backwards." (Plaintiff's Exhibit C) This tag, signed by a driver other than Ms. Kimber, may well have been prepared pursuant to her report of the incident of the vehicle "lunging forward" on September 19, 1985, although that particular anomaly is not specified in the repair tag.

There is a notation on Defendant's Vehicle Maintenance Work Order, taken from Defendant's business records, dated September 19, 1985, as follows: "Transmission bad", and which indicates 2.4 hours of maintenance work on this feature. (Plaintiff's Exhibit D) The vehicle was then presumably returned to service.

It is significant that there was maintenance work performed on the vehicle on November 13, 1985 and November 14, 1985, just prior to the collision which is the subject matter of this action. Included in the "Description of Work" performed and completed on the vehicle at that time are the following (see Plaintiff's Exhibit D, being Defendant's Vehicle Maintenance Work Order):

2. Repair Brakes - Won't Stop Vehicle??

5. Check Trans??

Plaintiff's Exhibit D, being the aforesaid Vehicle Maintenance

Order from Defendant's business records shows that the vehicle was returned to service on November 14, 1985, following the maintenance work of November 13 and November 14, and the incident giving rise to this litigation occurred later that same day.

Ms. Kimber testified that on November 14, 1985 she was northbound on Cardoni Street and observed, ahead of her, Plaintiff's vehicle on Cardoni stopped at a stop sign at Seven Mile Road. She said that she stopped behind Plaintiff's vehicle, with her foot on the brake pedal, when the Jeep again "lunged forward" and struck Plaintiff's auto in the rear and then "bounced off his car". She stated that the impact was "not harsh" in that packages on the seat of the Jeep were not knocked over, but that the left rear bumper guard on Plaintiff's vehicle had been damaged. Defendant's business records indicate, however, that the left front bumper of the Jeep may have been cracked by the impact. (Plaintiff's Exhibit F) Ms. Kimber's formal report of the accident, filed with the Defendant (Plaintiff's Exhibit G) is consistent with her testimony, as is a diagram of the accident which she also contemporaneously prepared and filed. (Plaintiff's Exhibit B)

Defendant maintains that there was no negligence on the part of its driver, Ms. Kimber, in that she came to a complete stop behind Plaintiff's car with her foot on the brake pedal, and the vehicle then moved forward due to an unforeseen mechanical problem.

Defendant further claims that there is no showing of negligence on the part of itself since there is no showing that it did not properly maintain the vehicle.

The difficulty with Defendant's position is that since its vehicle did accelerate forward and strike Plaintiff's car, either Ms. Kimber must have negligently failed to apply the brakes, or must have driven the car forward into the collision or, on the other hand, there must have been deficiencies in Defendant's maintenance and repair, given that Kimber testified to the same thing having happened at least twice before and having been reported to Defendant and apparently not having been corrected.

Especially damning to Defendant's position with regard to maintenance of the vehicle is the fact that on November 13, 1985 the vehicle was apparently in its repair shop due to inability of a driver to stop the vehicle by use of its brakes, and some apparent difficulty with the transmission. The vehicle was, as above stated, then returned to service on November 14, 1985, and on that very day, according to the testimony of Ms. Kimber, it suddenly and inexplicably lunged forward, while the brake pedal was being applied, and struck the rear of Plaintiff's automobile.

This negligence suit is governed by Michigan law, and under pertinent Michigan authority violation of Michigan penal statutes governing the operation or maintenance of motor vehicles creates

a prima facie showing of negligence. Zeni v Anderson, 397 Mich 105 (1976). This statutory presumption of negligence can only be rebutted by clear, positive and credible evidence opposing the presumption. Petrosky v Dziurman, 367 Mich 539, 116 N.W.2d 748(1962)

A Michigan statute provides that a driver who strikes another vehicle in the rear is prima facie guilty of negligence. MCLA 257.402.

A second Michigan statute provides that it is unlawful to permit a vehicle to be driven which is in such unsafe condition as to endanger any other person. MCLA 257.683.

Finally, a third Michigan statute provides that all motor vehicles must be equipped with adequate brakes. MCLA 257.705.

Violations of such penal statutes therefore create rebuttable presumptions of negligence. While such presumptions can be rebutted, the presumptions remain in the case as permissible inferences for the fact-finder even if rebutted, and shift to the Defendant the ultimate burden of proof on the issue. Totorean v Samuels, 52 Mich App 14, 216 N.W.2d 429(1974). See also Baumann v Potts, 82 Mich App 225, 226 N.W.2d 766(1978).

The Court finds that in this case the Defendant has not

rebutted the presumption of its own prima facie negligence. Either Defendant's driver violated MCLA 257.402, or Defendant violated MCLA 257.683 and/or 257.705. Virtually no evidence was adduced rebutting Plaintiff's prima facie showing of Defendant's negligence, and what small amount of testimony was offered in that regard certainly does not overcome the permissible inference of negligence remaining in the case, and the Court therefore concludes that Plaintiff has, by a preponderance of the evidence, established clearly that either Defendant's driver was negligent, and that Defendant is therefore vicariously liable, or that Defendant itself was negligent in its maintenance and repair of the vehicle.

Plaintiff has offered as an additional exhibit a further Vehicle Maintenance Work Order, dated November 15, 1985, from Defendant's business records, showing very extensive brake repair work on the postal vehicle from November 15, 1985 to November 19, 1985, with such repairs having been commenced immediately following the subject accident of November 14, 1985. Defendant has objected to admission of this proposed exhibit on the basis of Fed. R. Evid. 407, which generally bars, for sound public policy reasons, evidence of remedial measures taken by a Defendant following an event which, if taken previously, would have made the event less likely to occur, as proof of negligence or culpable conduct on the part of the Defendant in connection with the event. Plaintiff, on the other hand, maintains that since Defendant has claimed that the vehicle was in good condition prior to the accident, he then is

permitted to produce evidence of the subsequent repairs to rebut the position of Defendant, relying primarilyon Patrick v South Central Bell Telephone Co, 641 F.2d 1192 (6th Cir 1980). A reading of Patrick indicates, however, that its holding was primarily that Fed. R. Evid. 407 does not forbid evidence of repairs that render the situation the same as it was at the time of the accident, but does prohibit evidence of repairs that make the situation better than that which existed at the time of the accident. In the case at bar it would appear that the exhibit is submitted in an attempt to show a remedial measure by Defendant after the accident to improve the condition of the vehicle over its state at the time of the collision. Plaintiff attempts thereby to cause an inference to be drawn that the state of repair of the vehicle was deficient when the accident occurred, and that would seem to be exactly the sort of evidence which Fed. R. Evid. 407 is designed to exclude. Further, it is not at all clear whether Plaintiff or Defendant raised the issue of condition of the vehicle at the time of the collision, since the Joint Pre-Trial Order states that Plaintiff's claim of Defendant's liability "is premised upon Ms. Kimber's negligent operation of a postal vehicle and/or Defendant's failure to adequately maintain said postal vehicle in a reasonably safe condition----."

Under these circumstances, the Court does not admit the Vehicle Maintenance Work Order of November 15-19, 1985, purporting to show remedial repair work on the vehicle following the accident,

and has not considered the same in reaching a determination, for reasons hereinbefore set forth, that Defendant is liable to Plaintiff. Parenthetically, if the proposed exhibit would have been admitted, it would constitute considerable additional evidence of Defendant's liability. The Court has concluded, however, that there is ample and sufficient evidence of Defendant's liability without reference to a consideration of this proposed and rejected exhibit.

PROVISIONS OF MICHIGAN NO-FAULT ACT

The Court, being satisfied that Defendant's negligence has been established by a preponderance of the evidence, will now proceed to the issue of Defendant's possible liability under Michigan law and the question of the extent and nature of any injuries suffered by Plaintiff. Under the Michigan No-Fault Act, MCLA 500.3101 et seq, tort liability in auto accidents is eliminated unless a certain threshold of seriousness of injury is reached. MCLA 500.3105 provides:

> (1) A person remains subject to tort liability for non-economic loss caused by his or her ownership, maintenance or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement. (Emphasis added).

The same section of the statute provides that, however, an action can be maintained and damages recovered, even in the absence of the Plaintiff's injuries reaching the aforementioned threshold,

for work loss, (i.e. loss of income) and allowable expenses as defined in MCLA 500.3107-3110, in excess of the limitations contained in those sections. Under MCLA 500.3107 an injured plaintiff is entitled to recover from a negligent defendant for his work loss (income loss) sustained more than three years from the date of the accident. The same section permits recovery for certain allowable expenses sustained more than three years from the date of the accident and reasonably incurred in obtaining ordinary and necessary services in lieu of those that, if he had not been injured, the injured person would have performed for himself. Those allowable expenses incurred within the first three years in excess of $20.00 daily are also recoverable from a negligent defendant. Thus, an injured party must look to his own insurer, without regard to fault, for recovery of his work loss during the first three years after the accident, and for such allowable expenses, to a limit of $20.00 daily, during the first three years. Any recovery for work loss beyond the three year period, any recovery of such expenses in excess of $20.00 daily during the first three years, and any recovery of any such expenses whatsoever beyond the three year period may be obtained in a tort action against the negligent defendant, irrespective of the aforesaid threshold of seriousness of injury. The threshold of injury only becomes relevant in determining whether a plaintiff is entitled to recover non-economic damages, such as those for pain, suffering, humiliation, et al.

Plaintiff in this action claims both non-economic damages, for pain and suffering, and damages for expenses for services which he must obtain in lieu of being able to perform those services for himself, with his claim for such services being for the period commencing three years after November 14, 1985, the date of the accident. As stated, in order to recover non-economic damages in a tort action against a negligent defendant he must establish that the seriousness of his injuries passes the threshold specified in MCLA 500.3135, while as to recovery of such expenses or work loss after the first three year period proof of such seriousness of his injuries is not required.

PLAINTIFF'S INJURIES

This case is considerably complicated by the fact that Plaintiff has been involved in a remarkable series of automobile accidents, all of which have led to litigation on his part. It is only fair to note, however, that each and every one of these accidents, in all of which Plaintiff has claimed to have suffered physical injuries, occurred without any fault or negligence on the part of Plaintiff. The accidents, briefly described, were as follows:

1. December 31, 1980: Plaintiff's vehicle, stopped at a red light was struck in the rear.

2. May 26, 1982: Plaintiff's vehicle was struck by a U.S. Government-owned vehicle which turned in front of him in making a left turn. The government admitted liability. This incident was the subject of litigation in this court and a decision and opinion by Honorable Ralph B.

Guy, Jr., District Judge, which is most informative in dealing with the issues herein. See McAdoo v United States of America, 607 F.Supp. 788, E.D. Mich 1984.

3. September 29, 1981: Plaintiff's vehicle, stopped at a red light, was struck in the rear.

4. November 14, 1985: This is the case at bar. Plaintiff's vehicle, stopped at a stop sign, was struck in the rear by Defendant's postal vehicle.

After each of these accidents Plaintiff was treated at the Eisman Clinic, a chiropractic clinic, primarily by Dr. David Eisman, D.C., and Dr. Jeffrey Eisman, D.C.. Unfortunately, but without denigrating the value or efficacy of the chiropractic art, Plaintiff did not seek treatment from any medical doctor or osteopathic physician, and the Court therefore must rely for evidence of the extent and nature of injuries sustained by Plaintiff in each one of these accidents, on the testimony of Dr. David Eisman, and on the extensive records of the Eisman Clinic.

Basically similar injuries were diagnosed by Dr. Eisman and the Eisman Clinic following each of the accidents and their description in each instance is couched in the professional language and terminology of chiropractors and varies very little indeed. The injuries, in summary, in each instance, are set forth as follows:

1. December 31, 1980 Accident: Hyperextension/Hyperflexion injury to cervical and dorsal spine. Traumatic myofascitis of lumbar musculature. Multiple subluxations in cervical, dorsal and lumbar spine. (Joint

Exhibit H)

2. May 16, 1981 Accident: Acute traumatic cervical sprain. Acute sprain to thoracic and lumbar spine with peritendonitis resulting in extensive neuralgia into intercostal area. Acute lumbosacral sprain. Post traumatic cephalgia. Multiple subluxations in cervical, thoracic and dorsal spine. Cervical lordotic curve decreased. (Joint Exhibit H)

3. September 29, 1981 Accident: Hyperextension/Hyperflexion injury to cervical, thoracic and lumbar spine with myofascitis. Post traumatic cephalgia. Multiple subluxations in cervical, thoracic and lumbar spine. Muscle spasms. Restricted motion in cervical, thoracic and lumbar spine. Cervical lordotic curve decreased. Mild osteoarthritis with spurring in cervical spine. Mild osteoarthritis with lipping and bridging in thoracic spine. (Joint Exhibit H)

4. November 14, 1985 Accident: Traumatic injury to muscular and ligamentous structures of the neck and back. Thoracic and lumbar sprain/strain with contusions. Upper extremity paresthesia. Lumbosacral spasm. Lower extremity radiculopathy. Subluxations in cervical, thoracic and lumbar spine. Restricted range of motion in neck and lower back. (Joint Exhibit L)

Essentially then, the Plaintiff was diagnosed by Dr. David Eisman and his associates at the Eisman Clinic as having suffered soft tissue injuries in each accident, in the cervical, dorsal and lumbar regions, with evidence of muscle spasms and related symptoms.

Dr. David Eisman testified that after each accident Plaintiff's condition, with chiropractic treatment, gradually improved, only to have his prior problems aggravated and his

condition suffer setbacks in each successive trauma. He testified that the formation of fibrotic (scar) tissue following each accident rendered Mr. McAdoo's neck and back more susceptible to future injury. He further testified that while he noted that Plaintiff suffered from degenerative arthritis when he first saw him on January 2, 1981 following the accident of December 31, 1980, each successive trauma thereafter further aggravated his degenerative arthritis.

The records of the Eisman clinic (Joint Exhibit H) make specific reference in a report dated June 15, 1981, following the accident of May 16, 1981, that there was "evidence of moderate osteoarthritis with bridging."

Records of Mt. Carmel Mercy Hospital of May 17, 1981, following the accident of May 16, 1981, contained x-ray findings of degenerative disease of the cervical spine.

The records of the Eisman Clinic and a report dated October 15, 1981 regarding the accident of September 29, 1981, contain the following language: "(there are) extensive osteo and degenerative changes seen in the cervical, dorsal and lumbar spine (which) are not the result of this accident (of September 29, 1981) but a spine of this type is more susceptible to injury and to prolonged symptoms than the normal spine."

It was the professional opinion of Dr. Eisman, as set forth in his testimony and in the records of the Eisman clinic, that while Plaintiff suffered from degenerative arthritis on December 31, 1980, the trauma suffered in each successive accident, the last of which was the accident of November 14, 1985, which gives rise to this litigation, severely and successively aggravated and exacerbated his pre-existing condition; that after each accident he made progress until that progress was arrested and reversed by another trauma to his neck and back; that his condition is permanent and will deteriorate. He testified that in his opinion, as a result of and following his latest injury of November 14, 1985, there had been aggravation of the degenerative arthritis and acceleration of the aging process of his neck and back and that as a further result of this latest trauma he cannot perform any activity involving bending, stooping or twisting, cannot lift more than five or ten pounds, cannot shovel snow, cannot mow a lawn or perform ordinary household tasks such as vacuuming a floor, unless he could operate the vacuum cleaner in a straight line at all times, and generally is incapacitated. Dr. Eisman also maintains that following his injury of November 14, 1985 he has developed, as a result thereof, increased loss of range of motion of his cervical and lumbar spine, marking a deterioration in his ability for such motion as compared to his situation prior to November 14, 1985.

Plaintiff testified that he has a ninth grade education and

had spent most of his life in fulltime employment, and rather proudly stated that he had never sought or obtained welfare assistance. He worked as a laborer at Detroit Steel Products Company for thirty years, leaving there when the plant closed, and then worked for Suburban Brick Company for about seven years leaving there due to injuries suffered on December 31, 1980. He planned to return to that employment until he was again injured on May 16, 1981. It is noteworthy that the records of the Eisman Clinic (Joint Exhibit H) confirm that on April 17, 1981 the Clinic issued an authorization for Plaintiff to return to work, following his injury of December 31, 1980. Plaintiff further testified that despite the injuries which he then successively suffered on May 16, 1981 and September 29, 1981, he had considerably improved until the accident of November 14, 1985. He stated that just before his latest accident he had improved to the point that he could shovel snow, do yard work, do housework, go for walks, ride his bicycle and remain physically active. Since the accident of November 14, 1985 he relates that he can do none of these things. He states that he was able to perform moderate lifting before November 14, 1985, but cannot now do so. He stated that prior to November 14, 1985 he hunted, socialized and "got out to do things". He testified that he is in constant pain now, is unable to sleep well, and that his days now consist of "sitting, watching TV, looking out the window." He concedes that he was "not 100%" before the accident, but felt that he was improving.

Defendant's medical expert, Dr. Richard Krugel, M.D., examined Plaintiff on January 23, 1989. He is an orthopaedic surgeon with extensive credentials. He essentially agreed with Dr. Eisman that Plaintiff had significantly decreased range of motion in the cervical and lumbar spine and suffered from degenerative arthritis in the cervical and lumbar spine. He attributed Plaintiff's present complaints and symptoms to such degenerative arthritis rather than to the trauma suffered in the various accidents. He conceded that trauma can contribute to degenerative changes but stated that they are primarily a disease of aging (page 10 of his deposition). Dr. Krugel further conceded that loss of lumbar lordosis, which he found, can result from trauma (page 47), narrowing of the C4-5 Intervertebral Disc Space, which he found and is indicative of degenerative arthritis, could be related to trauma (page 51), and calcification in anterior ligaments at L4-5 and L5-S1, which are indicative of degenerative arthritis and which he also found, can result from trauma (page 53). At pages 55-56-57 of his deposition he testified that he cannot say whether the November 14, 1985 accident contributed to Plaintiff's present condition; that it could have contributed, but that in his opinion the 1981 accident was far more significant. (Pages 55-57). At page 57 he again testified that the accident of November 14, 1985 could have contributed to Plaintiff's present condition.

When a hypothetical question incorporating the facts of Plaintiff's condition, both immediately before and immediately

after November 14, 1985, as testified to by Plaintiff, was put to Dr. Krugel, he testified that assuming those facts to be correct and accurate, the accident of November 14, 1985 had resulted in some aggravation of a pre-existing condition (pages 57-58).

Dr. Krugel testified that Plaintiff had lost 50% of the range of motion in his spine, had lost, to a great extent, his ability to lift, to bend and stoop, to twist, and that this loss of function was permanent (pages 59-61). At page 62 of his deposition he said that he could not say, from his sole examination of Plaintiff on January 23, 1989, that the trauma of November 14, 1985 did not contribute to Plaintiff's present condition and difficulties.

ISSUE OF WHETHER PLAINTIFF HAS SUFFERED SERIOUS IMPAIRMENT OF BODY FUNCTION

At the time of Plaintiff's accident of May 16, 1981, the test to determine, under MCLA 500.3135, whether Plaintiff had suffered a serious impairment of body function and was therefore entitled to recover non-economic damages, was quite different than the present test. As Judge Guy so ably pointed out in McAdoo v United States of America, 607 F.Supp.788 (D.C.Mich) the rule for determining whether a Plaintiff's injuries had crossed the threshold so as to be considered a serious impairment of body function, was set forth in the decisions of the Michigan Supreme

Court in Cassidy v McGovern, 415 Mich 483, 330 N.W.2d 22 (1982). The Michigan Court there said that the "serious impairment" standard must be considered in conjunction with the other threshold requirements for a tort action for non-economic loss, namely, death and permanent serious disfigurement. In addressing this subject, the Michigan Court stated that "the Legislature clearly did not intend to erect two significant obstacles to a tort action for non-economic loss and one quite insignificant obstacle." Id. at 503, 330 N.W.2d 22. The Michigan Court stated, in Cassidy that, where there is no factual dispute regarding the nature and extent of Plaintiff's injuries, or where a factual dispute is not material to the determination, the matter of whether there is a serious impairment of body function is to be determined as a matter of law, under the following parameters:

1. Plaintiff must suffer an injury.
2. The injury must seriously impair a body function.
3. The body function must be an important one.
4. The injury must be objectively manifested.

Based on the Michigan test, Judge Guy appropriately found that the soft tissue injury to neck and back suffered by Mr. McAdoo on May 16, 1981, which prevented him from working, did not amount to a serious impairment of body function; therefore Plaintiff was held not to be entitled to recovery of non-economic damages for pain and

suffering. Since actions under the Federal Tort Claims Act are non-jury trials, the matter of whether the threshold of serious impairment of body function is to be determined as a matter of law by the Court is of no particular significance, but the threshold test is, of course, of great significance.

Now, however, the Michigan Supreme Court has significantly departed from its holding in Cassidy, supra, by its ruling in DiFranco v Pickard, 427 Mich 32, 398 N.W.2d 896 (1986). The Court there held, disavowing and overruling much of its Cassidy decision, that in order to recovery non-economic damages, the impairment need not be of the entire body function or even of an important body function. The test is now, under Michigan law, in accordance with DiFranco, to be that:

1. Plaintiff must suffer an injury.

2. The injury must seriously impair a body function.

The Court in DiFranco further held that the determination of whether a serious impairment of body function had occurred was basically a question of fact in each instance.

Thus, the Michigan requirements that the body function be an important one and that the injury be objectively manifested have been disavowed. The Court in DiFranco further held that soft-tissue injuries to muscles and ligaments of the neck and back, which impaired two of Plaintiff's body functions, i.e., the ability to move his neck and the ability to move his back, provide an issue of fact as to whether a serious impairment of body

function has occurred. Under the Cassidy decision, such an injury would quite clearly have been held to not constitute a serious impairment of body function. The Court in DiFranco further held that the fact that a soft-tissue injury to the back prevents Plaintiff from performing heavy lifting presents a question of fact as to whether he has suffered a serious impairment of body function.

It is the finding of the court that Plaintiff did suffer further soft-tissue injuries to his neck and back in the collision of November 14, 1985, that those injuries aggravated a pre-existing condition of degenerative arthritis of his spine, and that the injuries and aggravation of prior condition have seriously impaired his body functions of the ability of movement of his neck and back and his ability to perform lifting, bending, stooping and twisting and that he is therefore entitled to recover non-economic damages. It would appear that had the DiFranco standard been in effect in 1984 rather than the now disavowed holding in Cassidy v McGovern, supra, Plaintiff would have been entitled to recover non-economic damages under the Michigan No Fault Act in that litigation as well.

ISSUE OF PLAINTIFF'S RIGHT TO RECOVER
ALLOWABLE EXPENSES

The question of recovery for work loss is not involved in this litigation, even though such recovery can be had in the absence of a showing of serious impairment of body function for any period of work loss more than three years from the date of an injury under the Michigan No Fault Act. See MCLA 500.3135(2)(c) and 500.3107(b).

As previously stated, under the aforesaid Michigan statute, an injured party is required to look to his own insurer for recovery for work loss during the first three years following an automobile accident, and is entitled to recovery from the tort-feasor any provable work loss which will extend more than three years from the date of the accident. Plaintiff herein, however, was awarded damages for work loss against this same Defendant in McAdoo v United States of America, 1984, supra,which was the suit arising from his May 16, 1981 injuries. In that action Judge Guy awarded work loss damages extending to June 24, 1990, when he will reach the age of seventy. Thus, he makes no claim for damages for work loss in the case presently before the Court.

Plaintiff does make a claim herein for recovery of expenses incurred or to be incurred in obtaining ordinary and necessary services in lieu of those that, if he had not been injured, he would have performed for himself, for the period commencing three years from the date of the accident and continuing thereafter. As with work loss benefits, he must look to his own insurer during the initial three years after an accident to recovery such expenses, to a limit of $20.00 daily. MCLA 500.3135(2)(c) and 500.3107(b). His claim in this regard is, therefore, for the period commencing November 15, 1988 (the accident having occurred November 14, 1985) and continuing for his life expectancy, there having been evidence produced that his condition is a permanent one and is likely to further deteriorate.

Plaintiff is clearly entitled to such recovery, even if the

finding had been that he had not suffered a serious impairment of body function, since that standard is only applicable to a claim for non-economic damages. Plaintiff has testified, and Dr. Eisman has confirmed, that he is unable to do lifting, except minimally, bending, stooping, twisting and is unable to perform yard work, housework, snow shoveling and the like, and has been required to rely on the services of Anne Houston, who is both a neighbor and a cousin. Ms. Houston testified that she has, since the november 14, 1985 accident, done housework for Plaintiff, prepared his meals, done his laundry, washed his dishes, made his bed, et al, because he could not stoop or bend. She states that she goes to his house at least three or four times weekly and states that she spends considerably more than ten hours per week assisting him. She stated further that Plaintiff paid her for her services when he was able, but that she was glad to perform these services for him even when he was unable to pay her. She testified that she performed the services "for him and not for the money, because he has always done so much for others." Further, so she said, he had done these things for himself prior to the November 14, 1985 accident, but could not thereafter, "because he is in too much pain" and "he was my right arm before he got hurt."

AGGRAVATION OF PRE-EXISTING CONDITION

Since Plaintiff has suffered injury to his neck and back in a series of four automobile accidents, the question arises as to what damage was done to him in any particular accident. Dr. Eisman has testified that each accident successively aggravated and

exacerbated a pre-existing condition of degenerative arthritis, with the sum total of the trauma suffered in the accidents resulting in his present condition. Dr. Krugel, Defendant's expert, does not disagree that each trauma may be a factor in his present condition, although he believes the May 16, 1981 accident is more significant than the September 29, 1981 or November 14, 1985 accidents (pages 55-57 of Dr. Krugel's deposition).

As Judge Guy correctly stated in the prior case between these same parties, 607 F.Supp.788,797: "The fact that one cannot completely differentiate between what damage was done by which accident is not fatal to Plaintiff's claim, since Michigan law dictates that where the Court or jury is unable to separate damages caused by a defendant's conduct from those which were pre-existing, then the entire amount of plaintiff's damages must be assessed against the Defendant." Belue v Uniroyal, Inc., 114 Mich App 589, 319 N.W.2d 369(1982) (Emphasis Added)

It is, of course, also true that under Michigan law the negligent conduct of a defendant which results in an aggravation of a plaintiff's previous injury or medical condition will result in liability for damages. Rypstra v Western Union Telegraph Company, 374 Mich 166, 132 N.W.2d 140(1965).

DAMAGES

Insofar as recovery of expenses is concerned, Plaintiff seeks recovery for 10 hours of household services each week at the minimum wage of $3.35 per hour for the period commencing November 15, 1988 and continuing for the remainder of Plaintiff's life

expectancy, which was 11.17 years on November 15, 1988, Plaintiff being then 68 years of age. (See Joint Exhibit P)

This computes to a sum of $19,458,14.

Plaintiff also seeks recovery for yard work and snow shoveling, estimating 16 weeks if yard work at $10.00 per week and $25.00 per year for snow removal (5 snowfalls at $5.00 each). This computes to a total of $2,066.45.

Thus, Plaintiff's claim of damages for recovery of allowable expenses is in the total amount of $21,524.59.

The Court feels that Plaintiff's claim for such expenses is on the conservative side, given the testimony of Ms. Houston that she customarily provides considerably more than 10 hours of services to Plaintiff per week, and the Court therefore does feel that an award of $21,524.59 in this regard is appropriate.

Insofar as Plaintiff's damages for non-economic losses, i.e. pain and suffering, are concerned, we are dealing with a period of three years and four months which have elapsed since the date of the accident, and a future period, his injuries being of a permanent nature, of the remainder of his life expectancy, being

approximately an additional 11 years. Plaintiff has attested to his pain, his physician has substantiated his allegations regarding the extent and severity of his condition, and Defendant's medical expert is in substantial agreement as to the seriousness of his neck and back condition, although he does not agree as to the cause thereof. Plaintiff's activities are apparently now almost totally

restricted, he is unable to pursue his prior avocations and recreations, and he states that he is in considerable discomfort. There seems little possibility that these symptoms will subside, given his age, his degenerative arthritis, and the successive traumatic incidents to which he has been subjected. Under the circumstances, an award of $10,000.00 for past pain and suffering and $20,000.00 for future pain and suffering would seem to be modest and conservative.

Thus, under ordinary circumstances the Court would make an award of at least $51,524.59.

Since Plaintiff's administrative claim is restricted to $25,000.00 as set forth in the Joint Final Pre-Trial Order, the Court will limit its award herein to $25,000.00, although Plaintiff's damages are, in the Court's estimation, in the amount above set forth.

That being the case, there is no reason or basis for the Court to discount Plaintiff's future damages to present value by 5%, as prescribed in Diggs v Pepsi Cola Metroplitan Bottling Company, 816 F.2d 914 (6th Cir.1988) since even with such discount Plaintiff's damages would be substantially in excess of $25,000.00.

JUDGMENT

Plaintiff's counsel may prepare a judgment awarding damages to Plaintiff from Defendant in the amount of $25,000.00 together with any allowable costs and interest.

Dated: March 13, 1989.

PAUL V. GADOLA
UNITED STATES DISTRICT JUDGE

PURSUANT TO RULE 77(d), FED. R. CIV. P.
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DEPUTY COURT