

CITATION: Leochko v. Rostek, 2013 ONSC 7899
COURT FILE NO.: CV-07-0267
DATE: 2013-12-20

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:)
)
STACEY LEOCHKO,) *W. Danial Newton and Daniel Lester, for*
) the Plaintiff
)
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Plaintiff)
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- and -)
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)
RICHARD ROSTEK,) *Joseph Villeneuve and Eric Pardu, for the*
) Defendant
)
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Defendant)
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) **HEARD:** December 10, 2013,
) at Thunder Bay, Ontario

Mr. Justice D. C. Shaw

Decisions On Motions

[1] This action arises out of a motor vehicle accident on June 30, 2005, in Dryden, Ontario. The action was tried before a jury. Liability was admitted by the defendant. The trial proceeded on the issue of damages.

[2] After I concluded my charge, and while the jury was deliberating, I heard a motion by the defendant for a ruling that the plaintiff's claims for future care costs and non-pecuniary damages were barred by s. 267.5(3) and s. 267.5(5) of the *Insurance Act*, on the ground that the plaintiff's

injuries did not meet the statutory threshold, that is, that the plaintiff did not sustain a serious permanent impairment of an important physical, mental or psychological function.

[3] I reserved my decision on the matter pending receipt of the jury's answers to the questions set for them. The jury's answers were received on December 10, 2013.

The Evidence

[4] The plaintiff, Stacey Leochko is 37 years of age. She has an 18 year old daughter, Kayla.

[5] Ms. Leochko graduated from Grade 12 in 1994. She and Kayla's father, Mr. Rivalin, started living together in 1994 while Ms. Leochko was pregnant. They separated in August 2004. Ms. Leochko described it as an amicable separation, although stressful.

[6] Ms. Leochko remained at home with Kayla until Kayla was 5 or 6 years of age. She worked with an insurance adjustor from November 2002 until August 2003. In October 2003, she began working as a receptionist on a contract basis for Kenora District Housing Corporation. She later became an administrative assistant for the housing manager. Her first employment contracts were for six month periods. On June 30, 2005, the date of the motor vehicle accident, Ms. Leochko entered into a three month contract. She said that the term was only three months because Kenora District Housing Corporation was amalgamating with the Kenora District Social Services Board.

[7] The accident was on Thursday June 30, 2005, around 4:30 pm after Ms. Leochko got off from work. She was driving to pick up Kayla from her parents. She was driving a 2000 Honda Civic going east on Government Street. She was wearing a seatbelt. She said traffic was heavy.

She stopped as traffic had backed up. She looked into her rear view mirror. She saw the defendant's truck and it was not stopping. She said she tensed and braced her hands on the steering wheel. She said she was looking up and to the right into her rearview mirror. She did not recall the speed of the defendant's truck, she said that the impact from behind was hard. At trial, in cross-examination, she agreed that there was no reason to say that the speed of 20 km per hour set out in the police report was not correct. There was a second impact as she was pushed into the rear of the van ahead of her. She said that within the first moment of the accident she felt a little woozy and out of it. She immediately felt pain in the left side of her neck.

[8] Ms. Leochko attended at the Emergency department of the Dryden hospital shortly after the accident, with pain in the left side of her neck, radiating through her neck to her jaw and shoulder. She had tingling in her fingers, she was nauseous, woozy, anxious and unsettled. The doctor at Emergency prescribed Robaxacet and Naproxen. She went back to Emergency on July 3, 2005.

[9] She tried going back to work for five hours on July 6 and 7, 2005, and for half an hour on July 8, 2005. She tried again in late July and early August 2005 but did not return after that.

[10] After the accident, Ms. Leochko began to receive \$382.33 in income replacement benefits from the insurer of her vehicle, Wawanesa. The insurer stopped these payments in 2007. Wawanesa re-instated the payments in October 2009 and paid Ms. Leochko arrears of income replacement benefits of \$43,967.95. The benefits continue to be paid, although reduced by disability benefits that Ms. Leochko receives from Canada Pension Plan.

[11] Ms. Leochko said that when Wawanesa stopped her benefits, she had no income and could not pay her bills, including her mortgage. She had to declare bankruptcy and lost her house. During this time she moved in with her parents and applied for and eventually received Ontario Disability Support Plan benefits (ODSP).

[12] Ms. Leochko received ODSP to November 2009, when she began to again receive income replacement benefits from her insurer. Of the \$43,967.95 in arrears paid by Wawanesa, Ms. Leochko said that approximately \$10,000 had to be paid to ODSP and approximately \$17,000 towards bankruptcy.

[13] Ms. Leochko saw doctors in Dryden on July 7 and July 12, 2005. She started physiotherapy, massage and chiropractic treatment.

[14] She was referred to the Pan Am Clinic in Winnipeg. On May 2, 2006, she began to see Dr. Charles Johnson in Winnipeg on referral from a physician at the Pan Am Clinic.

[15] Dr. Johnson is a physiatrist. He was qualified by the court to give opinion evidence on musculoskeletal pain syndrome from the perspective of a specialist in physical medicine and rehabilitation with a special interest in musculoskeletal pain syndrome.

[16] Dr. Johnson took a history from Ms. Leochko. She said that she had pain in the area of the left shoulder and the base of her neck, and numbness in her hand, and that her headaches were improving. X-rays and CT scans of her neck and thoracic spine were normal.

[17] Dr. Johnson did a physical examination. The range of motion in Ms. Leochko's neck was restricted by about 30%. He said that Ms. Leochko had spinal segmental sensitivity at the C-4 and T-1 levels of the spine. He also found sensitivity on her left trapezius muscle.

[18] Dr. Johnson did nerve blocks on Ms. Leochko. He explained the procedure as follows: he takes a needle with a local anesthetic and probes the ligament. When the needle hits the trigger point of pain, the patient jumps, instantaneously. The nerve in that segment of ligament is then blocked. Then he probes the muscle. The instant the needle touches a tender myofascial band across the muscle, the patient will again jump, instantaneously. The muscle then releases.

[19] Dr. Johnson said that the patient has no control over this, that the signature sign of a myofascial band is that one can see the whole band ripple when it is released. He said this was an objective finding. He said that once the band is released the body adjusts over a period of days to weeks.

[20] He saw Ms. Leochko again on September 25, 2006. She reported that she experienced pain for a few days after her treatment on May 2, 2006 and then less pain, but over a period of time, the pain came back. Dr. Johnson said that this was typical, that the treatment was a process. On examination, on May 2, 2006, Ms. Leochko had 60% range of movement in her neck and tenderness over her left trapezius. Dr. Johnson noted spinal segmental sensitization at the C-3 and C-6 levels. He did paraspinal blocks at those levels, using the same treatment as on May 2, 2006.

[21] Dr. Johnson said that in his opinion, based on the history he took from Ms. Leochko and his physical examination, that the pain in Ms. Leochko's neck and shoulders was consistent with

her motor vehicle accident and there was a high probability that the collision was the source of her pain.

[22] Dr. Johnson saw Ms. Leochko again on November 20, 2006, May 18, 2007, November 20, 2007 and April 22, 2008. On those occasions he found spinal segmental sensitivity at various levels, including C-4, T-7, C-5, T-6, C-6 and T-4. He did blocks at those levels, needled the ligament and needled the muscles where there were tender bands resulting in a twitch response as the muscle released.

[23] On June 4, 2008, July 7, 2008, July 22, 2008, and February 18, 2009 Ms. Leochko had rhizotomy treatments done by an anaesthetist at the Pan Am Clinic in Winnipeg. This entails inserting a needle that burns and melts the nerve, with a view to disarming the painful nerve.

[24] Dr. Johnson said that Ms. Leochko described herself as depressed. He said that all patients with chronic non-cancer pain are depressed at some point. He stated that he believed Ms. Leochko was feeling ongoing physical and emotional distress that started after the motor vehicle accident and that every aspect of her life was affected. He was of the opinion that Ms. Leochko has chronic pain, which he defined as pain that goes beyond the time that the condition should heal, namely, three months, and that given the length of time since its onset, there was a high probability that it was a permanent condition.

[25] Dr. Johnson last assessed Ms. Leochko on June 26, 2009. He was of the opinion that she had not progressed significantly and that all treatments had failed to give her significant pain relief and a return to functional ability.

[26] He said that generally patients with chronic pain are not able to perform activities on a routine and reliable basis, they have to take breaks, the activity makes them tired, the pain prevents them from sleeping well, they are depressed and their lives are a shambles. He said that those general impairments are what he saw in Ms. Leochko.

[27] In 2010, Ms. Leochko and Kayla moved to Edmonton, She said it took almost a year to get a referral to a pain clinic where she saw Dr. Robert Hauptman.

[28] Dr. Hauptman is a family physician. He was qualified by the court to give expert opinion evidence on chronic pain syndrome or disorder from the perspective of a family physician with a special interest in pain medicine management.

[29] He first met Ms. Loechko in January 2011.

[30] Dr. Hauptman said that Ms. Leochko presented with chronic pain disorder in her neck due to myofascial and mechanical factors.

[31] With respect to the mechanical aspect, Dr. Hauptman felt that the pain was coming from facet joints in Ms. Leochko's spine, based on interventions done by doctors in Winnipeg that pointed to the facet joints as part of the pain generators. When asked whether there was anything observable about the facet joints, Dr. Hauptman said that the problem with chronic pain is that this is not something that can be imaged, that it is coming from the nervous system which does not bode well for imaging.

[32] With respect to the myofacial aspect, he said that this was related to the muscles.

[33] He formed the opinion that, from a temporal relationship, the pain was from the time going forward from the motor vehicle accident and that it appeared to be related to the 2005 accident.

[34] Dr. Hauptman prescribed 10-15 milligrams of Oxycontin, twice a day, plus Percocet for breakthrough pain. He said that the primary goal of the medication was to improve Ms. Leochko's level of function and the secondary goal was to reduce pain. Dr. Hauptman also recommended that Ms. Leochko exercise to improve her over-all level of well being and function.

[35] Dr. Hauptman stated that the vast majority of soft tissue injuries heal within three months and that once the tissue healing happens, the pain turns off. He said that there are people where, despite tissue healing, there are changes to their nervous system. The changes cannot be seen in scans or x-rays. He said that pain beyond tissue healing is chronic pain. He said that a number of years ago, people with chronic pain were labelled as psychiatric. He said, however, that the problem is with the nervous system.

[36] Dr. Hauptman said that although he recommends exercise, which enhances inhibiting chemicals within the nervous system, exercise is a challenge with chronic pain patients because it, together with behaviour modification, is the last thing chronic patients want to do. He said that Ms. Leochko was typical of chronic pain patients in that it was difficult for her to work on exercise and to stop smoking.

[37] He saw Ms. Leochko at three month intervals to re-evaluate her condition, to encourage life style modifications and to evaluate medications. He continues to see Ms. Leochko. He last

saw her in September 2013. He said that her ongoing neck pain is the primary issue he is dealing with. He said that she has been seeing more consistent good days than bad for Ms. Leochko and improvement in function from three to four years ago.

[38] With respect to Ms. Leochko's prognosis, Dr. Hauptman said that there is no known cure and that he expects Ms. Leochko to have chronic pain for the rest of her life. He does not expect her to return to pre-injury function.

[39] Dr. Hauptman said that he knew that Ms. Leochko was alleging that the motor vehicle accident was the cause of her problems. He said that he was more interested in managing her pain and that the cause of her problems was not his primary concern.

[40] He said that he understood that the accident was a rear-end collision, resulting in whiplash. He did not know how fast the defendant's car was going. He said that it was not necessary in coming to his opinion to know the actual mechanics of the accident.

[41] Dr. Mueller is a psychologist. He was qualified by the court to give expert opinion evidence on pain disorder from the perspective of a clinical psychologist with an interest in and experience in healing patients with chronic pain.

[42] Based on his interviews with Ms. Leochko and her responses to symptoms check lists and psychiatric questionnaires, Dr. Mueller diagnosed Ms. Leochko with pain disorder associated with both psychological factors and a general medical condition. He said the psychological factors include chronically depressed mood, fear of pain and pain related health anxiety,

disturbed and non-restorative sleep, low self-esteem and high interpersonal sensitivity, and defeating cognitive behaviours.

[43] To come to the diagnosis, he used the DSM-IV, which is the Diagnostic and Statistical Manual of Mental Disorders, Volume 4, published by the American Psychiatric Association, which he said was a guide for health professionals, especially psychologists and psychiatrists, to assist in describing, classifying and diagnosing disorders recognized by the American Psychiatric Association.

[44] Dr. Mueller recommended psychological treatment, including (a) cognitive behavioral therapy, which he said was talk therapy to help patients identify their thoughts, feelings and beliefs that may be negative, and (b) biofeedback training, which involved monitoring heart rate, sweat glands, muscle tension and other stress related autonomous responses and then teaching the patient to control those responses.

[45] Dr. Mueller said that where there is pain disorder with psychological factors there is almost always depression. In Ms. Leochko's case, he said she had to be treated for pain, depression and sleep problems.

[46] Dr. Mueller testified that there was no evidence that Ms. Leochko had either a Factitious Disorder or that she was malingering. He said that a Factitious Disorder is where a patient consciously or unconsciously feigns symptoms for the purpose of taking on a sick role. He said malingering is where a person fakes symptoms for a monetary gain.

[47] Dr. Mueller said that Ms. Leochko is experiencing some level of functional impairment in most areas of her life, primarily as a result of her perceived pain, depressed mood and disturbed sleep.

[48] He said his opinion was based on information from Ms. Leochko and based on his observations. He said that in his opinion a chronic pain disorder had developed as a consequence of the motor vehicle accident.

[49] He said that because of her pain, he did not find that Ms. Leochko's current functional abilities will likely improve.

[50] He said that chronic pain was a subjective experience, that the diagnosis stems largely from complaints heard from the patient. He agreed that if Ms. Leochko exaggerated or misled, that could affect his opinion. He said that he assumed the truthfulness of what Ms. Leochko was telling him.

[51] He said that when he met with Ms. Leochko he was not trying to figure out what caused the chronic pain but was trying to figure out how to treat it.

[52] Dr. Whittaker is a family physician practicing in Dryden. He was qualified by the court to give opinion evidence on the general health of Ms. Leochko before the accident, the decisions that guided his treatment after the accident and Ms. Leochko's ability to work after the accident, based on his observations, investigations and symptoms as reported by Ms. Leochko.

[53] Dr. Whittaker was Ms. Leochko's family physician from 1995-2010.

[54] Ms. Leochko had laparoscopic surgery for endometriosis sometime before 2000. Dr. Whittaker said that she was managing well between 2000 to 2003. He treated her with anti-inflammatories and birth control pills.

[55] In May 2004, she had numbness in her face after which an MRI was done to rule out Multiple Sclerosis. The MRI was normal.

[56] In July 2004, after Ms. Leochko's separation, Dr. Whittaker prescribed Effexor, which is used to treat anxiety and depression, at a dose of 37.5 mg, which is the lowest dose available.

[57] Dr. Whittaker's clinical record of July 26, 2004 noted that Ms. Leochko was having problems with her energy and concentration, that her mind was in overload. He also noted she was separating and that the separation was amicable. He noted in September 2004 that the Effexor seemed to be helping. He noted that she was "more level", that she still had some night awakenings, that she was still working on her separation, that she knew it would be OK and that her family was noting improvement. He renewed her Effexor at 37.5 mg. In December 2004 he noted that Ms. Leochko was doing well on Effexor, with no side effects and that she was seeing a counsellor, Ms. Karen Little.

[58] On June 13, 2005, two weeks before the motor vehicle accident, Ms. Leochko was still on 37.5 mg of Effexor. Dr. Whittaker noted that the Effexor was working well. He noted that Ms. Leochko was not smoking, her weight was stable but she knew she had to lose weight. Her pap smear exam was normal. Dr. Whittaker was not aware of any difficulties that she had working or with daily activities. He said her presentation as a patient was unremarkable, that nothing stood out.

[59] After the accident, Ms. Leochko was seen by Dr. Whittaker's colleagues at the Dryden clinic. Dr. Whittaker first had contact with Ms. Leochko after the accident on September 14, 2005 when he received a telephone call from her requesting referral to Ms. Karen Little for counselling.

[60] Dr. Whittaker had another telephone call from Ms. Leochko on September 20, 2005 and noted that Ms. Leochko was seeing Ms. Little for depression. She had gone off the Effexor after the accident.

[61] Dr. Whittaker first saw Ms. Leochko after the accident on September 25, 2005.

[62] He took her history of the events of the accident and noted whiplash. He noted that Ms. Leochko continued to have pain in her upper, middle area. She said that she had pain up her neck which was causing her headaches. He prescribed a muscle relaxant and he changed her anti-inflammatory medication. Dr. Whittaker said that seven out of ten would describe her mood. Her Effexor had been increased to 75 mg. once daily.

[63] Dr. Whittaker had his last visit with Ms. Leochko on March 9, 2006. His notes indicated that she continued to have problems with her thoracic spine and could not seem to get loose. She said that physiotherapy was helping her with her neck but that her thoracic spine continued to be problematic. Acupuncture seemed to help for a short while. Dr. Whittaker prescribed some amitriptyline, 10 to 20 mg at bedtime, to see if it could help with her sleep and pain.

[64] On February 9, 2006 another doctor in the clinic increased her Effexor from 75 mg to 112.5 mg.

[65] On May 15, 2006 she was treated by another doctor in the clinic. She was noted to still have trouble with the left side of her neck and shoulder. Her Effexor was increased to 150 mg.

[66] On May 16, 2006, Dr. Whittaker advised Ms. Leochko's lawyer that her prognosis for full recovery was not good, that given the lack of improvement in her spinal symptoms over six months she was likely to have an ongoing problem. He said that Ms. Leochko to his knowledge had otherwise been a very positive and energetic person. He said that there was no doubt that the motor vehicle accident had caused significant and apparently ongoing problems for Ms. Leochko.

[67] On September 24, 2007, Dr. Whittaker wrote to the pain management clinic in Winnipeg asking the clinic to see Ms. Leochko regarding chronic pain. He wrote, in part, "Past medical history shows issues with chronic headaches as well as with endometriosis. There is a history of depression, but that does not appear to have changed with her recent symptoms".

[68] Dr. Schatzker is an orthopedic surgeon. He was qualified by the court to give expert opinion evidence on orthopedic surgery with special emphasis on treating trauma patients and rehabilitation.

[69] Dr. Schatzker met with Ms. Leochko in September 2012 at the request of defense counsel to conduct an orthopedic assessment.

[70] Dr. Schatzker said that there was nothing physical in Ms. Leochko's clinical picture that suggested a pre-existing vulnerability to a worsened outcome, that she was a young woman with a perfectly normal neck. Dr. Schatzker said that if a person did not recover from a soft tissue

injury within the expected time, one had to look for any factors that might influence the cause of the illness, not just at physical factors but also at psychological factors. One had to understand how an individual is able to cope with pain. Dr. Schatzker said that he took note of the fact that not long before the motor vehicle accident, Ms. Leochko underwent a stressful separation, became very depressed and was on anti-depressant medication. He said that individuals with such a history may react adversely to an added injury in their life. He said that Ms. Leochko had told him that she had been very depressed.

[71] Dr. Schatzker said that from an orthopedic perspective, Ms. Leochko does not suffer any type of serious or permanent impairment. He said that as there are no objective findings of any disorder affecting her neck. He said that there is no reason to restrict her activities. He said that providing her with restrictions is deleterious, that it would be suggesting to her that there is something wrong. He said she should be made aware that she would not harm herself with activities.

[72] Dr. Schatzker testified that he thought it was unreasonable for Ms. Leochko to have had 8 rhyotemies, because they did not appear to work. He said that in his opinion the narcotic medications that Ms. Leochko was on were unreasonable, that the medications were not working and that Ms. Leochko was becoming addicted. He said that every effort should be made to get her off the medication.

[73] Dr. Schatzker said that the X-rays, EMG, CAT Scans and MRI were all normal and that there were no findings from these objective tests to support Ms. Leochko's self-perceived levels of impairment. Dr. Schatzker said that Ms. Leochko is a young woman who, from a relatively

minor physical accident, has had a major change in her life and has become incapable of looking after her house and her daughter and going to work. He said that she is living her pain. He said that because she cannot offer a physical explanation, she needs psychiatric help.

[74] Dr. Berger is a psychiatrist. He was qualified by the court to give expert opinion evidence as a psychiatrist with expertise in the diagnosis of and treatment of psychiatric conditions including somatic syndrome and various pain conditions.

[75] Dr. Berger met with Ms. Leochko on April 24, 2013 at the request of defence counsel to conduct a psychiatric assessment.

[76] Dr. Berger said that he shared Dr. Schatzker's concern that there was no major physical cause for Ms. Leochko's symptoms. He also shared Dr. Schatzker's concern about her use of opiate medications. He said that in his review of the medical records he saw no organic reasons for pain complaints. He said that he is convinced that there are psychological reasons for why Ms. Leochko has symptoms, but what those reasons are could take years to find out.

[77] He said that, in his opinion, the bio-feedback activities recommended by Dr. Mueller had no worthwhile medical basis to them and that Dr. Mueller appears to be trying almost anything to help Ms. Leochko. He said that the good intentions are there, but with no good scientific basis.

[78] He said that the idea of myofascial trigger points used by Dr. Johnson had no objective validity and had been invalidated as not worthwhile.

[79] Dr. Berger disagreed with the inclusion of pain disorder in the DSM-IV, because it was purely objective and that it was wrong to make symptoms the basis of diagnosis.

[80] Mr. Winn is a physiotherapist in Thunder Bay. He was retained on behalf of Ms. Leochko's accident benefits insurer to do a functional abilities assessment of Ms. Leochko on May 1, 2007.

[81] From his testing he concluded that Ms. Leochko demonstrated functional abilities of medium level work, consisting of occasionally lifting up to 20 kilograms, plus ability to work 8 hours per shift and within that shift, six hours sitting for up to 60 minute durations, standing four to five hours in 60 minute durations and short distance walking on a frequent basis for four to five hours a shift.

[82] He said that Ms. Leochko was co-operative and gave a complete effort on the testing. He said she reported pain throughout the assessment in the majority of the categories. The pain involved her neck, back and headaches. He said that this was not an assessment of pain.

Positions of the Parties

[83] The defendant submits that Ms. Leochko has failed to establish that as a result of the motor vehicle accident she sustained a serious permanent impairment of an important physical, mental or psychological function.

[84] The defendant submits that if the plaintiff suffers from chronic pain (which the defendant does not concede that she does), the chronic pain was not caused by the motor vehicle accident.

[85] The defendant characterizes the plaintiff as an untruthful, unreliable witness whose evidence should be given no weight. In support of this position, the defendant submits:

- Ms. Leochko was depressed prior to the accident because of her break-up from Mr. Rivalin
- she was on Effexor, an anti-depressant, for that depression;
- she lied at trial about a plan to blow up her house, killing herself, her daughter and her dog after she had gone bankrupt and lost her home;
- she told Dr. Mueller that she had no emotional problems before the accident, information which Dr. Mueller needed as a psychologist to understand her motivation;
- she lied in saying that she moved to Edmonton because her daughter, from age 7 on, feared gang violence in Dryden's high school;
- she stopped working when she knew she would be receiving insurance benefits;
- in 2008, she presented a budget in her ODSP application showing \$60 per month for food, and that same day spent \$34 on fast food and \$40 on liquor;
- from May 2008 to May 2009 she regularly purchased alcohol when she was receiving ODSP;
- in June 2008 when she filed for bankruptcy, she prepared a budget which showed no expense for alcohol but the next day spent \$39 on alcohol;

- in her bankruptcy proceedings she valued her car at \$5,600, rather than \$8,000, which was the value she assigned to it on her ODSP application so that it would be an exempt asset;
- she was selective in the information she gave to ODSP, CPP and Dr. Mueller;
- she told Dr. Johnson that the accident occurred when she was hit from behind at “full speed” when the police report showed the defendant’s vehicle travelling at 20km. per hour on impact in a 50 km. zone;
- she was inconsistent in her answers to questionnaires from Dr. Mueller and Dr. Johnson;
- she said that she was getting worse, although in 2007 she told Dr. McCormick, an orthopaedic surgeon retained by her accident benefits’ insurer, and Mr. Winn, also retained by her insurer, that she was 75% better;
- all objective medical tests have been normal;
- Ms. Lochko was not compliant with the recommendations of Dr. Mueller and Dr. Hauptman to exercise, engage in activities and follow a healthier diet;
- She obtained significant OSAP funding in 2007 and 2008, but made no effort to complete her studies.

[86] The defendant submits that the plaintiff’s conduct during the past eight years has been motivated by her desire to receive ongoing income replacement benefits from her insurer and ultimately a large award against the defendant’s insurer.

[87] The defendant submits that none of the plaintiff's treating physicians nor her psychologist can give an opinion on causation because they did not have the plaintiff's complete medical history nor an accurate history of the accident and, as a result, did not understand the plaintiff's motivation to lie and exaggerate in order to obtain a large settlement or award at trial.

[88] The plaintiff submits that she has sustained a serious permanent impairment of an important physical, mental or psychological function as a result of the accident of June 30, 2005.

[89] The plaintiff points to the fact that all her treating physicians and her psychologist are of the opinion that she has chronic pain caused by the accident. The plaintiff submits that she was found credible by both the defense medical experts.

[90] The plaintiff responds to other of the defendant's submissions:

- she was not depressed before the accident, but rather was experiencing stress and anxiety for which she was prescribed a low dose Effexor;
- she did not lie at trial about her suicidal ideations in 2008. She had discussed these thoughts in her examination for discovery;
- Ms. Leochko's mother confirmed that the move to Edmonton was done for Kayla's sake. Kayla received a scholarship for school in Edmonton;
- she would not have chosen to live the way she does for the past eight years in the hopes of obtaining a settlement or damage award;

- although she initially returned to work when she did not know that she had income replacement benefits, she again attempted to return to work after she became aware of those benefits;
- she explained at trial that the entries in her bank statements regarding alcohol often related to purchases that she made for family and friends who reimbursed her;
- with respect to her ODSP and her application budget of \$60 per month for food, she was living with her parents who assisted her and who reimbursed her for expenses she incurred for their benefit, including alcohol. Ms. Leochko's mother was not cross-examined by the defendant on this issue;
- with respect to her OSAP monies, Ms. Leochko attempted schooling but could not continue with it because of the pain;
- she did not know of the value of her car when she informed ODSP of its value and she relied on the Trustee in Bankruptcy who valued the vehicle for the purposes of the bankruptcy;
- when Dr. Johnson first gave his opinion on the cause of Ms. Leochko's chronic pain, he did not refer to the speed of the defendant's vehicle;
- although she did not advise Dr. Mueller that she had emotional problems before the accident, she was on Effexor only for anxiety and at the lowest possible dose;

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- her comments to Dr. McCormick and Mr. Winn about being 75% better were only at a single point in time. Mr. Winn noted that Ms. Leochko reported pain during most of the functional testing. He did not follow up the next day;
 - chronic pain, by definition, is not supported by objective findings at the site of the injury. In any event, Dr. Johnson reported on objective, autonomous reactions by Ms. Leochko during his trigger point needling of her ligament and muscles;
 - Dr. Mueller testified that although Ms. Leochko was not compliant with his recommendations concerning exercise, activities and nutrition, this was something that it was difficult for most chronic pain patients to comply with.

[91] The plaintiff notes that the defendant called no experts on chronic pain, whereas the plaintiff called three experts in that area, all of whom supported the plaintiff's position, as well as her family physician who was well acquainted with the plaintiff's pre-accident health. The chronic pain experts who testified each found the plaintiff to be credible and made the following assumptions that the defendant had not shown were wrong:

- prior to the accident, the plaintiff was healthy, working, active, social, and managing her affairs;
- she was involved in a motor vehicle accident where she was hit from behind with a significant impact and pushed into another vehicle, resulting in a second impact;
- since the accident, she has made consistent reports about her symptoms;

- since the accident, there has been no intervening event or trauma to cause her complaints.

Discussion

[92] Although this is a motion by the defendant, and the defendant has placed the credibility of the plaintiff squarely in issue, the onus of proof remains on the plaintiff to establish on the balance of probabilities that she has suffered a serious permanent impairment of an important physical, mental or psychological function. See *Meyer v. Bright*, [1993] O.J. No. 2446 (C.A.), at paras. 50-52.

[93] This is a chronic pain case. The Supreme Court of Canada in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504 (S.C.C.), at para. 1 made the following observations on chronic pain:

“... There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real. While there is at this time no clear explanation of chronic pain, recent work on the nervous system suggests that it may result from pathological changes in the nervous mechanisms that result in pain continuing and non-painful stimuli being perceived as painful. These changes, it is believed, may be precipitated by peripheral events, such as an accident, but may persist well beyond the normal recovery time for the precipitating event. Despite this reality, since chronic pain sufferers are impaired by a condition that cannot be supported by objective findings, they have been subjected to persistent suspicions of malingering on the part of employers, compensation officials and even physicians.”

[94] The existence of objective findings is not necessary. The nature of chronic pain is such that a diagnosis is based on the patient's subjective complaints. However, if the plaintiff's self-reporting of pain and resulting limitations is not credible, that would undermine the evidence of

her treating physicians and psychologist whose opinions that the plaintiff suffers from chronic pain and that the chronic pain is debilitating, are largely based on what they were told by Ms. Leochko.

[95] As noted by O'Halloran J.A. in *Faryna v. Chormy*, [1951] B.C.J. 152 (C.A.), at paras. 10-12, in assessing the credibility of a witness, the test is whether the evidence of that witness is in harmony with the preponderance of probabilities in the case.

[96] I have come to the conclusion that Ms. Leochko has chronic pain, that the chronic pain would not have developed but for her accident and that the chronic pain meets the threshold of a serious permanent impairment of an important physical, mental or psychological function.

[97] Dr. Johnson is an expert on chronic pain. With one exception, his understanding of the events surrounding the accident are in accord with the evidence at trial. The one exception is the speed with which the defendant's vehicle struck the rear of Ms. Leochko's vehicle. In a report dated February 18, 2013, Dr. Johnson stated that it was his understanding that Ms. Leochko's vehicle was struck from the back at "full speed". Ms. Leochko was unable to say how fast the defendant's vehicle was travelling but agreed that she had no basis to dispute a speed of 20 km. per hour as noted in the police motor vehicle accident report. The speed limit in the area of the accident was 50 km. per hour. The evidence therefore did not show that the defendant's vehicle was at "full speed" in relation to the speed limit.

[98] However, there is no dispute that Ms. Leochko suffered a whiplash injury as a result of the accident, whether the defendant's vehicle was travelling 20 km. per hour, or 50 km. per hour

or at “full speed”. The impact was sufficient to cause Ms. Leochko’s vehicle, with the brakes applied, to slide forward and strike the rear of the vehicle in front of her.

[99] Dr. Shatzker, the orthopaedic surgeon retained by the defendant, was of the opinion from his review of the medical records that Ms. Leochko sustained a moderate soft tissue injury, a myofascial strain including muscles and connective tissue. He said that her symptoms were common for such an injury, headaches, nausea, dizziness, neck pain radiating to her shoulders and tingling and numbness of her left arm and fingers.

[100] Dr. Johnson said that a full speed impact was not necessary to support his findings. He said that at 20 km. per hour, a whiplash injury could certainly happen. Whatever speed the defendant may have been travelling, Dr. Shatzker, who as an orthopaedic surgeon would have the greatest expertise to speak to this issue, was in no doubt that the accident did in fact cause a whiplash injury.

[101] In my view, whether a collision at “full speed” would have caused a more severe whiplash injury is of no consequence. The issue is not the severity of the whiplash and whether Ms. Leochko should have objectively recovered from the soft tissue injuries of the whiplash injury. Her soft tissue injuries had objectively resolved. That was not in dispute. The issue is, did she develop chronic pain that originated with whiplash notwithstanding that the soft tissue injuries had healed?

[102] Dr. Johnson was of the opinion that it is highly probable that all of the ongoing pain and function limiting symptoms experienced by Ms. Leochko were a direct result of the accident of June 30, 2005.

[103] The defendant submits that Dr. Johnson seemed oblivious to the argument that the ongoing insurance payments that Ms. Leochko was receiving provided significant incentive to place blame while she lived in denial of what the defence says was her longstanding depression that was not altered by the motor vehicle accident.

[104] Essentially, the defendant is accusing the plaintiff of malingering. Malingering, as described by Dr. Mueller, is faking symptoms for monetary gain.

[105] Dr. Berger, the psychiatrist retained by the defendant, who would have the expertise to speak to malingering, was quite certain that Ms. Leochko was not malingering. He said that he did not believe “for a moment” that she was lying. Although he saw no organic reasons for pain complaints and was convinced that there were psychological reasons why she had symptoms, malingering was not one of those reasons. Similarly, Dr. Shatzker, testifying as an expert for the defendant, said that he found Ms. Leochko credible and that she was not trying to exaggerate her symptoms. He said that she perceived pain and impairment, that she believes she is in pain, albeit he found no anatomical support for that pain.

[106] Dr. Mueller, as a psychologist who like Dr. Berger would have expertise to speak to malingering, was of the opinion that Ms. Leochko is not malingering and did not suffer from Factitious Disorder,

[107] All of Ms. Leochko’s treating physicians found her credible.

[108] In the face of medical, psychiatric and psychological evidence that Ms. Leochko was not lying about her symptoms, is there other evidence from which to conclude that

notwithstanding the evidence of the plaintiff's experts and the defence expert's Ms. Leochko is faking her symptoms for monetary gain. In my view, although there are inconsistencies in Ms. Leochko's evidence, those inconsistencies are not sufficient to lead me to conclude that the unanimous opinion of the experts on this issue is wrong.

[109] A significant aspect of the defendant's criticism of Ms. Leochko is that she did not reveal to her treating doctors that she was depressed before the accident. The defendant refers to the letter of Dr. Whittaker of September 24, 2007, to the pain management clinic in Winnipeg, that stated in part "There is a history of depression, but that does not appear to have changed with her recent symptoms." The defendant submits that this indicates that Dr. Whittaker diagnosed depression prior to the accident. The defendant also notes that after the separation Ms. Leochko was on Effexor, which is an anti-depressant.

[110] However, in his testimony, having reviewed Ms. Leochko's clinic notes and records, and having seen her as recently as two weeks before the accident, Dr. Whittaker said that he was not aware of any difficulties that Ms. Leochko had working or with her daily activities and that her presentation as a patient was unremarkable, that nothing stood out.

[111] The Effexor prescribed before the accident was at the lowest possible dose, a level which according to Dr. Johnson probably had little effect.

[112] There is nothing in Dr. Whittaker's notes prior to the accident to indicate that he had diagnosed depression. At trial, there was nothing in his evidence in chief or in cross to indicate that he had diagnosed depression before the accident.

[113] His notes indicate that Ms. Leochko's separation was "amicable". This was confirmed by Ms. Leochko. Ms. Berg said that Ms. Leochko's separation was a positive move and that Ms. Leochko was much happier after the separation. Ms. Leochko testified that the break-up was amicable, albeit stressful, and that the Effexor was for anxiety.

[114] Dr. Mueller was not told by Ms. Leochko of her anxiety before the accident, nor of her pre-accident use of Effexor. However, he said that when he later learned of it, it did not affect his opinion because there was no evidence that she was receiving Effexor for depression. He understood Dr. Whittaker's letter of September 24, 2007 as speaking to post-accident depression.

[115] In my view, although Ms. Leochko was on Effexor for anxiety and stress before the accident, I do not find that she was depressed as of June 30, 2005 or that her treating physicians were misled in that regard. The evidence of Ms. Berg, Dr. Whittaker, Mrs. Leochko and the information in Ms. Leochko's employment records all indicate that Ms. Leochko was functioning well at the time of the accident.

[116] I accept that Ms. Leochko can be criticized for not disclosing to ODSP and to her Trustee in Bankruptcy that she was buying alcohol and fast food when she was representing her financial circumstances as dire. However, that does not alter the fact that her financial circumstances were dire – she had been cut off her income replacement benefits; she was bankrupt. I do not find this to be so significant that I should therefore disbelieve the symptoms she reported to her doctors. Ms. Leochko did explain that while she lived with her parents, she bought alcohol and fast food for her family and friends for which she was reimbursed. Ms. Leochko's mother was not challenged in cross-examination on that issue.

[117] I give little weight to the fact that in 2008 she valued her 2000 Honda Civic at \$8,000 in her ODSP application and then a month later valued it at \$5,600 in her bankruptcy proceedings. There was no evidence what her eight year old compact car was worth. Ms. Leochko said she relied on her Trustee in Bankruptcy. Her vehicle may well have had a market value of \$5,600 or even less. Her Trustee was likely better able to value the vehicle than was Ms. Leochko.

[118] The defendant was very critical of Ms. Leochko's evidence at trial about suicidal ideations, with thoughts of blowing up her house with a gas barbeque, killing herself, Kayla and her dog. The defendant described this as "shameless", by which I assume that he meant it was an attempt to elicit sympathy from the jury. The defence submitted that this contradicted her evidence on discovery. However, at discovery Ms. Leochko did speak about suicidal ideations and "almost a plan". Her thoughts of suicide were confirmed by her mother's testimony.

[119] The defendant was critical of Ms. Leochko's receipt of OSAP funding and alleged she made no effort at education and simply spent the OSAP money. Ms. Leochko testified that she used some of the funding for tuition and books, tried to pursue a psychology degree on-line with the University of Athabasca, but that she could not concentrate on the materials because of her pain.

[120] Although I found to be somewhat puzzling Ms. Leochko's evidence that, beginning in Grade 2, Kayla expressed fears about going to high school in Dryden because of "gangs", and that Kayla was therefore set on moving as early as age 7, the fact is that before the move to Edmonton Kayla received a scholarship at an Edmonton high school, which suggests she did want to move. In addition, Ms. Leochko's mother confirmed that Kayla wanted to move from

Dryden. Ms. Leochko's explanation that she herself wanted to move because there were more opportunities and more cultural activities in Edmonton for Kayla is not unreasonable.

[121] In my view, it would be too great a leap to conclude that Ms. Leochko was malingering and that she was misleading her doctors from the evidence of alcohol and fast food purchases, car valuations, suicide ideations, OSAP funding, the separation from Mr. Rivalin with associated emotional problems, the description of a "full speed" impact, and the explanation of the move to Edmonton.

[122] It is also my view that the theory of the defendant, that Ms. Leochko was lying for financial gain is not in harmony with the preponderance of probabilities in the case.

[123] At the time of the accident, Ms. Leochko had a job in which she was very happy. According to Ms. Berg, whom I found to be credible and reliable, Ms. Leochko had enormous potential, got on well with her co-workers and thrived in her job. Ms. Berg said that Kenora Housing "guaranteed" its contract employees that they would have positions with Kenora Social Services after amalgamation. Ms. Leochko owned her own home. She was social. She had friends. She had normal energy levels. She managed the daily activities of living. There is nothing that would reasonably lead one to conclude that she may have been looking for a way out of her circumstances.

[124] After the accident, she tried to return to work, she went to physiotherapy, massages, her family physicians and counselling. She then made four hour trips to and from Winnipeg where she underwent nerve blocks, which were uncomfortable. She then underwent even more painful rhystomy treatments, eleven in total. Her income replacement benefits were terminated and not

restored for two years. She went on social assistance. She went bankrupt. She lost her house. She has been to approximately 140 medical appointments. Her life became, in the words of Dr. Johnson, “a shambles”. Her present accident benefits and CPP benefits are approximately half of what she could reasonably be earning according to the evidence of the plaintiff’s economist. After payment of her rent, she is left with slightly more than \$700.00 per month.

[125] I do not find it plausible that Ms. Leochko would have planned to give up the life she had on June 30, 2005, and the life she could reasonably have expected to have in the future, in exchange for eight years of the life that she has had, in a deliberate scheme of lies and deception, of manipulating experienced physicians, with the expectation, but with no certainty, that she would receive a settlement or award that would make it all worthwhile.

[126] On the balance of probabilities, I find that Ms. Leochko suffers from chronic pain and that her chronic pain would not have happened but for the accident.

[127] If one accepts the validity and accuracy of Ms. Leochko’s subjective complaints, then the requirements of s. 4.2(1) of O. Reg. 491/96 are also satisfied. I accept the evidence of Dr. Mueller, Dr. Hauptman and Dr. Johnson, set out above, as regards Ms. Leochko’s limitations, the importance of the functions which have been impaired and the permanence of the impairment.

[128] It is apparent that my ruling on the motion is based on conclusions that are different than the conclusions of the jury, who awarded Ms. Leochko \$10,000 for general damages, \$14,521.21 for past loss of income, nothing for future loss of income and nothing for future care costs.

[129] However, as observed by Leach J. in *Mayer et al v. 1474479 Ontario Inc. et al*, 2013 ONSC 6805, at paras. 44-45 and 50, the overlap arising out of the relation between the jury's verdict and the judge's threshold determination:

"44. ... gives rise to the distinct possibility that a jury, charged with factual determinations in such cases, and a trial judge, charged with making a legal threshold ruling effectively requiring underlying factual determinations of a similar nature, may perceive such matters differently and arrive at separate conclusions that appear to be inconsistent.

45. However, that is an unavoidable reality of our jury system and the superimposed legislative scheme now embodied in the threshold provisions of the *Insurance Act, supra. ...*"

[130] I also adopt as applicable in this case, the words of Leach J. at para. 50:

"50. While the jury may have taken a different view than mine or *vice versa*, that does not mean the jury's view was unreasonable. As the trier of fact, the jury was perfectly entitled to reach its own independent and different assessments of credibility and for causation, based on its view of the evidence."

[131] The defendant's motion is dismissed.

[132] Judgment shall be entered in accordance with the answers given by the jury, namely:

- (1) General damages - \$10,000;
- (2) Past Loss of Income - \$14,521.21;
- (3) Future Loss of Income - \$Ø.00;
- (4) Future Care Costs - \$Ø.00.

[133] If the parties are unable to agree on the costs of this action, including the defendant's threshold motion, they shall contact the Trial Co-ordinator within 30 days to set a date to speak to the issue.

"original signed by"
The Hon. Mr. Justice D. C. Shaw

Released: December 20, 2013

CITATION: Leochko v. Rostek, 2013 ONSC 7899
COURT FILE NO.: CV-07-0267
DATE: 2013-12-20

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

STACEY LEOCHKO

Plaintiff

- and -

RICHARD ROSTEK

Defendant

DECISIONS ON MOTIONS

Shaw J.

Released: December 20, 2013

/mls