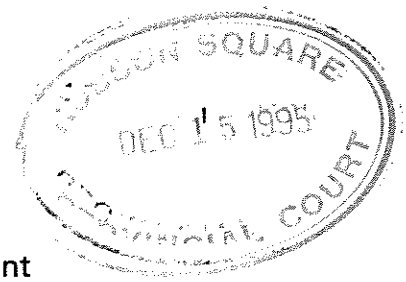
Vancouver Registry
No. C93-05913

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

CIVIL DIVISION

Between:	)	
	)	**AMENDED**
CHARLES PAYNE	)	
	)	**REASONS FOR JUDGMENT**
Claimant	)	
	)	**OF THE HONOURABLE JUDGE**
And:	)	
	)	**C.L. BAGNALL**
VIRGINIA MCDADE	)	
	)	
Defendant	)	



Appearances:

Mr. P. Kent Snowsell	Counsel for the Claimant
Mr. Scott McDonald	Counsel for the Defendant

Date of Hearing:	November 8, 1995
Date of Judgment:	November 24, 1995
Date of Amendment to Judgment:	December 14, 1995

The Claimant sues the Defendant for damages arising from a motor vehicle accident of a type commonly referred to as a "rear-ender" which occurred on November 6, 1991. Liability for the accident is admitted by the Defendant. The outstanding issues are causation and quantum of damages.

The Claimant's position is that as a result of the accident he suffered injury to the soft tissue of his neck. The Defendant resists the claim, asserting that the impact was minimal and could not have caused the injury described by the Claimant. In essence, the Defendant challenges the credibility of the Claimant on the basis that

common sense demands the conclusion that the Claimant is fabricating or exaggerating his injuries when the actual damage to the vehicles is considered.

The evidence presented by counsel for the Claimant included testimony from the Claimant and his friend, George Stubos, who was the driver of one of the vehicles involved in the collision, and also clinical notes and two reports from the Claimant's doctor.

The evidence presented by counsel for the Defendant was comprised of the testimony of the Defendant and of an engineer, Jonathan Gough, as well as a series of photographs of the vehicles and documents relating to the repairs to the vehicles.

I have considered all of the evidence although I do not intend to refer to all of the evidence in detail in these reasons.

The Claimant, Charles Payne, is a 33 year old private investigator who completed his Bachelor of Arts degree at the University of British Columbia in 1987. He was unemployed at the time of the accident. His main occupation, apart from work, is karate, a sport at which he excels.

When the accident occurred Mr. Payne was the front seat passenger in the vehicle owned and driven by his friend, George Stubos. He had no warning of the impending collision. Mr. Payne had his head turned to his left to speak with Mr. Stubos at the point of impact (he has a prosthetic left eye and so commonly turns his head in this fashion to speak to someone situated to his left). He was wearing his seat belt. The impact threw him back against his seat as the car was pushed approximately two feet forward.

Mr. Payne told the Court he was injured as a result of the accident. He consulted his doctor only twice because he was unhappy with his doctor's attitude towards his complaint. I am satisfied Mr. Payne does not attend his doctor often in any event on the basis of the contents of Exhibit 1. The symptoms described by Mr. Payne do not bear recitation in detail. It is sufficient to describe his injury as in the upper end of the range of mild whiplash injuries. His discomfort persisted for some months and his activity level was affected for much longer, but he was not disabled nor in significant pain at any time.

George Stubos is a 29 year old stockbroker. He described the accident in much the same way as Mr. Payne did. He was able to see the McDade vehicle approaching in his rearview mirror and so was aware of the imminent impact. He described the resulting sore back and neck and headaches. He attended a massage therapist to alleviate his symptoms. Mr. Stubos could not tell the Court how long his difficulties persisted because he was injured more seriously in another accident some two months later, which effectively disguised the original injury.

Virginia McDade, the Defendant, described her speed as slow due to falling rain and slick conditions just before the impact. She said she applied her brakes but could not stop in time. Her front bumper slid under the rear bumper of Mr. Stubos' Acura. She said the impact was "more of a slide than a bang" and that she was not injured.

There is no doubt that the force of this collision was minor. That conclusion is supported by all of the testimony of the three occupants of the two cars and by the photographs of the damage to the cars and the documentation regarding repairs of the vehicles.

The Defendant presented the evidence, both in report form and in *viva voce*

testimony of Mr. Jonathan Gough, to convince the Court that an accident of this minor nature could not have caused the injury described by Mr. Payne.

Mr. Gough had available to him the statement of Mr. Payne, I.C.B.C. estimates of damage (CL14's) and photographs of each vehicle; he had access to the McDade vehicle eight months subsequent to the accident, after repairs had been effected; he had no access to the Stubos vehicle but he did happen to own a 1991 Acura Integra so he made measurements on that vehicle to assist him in preparing his report.

I have reluctantly concluded that I cannot rely on the opinion evidence given by Mr. Gough. Mr. Gough's conclusions are stated as follows:

> "1. The 1991 Acura Integra driven by George Stubos sustained a rear impact which would have resulted in a speed change of 7.5 km/h or less.
>
> 2. The forces which the vehicle occupants would have experienced would at most have been sufficient to cause their heads to be displaced rearward into contact with their headrests and rebound forward. The range of cervical extension and cervical flexion which the vehicle occupants would have experienced would have been well below the levels which researchers have associated with injury.
>
> 3. The collision forces involved in this incident would have been within the range which could be experienced during an amusement park bumper car ride."

His opinion as to the speed change of the Acura forms the foundation for his opinions as to the "occupant dynamics" and the potential for injury. He determined first the speed change of the McDade Mercedes by observing the score marks on the front bumper isolators. The reliability of those marks as indicators of the force of this impact is suspect for the following reasons:

1. The marks were observed by Mr. Gough eight months after the accident. No comment was made as to whether or not this would affect the marks, nor as to whether or not Mr. Gough knew of any intervening blows to that bumper.
2. The marks observed by Mr. Gough were on both isolators, but the CL14 for the Mercedes, completed six days after the impact and which Mr. Gough had, refers clearly to marks on only the left isolator, and to a much longer mark than those described by Mr. Gough (12.7 mm. as opposed to 2-4 mm.) This discrepancy was never addressed by Mr. Gough prior to forming his opinion.
3. Mr. Gough was asked in cross-examination if it was his view that he should have tested the isolators to ensure they were functioning correctly and were fully returned to their original extended length before relying on measurements of score marks on the isolators as an indicator of the force of the impact. He said this was correct procedure if the isolators were not equally marked, which is his view the Mercedes isolators were. In light of the information in his possession from the ICBC estimator, it is my view that Mr. Gough should have tested the Mercedes isolators in accordance with proper procedure. This he did not do.
4. In order to assess the force required to move the Mercedes isolators the distance he measured, Mr. Gough had to refer to studies by other researchers. None of those studies included testing of a bumper of a Mercedes vehicle, so Mr. Gough assumed that its isolators were no more resistant than the most resistant of the tests he perused. He could not legitimately make this assumption. The next step in his analysis required that Mr. Gough determine the ratio of weights of the Stubos Integra to the McDade Mercedes. Again he referred to charts and tables for these weights, which in my view reduces the reliability of his conclusion. He had no knowledge of the actual weight of either vehicle.

In view of all of these difficulties Mr. Gough's opinion as to the precise force of the impact must be discarded. His comments about occupant dynamics and potential for injury flow from his conclusion about the force of the impact and must also be discarded.

There were other difficulties with Mr. Gough's testimony which in my view necessitate comment.

Mr. Gough made assumptions which he should not have made. He used measurements from his own vehicle to determine the level of head support available in the Stubos vehicle. He should not have assumed that the cars were identical. He assumed a height of 185 cm. for Mr. Payne which was corrected in an addendum, but to a still incorrect figure. He should not have made such an assumption in his original report when it is clear that stature relative to headrest support is a factor in the potential which exists for neck injury.

Mr. Gough relied on the results of research conducted by his own firm in reaching his conclusions. He did not volunteer but acknowledged in cross-examination that all of the volunteer test subjects for that research were employees of his firm and that he himself was one of the test subjects.

Mr. Gough did not volunteer but acknowledged in cross-examination that research demonstrates a greater potential for neck injury where the occupant's head is turned at the point of impact. Mr. Gough did not volunteer but acknowledged in cross-examination that injury can occur even within the normal range of motion for the human neck. These acknowledgments are rather surprising in light of the definite and sweeping nature of Mr. Gough's reported conclusions as set out above and cause concern about his impartiality as an expert witness.

A further example of difficulties is Mr. Gough's use of the article "Speed Change (V) of Amusement Park Bumper Cars" by Gunter P. Siegmund and Peter B. Williamson. At page 5 of his report Mr. Gough writes:

> " Siegmund et al have reported that amusement park bumper car impacts resulted in speed changes to the struck car of up to approximately 8 km/hr. There was no head support provided by the seats in the bumper car. Significantly, none of the subjects involved in these tests reported any injury. The impact experienced by the Stubos Acura should have been within the range which could occur in an amusement park bumper car ride."

His point is a significant one and it is based on this article. In cross-examination it became evident that Mr. Gough has in part misrepresented the article and that for the most part he disagrees with it. First of all there were only <u>two</u> subjects used in the research by Siegmund and Williamson which makes puzzling his use of the word "none" in the section of his report quoted above. Second, only one of the subjects experienced any movement of his head in the measured tests <u>because the other subject braced himself</u>, which would certainly explain the lack of injury.

Third, the article itself is phrased in cautious terms and the authors make a point of noting the differences between the bumper car experience and that of the occupant in a vehicle during an accident. Mr. Gough makes mention of none of this when he compares the impact he concluded Mr. Payne experienced to that of a bumper car rider. His trivialization of the impact of the Stubos and McDade vehicles in this fashion is utterly inappropriate in light of the following comments in the article itself. The emphases are mine.

> "Some occupants in low-speed rear end impacts experience a consistent combination of soft tissue injuries despite the absence of damage to their vehicles. These injuries are primarily to the cervical spine, but secondary injuries such as pain radiating to the shoulders and upper limbs as well as low back pain are also reported. Although a significant amount of work has attempted to unravel the apparent disparity between vehicle

impact severity and occupant injury, there is still no general consensus regarding the injury mechanism."

at page 1.

"The number of variables at play in a complete analysis of a low-speed rear end impact, including impact severity, seat back stiffness, occupant/seat interaction, initial occupant position and preparedness, and occupant neck strength, makes a detailed analysis of any specific rear end collision extremely difficult to model or replicate."

"... staged collisions are performed to reproduce damage or isolator compression. This establishes the severity of the impact for the automobile, but extending this information to a determination of occupant injury potential is difficult, and frequently subjective."

at page 2.

"Occupant B's post-impact motion was recorded in tests 4 and 10. Because of pre-impact tensing of the neck and a pre-impact head opposition rotated well forward of vertical, no head or torso rotation rearward of vertical was recorded for occupant B in either test. This illustrates one person's ability to resist head motion in anticipated low speed impacts." (I pause in my reference to specific comments in this article to note that Mr. Gough is of the opinion that preparedness is not a factor in occupant dynamics, which opinion he does not qualify by referring to contrary views such as this one.)

at page 6.

"Although the vehicle dynamics of bumper car collisions are similar to automobile collisions, the occupant dynamics may not be ... The influence of seat back height and stiffness on occupant dynamics and injury potential is not fully understood, primarily because the exact nature of the injury is still not fully understood."

at page 8.

"Some level of preparedness must also exist in any patrons of bumper car rides at amusements parks ... This anticipation of an impact differs largely from the experience of many occupants in low-speed rear end automobile collisions. The use of these results to assess the injury potential for motor vehicle occupants must account for this difference."

at page 9.

For Mr. Gough to make use of these test results as a foundation for his conclusions without referring to these cautions regarding the distinction between the bumper car experience and the experience of a low-speed rear end accident is nothing short of unprofessional and might very well be seen as a deliberate attempt to mislead the court.

I am satisfied that the injury described by Mr. Payne was caused by this accident. I can see no basis in the evidence for any doubts about his credibility. The cases referred to by counsel set out the range of award for this sort of injury. There will be judgment for the Claimant in the amount of $6,000.00 together with (deletion) service and filing fees of $105.00.

I was asked to consider penalizing the Defendant under Rule 20(5) of the Small Claims Rules. I have concluded that is would not be appropriate to do so. The effect of such a penalty would be to punish the Defendant (or counsel for the Defendant) for proceeding on the basis that Mr. Gough's opinion had validity.

C L Bagnall

The Honourable Judge Conni L. Bagnall
Provincial Court Judge

December 14, 1995