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No. B904266

VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:)

) **REASONS FOR JUDGMENT**

FOTEOS MASSOURAS, also known)

as FRANK MASSOURAS)

) **OF THE HONOURABLE**

PLAINTIFF)

)

AND:) **MADAM JUSTICE**

)

WAYNE TIMOTHY LUCIER)

) **KIRKPATRICK**

DEFENDANT)

Counsel for the Plaintiff

E.P. Good

Counsel for the Defendant

W.H. Bradbrooke

T.H. Pettit

Dates and Place of Trial

February 6, 7, and 8, 1995

Vancouver, B.C.

1 Mr. Massouras was injured in a motor vehicle accident on November 6, 1989. He suffered soft tissue injuries to his left shoulder and shoulder blade area, and the area above the left collarbone. Mr. Massouras has consistently complained of pain in the affected areas since the date of the accident five and a half years ago. He says that the pain prevents him from working and participating in the social activities he enjoyed prior to the accident. He brings this action for damages. Liability is admitted.

THE FACTS

2 On November 5, 1989, Mr. Massouras was driving his 1977 Ford Econoline van on the King George Highway in Surrey. He was stopped at a red light when a car behind him rear-ended his van. His van was pushed forward approximately 10 feet. The damage, mostly to the rear of his van, cost \$1,500.00 to repair. Upon impact, Mr. Massouras was looking straight ahead. His body was flung back and then forward. He was wearing a three point seat belt,

but the seat of the van had no headrest. He described feeling a thud to the spine, and a few minutes after the motor vehicle accident experienced pain in his left neck, shoulder, leg, and knee.

3 At the accident scene, Mr. Massouras called the police three times to attend. When the police failed to appear after he waited 45 minutes, he left.

4 That evening he slept, but woke up approximately three times with pain in his left neck and knee. The following day he worked at his job as a commercial painter until noon and then decided to see his doctor, Dr. Kerins. Dr. Kerins made a diagnosis of soft tissue injuries and ordered x-rays. He advised Mr. Massouras to take pain killers if necessary.

5 Mr. Massouras returned to work on November 7 and 8. He was still experiencing what he described as a lot of pain in his neck and upper back. On November 8 he worked until lunch, and after discussing the matter with his doctor, was advised to remain off work.

6 In the years since the motor vehicle accident, Mr. Massouras has received intensive and extensive treatment for his injury. He has seen his family doctor, Dr. Kerins, more than 150 times, each time complaining of pain in the left shoulder area and the left collarbone area. Dr. Kerins referred him to or recommended physiotherapy, chiropractic treatments and acupuncture treatments. Mr. Massouras has had 166 physiotherapy treatments. By February 23, 1992, Mr. Massouras had received 70 chiropractic treatments.

7 By April, 1994, Mr. Massouras was still complaining of pain in the left shoulder and scapular area. Dr. Kerins reported that:

He complained that he could not work, his sleep was disturbed and he felt quite depressed. He was very concerned that five years had now elapsed since his injury with no improvement. I explained to him in detail that I could not find any medical reasons to explain his symptoms at this stage, five years after his accident.

8 In a medical/legal report dated June 9, 1994, Dr. Kerins reported that:

I will now try to deal with the prognostic aspect of Mr. Massouras' case. In my letter of 17 May 1993, I pointed out that Mr. Massouras would make a complete recovery. However, in the intervening time he has not made this recovery. Mr. Massouras' case is very difficult in terms of his consistently complaining of pain in the shoulder and scapular area. We have tried many methods of treatment and have undertaken many investigations, all of which have not been helpful with respect to determining the cause and alleviating this man's pain. At this time I have carefully considered Mr. Massouras' problem, and I cannot recommend any further investigations or treatment. His case is unusual with respect to the length of his symptomatology. Most cases of soft tissue injury resolve and recover over periods ranging from six months to a year to possibly a year and a half. However, this man is now five years post-MVA. I have been observing Mr. Massouras and examining him at quite regular intervals, and I feel it is very difficult to give a prognosis in his case. The problem here is that Mr. Massouras complains consistently of pain in the affected areas since his MVA. He did not suffer from pain before the accident, and was employed on a regular basis. Therefore, I feel that we have nothing more to offer him from a medical point of view. There are no other tests or investigations which we can carry out, and I feel that all I can do is to observe him over the next period of time and hope that he will make a recovery.

9 In addition to the constant care provided by Dr. Kerins, Mr. Massouras was also examined by Dr. Beckman, a neurologist, in July, 1990. Dr. Beckman found Mr. Massouras' neurological exam to be normal. He found no obvious spasm present and determined that he had a full range of passive head

motion.

10 In June, 1991, Mr. Massouras was examined by Dr. MacNeil, an orthopaedic surgeon. Dr. MacNeil noted that Mr. Massouras "seems to have a fair amount of faith in his chiropractor, but very little faith in anybody else that had anything to do with his management." He found that Mr. Massouras had continuing discomfort related to his neck with no objective abnormal physical findings in this area.

11 In June, 1991, Mr. Massouras was examined by Dr. Vondette, a specialist in physical medicine and rehabilitation. Dr. Vondette's 16 page report is a thorough review of Mr. Massouras' medical history to June, 1991, in relation to the motor vehicle accident. His advice to Mr. Massouras was as follows:

I stressed to Mr. Massouras that if there was a word that summarized what needed to happen to relieve the deconditioning of his neck, it was "reconditioning", and that in order to achieve such reconditioning, he had to come to see himself as being the most important part of the treatment process (rather than thinking of chiropractor "adjustments" or physiotherapy "treatments", or perhaps some pill as being the most important part of the process). I stressed to him that what always had to be kept in mind was that pain, admittedly his key symptom, was merely a byproduct of dysfunction - the dysfunction being related entirely to the presence of contracture, disuse weakness, and maladaptive posture. He would not have had this deconditioning, of course, had it not been for the relative lack of movement during the first few days and weeks following the injury, due to the presence of muscle "spasm" as well as painful inhibition of neck movements due to inflammation.

12 Mr. Massouras was assessed for his suitability to undergo treatment at the Columbia Centre for Integrated Health Services in order to deal with his ongoing pain. In August, 1993, Mr. Massouras underwent the four week program provided by the Columbia Centre, which includes medical, psychological, and vocational assessment. In a follow-up report from the Columbia Centre, Dr. Miller, a psychologist, reported:

In summary, Frank is still waiting. He is waiting for someone to solve his shoulder problem, though he says he won't consider shoulder surgery (even if it is prescribed) without a guarantee, and of course guarantees don't exist. He is waiting to find out if his shoulder can be improved so he can return to painting before he really considers other options. He has explored supervisory and estimating painting jobs, but not very aggressively, and he thinks it is unlikely he could get one of these jobs anyway. Frank wants to upgrade his English language skills, yet he is waiting to resolve these earlier issues before he moves forward in this area. Frank reports that he is ready to move forward, yet it appears that his life is very much on hold. Some aggressive case management is in order in this instance. First, to get a definite answer regarding Frank's medical status, and secondly to get Frank to commit to a vocational plan and take greater responsibility for upgrading his English language skills, and for his future in general.

13 Dr. Chalmers, of the Columbia Centre, referred Mr. Massouras to Dr. Nelems, a thoracic surgeon. Dr. Nelems concluded that he could offer no surgical help to Mr. Massouras.

14 Mr. Massouras was also seen in March, 1990, July, 1990, and October, 1991, by Dr. Arthur, an orthopaedic surgeon, at the instance of the Insurance Corporation of British Columbia. On October 16, 1991, Dr. Arthur reported as follows:

There were no objective findings on examination today. This gentleman's complaints are compatible with resolving soft tissue insult which I stated in my two earlier reports. He still has difficulty with the heavier duties at work but I see no reason why he should not with reassurance and persistence be able

to get back into even the heavier chores at work. There are no further investigations required in my opinion and I do not think passive treatment at this stage plays a role. I do not believe there is any specific treatment that can be offered to Mr. Massouras other than encouragement to maintain a good level of activity and carry on with his work.

15 Because the burden of the medical evidence suggests that there is no medical explanation for Mr. Massouras' continuing complaints of pain, counsel for the defendant had Mr. Massouras examined by Dr. Coen, a clinical and forensic psychologist and neuropsychologist to determine if there was a psychological component to his complaints of ongoing pain. Dr. Coen assessed Mr. Massouras on October 28, 1994, and on December 5, 1994, provided a lengthy report of his findings. Dr. Coen concluded that:

There is no psychological basis to explain the development of the chronic pain complaint of Mr. Massouras. That is, there is no specific psychological mechanism evident which would explain why Mr. Massouras has ongoing chronic pain. For example, there is no psychological condition or reaction secondary to the experience of chronic pain which is aggravating his medical condition (e.g. anxiety, depression, pain phobia, fear of reinjury, etc.). Similarly there is no evidence of a major acute psychological condition immediately prior to his motor vehicle accident which may have limited his ability to cope with chronic pain. However there are very definite psychological factors which are contributing to his complaint of disability.

Dr. Coen could find no psychological conditions or problems to have arisen from the motor vehicle accident that required treatment.

16 In response to Dr. Coen's report, counsel for the plaintiff obtained a critique of Dr. Coen's report from Dr. Williams, a psychologist, on January 6, 1995. It is significant that Dr. Williams did not assess Mr. Massouras, but merely examined Dr. Coen's report and the techniques used by Dr. Coen in arriving at his conclusions. Dr. Williams concluded that Dr. Coen's opinions "do not follow from the data", and was concerned that Dr. Coen did not explain what Dr. Williams concluded was the "significant elevation on the depression scale... ."

17 Notwithstanding Dr. Williams' attack on Dr. Coen's findings, the burden of the evidence, both from the Columbia Centre, to whom Mr. Massouras was referred by his own counsel, and the findings of Dr. Coen, suggest there is no psychological foundation for Mr. Massouras' continuing complaints of pain.

18 The impression of Mr. Massouras, gained from the considerable body of medical and other evidence, is of a man without the will to get better. Although it is true that he has tried to follow the advice of numerous physicians to exercise, he has, he says, because of his pain, been unable to keep active, return to work, or adopt a normal, active routine. Mr. Massouras' complaints of pain seem genuine. He attributes all of his physical complaints to the motor vehicle accident. He essentially considers himself disabled and feels the future is hopeless. He has not worked for more than two years and says that he has not even attempted to work because the pain he feels is greater than he experienced immediately after the motor vehicle accident. He is waiting for someone or something to fix him. Until that happens, he is unwilling to get on with his life.

19 Mr. Massouras has had the benefit of a truly remarkable number of medical, psychological, and vocational assessments and treatments. No one is able to say conclusively what it is that Mr. Massouras truly suffers from. It is, in many respects, parallel to the circumstances found in **Moon v. Zachary** (December 5, 1984), Victoria Registry No. 80/1907 (B.C.S.C.) in which McEachern C.J.S.C. (as he then was) found, at p. 39:

The evidence in this case borders on the bizarre and I have reviewed it over and over again. Short of finding the Plaintiff to be deliberately deceitful,

which I am reluctant to do, I cannot come to any conclusion on the evidence except that the Plaintiff has slipped unknowingly into a mistaken understanding about the extent and effect of her injuries. In my view the Plaintiff did indeed become subject to the chronic benign pain syndrome which was not a physical or psychological consequence of the injuries she sustained in the accident. I venture to hope that the law has not become so clinical that judges must always make positive or negative findings on credibility. It seems to me that in many cases, of which this is one, the chronic benign pain syndrome is a valid alternative.

McEachern C.J.S.C. rejected the claim for damages for chronic pain.

20 In **Smith v. Wensley** (January 15, 1988), Victoria Registry No. 85/0178 (B.C.S.C.), Taylor J. (as he then was) considered the problem raised by a person who continues to suffer pain in the absence, or near absence, of any organic explanation for the pain. He held, at pp. 6-7:

It seems to me that if a person is reduced by an injury to a depressed psychological state, so that continued pain is involuntarily experienced thereafter even though there is no physical basis for it, that pain might logically be attributed to psychological problems brought about by the accident, and the continued sensation of pain could properly be regarded in such a case as something caused by the accident. But where depression or some other psychological condition leading the victim to experience revival or continuation of pain has not been shown to have been caused by the accident to which the pain is attributed, it cannot be said, for the purposes of the law, that a causal connection exists between the injury and the continued pain. The only connection between them is that which exists in the mind of the sufferer - the injury is merely the subject on which the victim's mind has happened to focus or "fixate" - and that is not, of course, sufficient to establish a connection in law between the injury and the continuing complaint.

21 Based on all of the evidence, I am not persuaded, on a balance of probabilities, that the defendant's unlawful act is a contributing cause of the pain Mr. Massouras continues to feel. I find that Mr. Massouras' continuing pain is not a physical or psychological consequence of his injuries, and following **Smith v. Wensley**, *supra*, conclude that his continuing pain is not compensable.

22 If I am wrong in this finding, I am not persuaded that Mr. Massouras has established that he could not overcome his pain had he followed his doctor's recommendation to return to work, increase his activity, and work through the pain.

23 In many respects, Mr. Massouras' circumstances in this regard are similar to those found by Clancy J. in **Buteikis v. Adams** (1994), 90 B.C.L.R. (2d) 213 (B.C.S.C.), where he held, at p. 227:

She is so engrossed in seeking a solution to her problem that she cannot accept any explanation that does not attribute her problems to the defendant's negligence, or alternatively, the recalcitrance of Insurance Corporation of British Columbia in dealing with her claim.

24 Mr. Massouras is similarly engrossed in finding a solution to his problems. He blames all of his problems on the motor vehicle accident. Notwithstanding the payment of approximately \$70,000.00 by the Insurance Corporation since 1990, Mr. Massouras holds the view that the Corporation has "starved him out." Mr. Massouras agreed that in 1991 he returned to work (and, indeed, earned more income than he had in the previous five years, except 1989) notwithstanding that he said he worked with pain. His simple explanation was that he had to go back to work because he had no money. That evidence suggests to me that, with the end of litigation, Mr. Massouras' condition is likely to improve.

25 As held by the Court of Appeal in *Maslen v. Rubenstein* (1993), 83 B.C.L.R. (2d) 131 (B.C.C.A.), at pp. 143-144:

Certainly in cases where the remaining problem is wholly psychological, termination of the forensic process, with its adversarial stresses, hazards and uncertainties, would seem bound to have some benign influence on the patient's condition. This has, of course, nothing to do with the plaintiff's sincerity, or truthfulness, in advancing the claim.

GENERAL DAMAGES

26 There is no question that Mr. Massouras suffered a moderate to severe whiplash injury as a result of the accident on November 5, 1989. It is difficult to pinpoint the time when Mr. Massouras' injuries had objectively healed but he continued to complain of subjective pain. Certainly he could be expected to have healed within about two years from the date of the accident, which would put it at November, 1991. However, as best as I can determine, Mr. Massouras' physical injuries were not healed by 1991 and probably extended into November, 1993.

27 By 1993, when Mr. Massouras was assessed by the Columbia Centre, Dr. Chalmers found "his abdominal muscles are moderately deconditioned and he is mildly overweight... . The assessment team felt that Frank would make a suitable candidate for admission to a multi disciplinary pain management program, to help him become conditioned and active and to learn techniques for managing his pain."

28 Based on the medical and other evidence, there can be little doubt that Mr. Massouras contributed to his deconditioned state by relying on physiotherapy and chiropractic treatments, and by failing to become involved in an active exercise program. His excuses, for example, in failing to embark on a swimming program were not persuasive. Indeed, Mr. Massouras' willingness to abandon an exercise program for tenuous reasons supports the view that Mr. Massouras expects to be fixed by some external source rather than becoming well through his own efforts.

29 Considering all of the evidence, I conclude that a fair award for a moderate to severe whiplash injury of the duration experienced by Mr. Massouras is \$35,000.00.

PAST INCOME LOSS

30 Mr. Massouras' claim to past wage loss is complicated by his failure to have returned to work on a timely basis. Shortly after the accident, Dr. Kerins noted in his clinical records, on December 14, 1989, that Mr. Massouras was to go "back to work as soon as possible." On February 8, 1990, Dr. Wachsmuth noted that:

I have also told him that maybe he could go back to work as he is right handed just for an hour or so each day, if that is possible, and gradually increase his strength. He is reluctant to do this.

31 The physiotherapist who saw Mr. Massouras on so many occasions noted that Mr. Massouras needed to be encouraged to return to work. Dr. Kerins, in his clinical records noted on April 5, 1990, that "Mr. Massouras did not 'want to go back to work'." Again, on May 24, 1990, Dr. Kerins noted that "he probably should go back to work - he does not want to go back." On June 25, 1990, the physiotherapist noted in her clinical records that "patient reluctant to return to work!" By August 2, 1990, Dr. Kerins noted in his clinical records that "I feel this man is fit to go to work - I can't find anything wrong with him." By August 10, 1990, Dr. Kerins noted that Mr. Massouras was fit to return to work for two to three hours per day. The physiotherapist repeatedly advised Mr. Massouras to try to work again, and Dr. Kerins continually urged him to do so.

32 A further, minor, complicating factor in assessing Mr. Massouras' past wage loss is an intervening injury which occurred on June 18, 1992, when he fell from a step ladder while at work. He suffered a soft tissue injury to his back and right shoulder, as well as his right arm and leg, in that fall. He was disabled from work from June 18, 1992, to July 23, 1992.

33 Mr. Massouras advances a claim of \$75,000.00 for past income loss. This claim is calculated based on a pre-accident rate of earnings of \$2,015.00 per month, including unemployment insurance benefits. Counsel for Mr. Massouras calculated his projected earnings, without accounting for contingencies, to be \$126,945.00. In the 63 months since his accident, Mr. Massouras earned income of \$53,604.00, thus reducing his claim to approximately \$75,000.00.

34 One of the issues raised in respect to Mr. Massouras' claim to past wage loss is whether unemployment insurance benefits received in the period 1986 to 1989 were properly included in calculating an average pre-accident rate of earnings for the purpose of calculating the past wage loss from the date of the accident until trial.

35 Counsel for Mr. Massouras provided three decisions dealing with the issue of the unemployment insurance benefits and the calculation of past wage loss: **Trotta v. B.C. Hydro and Power Authority** (October 4, 1979), Kamloops Registry No. 962 (B.C.S.C.), **Rezansoff v. Gogal** (1981), 29 B.C.L.R. 25 (B.C.S.C.), and **Wilde v. Wardstrom** (November 10, 1986), New Westminster Registry No. C841545 (B.C.S.C.).

36 The determination as to whether unemployment insurance benefits are properly included in the calculation of loss of earnings hinges on the determination of whether Mr. Massouras' employment as a commercial painter can be characterized as "seasonal", and therefore a foreseeable and reasonable part of the plaintiff's annual income.

37 Mr. Massouras is a member of the Painters Union. In the 15 years prior to trial, Mr. Massouras' chief employers were MacQuaig Painting, Velvet Painting, and Peak Painting. Mr. MacQuaig testified that he is unable to employ painters constantly for the simple reason that painting projects end and may not be immediately followed by another project on which he can keep his workers employed. He testified that Mr. Massouras was, prior to his accident, one of his best painters, and as such, was one of the first to be hired and the last to be let go.

38 Mr. Massouras testified that he also regularly worked for two other painting contractors, and that he was capable of working in the residential painting field, although had chosen not to do so.

39 Lynn Tripp, the administrator for the Painters Union, described Mr. Massouras' work as seasonal. However, the impression left by her evidence was that the work was seasonal only in the sense that workers tended to bank a certain number of hours of work in order that a claim could be made under the unemployment insurance scheme. She agreed that, if a union job is not available, it is open to an employee to work in a non-union job. The worker can ask for a special dispensation to work in a non-union position, and so long as the employer is not "anti-union", the worker's position with the union would not be jeopardized.

40 The cases referred to by counsel concerned employment as a chambermaid (**Trotta**), a fish cannery worker (**Rezansoff**), and a greenskeeper at a golf course (**Wilde**). Based on all of the evidence in this case, I find it strains the meaning of "seasonal" to include painting in that category. It is clear that Mr. Massouras was, in the pre-accident period, capable of working both as a commercial painter for union and non-union jobs and, if he chose, as a residential painter. He chose not to do so because unemployment insurance benefits were available to him and not, strictly speaking, because no work was

available to him. I therefore conclude that Mr. Massouras is not a "seasonal worker" and that therefore the unemployment insurance benefits should not be included in the calculation of his past wage loss.

41 Having regard to Mr. Massouras' failure to return to work and his entrenched resistance not to return to work until he was free from pain, I assess his past income loss at \$20,000.00.

FUTURE WAGE LOSS

42 Mr. Massouras has been assessed by the Columbia Centre and by Derek Nordin of the Vocational Consulting Group Inc. concerning his future prospects for employment. There is little question that Mr. Massouras suffers from restrictions arising from his level of education (approximately grade 10 from a school in Greece), work experience and language. Mr. Nordin concluded that Mr. Massouras is now unsuitable for work in the painting industry.

43 However, all of the evidence in respect of Mr. Massouras' claim for loss of future income hinges on a finding that he is permanently disabled or has lost his capacity to work as a painter and that the motor vehicle accident was the cause of that disability. I have already concluded that Mr. Massouras is not permanently disabled, and the motor vehicle accident is not the cause of his ongoing complaints. In these circumstances, I find that Mr. Massouras has failed to make out a claim for future wage loss.

COST OF FUTURE CARE

44 Having regard to my findings in respect of future wage loss, I conclude that the claim for cost of future care has not been made out.

SPECIAL DAMAGES

45 Counsel for the defendant agrees that the claim to \$500.00 to compensate Mr. Massouras for transportation costs in attending to his numerous medical and other appointments is reasonable. To this, I would also add the cost of his benefit package at the rate of \$65.00 per month or \$1,625.00, for a total of \$2,125.00.

SUMMARY

46 Mr. Massouras is entitled to the following award:

(1) General damages	\$35,000.00
(2) Past wage loss	\$20,000.00
(3) Special damages	<u>\$ 2,125.00</u>
Total	<u>\$57,125.00</u>

47 Unless there are facts of which I am not aware, Mr. Massouras is entitled to his costs at scale 3. Order accordingly.

P.A. KIRKPATRICK J.

"P.A. Kirkpatrick J."

February 22, 1995

Vancouver, B.C.