No. 28546
Prince George Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:	
PATRICIA JOAN COMEAU	REASONS FOR JUDGMENT
PLAINTIFF	OF
AND:	THE HONOURABLE
RODNEY SIEMENS and DOUGLAS KOPETSKI	MR. JUSTICE PARRETT
DEFENDANTS	
Counsel for the Plaintiff:	Dick Byl
Counsel for the Defendants:	Lorne A. J. Dunn
Place and Date of Trial:	Prince George, B.C. February 19, 20 and 21, 1996

INTRODUCTION

1 The plaintiff seeks damages for injuries sustained when she was struck by a vehicle while crossing a parking lot in the city of Quesnel on September 21, 1993.

2 Liability and quantum of damages are in issue.

BACKGROUND

3 The plaintiff is a woman, 54 years of age, who was born in Powell River on March 17, 1942. She was raised in that

ORIGINAL

community and attended school there completing grade 10 before leaving in her grade 11 year.

4 On September 21, 1993 the plaintiff had driven to the parking lot of a doughnut shop in the area of downtown Quesnel. Upon her arrival at about 6:45 a.m. she met her two friends Jean Mantie and Linda McKerlie. These three met on a daily basis to do the "river walk", a three mile walk along the banks of the Quesnel and Fraser rivers.

5 Upon arriving in the parking lot the three friends parked near the alley on the eastern side of the parking lot before walking across the parking lot, to pass the doughnut shop before crossing Front Street to reach the pathway they would follow. As they crossed the parking lot the plaintiff dropped her glove, she bent to pick it up and as she did so she was struck by the vehicle driven by the defendant Rodney Siemens which had entered the parking lot from Front Street.

LIABILITY

6 At the close of submissions I advised counsel that I was satisfied that liability for the accident rested wholly with the defendants and that reasons would follow.

7 The submission made by the defendants was narrow and focused, they did not suggest that they were not at fault but

rather that the plaintiff was also contributorily negligent in failing to keep a proper lookout. Mr. Dunn submitted that Ms. Comeau's contributory negligence lay in the range of 25 to 50%.

8 Mr. Dunn in making these submissions points to the definition of "highway" found in s. 1 of the ***Motor Vehicle Act*** R.S.B.C. c. 288 and amendments:

> "highway" includes every highway within the meaning of the ***Highway Act***, and every road, street, lane or right of way designed or intended for or used by the general public for the passage of vehicles, and every private place or passageway to which the public, for the purpose of the parking or servicing of vehicles, has access or is invited;

Also relevant to his submission are some of the provisions of s. 181, 182, 183 and 184 which read:

> 181. (1) Subject to section 182, the driver of a vehicle shall yield the right of way to a pedestrian where traffic control signals are not in place or not in operation when the pedestrian is crossing the highway in a crosswalk and the pedestrian is on the half of the highway on which the vehicle is travelling, or is approaching so closely from the other half of the highway that he is in danger.
>
> (2) A pedestrian shall not leave a curb or other place of safety and walk or run into the path of a vehicle that is so close it is impracticable for the driver to yield the right of way.
>
> 182. When a pedestrian is crossing a highway at a point not in a crosswalk, he shall yield the right of way to a vehicle.
>
> 183. Notwithstanding section 180, 181 and 182, a driver of a vehicle shall

> (a) exercise due care to avoid colliding with a pedestrian who is on the highway;
>
> (b) give warning by sounding the horn of the vehicle when necessary; and
>
> 184.(1) Where there is a sidewalk that is reasonably passable on either or both sides of a highway, a pedestrian shall not walk on a roadway.
>
> (2) Where there is no sidewalk, a pedestrian walking along or on a highway shall walk only on the extreme left side of the roadway or the shoulder of the highway, facing traffic approaching from the opposite direction.

10 Mr. Dunn provided a series of decisions which touch on these sections of the ***Act*** and the duties cast respectively on the operators of vehicles and pedestrians. Each case in this area seems to turn on its own facts and this case is no exception.

11 This incident occurred in the early morning, in broad daylight and in circumstances where traffic was extremely light. Having parked their vehicles the three ladies walked diagonally across the parking lot side by side towards a patio area located on the south side of the donut shop. As they approached the patio area they crossed through a series of four parking stalls located immediately adjacent to the donut shop. At this point Ms. Comeau dropped her glove. Ms. Comeau made an exclamation and bent down twisting slightly to her right to retrieve the glove as her friends continued walking. As she was bent over the plaintiff was struck

by the defendant's vehicle.

12 The defendant Rodney Siemens driving a 1987 Pontiac Sunbird was on his way to work, he approached the area from the south heading north on Front Street before making a right turn into the parking lot. This entrance lane runs generally west to east with the four parking stalls located to the drivers left at right angles to his lane of travel. The view across this area is completely unobstructed.

13 At this point the evidence diverges, Ms. Mantie and Ms. McKerlie testified that the defendant entered the parking lot from Front Street "bottoming out" as he did so. Neither was able to estimate the speed of the vehicle but both described it as going "fast". Both agreed that the interval between the glove being dropped and the accident was very short. Ms. Mantie described seeing the car enter the parking lot, turn into the parking stalls and "Pat was on the ground".

14 Mr. Siemens described a very different situation. Mr. Siemens is a 24 year old lumber piler who was at the time on his way to work. He entered the parking lot as he described it to "grab a coffee and a doughnut" before work. He agreed that as he entered the parking lot he heard a scraping sound which he said came from the rubber spoiler at the front of his vehicle. He testified that as he came into the parking lot he noticed three

ladies walking west across the parking lot towards Front Street. Mr. Siemens testified that he brought his vehicle to a full stop, turned on his turn signal and waited for them to walk clear of the area where he was going to park. They, according to him, were crossing the stall where he was going to park, "once I felt they were safely out of the way I started to turn". As he completed his turn he testified that he noticed that only two of them had continued and the other was bent over picking up something. He braked but was unable to stop before his left front fender struck "her butt".

15 There are certain difficulties with this version of events. In his statement given concerning the accident on September 27, 1993 he made no mention of either stopping or of engaging his turn signal.

16 Mr. Siemens also testified that three of the four parking stalls had vehicles parked in them. All three of the ladies testified that all four of the parking stalls were empty which is why they were walking through that area.

17 I am satisfied on the balance of probabilities that the accident occurred as described by the plaintiff and her two companions. The cause of this accident was the speed and inattention of Siemens. I reject his version of events, with the exception of the fact that he saw the three as they walked across

the empty parking lot.

18 Even if I were to accept his evidence the accident is entirely his fault. As he describes the events the plaintiff was clearly visible in an empty parking lot ahead and to his left (ie on the driver's side of the vehicle). It is inconceivable that a driver taking even the most basic of care and maintaining a rudimentary lookout would have hit Ms. Comeau. This is not a case of contributory negligence and I find the defendants wholly at fault.

THE PLAINTIFF'S INJURIES

19 Ms. Comeau at the time of the accident was 51 years of age. She enjoyed a long term stable marriage. Her three sons were grown and had left home. She had been employed for some time as a cashier/teller at the Overwaitea store in Quesnel. Her husband was a mechanical supervisor at a local pulp mill.

20 The two of them enjoyed an active and happy lifestyle. The daily, early morning river walks were indicative of her lifestyle.

21 The major issues raised in relation to the plaintiff's damage claim include allegations:

(a) that she had a pre-existing problem with her shoulder which would have left her in the same condition within

eight years in any event, and

(b) that her recollection of events and her condition are inaccurate and inconsistent with the medical evidence.

22 The plaintiff was struck in the area of her left buttocks as she bent to retrieve her glove, she was driven forward landing on her right shoulder on or near the raised curb separating the parking stalls from the sidewalk area. Ms. Comeau was immediately conscious of pain in her shoulder.

23 Ms. Comeau got up and walked to one of the picnic tables where she rested momentarily. After a short time she attempted to continue her walk, crossing Front street before she asked her friends to take her to the hospital. Eventually x-rays were taken and she was told to see her family doctor.

PRE-ACCIDENT HEALTH

24 Dr. Fine had been the plaintiff's family doctor since 1983. The clinical records include the following entries:

> **June 2, 1980**
>
> . . . There is very little to see on superficial examination of her R arm. There is no wasting, no skin changes. Today I was unable to demonstrate any sensory loss. Or any motor loss. She is a little bit tender over the head of her radius but it really doesn't look like a tennis elbow. The story is reminiscent of a carpal tunnel syndrome but she describes it as involving the back of her forearm and hand chiefly and always the lateral three fingers, never the index. I really don't know what is causing the symptoms

in her hand and I would like very much to have her seen by Dr. Barber concerning this.

June 9, 1980

Dr. Jones: I have been asked to see this woman concerning two problems 1) Numbness in her R hand. 2) Recurrent VV's/. For about 1 1/2 yrs. now has c/o numbness in the r hand. It only occurs when she is in bed at night, she wakes up with the hand numb and she describes the numbness as extending down the ulnar border of her hand and involving the little, ring and middle fingers. It never involves the thumb or index finger. She finds that by rubbing the hand and shaking it the sensation will come back. It is really not associated with much pain although she does have a little bit of tenderness and aches sometimes over the head of her radius. She also has some other vague complaint about pains in her back between her shoulder blades and so on. She never has any problems with her L hand, there has been no history of injury. Occasionally she notices that her hand is weak and she feels she is going to drop something although she never actually has.

July 14, 1980

. . . History of the patient is that for the last 18 months she has noticed some weakness and odd altered sensation in her right hand 3rd to 5th fingers. She feels as though that it is mainly palmar, and for the last 4 month's she has had trouble with numbness at night time. Tends to wake her up at night and it is quite numb, and she has to shake it. It is not the whole surface of the hand, and sometimes she thinks it is on the volar aspect but not sure. It is getting slowly worse, and she is rather worried about his and she is thinking about MS. She has had no truma(sic) to her elbow or wrist. Her neck feels fine, and other health beyond some other problems that she is seeing Dr. McIntyre about are really quite non-descript.

May 20, 1987

S: Two problems today. 1) Pain in the R shoulder, nagging problem increasing over the last month. Works at one of the grocery stores and does a lot of lifting with her R arm. Has noticed the pain is worse with trying to lift her arm above horizontal.
O: Full ROM of shoulder. Pain when holding arm at the horizontal against force. Very tender at the point of the shoulder. Otherwise, nontender. Pap test done today Normal looking nuliparous os.
A: Superspinatous tendonitis.

April 3, 1989

1) Reynaud's type phenomenon, R hand. Concerned because 2 relatives have recently suffered strokes. Also, her R sciatica is causing continual problems despite a lot of work on conservative exercises.
P: X-ray C-spine and thoracic inlet. Also LS spine. CBC, fasting blood glucose, cholesterol, triglycerides and T4. Review for a CC. JPHF/jn

July 17, 1990

Was on holidays lately - is a little worried because had period twice . . . & had severe pressure headaches biparietal.

December 2, 1993

1) Raynaud's Disease 5 yrs., whenever cold. x20 sx scleroderma or similar.

These entries are by no means the only entries in the plaintiff's clinical records. Her records, in my view, generally show a person who has had over a good many years occasional medical problems, sometimes requiring investigation and treatment.

The entries I have reproduced cover incidents in which

medical difficulties affected the same area (ie. the right shoulder or arm) or produced similar symptoms (ie. sciatica and headaches).

27 Dr. Fine, in his report of July 15, 1994 described the plaintiff's initial problems in this way referring to her attendance at the hospital:

> . . . She was complaining of pain in the right shoulder and was initially assessed by Dr. G. Smart, the emergency physician on call. X-rays taken at that time were normal and Dr. Smart's assessment was of a strain of the acromioclavicular joint. He advised rest in a sling and prescribed Advil for symptomatic relief. She was reassessed the following day by my colleague, Dr. M. Walker at the Avery Clinic. He felt that no change in management was required.
>
> I first saw Mrs. Comeau in relation to these injuries on September 30, 1993. At that time, she was complaining of continuing pain in the right shoulder, which had been continuous since the accident the week before. The pain was localized in the glenoid region and also extended into the supraspinatus and trapezius area.
>
> My examination at that time revealed no local bony tenderness, but there was tenderness of the joint posteriorly. Flexion was limited to 90°, abduction was limited to 70°. There was marked pain on passive movements beyond this point. My diagnosis was of a rotator cuff tear and I prescribed Naprosyn, 250 mg tid and referred her to physiotherapy for a rehabilitation program.
>
> When reviewed on the 21st of October 1993, her symptoms had not improved and she felt that she was not making much progress in physiotherapy. I found that the range of movement of the shoulder was less than previously and elected to inject the shoulder with local anesthetic and steroid. I changed her prescription to Toradol, 10 mg qid.

. . .

> Whilst her major symptomatology has been related to her right shoulder, Mrs. Comeau has also experienced continuing pain in the left hip region since the time of the accident, which is where she was originally hit. X-rays of the pelvis and hip region did show a small area of minor ossification at the insertion of the iliopsoas tendon into the left trochanter, but the significance of this is not certain. More recently, the pain in the left hip become more sciatic in quality radiating down the leg to the left foot and involving the lateral three toes.
>
> My assessment on June 7th was that she was possibly experiencing L5-S1 sciatica and I have asked her to draw the symptoms to the attention of Dr. Velazquez.
>
> Mrs. Comeau's general health is good. She is an active woman who enjoys taking regular exercise. Since the accident, her activities have been severely curtailed.

28 Mr. Dunn in his submissions forcefully raised the issue of the plaintiff's recollection, particularly as it related to her past medical history. Mr. Dunn suggested that her "evidence on almost every point was more favourable to her than all of the other evidence. . .".

29 Ms. Comeau is not a very good historian. She has little in the way of accurate recollection of her medical history particularly when she was cross-examined concerning incidents a decade or more ago. In my view, these difficulties do not in any way flow from any attempt on her part to deceive or to slant the evidence in this action.

30 I have no hesitation in accepting the plaintiff as a truthful and forthright witness doing the best she could to accurately testify. Unfortunately, the passage of time, and her own personality, have left her recollection less than accurate. Ms. Comeau is an outgoing, sociable and positive individual who, in my view, does not generally dwell on setbacks but tends to put them behind her and move on. Unfortunately she perceives the injuries she received in this accident as having destroyed much of her happy and contented lifestyle and has come to focus on those injuries and their impact on her. Both of these factors have affected her evidence and its accuracy and reliability. I am completely satisfied that this is in no way intentional, nevertheless her evidence must be approached with care.

THE MEDICAL EVIDENCE

31 It is in this area that counsel's view of the evidence diverged most in their submissions. Mr. Byl submits that:

> The medical reports paint a consistent picture, and are completely supportive of the problems that Mrs. Comeau described in her testimony before this Court. The one area where there is some apparent inconsistency, namely in Mrs. Comeau's description of the pain in the months following the Velazquez surgery (April 25, 1994) is likely attributable to a miscommunication between Mrs. Comeau, Dr. Velazquez, and subsequently Dr. Fine. Even Dr. Velazquez described her prognosis as "guarded" and indicated that a great deal of physiotherapy would be in order.

32 Mr. Dunn submits that the medical evidence contradicts

much of what the plaintiff said concerning her condition, he goes on to submit:

> . . . Most importantly, both treating doctors that performed surgeries on Mrs. Comeau opine that Mrs. Comeau had a pre-existing right rotator cuff tear. Dr. Davidson opines that Mrs. Comeau would be symptomatic such that it would interfere with her job within 5 years and would cause her to retire or change jobs within 8 years. Thus the ***Pryor v. Baines*** argument.

33 Ms. Comeau had a difficult time following this accident. When Dr. Fine saw little improvement in her shoulder by November 8, 1993 he referred her to Dr. Velazquez, an orthopaedic surgeon then practicing in Prince George. Dr. Velazquez first saw the plaintiff on December 15, 1993. On this visit her major complaint was of persistent pain in her right shoulder with a significant loss of motion.

34 Initial treatment consisting of injections, anti-inflammatories and physiotherapy was unsuccessful and on April 25, 1994 she underwent a surgical decompression and rotator cuff repair. In his report of June 20, 1994 Dr. Velazquez described the surgery and her recovery in this way:

> At the time of surgery a large rotator cuff tear of the right shoulder was found. In addition, she had a large spur in the antero-inferior aspect of the acromion which was impinging on the rotator cuff and the tear, probably contributing to the pain. An acromioplasty was performed, followed by a rotator cuff repair. She had a large tear with an area of bare articular cartilage in the humeral head, which was quite significant.

> The adhesions in the tear were mobilized and the tear was brought down at least two thirds of the way into a trough of bone in the humeral head. This was a good repair, but she obviously has a massive tear and in order to take tension off the repair she required the use of an abduction wedge for about 4 to 5 weeks post-operatively. After this period of time, the wedge was removed and she was started on very gentle active assisted exercises.
>
> Post-operatively she was followed on May 5, May 18 and lastly on June 14. On her last visit she was quite happy in the sense that her pain relief was quite significant and she was starting to mobilize the arm with the physiotherapist much more comfortably. She described the pain relief to be at least 50% of the pre-op level and she had reached about 50 degrees of elevation on active abduction.

35 Despite the initial positive results Dr. Velazquez's prognosis was less optimistic:

> With respect to her right shoulder, the prognosis is guarded. She has a massive rotator cuff tear which has been repaired and she is certainly going to require a lot of physiotherapy and time before the ultimate level of functional recovery is obtained. I expect that it is going to be at least 6 months before we reach the eventual recovery level. I think that she will experience good pain relief from the operation, but the function in terms of the eventual range of motion and strength will be slower to come back and she may only recover about two thirds of her shoulder motion and strength. Only time will tell.

36 In discussing the causal relationship between the damage he observed and the accident Dr. Velazquez went on to say:

> With respect to the causative relationship between the accident in question

> and Pat Comeau's shoulder rotator cuff tear, I think that this tear was so large that I don't think it's entirely attributable to this accident. Since she tells me that she was previously asymptomatic with respect to this should, all I can say is that she probably had an underlying tear in this rotator cuff, which was not giving her trouble and falling on the shoulder probably enlarged the tear to the point that it made it significantly symptomatic.

37 Dr. Velazquez goes on to note complaints with respect to her left hip and thigh which he describes as "totally new". He goes on to say that:

> I am not too sure of the reasons for them is(sic) and I have no way of relating them to the motor vehicle accident . . .

38 This portion of the evidence is a good example of the difficulties that can flow from evidence viewed in isolation. Dr. Fine, her treating family doctor, has noted in the passage from his report previously quoted her continuing complaints of pain ". . . in the left hip region since the time of the accident. . .". On June 7, 1994 he advised the plaintiff to bring those symptoms to Dr. Velazquez's attention and she obviously did so. The complaints may have been new to Dr. Velazquez but they were not in fact new.

39 This incident serves to highlight the personality factors to which I earlier referred. The plaintiff is not overly sophisticated in her approach to the medical profession. Dr. Fine was the doctor treating her for her injuries, her most significant

symptomology arose from her shoulder. When Dr. Fine referred her to Dr. Velazquez for treatment of her shoulder she attended on him for that purpose and followed his advice. Similarly when Dr. Fine suggested she bring her left hip symptomology to Dr. Velazquez's attention she did so. These incidents are perfectly understandable and flow from the plaintiff's trust in Dr. Fine. In an ideal world her referral would have encompassed both complaints or Dr. Velazquez would have focused on all of her injuries, regrettably the world is not ideal, Ms. Comeau's major symptomatology at the time came from her shoulder and it is clear that her attention and that of both doctors was focussed on that injury. A review of Dr. Fine's referral letter of November 8, 1993 and Dr. Velazquez's initial reply of December 17, 1993 demonstrates that narrowing of their attention.

40 When Dr. Velazquez left Prince George the plaintiff's orthopaedic care was taken over by Dr. Michael Corrigan, who followed up on the earlier surgery. In two reports dated January 10, 1995 and August 21, 1995 Dr. Corrigan comments on the cause of the plaintiffs difficulties:

> Your client has a serious injury. She sustained a rotator cuff tear of the right shoulder, and this was operatively repaired by Dr. Velazquez. The diagnosis is not in doubt. Dr. Velazquez was a little skeptical about the mechanism of injury being responsible for the rotator cuff tear. I would agree with this notion, however I have seen Mrs. Comeau in follow-up on a number of occasions for Dr. Velazquez and on taking a careful history from her it is quite clear that she's never had any rotator cuff problems in the past. Although

> it is possible that asymptomatic tears in the rotator cuff can exist, this is usually in the elderly. I have gone into the mechanism of injury with Mrs. Comeau and I think she was thrown to the ground heavily enough onto the shoulder that a rotator cuff tear, in my opinion, did occur as the result of the motor vehicle accident.
>
> I think this is an important point since her shoulder I think is going to give her a permanent disability. Her initial post-operative course was slow but satisfactory, but now it has been complicated by intractable pain in the shoulder. It's to the extent where I am referring her to a shoulder sub-specialist in Vancouver for further care.
>
> She also sustained a contusion to her buttocks which irritated the sciatic nerve. This gave her a bizarre symptom complex of funny feelings in her legs, which made physicians wonder if her symptoms were functional. However, the symptoms fit into a pattern of a sciatic nerve contusion and this has been confirmed by consultation which I obtained from a neurologist.
>
> . . .
>
> At present, because of the intractable pain and the stiffness at her shoulder, she is not fit for any gainful employment even on a part-time basis.

41 In his subsequent report which follows surgery performed by Dr. Ross Davidson he records both his observations and his prognosis:

> Her shoulder is still her major disabling problem. Since last I wrote, she's had an arthroscopic subacromial decompression performed by Dr. Davidson at U.B.C. sports medicine clinic. This operation has been successful in as much it has relieved a large portion of the chronic pain which was hampering Mrs. Comeau. Her shoulder still suffers from chronic stiffness and definite

weakness, and is also still uncomfortable at times. I have had the opportunity to look at Dr. Davidson's operative report and at arthroscopy he visualized not only scarring which he decompressed, but the fact that the rotator cuff repair performed by Dr. Velazquez had come apart.

When I saw her last, she had objective weakness of the arm and a restricted range of motion.

In my opinion with regard to the shoulder, I don't think there will be very much improvement as time goes by. With the rotator cuff not being intact she will always have weakness of the shoulder. I think that the stiffness which she experiences is likely to be permanent. With regard to her working abilities, I do not think she will be fit in the future to return to a grocery store cashier position as she has held for the past eighteen or so years. It goes without saying that this is a very repetitive shoulder-intensive job and many cashiers with healthy upper limbs suffer upper extremity symptoms and problems. I think if Mrs. Comeau were to return to such an occupation she would be unable to complete a full working day, and would be unable to hold down such a position. In my opinion she would be fit in the future for non-repetitive shoulder activities such as clerical work in an office.

She has some other ongoing symptoms. At the time of the accident she had a contusion to her left buttock producing a neurapraxia of the sciatic nerve. She still has tingling in her left leg which she finds bothersome. She has developed, since the accident, some chronic low back pain with discomfort radiating into both thighs. I think this is related the inactivity which the motor vehicle accident brought on. Prior to the motor vehicle accident she walked quite a few miles every day. She has been unable to do this since the motor vehicle accident and I think this is the basic cause for her chronic low back pain. It should improve with time as she can take more exercise.

42 Dr. Corrigan's opinion on the causation issue is found in the last paragraph of his report:

> As I think I have stated before, there is no question in my mind that the rotator cuff tear was a direct result of how she landed on the ground after being struck by the motor vehicle. I do not think, as other medical reports suggest, that she must have had rotator cuff disease prior to the motor vehicle accident since she had no symptoms of this. In my opinion the mechanism of injury is comparable with producing a rotator cuff tear.

43 On the whole of the evidence it is clear that the plaintiff experienced considerable pain relief following the surgery by Dr. Velazquez, unfortunately that initial relief did not continue and the situation deteriorated again in the fall and winter of 1994-1995. When Dr. Fine encountered some difficulty in getting a referral to a specialist in the lower mainland Ms. Comeau took the initiative and was successful in getting an early appointment to see Dr. Ross Davidson.

44 Dr. Davidson after his initial assessment examined her shoulder under anaesthetic and carried out an arthroscopic subacromial decompression and debridement. As he wrote in his report of December 15, 1995:

> At that time it was noted that the rotator cuff repair had in fact failed just posterior to the biceps tendon. It appeared that the sutures had pulled out of the tendon in this area and the cuff had retracted approximately 1.0 cm. However, its posterior margin still appeared partially attached. There was a large bony protuberance which was felt was

> impinging on the acromion and this was resected and abraded back to normal contour. Subacromial region was also debrided of loose scar at the time.
>
> Post-operatively Mrs. Comeau was referred for physiotherapy and was seen in the Sports Medicine Clinic on three further occasions; namely, August 1, 1995, September 18, 1995 and, most recently, October 5, 1995.
>
> She has continued to complain of pain and weakness in relation to her shoulder. She has improved her range of motion in the shoulder but has some persistent subacromial crepitus and clicking and anterior discomfort.
>
> Her back and buttock area became more bothersome in September. It was felt that she had suffered from sacroiliac subluxation on the left side. This was manipulated and she was referred for physiotherapy at the Sports Medicine Clinic which she attended.
>
> At the time of her last assessment her buttock pain had improved significantly. She had regained almost full range of motion in the shoulder but continued to be bothered by ongoing pain and discomfort.

45 Dr. Davidson's conclusions as recorded are significant given the somewhat mixed medical opinions concerning Ms. Comeau's condition prior to the accident:

> Thus in summary: the major injuries sustained by Mrs. Comeau in her motor vehicle accident of 21 September 1993 are that of direct trauma to the anterior aspect of her right shoulder and trauma to her left buttock area.
>
> As a result of this she has required treatment for rotator cuff tear in relation to her right shoulder. Surgery was undertaken 25 April 1994. This has not been entirely successful.
>
> She has also been diagnosed as suffering from sacroiliac subluxation on the left side as a cause of some of her buttock pain. This most

recently has responded to physiotherapy and manipulation.

It is interesting to note, from the findings at the time of surgery as noted in Dr. Velazquez's operative report and a past history of possible rotator cuff tendinitis in 1987, that she may well have had some minor rotator cuff problems.

To this end however, she was able to function as a checkout clerk in a food supermarket.

In light of her current findings and the findings at arthroscopy, I do not feel that she will be able to return to this occupation. I feel she would be unable to spend extended time on her feet, leaning over, lifting heavy groceries and packing the same. The most troublesome area will be that of the right shoulder.

While she may well have had some degeneration in the shoulder prior to her motor vehicle accident, there can be no denying that the accident precipitated a more significant injury and hence her inability to return to work.

While noted there were some changes that were possibly long standing noted at the time of surgery, I feel that the accident has been the cause of her inability to return to work. However, with rotator cuff problems, as long as the tear is not too big, people are able to function at a significant level for some time and it is not possible to prognosticate if Mrs. Comeau would have in fact been able to continue as a checkout person for several years to come or whether her shoulders would have caused her ongoing problems in the future.

As you are aware, she is 53 years of age but it is foreseeable that she would at least have been able to work for possibly five years before any problems in her should may have caused a change in her work habits.

With regards to her left buttock pain I feel that she may well have sustained, with the direct blow to the buttock area, a sacroiliac

> subluxation. This would cause her persistent pain in that area but would be amenable to repeated physiotherapy and manipulative treatment to keep this in check. However, this may require repeated visits to the therapist in the future.
>
> With regard to effect on the non-working portion of her life, I certainly feel that her ability to partake in active athletic endeavour will be limited. I feel that such things as curling and extended outdoor hiking will be difficult because of problems in relation to the shoulder and buttock area.

46 Dr. Davidson did not testify at trial, but, in addition to his reports counsel prepared and filed as Exhibit 8, an agreed statement of facts concerning his evidence. In light of Dr. Davidson's qualifications and the issue before the court those agreed facts are worth setting out in full:

> 1. On the basis of the surgical note of Dr. Velasquez(sic), dated April 25, 1994, which is the most significant, and also on the basis of the clinical notes of Dr. Fine of 1987, Dr. Davidson is of the opinion that there is a greater than 50% likelihood that the Plaintiff had sustained a pre-existent right rotator cuff tear.
>
> 2. Dr. Davidson is of the opinion that the Plaintiff would probably have experienced problems in her right shoulder within five years of the accident, although probably those problems would not be as severe as they presently are.
>
> 3. Dr. Davidson is of the opinion that, had the motor vehicle accident not occurred, the Plaintiff would probably not have worked until age 65, due to problems in her right shoulder.

4. Dr. Davidson is further of the opinion that had the motor vehicle accident not occurred, symptoms in the Plaintiff's right shoulder would onset gradually within five years from the accident, and would increase such that she would probably be seeking alternate employment, or retirement within eight years of the date of the accident.

5. Dr. Davidson indicated that the Plaintiff presently can work if the job does not involve repetitive lifting (particularly when she is lifting with her arm out from her body), or movement of the Plaintiff's right had above her shoulder. She cannot work at a job that requires continual standing in one place.

6. The Plaintiff does have further surgery as an option, but Dr. Davidson is not optimistic that such surgery would be successful.

7. At the present time, there is no evidence of chronic rotator cuff arthritis, but Dr. Davidson is of the opinion that arthritic degeneration could occur, depending upon the stress that is placed across this joint.

8. Further improvement (after Dr. Davidson's surgery) is expected up to one year after the surgery. There will probably not be much improvement after this period of time, and, down the road, further degeneration would be expected to occur, depending upon the stress that is place across the joint.

9. Dr. Davidson is also of the opinion that because a sacro-iliac subluxation existed, the Plaintiff is subject to further bouts of this. Therefore, there is a measure of relief that can be obtained by

> physiotherapy. Dr. Davidson felt that physiotherapy once a month, for three to four years, coupled with a home exercise program would be appropriate.

47 During the course of these investigations the plaintiff had been referred to a neurologist, Dr. Lyle Daly. Dr. Daly noted a complaint the day after the accident of a "painful heavy sensation" in her left leg. He examined the plaintiff concerning these left leg complaints on two occasions, September 22, 1994 and on February 27, 1995.

48 Dr. Daly concluded that the plaintiff's symptoms were suggestive of an irritation of the sciatic nerve. He also concluded that:

> The nerve irritability in the buttock, which can be provoked with direct pressure, localizes the site of the injury and this is presumably related to the impact suffered at the time of her accident in September 1993.
>
> Where there is no evidence of a significant nerve injury and symptoms are largely irritative, one would expect gradual improvement and in most cases symptoms will disappear within 1 to 2 years. There is no specific treatment. She has attended physiotherapy for range of motion and stretching exercises, and is maintaining a high activity level. Mrs. Comeau should be reassessed at two years.

49 The present trial occurred at the halfway point of that suggested period for reassessment. Dr. Fine in his evidence at trial testified that in January and early February of this year he

had noted a significant deterioration in her condition. This was accompanied by an increase in pain which caused him to resort to prescribing narcotic analgesics. Dr. Fine testified that he had on examination observed both abnormal posture and gait which he related to increased pain in her buttock and lower back. By February 2, 1996 he felt the worst of the pain had settled down but he found a further reduction in the range of motion of her shoulder.

50 Dr. Fine went on to testify that the plaintiff has been very well motivated and co-operative in her treatment regime but that in recent months he has noted a definite decline in her morale.

DISCUSSION

51 It is clear that the plaintiff suffered two significant injuries in this accident. The first and most significant is the tear and damage to the rotator cuff of her right shoulder. The evidence is consistent that the damage to her shoulder is permanent leaving her with permanent weakness, restrictions in movement and discomfort and pain with use. The evidence clearly supports the conclusion that this injury makes it impossible for her to return to her former employment.

52 The second injury to her left buttock/sciatic nerve has caused her difficulty as well but on a considerably milder scale

than her shoulder injury. As Dr. Davidson opined:

> This would cause her persistent pain in that area but would be amenable to repeated physiotherapy and manipulative treatment to keep this in check. However, this may require repeated visits to the therapist in the future. (my emphasis)

53 The plaintiff has had three very difficult years, has undergone two bouts of shoulder surgery and must now face the fact that she must live with permanent restrictions in the use of her right shoulder and arm. Those restrictions will leave her with an ongoing level of pain and discomfort and will prevent her from returning to a job she has held since September 31, 1977.

54 The loss of the job is of course compensable as to the financial loss under a separate head of damage. In this case, however, that loss is of significance in a consideration of her non-pecuniary losses as well. For the plaintiff, prior to the accident, at age 51, she had found a rewarding and comfortable lifestyle. She and her husband combined a comfortable income, with time off and an active lifestyle which included golfing, skiing and hiking. Ms. Comeau did the three mile river walk twice a day on days when she worked and three times on her days off. She played golf 10 to 12 times a year and went downhill skiing at least once a week during the winter.

55 In the five years preceding the accident her health was good, missing work on only two occasions because of the flu.

56 Since the accident the plaintiff has been unable to return to her golf or to skiing and although she has continued to do the river walk she testified she now does the three mile walk once a day which is all she can manage, because of her leg and hip.

57 The restrictions from her shoulder are both in strength (14 ounce can is about all she can lift) and in range of motion, particularly in the area of reaching for things.

58 It is the combination of her two injuries which she finds difficult, restricting, as it does, her ability to stand or sit in one position for long periods and her ability to use her right arm.

59 Ms. Comeau's job was more than simply a source of income for her. It was also a major social component of her life, where she knew and visited with both her co-workers and the members of the community who shopped at the Overwaitea store.

60 The restrictions from her shoulder injury have reached into every aspect of her life affecting not just her employment, but her recreational activities, her ability to entertain friends in her home, and her activities in the home preventing her from such activities as sweeping and vacuuming, washing windows and walls and affecting her ability to perform such tasks as the folding of laundry.

VOCATIONAL STUDIES

61 There are three vocational reports before the court by a) Finola Gallagher, b) Joseph Hohmann and c) Richard Carlin. These reports uniformly accept that Ms. Comeau cannot return to her former employment.

62 The first of these reports prepared following an evaluation on November 30, 1995 identified the following list of limitations and difficulties:

- Sleep Disturbance: Reports she sleeps for four hours or less per night and is related to back pain and discomfort. She reports she has to get up several times per night in an effort to relieve the "aching". She has tried taking medication, i.e. Amitriptyline, but reports she was unable to tolerate it. She now occasionally takes Tylenol #3.

- Difficulty sitting for long periods due to left hip, buttock and leg pain. Walking relieves the "pressure".

- Difficulty standing for long periods, particularly in "one spot" due to low back pain, reportedly assuming a leaning forward posture to relieve the problem.

- Decreased walking tolerance - albeit she is now walking up to three miles daily, she used to walk nine miles daily prior to her accident. Left leg becomes heavy and she feels she has to "lift it" to take a step.

- Limited ability to lift and carry due to right shoulder weakness, reportedly using left upper extremity now as dominant extremity. Lifting a full tea pot repeatedly

requires the support of her left arm.

- Difficulty performing activities requiring pushing and pulling, eg. ironing, vacuuming, mopping. She has a home maker for five hours once weekly who performs the heavier household tasks.

- Difficulty performing simple self-care activities, eg. dressing, hair care due to shoulder and back problems.

- Restricted ability to perform any reaching or sustained activity above chest level due to shoulder dysfunction. She reports she and her spouse moved into a new home approximately one year ago. She would normally participate in the decorating, eg. painting, wallpapering. She has been unable to do so due to her lack of ability to perform reaching activities.

- Difficulty performing repetitive activities requiring force, eg. chopping vegetables. She now used an ostersizer.

- Difficulty stooping/bending her back for any length of time due to increased back pain.

- Restricted leisure activities: Ms. Comeau reports she used to downhill ski, golf, hike. She has been unable to participate in these activities since her accident. She also reports that her social life has been restricted, eg. she used to entertain large groups, making "fancy dinners and desserts".

- Emotional Difficulty: Ms. Comeau reported that although she feels "she has adapted to living with her shoulder problem", she is frustrated and often angry regarding the lack of resolution of her back problem.

> She also indicates she "wants to get better and is not ready to accept her back pain can't be fixed". She reports she has always "been fast and energetic" and that work was, and is, an important aspect of her life. She has difficulty accepting that she may not return to her pre-injury employment as recently suggested by Dr. Davidson.
>
> - Occasional headaches, particularly following Physiotherapy treatment.

63 Some of Ms. Gallagher's observations during the evaluation are significant. The following extracts are representative:

> Ms. Comeau's gait was observed prior to, during, and following the test. In general, she was noted to be higher on her left iliac crest and her trunk was rotated to the right. She protected her right arm while stepping, holding it at her side with her elbow flexed. She periodically assisted her left hip extension with her left hand while ascending the steps. No increase in gait abnormalities was noted following completion of the test.
>
> . . .
>
> She was observed to walk at an average pace. Decreased weight bearing through the left lower extremity was noted on two occasions, i.e. on her arrival and following the interview. It was felt on both occasions to be related to prolonged sitting. When ambulating her left iliac crest was observed to be higher than her right.
>
> . . .
>
> She was observed to ascend and descend 12 steps of stairs, four times. She used the hand rail. She did not demonstrate any difficulty descending the stairs but reported difficulty ascending, in terms of repetitive flexion of left hip. She was able to perform

nine minutes of stepping during the Canadian Aerobic Fitness Test. Her right shoulder was held in a protracted and depressed posture. She was observed to occasionally hold her left buttock during the stepping motion at the third stage of the test. She climbed a three foot ladder in a foot by foot method. She appeared mildly unsteady as she was unable to stabilize herself with her right upper extremity. She complained of "heaviness" in her left leg.

. . .

She is limited in her ability to sustain a stooped posture due to low back and left hip pain.

. . .

This demonstrated lifting, carrying, pushing and pulling ability shows that Ms. Comeau is capable of work in the sedentary strength category. In my opinion, however, her lifting, carrying, pushing and pulling ability, even within the sedentary strength category, is restricted by her right shoulder dysfunction. Other restrictions related to sitting tolerance will also apply to sedentary strength jobs.

. . .

She was observed to sit for approximately three hours. The longest period of continuous sitting was for two hours and 20 minutes, ie.e. in the morning, during the interview and the performance of the hand tests. At all times, Ms. Comeau was observed to assume a forward sitting posture, forearms resting on desk, asymmetrical posture to the right due to avoidance of placing weight on the left buttock. Three different types of chairs and back rests were utilized in an effort to improve sitting posture and tolerance. She was, however, very resistant to allow her pelvis to rotate backwards to enable her low back to be supported. She was, therefore, sitting in forward flexion for a prolonged period of time. She occasionally weight shifted and stood briefly to stretch her back on one occasion.

Ms. Comeau is able to tolerate both sitting and standing although she does experience discomfort from prolonged use of these positions. Sitting and standing tolerance is improved with alteration of these postures.

Ms. Comeau's performance on the lifting, carrying, pushing, pulling evaluation suggests she is able to work within the sedentary strength category. With her current level of ability, restrictions exist within this category in terms of lifting/carrying ability and sitting tolerance.

Observation of her sitting tolerance, given her symptomatic response, suggest that her tolerance is less than 2.5 hours for continuous sitting due to low back and left hip pain. Her present sitting posture is contributing to low back pain irritation.

She did not present with any significant limitation to dynamic standing. Static standing of 29 minutes, however, was related to an increase in back pain.

According to the physical activities factors described in the C.C.D.O., Ms. Comeau's Work Capacity Evaluation indicates that she would be suited to work with the following profile:
. . .

64 Mr. Hohmann in his report writes that:

The medical opinions which I have reviewed suggest that in the future she would be able to perform non-repetitive shoulder activities such as office work (Dr. Corrigan), but that she will likely not be able to return to work as a supermarket cashier (Dr. Corrigan, Dr. Davidson). It is anticipated that her low back pain will improve with time (Dr. Corrigan), but that she is currently disabled and will be restricted for employment opportunities even if her back pain resolves (Dr. Harris). A physical capacities assessment finds her capable of sedentary strength employment with restrictions in the area of stooping, balancing, reaching, and handling.

> My vocational findings indicate that she has good transferable skills in dealing with the general public on a sales and cashiering basis developed over many years. She demonstrates a strong, stable attachment to the labour force, and earlier on in her career performed physically demanding work. Notwithstanding, her transferable skills are limited in scope, and aside from the foregoing, she does not have any training in any specific skill areas.

65 The difficulty of her present position is set out concisely by Mr. Carlin in his report at p. 10 where he writes:

> If Ms. Comeau's right shoulder improves somewhat but insufficient for her to return to work as a Cashier then her range of options is significantly reduced. She is a 53 year old woman who has only worked at manual labouring types of jobs. She left school during the middle of her Grade 11 year and consequently does not possess a Grade 12 certificate. Her vocational test battery results show that her academic skills would require one to two years of upgrading to reach a Grade 12 level. This is further reflected in her aptitude scores which suggest that she would be better suited to a practical, on-the-job training program rather than formal retraining. In summary, Ms. Comeau is a bright woman who does not possess adequate schooling or academic prowess to easily retrain in a more sedentary type of job. Consequently, if she is able to return to the labour market at all she will be limited to those unskilled or semi-skilled jobs that provide on-the-job training.
>
> Ms. Comeau lives in the community of Quesnel. This is a small community of approximately 8000 inhabitants located 120 kilometres south of Prince George. The majority of the labour force is employed within the City of Quesnel with the remaining workers employed in some aspect of the logging industry. Consequently, there are very few opportunities for an individual to work in an unskilled or semi-skilled job that would also not be physically demanding.

> Ms. Comeau does not possess any general clerical skills and, as the test results indicate, she would be a poor candidate for acquiring these skills. Consequently, even general office work or reception/switchboard work would probably not be suitable or appropriate for her. This leaves Ms. Comeau with very few options at her disposal. Some examples would be Gas Bar Cashier, Counter Clerk, and Retail Sales Clerk. Even within these occupations Ms. Comeau would need to be selective as some jobs would require more handling and manipulating activities than she might be capable of managing. The wages for these occupations in the Quesnel area range from approximately $6.50 - $8.00 per hour. There ware a large supply of workers for these occupations which means competition for the few available jobs is high. Part-time work is common.

66 The major difference between Mr. Hohmann and Mr. Carlin is to be found, in my view, in Mr. Hohmann's optimism.

NON-PECUNIARY DAMAGES

67 The plaintiff is a right hand dominant woman, 51 years of age at the time of the accident, who now has a permanent disability in the use of her right arm and shoulder. She has undergone two surgical procedures and will continue to suffer pain and discomfort. Virtually all aspects of her life have been affected. Her ability to perform household activities is limited and she will need some continued assistance. Her left buttock/sciatic nerve injury is one which, in my view, may continue to add its discomfort unless she receives continued maintenance therapy as suggested by Dr. Davidson.

68 I have reviewed the numerous cases provided to me by counsel. While they are helpful they each have to a greater or lesser extent distinguishing features.

69 Two of the decisions are closer comparisons to the present case, there are, ***Perry v. Bertacco***, (unreported) Vancouver Registry No. B904292, October 24, 1994, and ***Cummings v. Olson***, (Unreported) Powell River Registry No. S0161, October 24, 1994. The plaintiff's injuries are, in my view, significantly more serious than those in ***Cummings*** and somewhat less serious than those described in ***Perry***. In the latter case because the transverse fracture of the right humerous did not unite the plaintiff had undergone five separate surgical procedures and might well face additional surgery. I the present case an appropriate award for general damages is $75,000.00.

APPLICATION OF *PRYOR V. BAINES*

70 Mr. Dunn submits that ". . . both Dr. Velazquez and Dr. Davidson believe that Mrs. Comeau had a pre-existing degenerative condition of the right shoulder, which would have caused her some problems in the future, though there was only a possibility that the plaintiff's problems would have become as bad as they are but for the happening of this motor vehicle accident. Therefore it is submitted that an apportionment of damages is appropriate. This is more significant with respect to the wage loss claim."

71 There are two major difficulties with Mr. Dunn's submission, firstly neither Dr. Velazquez nor Dr. Davidson in any of the material before me described the plaintiff's condition as a "degenerative condition". Secondly, if the principles established in ***Pryor v. Baines*** apply, then, in my respectful view, they apply to both the non-pecuniary damage claim and to future losses.

72 Dealing with the first point, I have previously quoted extensively from Dr. Davidson's report. In his report of December 15, 1995 Dr. Davidson wrote:

> While she may well have had some degeneration in the shoulder prior to the accident, there can be no denying that the accident precipitated a more significant injury . . .
> (my emphasis)

73 From the paragraph which follows it is clear, in my view, that Dr. Davidson was of the view that the pre-existing problem was minor and what he is considering is a pre-existing tear of the rotator cuff. This view of Dr. Davidson's report is confirmed by the Agreed Facts contained in exhibit 8. What Dr. Davidson foresaw was a gradual onset of symptoms within five years of the accident with increasing symptoms such that she would be seeking alternate employment or retirement within eight years of the accident date.

74 The question raised is whether these facts give rise to an application of the principles enunciated in ***Pryor v. Baines and Johal*** (1986) 69 B.C.L.R. 395.

75 The principle arising from the decision in ***Pryor v. Baines*** is best set out at page 397 where Mr. Justice Carrothers said:

> These two sources or causes of damages can be dealt with, either as a case of aggravated damages or as a "thin skull" case, depending on which of two factual circumstances are found to exist. In a case where a second source of cause of damages is found to aggravate an existent and active first source or cause, that is a case of aggravated damages and there may be an apportionment of damages as between the two sources or causes. On the other hand, in a case where a second source or cause of damages triggers the first source or cause which has been found immediately prior to the injury to be merely a latent weakness or susceptibility and not an active source or cause, that is a "thin skull" case and there can be no apportionment as between the two sources or causes and full damages must be awarded against the tortfeasor creating the second source or cause of damages which triggered the latent first source or cause. This distinction became the nub of this appeal. [emphasis added]

76 This passage has been considered in a whole series of subsequent decisions including ***Martin v. Jordan and McLaws*** (1988) 31 B.C.L.R. (2d) 266, ***Prince v. Garcha***, (unreported) Vancouver Registry CA009268, November 24, 1989, ***Oulette v. Kinsmen Club of Ladysmith***, (unreported) Victoria Registry No. CA10080 and V00885, May 11, 1990.

77 The distinction drawn by the court in ***Oulette*** is of substantial significance to the development of these principles. I had occasion to consider these cases in ***Parkhurst v. Main***,

(unreported), New Westminster Registry No. C901811, October 18, 1991, where after quoting the critical passages in ***Oulette*** I reached the following conclusions:

On page 4 the court found:

> In this case the evidence established that the accident precipitated pain and disability, which flowed from a pre-existing very early degenerative arthrosis of the lateral compartment of the right knee. It also showed that the appellant would have suffered these symptoms in 5 - 10 years, even if no accident had occurred.

At page 5 the Court goes on to say that:

> In our opinion this is a case like ***Price v. Garcha***, where the plaintiff's pre-existing condition was already in a state of progressive deterioration, a process which was accelerated by the accident, and which resulted in loss of function. This is properly a case where the pre-accident state of health of the appellant contributed to the condition of which she now complains.

The principle to be drawn from these decisions, however it is characterized, is a distinction between a condition which is truly dormant and one which is active in the sense of being a predictable and progressive condition. The Shorter Oxford English Dictionary defines LATENT as:

> Hidden, concealed; present or existing but not manifest, exhibited or developed.

The presence or absence of symptoms may well be a key indicator of whether or not a condition is dormant or active in the sense I have described but it is not necessarily determinative as the existence of symptoms themselves may only occur at a particular

> point in the progress of the disease or condition.
>
> The key point for decision is whether or not the condition was triggered by the second cause or merely hastened in its predictable progress.

78 The present case is one which presents additional difficulties for the defence. In this case the evidence supports the conclusion that the plaintiff had a pre-existing right rotator cuff tear. What underlies the agreed facts expressing Dr. Davidson's opinions is the assumption that untreated the plaintiff "would probably have experienced problems in her right shoulder within five years of the accident, although probably those problems would not be as severe as they presently are."

79 There is no evidence before me which addresses the likelihood of treatment for that tear or its chances of success absent the motor vehicle accident. Obviously on the evidence surgery was an option, whether such surgery would have succeeded if the tear had not been the massive tear found by Dr. Velazquez after the accident is not addressed in the evidence before the court.

80 In the present case I have no difficulty concluding on the evidence that the plaintiff had a pre-existing minor rotator cuff tear, but as in ***Parkhurst v. Main*** the medical evidence falls short of establishing that some or all of Ms. Comeau's present symptoms would have occurred in any event as a necessary result of

a progression of that condition. In these circumstances this is not a case in which these principles should be applied.

81 In ***Pesonen v. Melnyk*** [1993] 6 W.W.R. 578, Hutcheon, J.A. postulated the existence of a third category of degenerative disease cases, at p. 581 he wrote:

> I think that the present case represents a third category of a degenerative disease of the spine that is asymptomatic at the time of the accident. The phrase "active source or cause" and the principle of allocation have no relevance to that third category. Nor has the phrase "thin skull" because that implies a stable condition and not a process of deterioration. A different approach to the award of damages is required for this third category.
>
> The proper approach to this third category, in my opinion, is that approved in ***Janiak v. Ippolito***, [1985] 1 S.C.R. 146 at 170, in the direction given by Lord Diplock in ***Mallett v. McMonagle***, [1970] A.C. 166 at 176. I need no quote the entire passage but the direction is that:
>
> > . . . in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing. . . would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.
>
> So the question to be answered is what are the chances, had the accident not occurred, that the pre-existing condition would have degenerated at some point to the stage that the plaintiff could not longer work.

82 The other two members of the corum while agreeing in the result of the appeal specifically disagreed with the existence of this third category and found that, on the evidence it was a "thin skull" case. On the evidence in the present case a similar conclusion emerges.

83 Mr. Dunn's concern about how ***Pryor v. Baines*** applies to loss of future income is answered by application of the approach in ***Janiak v. Ippolito*** (supra) and by a proper deduction for contingencies.

PAST LOSS OF INCOME

84 The parties agreed that as of the date of trial this loss totals $86,000 and that sum is awarded under this head of damage.

FUTURE LOSS OR INCOME

85 The approach to pecuniary loss outlined by the Supreme Court of Canada in the trilogy (***Andrews v. Grand & Toy (Alta.) Ltd.*** [1978] 2 S.C.R. 229: ***Thornton v. Bd. of School Trustees Of School Dist. No. 57 (Prince George)***, [1978] 2 S.C.R. 267 and ***Arnold v. Teno; J.B. Jackson Ltd. v. Teno; Teno v. Arnold***, [1978] 2 S.C.R. 287) and refined in ***Lewis v. Todd*** [1980] 2 S.C.R. 694 and ***Lindal v. Lindal***, [1981] 2 S.C.R. 629 accepts the principle that there should be full compensation for all pecuniary losses suffered. This approach means that plaintiffs should receive full compensation for loss of future wages and cost of future care in an attempt at full

restoration of their pre-accident living conditions.

86 The passage quoted earlier from ***Janiak v. Ippolito*** is an example of how this approach is to be applied. A deduction for contingencies is used to reflect such future possibilities as early retirement, a reduction of hours or future problems with her right shoulder. This approach was approved by our Court of Appeal in ***Steenblok v. Funk***, (1990) 46 B.C.L.R. (2d) 133 at p. 135:

> . . . It is sufficient at this point to state the proposition of law that in dealing with future loss substantial possibilities must be considered by estimating the chance of the event occurring and that the balance of probabilities is confined to determining what did in fact happen in the past. That is the law, as I understand it, decided in ***Kovats v. Ogilvie***, [1971] 1 W.W.R. 561, 17 D.L.R. (3d) 343 (B.C.C.A.); ***Schrump v. Koot*** (1977), 18 O.R. (2d) 337, 4 C.C.L.T. 74, 82 D.L.R. (3d) 553 (C.A.); and ***Janiak v. Ippolito***, [1985] 1 S.C.R. 146, 31 C.C.L.T. 113, 16 D.L.R. (4th) 1, 9 O.A.C. 1, 57 N.R. 241. The proposition is based on language taken from those three cases.

87 The approach is to assess the plaintiff's income earning ability as a "capital asset", and to consider the extent to which that capital asset has been depreciated as a result of the injury. Many of the cases in this area quote with approval a passage from the unreported decision of ***Brown v. Golaiy***, (13 December 1985), Vancouver Registry No. B831458 where Finch, J., as he then was, wrote:

> The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the

considerations to take into account in making that assessment include whether:

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;

2. The plaintiff is less marketable or attractive as an employee to potential employers;

3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and

4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

88 As Southin, JA wrote in ***Palmer v. Goodall***, (1991) 53 B.C.L.R. (2d) 44:

> Because it is impairment that is being redressed, even a plaintiff who is apparently going to be able to earn as much as he could have earned if not injured or who, with retraining, on the balance of probabilities will be able to do so, is entitled ot some compensation for the impairment. He is entitled to it because for the rest of his life some occupations will be closed to him and it is impossible to say that over his working life the impairment will not harm his income earning ability.

Finally returning to the language of the trilogy, Dickson, J., as he then was, wrote in ***Andrews v. Grand & Toy (Alta.) Ltd.*** (supra) at 251:

> "It is not loss of earnings but rather, loss of earning capacity for which compensation must be made . . . A capital asset has been lost: what was its value?"

89 The plaintiff was a cashier at Overwaitea, where she had been employed since September 21, 1977. From February 28, 1988 to the date of the accident on September 21, 1993 she averaged 32 hours per week.

90 Her rates of pay as presented by her employer were:

Effective date	Rate (per hour)
Dec. 1, 1991	$19.56
Apr. 4, 1993	19.81
Apr. 3, 1994	20.06
Mar. 26, 1995	20.31

To these rates was added a "pension premium" paid on every hour worked:

Apr. 4, 1993	.10 per hour
Apr. 3, 1994	.20 per hour
Mar. 26, 1995	.35 per hour

91 The defence submits that though the plaintiff is partially disabled she is not totally disabled and that she is left with some residual earning capacity. In addition Mr. Dunn submits that, on the evidence, within five to eight years of the accident ". . . vocationally she would be in the same position that she is in now."

92 I agree that the plaintiff is left with some residual earning capacity. Regrettably, her job skills, education and age leave her with little prospect beyond a minimum wage job in which she will be competing with much younger candidates. Her education and age leave little chance for successful retraining in the

secretarial/clerical field and her physical difficulties leave little prospect of anything but part time employment.

93 The prospect of the plaintiff returning to her former employment on a supported basis, which was canvassed at trial, is, in my view, unrealistic.

94 The plaintiff is left, however with very positive assets. She is personable and good with people.

95 Once she emerges from her present depression, which I suspect is due in no small measure to the way in which these types of proceedings tend to focus on the negative instead of the positive, she is likely to regain much of her former positive attitude.

96 In my view those attributes will likely result in her finding some form of part time employment which involves her dealing with the public. As a result of her physical restrictions, such employment is likely to be limited to minimum wage positions and limited part time hours. Such employment is likely to be more therapeutic than economically rewarding.

97 For the purposes of this assessment I accept the probability that regardless of the injury the plaintiff would have begun working somewhat reduced hours although it is likely she

would have done her best to maintain her present hours until her pension entitlement "vested" at age 60.

98 I consider it unlikely that she would have worked beyond age 60. This age corresponds fairly closely to the eight year opinion expressed by Dr. Davidson.

99 Ms. Comeau's future income is calculated at some $36,000 per year in her position at Overwaitea. Calculating this loss over two consecutive three year periods to age 60 yields a computed present value for her loss of income of $198,291.

100 Taking into account the various contingencies including residual earnings, an appropriate discount, in the present case would be in the range of 35%. Taking these factors into consideration I award the plaintiff under this head $128,000.

LOSS OF PENSION

101 The plaintiff advances a claim for diminution of her pension as a result of the accident. The evidence indicates that Ms. Comeau's present pension entitlement beginning at age 60 is $879.87 per month or $10,558.44 per annum. Her estimated entitlement if she had worked to age 60 would have been $1,149.98 per month or $13,799.76 per annum. The difference in this income stream is $3,241.32. The present day value of this income stream using a six year delay (to age 60) and a term of twenty-three years

representing the balance of her life expectancy, is $41,188.

102 In my view, this sum may be properly viewed as a further diminution of the plaintiff's earning capacity. The plaintiff's residual earning capacity is such that it is unlikely that she will obtain any employment which will materially affect this pension entitlement. Applying the same contingency discount I award the plaintiff under this category $26,772.

FUTURE CARE COSTS

103 Her injuries have had a particularly devastating effect on Ms. Comeau. The evidence discloses that she was a meticulous housekeeper who is now unable to maintain her home the way she did before. At present she has a homemaker in 5 hours per week at a cost of $15 - $16 an hour. Ms. Comeau's evidence is that although this is of great assistance it does not get completed all of the work she would have done before the accident. In my view, she is entitled to be compensated for 8 hours of homemaker assistance at $15 per hour calculated over a 48 week period annually. This represents an annual cost of $5,760.

104 In terms of ongoing therapy costs, I am satisfied that a level of maintenance therapy is necessary as a result of the accident and I am satisfied that this will be an ongoing need. Combining medication expenses, extra billing expenses, physiotherapy expenses and the occasional trip to Vancouver the

plaintiff's suggestion that these costs represent approximately $1,000 additional expense per year is not unreasonable.

105 With respect to these type of expenses in the present circumstances it is necessary to apply a higher contingency deduction. Given the previous rotator cuff tear, Dr. Davidson's opinion of her developing "some problems" over 5 to 8 years and the effects of the normal aging process the application of a 50% contingency is appropriate.

106 A calculation in this area must, of necessity, be somewhat rough and ready. Under this category I award the plaintiff $50,000.

SUMMARY

General Damages	$ 75,000
Past Wage Loss	86,000
Future Wage Loss	128,000
Loss of Pension Benefits	26,772
Future Care Costs	50,000
TOTAL	**$365.772**

107 In the event counsel are unable to agree on costs they may be spoken to.

J.

Prince George, B.C.