



It's No-Fault of the Court: *Litigating Whiplash*

BY ROBERT BURSTEIN *

Envision a middle-aged woman lounging in the courtroom with her neck brace, claiming great pains after she was rear-ended by a car that was traveling at 10 miles per hour. As a jury member, the first word that probably comes to mind is malingering. How often has pop culture epitomized the feigning plaintiff as a neck-brace toting, money-hungry citizen, just trying to get theirs? In reality, though, the vast majority of these whiplash injuries stem from rear-end impacts. Even more alarming, most serious car accident whiplash injuries result from crashes where the colliding car was travelling less than 10 miles per hour.¹ Despite these potentially serious injuries, if you walk or crawl into court without “objective” medical testimony backing your claim, you might as well go home.

THE WHIPLASH CONTROVERSY

Whiplash, aka: cervical hyperextension injury, cervical flexion injury, neck sprain or neck strain, is a hub of longstanding controversy in the medical community.² This diagnostic impasse is why whiplash and other soft tissue injuries burden the court dockets heavily and is also why insurance companies report such staggering rates of claim abuse. Described as both a mechanism of injury and a clinical syndrome, of the myriad of symptoms patients claim, neck pain is reportedly the only symptom patients have in common.³ This difficulty in determining the injury's existence causes many doctors to rely solely on the patient's subjective complaints. Whiplash may be defined as “trauma causing cervical musculoligamental sprain or strain due to acceleration/deceleration of the head relative to the trunk in any plane.”⁴ In a more digestible description, whiplash “implies injury to soft tissues (the muscles, ligaments and tendons) of the neck without direct application of force to the head or neck as would occur in acceleration hyperextension injuries.”⁵

Note in Figure 1 that when Car A rear-ends Car B, Car B first accelerates, followed by the passenger's shoulders and head.⁶ The passenger's shoulder and head accelerates

* Robert Burstein, bobby.burstein@gmail.com, is a recent graduate of Pace Law School. He completed his undergraduate degree in Psychology at the University of Virginia, where he was a member of the Phi Eta Sigma Honor Society, and is interested in pursuing a career in Personal Injury Litigation.

two to two and a half times the vehicle's ultimate acceleration.⁷ The mechanics behind whiplash are uncertain, but the event begins at the point of impact where the inertia of the head keeps it in place as the automobile initially crashes forward. The passenger's body and shoulders are then accelerated, intensely forcing the head backward, extending the cervical spine (the portion of the neck that includes discs C1 to C7) into an S-like formation (*see* Figure 2).⁸ The amount of stress placed on the neck varies based on the force applied by how heavy the head is and the speed of the head's movement.⁹ The injury mechanism described above excludes other types of car collisions and situations where the head rotates at the point of impact, causing another potential array of injuries.¹⁰ Other factors considered include whether the passenger expected the accident, whether the seat back breaks, the hyperextension of the neck over the head restraint, the rebound of the neck off of the head rest, how far forward the body is initially pulled, if the headrest is as high as the passenger's ears (if the headrest is lower, it can increase the severity of the injury), whether the passenger was wearing a seatbelt and the stiffness of the seat spring (the stiffer, the safer).¹¹

Patients who have experienced whiplash many a time remember the backward and forward jolting at the point of impact.¹² Some patients are unconscious and cannot recall the events surrounding the collision.¹³ The majority of the time though, the patient initially does not realize that he or she has been injured.¹⁴ Neck discomfort and/or nausea may occur shortly thereafter.¹⁵ The following days, the neck may be increasingly tight or swollen with restricted movement.¹⁶ These symptoms generally change or disappear, and a portion of patients have these symptoms permanently.¹⁷ When the doctor cannot pinpoint the cause of different symptoms, he or she may administer ineffective treatment to the patient, thereby creating a disconnect or distrust.¹⁸ This may result in the patient believing his or her symptoms are neurotic, regardless of whether the doctor believes this to be the case.¹⁹ The patient may also complain of hand pain or numbness, suggestive of cervical radicular pain related to nerve root compression.²⁰

To determine objective medical evidence of injury, the treating physician should take MRI and CAT scans soon as possible in addition to conducting a physical examination of the patient.²¹ This should include, but not be limited to range of motion tests for straight planes, rotation out of flexion and extension to determine how well the upper and lower cervical spine operates independently as well as comparison of active and passive range of motion.²²

By some measures insurance companies state that for every 1,000 people in the U.S. annually, there is a whiplash claim.²³ The U.S. Census Bureau states that currently there are 311,152,733 U.S. citizens.²⁴ This equates to approximately 311,153 whiplash claims last year. Other reports show that some 1,000,000 of the 13,000,000 involved in automobile accidents last year suffered whiplash injuries.²⁵ Studies also show that between 15 and 20 percent of auto-accident whiplash injury victims have symptoms after a year and only 5 percent face serious injuries.²⁶ This translates to only 13.9 percent of the 311,153 whiplash claims actually facing serious injury. This begs the question, what is a serious injury and how do we determine if there is one?

In 2008, a group of 13 individuals who staged car accidents in and around

Washington Heights, New York, were tried for stealing some \$6,200,000 from insurance companies.²⁷ Their operation entailed creating car accidents and ordering a myriad of unnecessary medical tests, unnecessary cervical collars, and claiming whiplash and other soft tissue injuries, as these injuries are harder to prove.²⁸ This criminal outfit partially consisted of three medical doctors, a chiropractor and two acupuncturists.²⁹ They fooled insurance companies for over four years.³⁰ The presence of personal injury mills such as these has only served to further fuel the whiplash debacle. Given the staunch controversy surrounding exactly what percent of the whiplash affected litigant actually is afflicted, numerous studies have been conducted to determine exactly this question. The researcher Gotten analyzed the work records of a group of 100 litigants who had experienced whiplash.³¹ He discovered that 41 percent of the litigants missed three months or more of work before settling, and only 7 percent of the litigants missed an equal amount of time after having settled.³² Gotten noted that following settlement proceedings most patient's symptoms would dissipate.³³

In a separate study by Macnab, a sample of whiplash injured litigant's symptomology was analyzed yielding findings that 45 percent of the patients remained symptomatic for two plus years post-settlement.³⁴ Schutt and Dohan in another study reviewed a large group of women who experienced car collision-related neck injuries.³⁵ They observed that the onset and persistence of symptoms was unrelated to litigation.³⁶ Given these contrasting studies, how do we resolve these differences? Even though there exists clear support that soft tissue injury cases are a source of serious injury within the medical community, the legal community refuses to equally recognize this fact. Where a major portion of this disconnect is due to the controversy surrounding the medical understanding of the injury and the nature of the injury, a portion seems to be due to the insurance industry's influence on society.

There are fervent proponents on each side of the whiplash debate. Needless to say, the Courts have their own voice. In the New York Court of Appeals case, *Pommels v. Perez*, the Court cites that, from 1992 to 2001, there had been a reported 1,700 percent increase in insurance claims under no-fault serious injury.³⁷ So what role does the role of our no-fault system actually play in abating frivolous suits?

NO-FAULT LAW

In 1995, a team in Saskatchewan, Canada conducted a study surrounding the impending shift from a tort compensation system to a no-fault system.³⁸ Including 7,462 claimants that met the criteria for whiplash, the study analyzed claims for the six month period preceding the system shift and the two six month period succeeding the shift.³⁹ The data revealed that over the listed timeframes, there was a 43 percent decrease for men and a 15 percent decrease for women for cases with lasting whiplash injuries.⁴⁰ The claim closure timeframe also decreased to 194 days and 203 days respectively.⁴¹ The team concluded that the elimination of compensation for pain and suffering is associated with a decreased incidence and improved prognosis for whiplash injury.⁴² In a separate 2005 study, the system conversion from tort to no-fault was analyzed by a team that studied total injury claims.⁴³ The study showed that in

Saskatchewan, there was a 5 year, 31 percent reduction in total injury claims, as well as a 43 percent decrease in Manitoba.⁴⁴ British Columbia remained a tort province and had a 5 percent reduction over the 10 years, whereas Quebec, a pure no-fault province had less than 1/3 of the injury claims of British Columbia.⁴⁵ As most whiplash cases involve non-serious injuries, would it be fair to conclude that injury claims, in general, involve a higher rate of serious versus non-serious injuries? If so, how should we interpret the conflicting findings of these two studies?

New York's No-Fault law, otherwise known as the Comprehensive Automobile Insurance Reparations Act of 1973, changed the landscape of this state's tort litigation.⁴⁶ In the Governor's Memoranda approving the bill, former Governor Nelson Rockefeller lauded its enactment.⁴⁷ He stated that the current automobile insurance system was too expensive, and offered inadequate protection.⁴⁸ By replacing systems, Rockefeller said every automobile accident victim is compensated regardless of fault, which clears the courts for more pressing litigation.⁴⁹ Finally, he believed that there would be a substantial premium savings to all New York motorists.⁵⁰

Today, if someone should be injured in a car accident, that individual would be entitled to up to \$50,000 from their insurance company for basic economic loss, save an exclusionary circumstance (*e.g.*, driving while intoxicated).⁵¹ This payment excludes pain and suffering, and, under No-Fault law, should this person believe that his or her injury warrants this sort of relief in tort, he or she must satisfy 5102(d) of the Insurance Code for serious injury.⁵² Formerly Insurance Law 671(4) prior to 1984, the statute defines serious injury as having nine classifications: "Serious injury" means a personal injury that results in: 1) death, 2) dismemberment, 3) significant disfigurement, 4) a fracture, 5) loss of a fetus, 6) permanent loss of use of a body organ, member, function or system, 7) permanent consequential limitation of use of a body organ or member, 8) significant limitation of use of a body function or system, 9) or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."⁵³

Of these nine classifications, the most commonly claimed injuries involving a soft tissue injury consist of permanent consequential limitations (these limitations must be important or significant) or significant limitations (these limitations cannot be minor, mild or slight, although they may be non-permanent; to prove this standard, "objective evidence of the extent or degree of the limitation and its duration..." must be provided; pain alone is insufficient and if the soft tissue injuries described as mild that did not cause the mobility to be restricted do not satisfy the criteria).⁵⁴

Although it appears that there is a delineation between these standards, these requirements are very ambiguous. The Court in *Altman v. Gassman* said that "consequential" and "significant" are synonymous.⁵⁵ The Court in *Vidal v. Maldonado* highlighted that the "terms (body function, system, organ or member) are used interchangeably" in a variety of courts.⁵⁶

Now the reader has been introduced to whiplash, how the injury occurs, the controversy surrounding soft tissue injury claims and how court systems have attempted to handle the arduous task of lightening the court dockets, the following cases should have a new flavor.

Brown v. Dunlap

In August of 1999 plaintiff was rear-ended by the defendant. An ambulance took him to the hospital where he complained of neck and back pain.⁵⁷ X-rays showed no fractures, so plaintiff was subsequently released.⁵⁸ A week later he had an MRI of the lumbosacral segment of his spine.⁵⁹ The radiologist saw disc bulges at L3-L5 and disc herniation at L5-S1 indenting the thecal sac.⁶⁰ The following month, a neurologist diagnosed plaintiff with a lumbosacral herniated disc and lumbosacral radiculitis.⁶¹ His treating physician, relying on plaintiff's MRI, reported spasms and tenderness and stated that the accident caused an acute cervical sprain as well as a lumbosacral sprain which caused pain and limitation in movement over the spine, a permanent injury.⁶²

In April of 2002, in opposition to defendant's summary judgment motion, plaintiff's treating physician noted numerical deficiencies in plaintiff's extension and flexion of the cervical and lumbar spine.⁶³ He also stated that he instructed plaintiff to continue exercises at home after conducting extensive physical therapy at his office (this is 2.5 years after the accident).⁶⁴ Plaintiff, in his affidavit stated that he continued to suffer excruciating pain in his neck and lower back when he stood for more than 15 minutes, could no longer lift heavy objects; experienced numbness in his legs when he remained too long in the same position and could not continue his prior sports activities.⁶⁵ The trial court awarded defendant's summary judgment motion on the grounds that the plaintiff did not explain the 2.5 year gap in treatment and relied on unsworn MRI reports.⁶⁶

On appeal, the Court reversed, stating that "plaintiff's submissions in opposition, however, raise material issues of fact as to whether he sustained a "permanent consequential limitation of a body organ or member" or a "significant limitation of a use of a body function or system."⁶⁷ The gap in treatment is not determinative in and of itself.⁶⁸ "A plaintiff need not incur the additional expense of consultation, treatment or therapy, merely to establish the seriousness or causal relation of his injury" is enough to raise an issue of fact.⁶⁹ Furthermore, the court held that even though the MRI reports were unsworn, the various medical opinions relying on them are sworn and competent evidence.⁷⁰

Parreno v. Jumbo Trucking Co.

Plaintiff was rear-ended by a truck and taken to the hospital where he had x-rays, was given pain medication and was subsequently released.⁷¹ Over the following five months, plaintiff received physical therapy until payment discontinued.⁷² Because of lasting pain, plaintiff saw an orthopedist who identified a herniated cervical disc, a bulging lumbar disc, cervical and lumbar straightening, cervical and lumbar muscle spasm with trigger points, and cervical and lumbar radiculopathy.⁷³ Plaintiff's treating physician administered a series of steroid injections, providing only temporary relief.⁷⁴

Plaintiff testified that it was difficult to turn his neck or bend forward or turn side to side because of the pain.⁷⁵ His daily functioning was impeded as he could not take out the garbage unassisted; he developed marital problems as a result of acquiring a pain-related temper and he was forced to reduce his work schedule as a damaged furniture inspector.⁷⁶ In total, he missed three or four full days of work. His physician testified that he treated plaintiff seven times over a 2.5 year period.⁷⁷ He had four findings as a result of his initial examination including a 30 percent limitation in the range of motion in plaintiff's neck, multiple trigger points of muscular spasm in his neck and should girdle, spasm and tightness of the lower back, and pain in the lower back and legs during a straight leg raising test at 70 degrees (the normal is 90 degrees).⁷⁸ He testified that his findings concerning muscle spasm were objective or, "beyond the control of the patient," in addition to being causally related to the accident.⁷⁹

Defendant's countered with two medical experts.⁸⁰ When reviewing plaintiff's MRI, their radiologist found no traumatic change, no straightening of the lumbar spine and no bulging disc.⁸¹ The radiologist also found that specifically around the neck, that the MRI film was blurry with no signs of trauma or disc herniation.⁸² She *did* acknowledge that the MRI showed some straightening of the cervical spine, attributed secondarily to muscle spasm, but primarily to patient movement.⁸³ Defendant's second witness examined plaintiff for *five* minutes. In this time frame, he determined:

1. Some limitation in his head and neck.⁸⁴
2. Normal results for the straight leg raising test, indicating no herniated disc.⁸⁵
3. That plaintiff could bend at the waist and bring his fingertips below his knees without difficulty.⁸⁶
4. That his intermittent complaints of neck and back pain were consistent with his age and occupation, and that there were no objective findings to suggest that the accident caused any impairment, permanency or disability.⁸⁷

Defendants conceded liability after plaintiff's testimony, but argued that plaintiff's injuries were not serious.⁸⁸ The jury awarded \$50,000 for past pain and suffering and \$50,000 for future pain and suffering.⁸⁹

Arguing that plaintiff's evidence did not establish a serious injury, the defendants convinced the Court, and the award was reversed.⁹⁰ "Viewing the trial evidence in a light most favorable to the plaintiff," the court stated that "plaintiff failed to establish a *prima facie* case of serious injury under either a quantitative or qualitative analysis."⁹¹ Even though plaintiff's treating physician testified to very specific quantitative findings, the Court stated they were based on subjective findings of pain.⁹² The Court stated this because the doctor admitted that the results of one of the tests, the straight leg raising test, would depend on patient's assertion of pain rather than a verifiable inability to raise one's leg more than seventy degrees.⁹³ The Court concluded that the plaintiff's medical expert failed to demonstrate that the tests were objective and also insufficient to demonstrate a serious injury.⁹⁴ When questioned regarding the qualitative difference between the plaintiff's injured cervical and lumbar spine and that of a

normal healthy spine, plaintiff's treating physician stated he did not understand, and when it was rephrased, the doctor replied "he certainly has pain with activities, acquires pain, complained of pain with weather changes."⁹⁵ He has muscular spasm that limits motion, worse at times than other times. He has a limited function certainly."⁹⁶ The Court held that plaintiff's assertion of a significant injury was "conclusory and tailored to meet the statutory and decisional requirements."⁹⁷

Physical examinations of whiplash aggrieved patients entail a myriad of tests depending on the presented symptoms. For instance, an often seen symptom, radiculopathy (presented in the cases above), consists of a lesion that causes irritation of a nerve root.⁹⁸ The patient who experiences this symptom reports pain, burning sensation or numbness that radiates along portions of the nerve root.⁹⁹ One of the tests used to examine radiculopathy is the Spurlings test.¹⁰⁰ This entails assessing the cervical nerve roots for stenosis.¹⁰¹ The neck is extended and rotated toward the side of the pathology.¹⁰² Once the patient is in position, a firm axial load is applied. If radicular symptoms are worsened by this maneuver, the test is said to be positive.¹⁰³ Interpreting the totality of what the patient exhibits must be a significant portion of what consists of objective medical expert testimony.¹⁰⁴ To say that because the findings are in part based on the plaintiff's exclamations of pain should not immediately discredit accepted medical tests. No doctor wants to exacerbate a patient's injury. Also, in *Vidal v. Maldano*, a First Department case like *Parreno*, the court stated that "despite the existence of objective evidence (spasm and a somewhat positive MRI)...[the *Parreno* Court] determined and concluded that plaintiff's medical evidence failed to establish a *prima facie* case of serious injury under a quantitative or qualitative analysis."¹⁰⁵ *Parreno* has been positively cited since the *Vidal* case, but note the inconsistency, even within the same department.

Whiplash injuries will remain a constant haven of controversy. As long as society expects the courts to resolve and eliminate the mass of fraudulent cases, inconsistent standards will be used across courts to lighten the docket. The above case highlights how easily discredited medical expert's testimony may be, even though their standards are acceptable in the medical community. If the insurance industry would like rates of overly litigious whiplash claims to subside, then an avenue of interest may be investment in preventative measures such as head restraints rather than efforts on tort reform because, frankly, our judicial system is not equipped to handle this increasingly difficult task that overburdens the New York Court's docket.

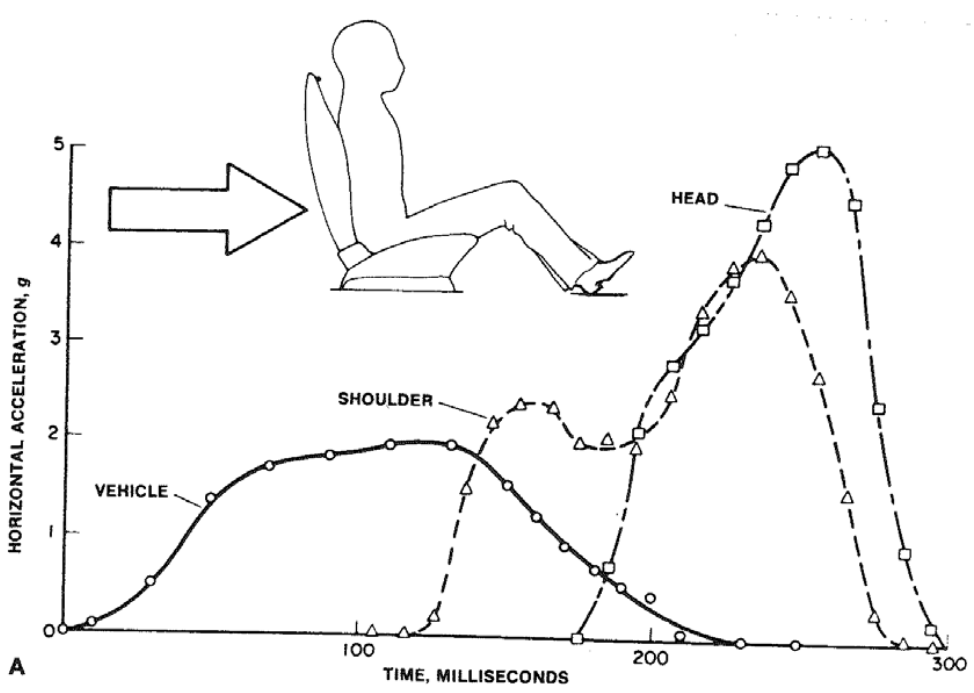


Figure 1

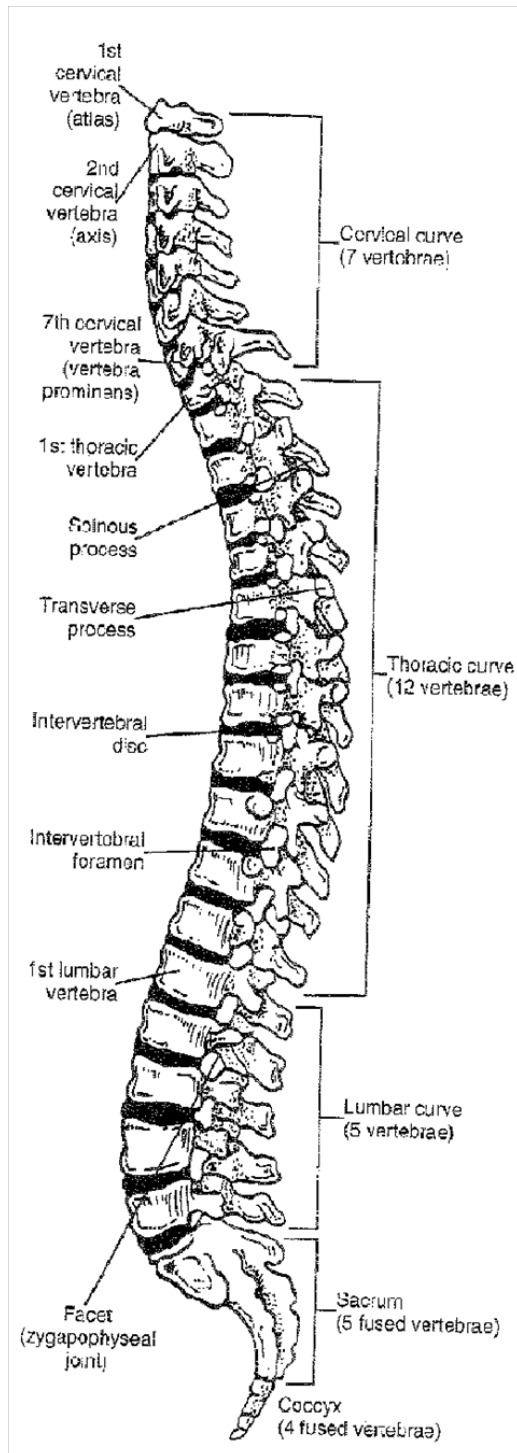


Figure 2

Endnotes

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