

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL CRILLY : CIVIL ACTION
V. : NO. 97-1984
UNITED STATES OF AMERICA :

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

I. FINDINGS OF FACT

A. The parties agreed to the following findings of fact:

1. On April 14, 1995, at approximately 10:00 a.m., plaintiff, Michael Crilly was operating his Geo Prism South on Roosevelt Boulevard in the curb lane, near City Avenue in the City and County of Philadelphia, Pennsylvania.

2. At the aforesaid date and time, defendant Harry Moody was operating a tractor-trailer Southbound on Roosevelt Boulevard, for the United States Postal Service in the passing lane directly next to Michael Crilly's vehicle.

3. At the aforesaid date and time, defendant Harry Moody, without assuring safe passage, crossed into the curb lane of travel causing the right wheel of the tractor-trailer he was operating to collide with the driver's side of plaintiff's vehicle which was lawfully traveling in the curb lane.

4. At all times relevant herein, the United States Government was the owner of the tractor-trailer operated by Harry Moody.

5. At all times relevant herein, Harry Moody was acting in his capacity as a United States employee and/or agent.

6. At all times relevant herein, the United States Government acted by and through its agents, servants and/or employees, specifically Harry Moody.

7. The United States of America has stipulated to liability for the motor vehicle accident that is the subject of this action.

8. As a result of this motor vehicle accident, the plaintiff Michael Crilly sustained property damage to his vehicle.

9. Mr. Crilly has not been reimbursed his \$250.00 deductible for damage to his vehicle nor has he received payment for \$427.68 for costs of renting a vehicle following the accident.

10. As a result of the motor vehicle accident, Mr. Crilly received medical treatment; his treating physician is Dr. Mark Radbill and his neurologist is Dr. Robert Winer.

11. On March 18, 1997, plaintiff filed his Complaint in the United States District Court for the Eastern District of Pennsylvania.

B. The court finds that:

12. At the time of the accident, plaintiff's body and left shoulder were thrown against the driver's side window and door. He then rebounded toward the center of the vehicle.

13. About one hour after the accident plaintiff told the postal inspector that he was shaken and that his hands were trembling, but that he was in no pain. He continued to his place of employment and worked that day.

14. Later that day he developed a stiffness in his neck and his brother took him to Abington Hospital.

15. At Abington Hospital plaintiff complained of stiffness in the neck and a pain

in his shoulder and headaches. X-rays were negative. The doctor in the emergency room at Abington Hospital suggested Motrin and that he avoid twisting.

16. The stiffness continued and plaintiff developed numbness in his forth and fifth fingers after 2 or 3 days. He then went to Dr. Mark K. Radbill, his family doctor, who gave him hot and cold packs and a massage 2-3 times a week. He was discharged in about 6 weeks. The pain and numbness were still there at the time but were manageable.

17. In February of 1996 the pain in plaintiff's shoulder and elbow became unbearable and he still had a stiff neck and numbness in his fingers. He returned to Dr. Radbill who referred him to the Achievement Center of Warminster Hospital. There he received cortisone patches, electrical currents, an exercise program, cold packs, hot packs and massages. After 8 weeks he felt better and his pain was reduced as to severity and frequency. Plaintiff acknowledges that physical therapy helps him substantially.

18. In October of 1996 plaintiff returned to Dr. Radbill because of renewed pain. He was given an MRI which Dr. Radbill told him showed a bulging disk. Dr. Radbill recommended that he consult a neurologist.

19. In December of 1996 plaintiff consulted Dr. Robert I. Winer, a neurologist, recommended by his lawyer. Dr. Winer first saw the plaintiff on December 12, 1996. On examination he found that plaintiff had reduced neck extension, tenderness to palpation to the neck and tested positive through several tests for radiating pain in his shoulder and arm, but no diminishing of pulse.

20. Dr. Winer's report (P-22) states that the MRI showed evidence of spasm and subluxation at C3 - C4 with a bulging disk at C5 - C6. He concludes that plaintiff had "evidence

of left thoracic outlet syndrome and painful restricted range of motion of the cervical spine.”

21. Dr. Winer sent him to the Achievement Center again where he received a neck collar, a home traction unit, massages and Mayo Clinic exercises.

22. Dr. Winer saw the plaintiff again on February 21, 1997, and gave him the Mayo Clinic exercises. Plaintiff did the exercises and on April 18, 1997 Dr. Winer recommended that he do the exercises with weights. On May 30, 1997 plaintiff stated he was doing the exercises with 5lb. weights, and that they were helping. On August 8, 1997 Dr. Winer reported that plaintiff had a full range of motion and no sign of compression in the neck. However, Dr. Winer noted that plaintiff's left hand got pale and was cooler to the touch and his pulse was now diminished. Previously there was nerve compression only but now it appeared there was some compression on the artery.

23. Dr. Winer acknowledged that a number of things can cause a diminished pulse. He has only observed it in the plaintiff on one occasion and no other doctor has observed it. He also is the only doctor who noticed a change in color and temperature in the plaintiff's hand and that only on one occasion.

24. On September 11, 1997 Dr. Winer noted that the nerve conduction across plaintiff's brachial plexus was slowed.

25. Dr. Winer's opinion is that the motor vehicle accident caused thoracic outlet syndrome, that it is permanent and that it will worsen over time.

26. Dr. Winer stated on October 9, 1997 that plaintiff should be followed closely for the next 1-2 years. However, as of the date of the trial on April 6, 1998 Dr. Winer has not seen the plaintiff since that time and plaintiff has not called for an appointment.

27. Dr. Winer's report of October 9, 1997 (P-8) states that "if his symptoms and signs progress, he may require further physical therapy, EMGs, MRI and surgical intervention for the left thoracic outlet syndrome. After surgery he would need a course of rehabilitation." (P-8) However, there is no evidence that plaintiff's symptoms and signs have progressed since that time.

28. Dr Winer, plaintiff's treating neurologist, impressed the court as someone trying to present the plaintiff's condition as slightly more serious than it is.

29. Michael Crilly, age 36, is married, has a 5 year old child, is a graduate of Drexel University in mechanical engineering and a graduate of the Widener Law School. He works for DE Technologies in King of Prussia, Pennsylvania and has a one hour commute. In addition, he has formed his own company, Scientific Solutions Inc., of which he is sole shareholder and president, and for which he works in the evenings and on weekends developing proposals for defense contracts.

30. Plaintiff testifies that bike riding still aggravates his condition, he would no longer even try to play tennis, that he does not cut grass or rake leaves and that his pain is aggravated if he lifts his arm above his shoulder. He states that he cannot drive more than 20 - 25 minutes without feeling pain and that at 40 - 45 minutes the pain becomes unbearable. He also experiences pain if he is seated at his computer for an extended period of time.

31. Plaintiff states that his pain as of the date of the trial is becoming more serious, that he has not seen Dr. Winer in the past 6 or 7 months but that the pain now is worse than at time of the accident and that it is progressing.

32. Plaintiff has lost no work except for the time taken for medical treatments.

He takes no medicines other than aspirin and tylenol. He has a prescription for a pain medicine but he does not use it. He wants to avoid taking any unnecessary pills and also surgery. When he is not in therapy he exercises 3 days a week when he is in pain and once a week when he is not in pain. He is in home traction once a week for about 20 minutes.

33. Dr. Larry R. Kaiser examined the plaintiff on behalf of the defendant. He is a professor of surgery at the University of Pennsylvania Medical Center and director of general thoracic surgery. In his report of January 9, 1998 (P-14) he noted some tenderness with palpation over the left neck but no spasm. He noted that plaintiff has some limited motion of his neck and pain in the ulnar distribution when his arm is abducted. Dr. Kaiser detected no diminution of pulse. The EMG shows progressive left partial denervation. Dr. Kaiser opines that plaintiff suffers from left thoracic outlet syndrome and that he may benefit from an operation to release the thoracic outlet should his symptoms worsen or he wishes to obtain some relief. He recommends that plaintiff continue on the home physical therapy program which has given him symptom relief and hopefully avoid an operation.

34. In Dr. Kaiser's report of April 3, 1998 (P-15) he states that thoracic outlet syndrome is not a progressive problem. "Once these patients have pain they either have persistent pain that is not relieved by conservative treatment or may benefit from a period of physical therapy with specific exercises for thoracic outlet syndrome." He further notes that many of those who have an operation report early relief of symptoms but symptoms return after several years.

35. Dr. David Pleasure, a neurologist who is vice chairman of neurology at HUP and chairman of neurology at Childrens' Hospital testified for the defendant. His examination of

the plaintiff showed no atrophy, no change of color, or loss of hair. The Adson's test was negative for compression of the artery in the armpit. This same result was achieved by Dr. Kaiser and also by Dr. Winer except on one occasion, which occasion is the only evidence of a change of blood flow. Dr. Pleasure concludes there were no objective neurological findings on the clinical examination. Dr. Pleasure found signs of partial denervation and reinnervation. He also reviewed the nerve conduction study and found that velocities were normal, that he could not conclude there was any slowing based on the data presented and that the test was, in fact, an unreliable test. He concluded there was some evidence of denervation in the left arm and a lesser amount in the right arm. He found no significant difference from December 1996 to September 1997. Dr. Pleasure diagnosed the plaintiff with an injury to the nerve fibers in the brachial plexus or cervical roots but was unable to tell which. In his report of February 26, 1998 (P-13) Dr. Pleasure states that he does not believe that plaintiff has thoracic outlet syndrome because there is no objective evidence of either ulnar or neural compression in the thoracic outlet. Dr. Pleasure also concluded that the findings from the MRI of the cervical spine would not explain any of the problems that plaintiff was reporting. He opined that the condition is now stable or static and that there is no evidence of progression. He also concluded that plaintiff will not get a total recovery either since it is now three years from the time of the accident.

36. Dr. Pleasure stated that plaintiff may have damage to the nerves in the armpit or possibly the neck, but not thoracic outlet syndrome which is a compression of the nerve or artery. Physical therapy alleviates his symptoms therefore he should be active.

37. Dr. Pleasure impressed the court as having given a well documented neutral evaluation of the plaintiff.

38. Dr. Winer concluded that plaintiff's condition was permanent and progressing. Dr. Pleasure and Dr. Kaiser concluded that plaintiff's condition was permanent but that it was not progressing. The court finds by a preponderance of the evidence that plaintiff's condition is permanent but that it is not progressing.

39. Plaintiff has a life expectancy of approximately 40 years.

40. The negligence of the defendant, United States of America, through its agent and employee, Harry Moody, was a substantial factor in bringing about plaintiff's harm.

41. Plaintiff has and will suffer general damages, including pain, suffering, inconvenience and loss of life's pleasures in the amount of \$125,000.00.

42. Plaintiff makes no claim for medical expenses or loss of earnings or earning capacity.

43. Plaintiff has suffered an economic loss of \$250.00 representing the deductible portion of his automobile insurance coverage for collision damage which was unpaid by his insurance company (P-24). He has also suffered an economic loss in the amount \$427.68 representing the charge for a rental car (P-25) while his vehicle was being repaired.

II. CONCLUSIONS OF LAW

A. The parties agreed to the following conclusions of law:

1. An action cannot be instituted against the United States for damages caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. 28 U.S.C. § 2675.

2. Plaintiff has complied with all of the prerequisites for filing suit against the United States of America under the Federal Tort Claims Act.

3. In a case brought under the auspices of the Federal Tort Claims Act, the law of the state in which the tort occurred controls the issue of liability. Gales v. United States, 617 F.Supp. 42 (W.D.Pa. 1985), aff'd without op., 791 F.2d 917 (3d Cir. 1986).

4. Negligence is the failure to exercise that care which a reasonable man would exercise under the circumstances. Yanofsky v. Commonwealth, State Horse Racing Commission, 537 A.2d 92,92 (Pa.Cmwlt. 1988).

5. A person is held to the standard that an ordinarily prudent person would exercise under the same circumstances. Colonial Taxi and Paratransit Services, Inc. v. Commonwealth Unemployment Compensation Board of Review, 521 A.2d 536, 538n.2 (Pa. Cmwlt. 1987).

6. At all times on April 14, 1995, defendant United States of America acted by and through its agents, servants, workmen, and employees of the United States Postal Service including Harry Moody, who was acting within the course and scope of his employment, for and on behalf of the United States Postal Service and the United States of America.

7. The United States of America has stipulated to liability for this motor vehicle accident.

B. The court concludes that:

8. Damages awarded in FTCA actions may ordinarily not exceed the amount of the administrative claim. Damages in excess of the amount set forth in the administrative claim are allowed only "where the increased amount is based upon newly discovered evidence not

reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.” 28 U.S.C. § 2675(b). The plaintiff carries the burden of proving these matters.

9. Plaintiff’s last administrative demand on December 26, 1996 was in the amount of \$125,000.00. Plaintiff alleges that in May of 1997 Dr. Winer first broached the possibility of plaintiff’s needing surgery in connection with his condition. In August of 1997 Dr. Winer first noted a weakened pulse and a cool hand. In September of 1997 an EMG showed a change in plaintiff’s triceps. Finally, plaintiff testified that his condition is getting worse.

10. The totality of this evidence constitutes newly discovered evidence and intervening facts sufficient to increase the limitation on damages over the amount claimed administratively. However, in view of the court’s findings with reference to the limited significance of these new allegations, the increase will not be substantial and the cap will be raised only to \$150,000.00.

11. The court having determined that the actual damages are in the amount of \$125,677.68 the amount of the limitation is, therefore, irrelevant to this decision.

12. The defendant, United States of America, having admitted that the motor vehicle accident was caused by the negligence of its agent and employee, Harry Moody and the court having found that defendant’s negligence was a substantial factor in bringing about plaintiff’s harm and that plaintiff is awarded general damages in the amount of \$125,000.00 and special damages in the amount of \$677.68, judgment will be entered in favor of the plaintiff and against the defendant in the amount of \$125,677.68.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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ORDER

AND NOW this day of May, 1998, after non- jury trial before the undersigned, IT
IS HEREBY ORDERED that judgment is entered in favor of the plaintiff, Michael Crilly, and
against the defendant, United States of America, in the amount of \$125,677.68.

William H. Yohn, Jr., Judge