

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

<b>BETWEEN:</b>	)	
	)	
Krystal McLeish	)	
	)	Alan J. Clausi and Ian Mair, for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
Erin Daines and Paul Penney	)	Kevin P. Nearing and Michelle Doody, for the Defendant
	)	
Defendants	)	
	)	
	)	<b>HEARD:</b> January 31, 2017

2017 ONSC 870 (CanLII)

**REASONS ON THRESHOLD MOTION**

**R. SMITH J.**

[1] The defendants have brought a motion seeking an order declaring that the plaintiff has not sustained a permanent and serious impairment of an important physical, mental or psychological function as a result of the motor vehicle accident that occurred on January 31, 2014 and has not met the threshold. The plaintiff disagrees and states that on a balance of probabilities the plaintiff has sustained a permanent, serious impairment of an important physical, mental or psychological function as a result of the accident.

**Analysis**

[2] Sections 267.5(3) and 267.5(5) of the *Insurance Act*, R.S.O. 1990, c. I.8 require the plaintiff to prove, on a balance of probabilities, that she has sustained a permanent, serious impairment of an important physical, mental or psychological function in order to recover for non-pecuniary damages. Sections 4.1 and 4.2 of the Ontario Regulation 381/03 to the Act, set out the statutory language and elements used to evaluate the threshold and defines “permanent”, “serious impairment” and “important function” for purposes of section 267.5 of the *Insurance Act*.

[3] The plaintiff is required to adduce evidence of one or more physicians that explains the nature of the impairment, the permanence of the impairment, and the specific function that is impaired and the importance of the specific function to the person.

[4] In *Meyer v. Bright*, [1993] O.J. No. 2446, the Ontario Court of Appeal has set out the three questions that are to be answered to determine whether a plaintiff has sustained a permanent serious impairment of an important bodily function as follows:

- (a) has the injured person sustained permanent impairment of a physical, mental, or psychological function?
- (b) If the answer to question number one is yes, is the function, which is permanently impaired, an important one?
- (c) If the answer to question number two is yes, is the impairment of the important function serious?

### **Permanence**

[5] For the impairment to be permanent, the impairment must,

- (i) have been continuous since the incident and must, based on the medical evidence and subject to the person reasonably participating in the recommended treatment of the impairment, be expected not to substantially improve,
- (ii) continue to meet the criteria in paragraph 1, and
- (iii) be of a nature that is expected to continue without substantial improvement when sustained by persons in similar circumstances.

[6] In *Morrison v. Gravina*, [2001] O.J. No. 2060, the Court found that chronic pain was a permanent physical impairment of an important bodily function on the basis of the plaintiff's subjective evidence. In *Martin v. Nova Scotia (Worker's Compensation Board)*, 2003 SCC 54 at para. 1, the Supreme Court recognized chronic pain injuries despite a lack of objective findings. The Supreme Court stated as follows: "despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress and that the disability they experience is real."

[7] The plaintiff continues to suffer headaches, has difficulty sleeping, has pain in her neck, lower back which have all been present since the collision on January 31, 2014.

[8] Both the plaintiff's experts and the defendants' expert Dr. Shanks diagnosed the plaintiff with chronic pain, and given this diagnosis, I find that the plaintiff's chronic pain is a permanent condition, that her pain was continuous since the accident, and is of a nature that is expected to continue without substantial improvement by individuals who suffer from chronic pain.

[9] Ms. McLeish's restrictions include difficulty with sitting or standing for long periods of time, difficulty with bending, lifting, twisting, turning, running and jumping. These symptoms, which have continued for over 3 years and with the diagnosis of chronic pain, I find meet the test of permanence.

### **Important function**

[10] The *Meyer v. Bright* decision stated that the Court must consider the importance of the function at issue as it relates to the particular individual who is affected by the impairment. The Court will consider all aspects of the injured person's life and the degree to which previous activities have been compromised by the injuries in issue. The activities of daily living must be considered which includes employment activities, household responsibilities, the ability to socialize with others, the ability to have intimate relationships, the ability to enjoy children and the ability to engage in recreational activities. Interference with these activities has been found to be an important function.

[11] The plaintiff's employment activities were affected as a result of her pain as she became excessively tired after working, she had difficulty performing daily household tasks, and she often withdrew from social contact due to her pain, and she is unable to enjoy raising her daughter due to her continuing pain as she has sent her five-year-old daughter to be cared for by her mother in Jamaica, and she is unable to participate in recreational activities such as working out at the gym.

[12] The jury has awarded the plaintiff \$175,000 for loss of future income based on the finding that she would not be able to become a police officer or a military police officer and has suffered this amount of lost income due to the injuries she has suffered in the accident. The jury also

assessed an amount of \$65,000 for pain and suffering and loss of enjoyment of life. Jury's award confirms that the plaintiff has suffered permanent damage to an important function.

[13] In the decision of *Rizzo v. Johnson* (2006), 82 O.R. (3d) 633 the Court found that the plaintiff's chronic pain has prevented her from following her dream career and that the loss of the physical ability to do so was important to the plaintiff. This is exactly what happened in this case as the plaintiff is unable to pursue her dream of becoming a police officer as a result of the injuries she suffered in the accident.

[14] As result I find that the chronic pain suffered by the plaintiff has impaired an important function as described above.

### **Serious impairment**

[15] Section 4.2 of Ontario regulation 461/96 defines serious as follows:

1. The impairment must,
  - i) substantially interfere with the person's ability to continue his or her regular or usual employment, despite reasonable efforts to accommodate the persons impairment and the person's reasonable efforts to use the accommodation to allow the person to continue employment,
  - ii) substantially interfere with the person's ability to continue training for a career in a field in which the person was being trained before the incident, despite reasonable efforts to accommodate the persons impairment and the person's reasonable efforts to use the accommodation to allow the person to continue his or her career training, or
  - iii) substantially interfere with most of the usual activities of daily living, considering the persons age.

[16] In *Meyer v. Bright*, the Court stated that analysis of what constitutes a serious impairment will vary amongst plaintiffs. The analysis will focus on the detrimental effect which the impairment has had upon the life of the particular plaintiff.

[17] In this case, the jury found that the injury caused the plaintiff's chronic pain which has prevented her from completing the tests required to become a police officer or a military police officer and awarded her the sum of \$175,000 for the loss of future income. The plaintiff's loss of her ability to train for a career as a police officer meets the criteria for a serious impairment.

[18] The plaintiff's injury has also affected the plaintiff's activities, her employment as a police officer as described above, and her ability to fulfil daily household responsibilities as she finds it difficult to complete the housework as a result of the continual pain. The continuing pain also seriously affects her enjoyment of life, her ability to socialize with others, has affected the quality of her relationship with her common-law partner Kevin Brown. She has also been unable to enjoy raising her child as she has sent her five-year-old daughter to Jamaica to be cared for by her mother as result of her ongoing pain and her inability to participate in activities with her daughter and the conflicting schedules with her partner.

[19] The plaintiff has been able to continue to work as a security guard however the pain she experiences during her 12 hour shifts have made her work difficult and unpleasant. In *Adams v. Taylor*, 2013 ONSC 7920 the Court found that an impairment was serious where the chronic pain rendered the activities very difficult and unpleasant. This applies to the plaintiff's situation and makes her impairment serious.

[20] The plaintiff was forced to leave her job as a pre-loader at UPS as a result of the injuries she suffered in the accident, she was unable to lift her child and she's had difficulty performing her housework and raising her child due to her injuries. The injuries suffered by the plaintiff have substantially interfered with her daily activities of living as she experiences pain doing daily housework. Her injuries have also seriously affected and substantially interfered with her relationship with her five year old daughter, as she has been sent to live with her mother in Jamaica.

**Disposition of threshold motion**

[21] For the above reasons, I find that the plaintiff has suffered a permanent, serious impairment of an important physical, mental or psychological function as a result of the motor vehicle collision which occurred on January 31, 2014.

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Justice Robert Smith

**CITATION:** McLeish v. Daines, 2017 ONSC 870  
**COURT FILE NO.:** 14-61793  
**DATE:** 2017/02/07

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

Krystal McLeish

Plaintiff

– and –

Erin Daines and Paul Penney

Defendants

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**REASONS ON THRESHOLD MOTION**

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R. Smith J.

**Released:** February 7, 2017