**CITATION:** Valentine v. Rodriguez-Elizalde, 2016 ONSC 3540
**COURT FILE NO.:** CV-12-463220
**DATE:** 20160602

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

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| **BETWEEN:** | ) | |
| | ) | |
| AMANDA VALENTINE | ) | *Z. Tsimerman and K. Podbielski*, for the Plaintiff |
| Plaintiff | ) | |
| | ) | |
| **– and –** | ) | |
| | ) | |
| SEBASTIAN RODRIGUEZ-ELIZALDE | ) | *J. Bowcock and A. Fox*, for the Defendant |
| | ) | |
| Defendant | ) | |
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| | ) | **HEARD:** February 12, 2016 |

**REASONS FOR DECISION – COLLATERAL BENEFIT, THRESHOLD AND DEDUCTIBLE DETERMINATION**

**FIRESTONE J.**

[1] The plaintiff Amanda Valentine ("Amanda") brings this action for damages as a result of a motor vehicle collision which occurred on January 21, 2011. On February 12, 2016, the jury returned its verdict. The jury awarded $30,000 for general damages, $14,022.83 for past loss of income, $50,000 for loss of competitive advantage, nil dollars for past housekeeping and $1,200 for future housekeeping.

**(a) Collateral Benefits**

[2] The parties agree that no collateral benefit deductions are to be applied to the jury's award of $50,000 for loss of competitive advantage.

[3] The jury's award of $1,200 for future housekeeping is subject to deduction of collateral benefits under s. 267.8(6) of the *Insurance Act*, R.S.O. 1990, c. I.8 ("the Act"). The parties agree

that the plaintiff received more than the amount awarded by the jury from her statutory accident benefit insurer. Therefore the net award for future housekeeping is nil dollars.

[4] The jury awarded $14,022.83 for past loss of income, excluding the first seven days after the accident, to the time of trial in accordance with s. 267.5(1) 1. and 2. of the Act. Pursuant to s. 267.5(1) 2.ii of the Act, the plaintiff is entitled to 70 per cent of this gross past income loss award less any collateral benefit deductions under s. 267.8(1) of the Act.

[5] The parties agree that the plaintiff's past income loss award after the application of s. 267.5(1) 2.ii of the Act is $9,815.98. The parties further agree that the amount of $5,131.81, representing the amount received for statutory accident benefits in respect of income loss, is to be deducted from this amount pursuant to s. 267.8(1)1 of the *Act*. The parties agree that the net award for past loss of income is therefore $4,684.17.

**(b) The Threshold Determination - When and How**

[6] After my jury charge was delivered and the jury retired to consider their verdict, the defendant brought what is routinely referred to as a "threshold motion". It sought an order that the plaintiff's claim for non-pecuniary loss is barred on the basis that her injuries do not fall within the exceptions to the statutory immunity provided for in s. 267.5(5) of the Act and the applicable regulations.

[7] Pursuant to s. 267.5(3) of the Act, the threshold also applies to any award for health care expenses. Health care is defined in Part VI, s. 224(1) of the Act as follows:

> "health care" includes all goods and services for which payment is provided by the medical, rehabilitation and attendant care benefits provided for in the *Statutory Accident Benefits Schedule*.

[8] In *Sabourin v. Dominion of Canada General Insurance Co.*, [2009] O.J. No.1425 (S.C.), the court found that housekeeping expenses were not a health care expense under s. 267.5(3) of the Act. The jury's award for future housekeeping in this case is not a health care expense and the threshold does not apply to it.

[9] It is important to highlight the different sections of the Act which define when and how the threshold determination (applicable to awards for health care expenses and non-pecuniary loss only) under sections 267.5(3) and (5) of the Act, respectively, can be made, both before and at trial.

[10] Section 267.5 (12) and (13) provide as follows:

> **(12) Motion to determine if threshold motion met; non-pecuniary loss**. In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, *a judge shall, on motion made before trial with the consent of the parties or in accordance with an order of a judge who*

> *conducts a pre-trial conference*, determine for the purpose of subsections (3) and (5) whether, as a result of the use or operation of the automobile, the injured person has died or has sustained,
>
> (a) permanent serious disfigurement; or
>
> (b) permanent serious impairment of an important physical, mental or psychological function. [Emphasis added]
>
> **(13) Determination binding.** The determination of a judge on a motion under subsection (12) is binding on the parties at the trial.

[11] Section 267.5 (15) provides:

> **(15) Determination at trial; non-pecuniary loss.** *If no motion is made under subsection (12),the trial judge shall determine* for the purpose of subsections (3) and (5) whether, as a result of the use or operation of the automobile, the injured person has died or sustained
>
> (a) permanent serious disfigurement; or
>
> (b) permanent serious impairment of an important physical, mental, psychological function. [Emphasis added]

[12] The triggering event necessary for a threshold determination "before trial" is a motion by either the plaintiff(s) or defendant(s). The motion can be brought on the consent of the parties, or, if the parties do not consent, with an order of pre-trial judge. In addition to ordering the hearing of a threshold motion under s. 267.5(12) of the Act, the pre-trial judge is also authorized by rule 50.07 (1)(c) of the *Rules of Civil Procedure* to make any other order that she considers necessary or advisable "including any order under subrule 20.05(1) or (2)." Subrules 20.05 (1) and (2) authorize the court to make a wide range of orders for directions and to impose terms as are just for the remaining issues in the action. Rule 20.05 is part of the summary judgment regime set out in Rule 20 generally, and described by the Supreme Court of Canada in *Hryniak v. Maudlin*, 2014 SCC 7. In considering whether to make an order for the hearing of a threshold motion at a pre-trial conference under s. 267.6(12) of the Act, it is appropriate to bear in mind the fundamental goals identified in *Hryniak*, namely efficiency, affordability and proportionality.

[13] If no motion is brought in accordance with the procedure specified in s. 267.5(12) of the Act, then the trial judge is required under s. 267.5(15) of the Act to determine the threshold issue.

[14] In cases where the parties do not consent to the motion, the decision to grant leave to bring a threshold motion prior to trial is to be made by the pre-trial judge on a case-by-case basis. Section 267.5(12) of the Act specifically contemplates that such motions can and will be brought. Experience shows that the vast majority of motor vehicle tort cases in this court settle

before trial. Many settle at the pre-trial conference. In a discrete minority of cases however, the threshold issue can be identified as an impediment to settlement. That is, in these cases, the parties may disagree on the threshold issue alone, thereby necessitating a full trial even though all other issues could be settled. In accordance with the principles in *Hryniak*, a determination of the threshold issue under s. 267.5(12) of the Act may well be appropriate in cases where the threshold dispute is creating a barrier to settlement of the action. The summary judgment process fits best for the resolution of a single, discrete issue before trial and may serve to avoid a trial on a much larger number of issues: *Griva v*. *Griva*, 2016 ONSC 1820, at para.19.



[15] Use of the pre-trial threshold motion procedure specifically set forth in the Act, in conjunction with the enhanced powers under Rule 20.05(1) and (2), may, in appropriate cases, provide a proportional procedure tailored to the needs of a particular case and serve the principles of proportionality, timeliness and affordability.

[16] In this case there was no motion brought under s. 267.5(12) of the Act prior to trial for a determination of the threshold issue. I am therefore required under s. 267.5(15) of the Act, irrespective of any motion being brought by a party, to determine if the threshold has been met or not.

**(c) Determining if The Threshold has Been Met - Applicable Legislation and Regulations**

[17] The relevant statutory and regulatory provisions to be applied in determining the threshold are contained in sections 267.5 of the Act and sections 4.1, 4.2 and 4.3 of O. Reg. 461/96 as amended by O. Reg. 381/03.

[18] Section 267.5(5)(a) and (b) of the Act provides that the owner of an automobile, the occupants of an automobile, and any person present at the incident, are not liable in an action for non-pecuniary loss unless the injured person has sustained "permanent serious disfigurement" or "permanent, serious impairment of an important physical, mental, or psychological function."

[19] Section 267.5(5)(a) and (b) provide as follows:

> Non-pecuniary loss.
>
> (5) Despite any other Act and subject to subsections (6) and (6.1), the owner of an automobile, the occupants of an automobile and any person present at the incident are not liable in an action in Ontario for damages for non-pecuniary loss, including damages for non-pecuniary loss under clause 61(2)(e) of the *Family Law Act*, from bodily injury or death arising directly or indirectly from the use or operation of the automobile, unless as a result of the use or operation of the automobile the injured person has died or has sustained,
>
> (a) permanent serious disfigurement; or

> (b) permanent serious impairment of an important physical, mental or psychological function.

[20] While the same threshold wording applies to claims for health care expenses under s. 267.5(3) of the Act, the statutory deductible under s. 267.5(7) of the Act applies only to claims for non-pecuniary loss. There is no deductible to be applied for health care expenses.

[21] Effective October 1, 2003, O. Reg. 381/03, amended *Court Proceedings for Automobile Accidents that Occur on or After November 1, 1996*, O. Reg. 461/96 O. Sections 4.1 and 4.2 of Reg. 461/96, helps to clarify the meaning of the threshold wording in s. 267.5(5) (b) of the Act. In addition, section 4.3 stipulates the evidence which must be adduced to prove permanent serious impairment of an important physical, mental or psychological function. Sections 4.1, 4.2 and 4.3 of O. Reg. 461/96 provide as follows:

> 4.1 For the purposes of section 267.5 of the Act,
>
> "permanent serious impairment of an important physical, mental or psychological function" means impairment of a person that meets the criteria set out in section 4.2.
>
> 4.2 (1) A person suffers from permanent serious impairment of an important physical, mental or psychological function if all of the following criteria are met:
>
> 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 person's 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 person's 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 person's age.
>
> 2. For the function that is impaired to be an important function of the impaired person, the function must,

i. be necessary to perform the activities that are essential tasks of the person's regular or usual employment, taking into account reasonable efforts to accommodate the person's impairment and the person's reasonable efforts to use the accommodation to allow the person to continue employment,

ii. be necessary to perform the activities that are essential tasks of the person's training for a career in a field in which the person was being trained before the incident, taking into account reasonable efforts to accommodate the person's impairment and the person's reasonable efforts to use the accommodation to allow the person to continue his or her career training,

iii. be necessary for the person to provide for his or her own care or well-being, or

iv. be important to the usual activities of daily living, considering the person's age.

3. For the impairment to be permanent, the impairment must,

i. have been continuous since the incident and must, based on 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.

(2) This section applies with respect to any incident that occurs on or after October 1, 2003.

**Evidence Adduced to Prove Permanent Serious Impairment of an Important Physical, Mental or Psychological Function**

4.3 (1) A person shall, in addition to any other evidence, adduce the evidence set out in this section to support the person's claim that he or she has sustained permanent serious impairment of an important physical, mental or psychological function for the purposes of section 267.5 of the Act.

(2) The person shall adduce evidence of one or more physicians, in accordance with this section, that explains,

> (a) the nature of the impairment;
>
> (b) the permanence of the impairment;
>
> (c) the specific function that is impaired; and
>
> (d) the importance of the specific function to the person.
>
> (3) The evidence of the physician,
>
> > (a) shall be adduced by a physician who is trained for and experienced in the assessment or treatment of the type of impairment that is alleged; and
> >
> > (b) shall be based on medical evidence, in accordance with generally accepted guidelines or standards of the practice of medicine.
>
> (4) The evidence of the physician shall include a conclusion that the impairment is directly or indirectly sustained as the result of the use or operation of an automobile.
>
> (5) In addition to the evidence of the physician, the person shall adduce evidence that corroborates the change in the function that is alleged to be a permanent serious impairment of an important physical, mental or psychological function.
>
> (6) This section applies with respect to any incident that occurs on or after October 1, 2003.

[22] In *DeBruge v. Diana Arnold*, 2014 ONSC 7044, Edwards J. confirmed the principle that in making its threshold determination, the judge is not bound by the jury verdict. The verdict is, however, a factor the judge may consider in determining the issue. At para.10 Edwards J. refers to the Ontario Court of Appeal decision in *Kasap v. MacCallum*, [2001] O.J. No. 1719 (C.A.) and states in part as follows:

> However, the Court of Appeal has made it clear in *Kasap v. MacCallum*, [2001] O.J. No. 1719, that a jury verdict at its highest is only one factor that the trial judge may consider, but is not bound to consider coming to its ultimate conclusion regarding the threshold motion. In that regard, the Court of Appeal stated as follows:
>
> > Nowhere does the legislature say that the judge is bound to consider the jury verdict much less that the judge is bound by an implied finding of credibility of the jury. By the same token the legislation does not suggest that the trial judge cannot, in the

> exercise of judicial discretion, consider the verdict of the jury. The legislation is clear: the judge must decide the threshold motion, and in doing so, the judge is not bound by the verdict of the jury. The timing of the hearing is in the discretion of the trial judge.



[23] O. Reg. 461/96 as amended by O. Reg. 381/03 does not change the interpretation to be given the statutory immunity or "threshold wording" contained in s. 267.5 of the Act. This is clear from a reading of s. 4.1 of the regulation which states "For the purposes of section 265 of the *Act*, 'permanent serious impairment of an important physical, mental or psychological function' means impairment of a person that meets the criteria set out in section 4.2." Section 4.2 goes on to provide clarification regarding the intended meaning of the threshold wording contained in the Act.

[24] In *Adams v. Taylor*, 2013 ONSC 7920, 118 O.R. (3d) 389, Smith J. refers to the decision of Morissette J. in *Nissan v. McNamee,* [2008] O.J. No. 1739, (2008), 62 C.C.L.I (4th) 135 (S.C.) and at para. 8 states as follows:

> Justice Morissette in *Nissan* concluded [at para 37]: "In summary, most of the regulation does not appear to support any significant change in the interpretation of the threshold. In general terms, it suggests at best some clarification of the law regarding accommodation." At para.14, she stated: "there are some changes from the existing case law suggested by the wording of the definitions now found in the regulations… However… efforts to reframe the broad approaches that have been applied since *Meyer*, should be resisted."

[25] I agree with the statement of Smith J. in *Adams* at para. 7 which rejects the notion that case law prior to the enactment of the applicable provisions contained in O. Reg. 461/96 is not relevant. This principle is also confirmed in *Sherman v. Guckelsberger*, [2008] O.J. No. 5322 (S.C.) and *Ali v. Consalvo*, [2009] O.J. No. 487 (S.C.) at para. 9. Prior case law, as confirmed in *Sherman* at para. 142, is of assistance to the court in helping to determine what constitutes "permanent", "serious", "continuous injuries", as well as "important function".

[26] The plaintiff bears the onus of proof to establish that her impairments meet the statutory exceptions or "threshold" that rests with the plaintiff: *Meyer v. Bright* (1993), 15 O.R. (3d) 12 (C.A.) at para. 50 and *Page v. Primeau,* 2005 CanLII 40371 (S.C.) para. 11.

[27] In *Meyer v. Bright,* the court outlined the three-part inquiry which is to be undertaken in the threshold analysis as follows:

> 1. Has the injured person sustained permanent impairment of a physical, mental or psychological function?
>
> 2. If yes, is the function which is permanently impaired important?
>
> 3. If yes, is the impairment of the important function serious?

[28] Under s. 4.2(1)3 of O. Reg. 461/96, for the impairment to be permanent, impairment must:

> i. have been continuous since the incident and must, based on 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.

All of these components must be satisfied: *Sherman*, at paras. 142 and 146.

[29] In *Bos Estate v. James* (1995), 22 O.R. (3d) 424 (Ont. Gen. Div.), Howden J. at p. 169 and 170 confirmed that the word "permanent" does not necessarily mean strictly forever until death. Permanent impairment means the sense of a weakened condition lasting into the indefinite future without any end or limit.

[30] While the word "permanent" does not mean forever, it does require that the impairment last into the indefinite future, as opposed to a predicted time period with a definite end. See: *Skinner v. Goulet*, [1999] O.J. No. 3209 (S.C.), at para. 33; *Brak v. Walsh*, 2008 ONCA 221, 90 O.R. (3d) 34, at para. 4.

[31] In *Hartwick v. Simser*, [2004] CanLII 34512 (S.C.), Toscano Roccamo J. stated at para. 87:

> It is now trite law that chronic pain arising from injury sustained in a motor vehicle accident, and which accounts for limitation in function unlikely to improve for the indefinite future, will meet the requirement of "permanence" in the threshold: see *Bos Estate v. James* (1995), 28 C.C.L.I. (2d) 166 (S.C.J.); *May v. Casola*, [1998] O.J. No.2475 (Ont. C.A.); *Altomonte v. Matthews*, [2001] O.J. No. 5756 (S.C.J.).

[32] Under s. 4.2(1)2 of O. Reg. 461/96, for the function that is impaired to be an "important function" of the impaired person, the function must:

> i. be necessary to perform the activities that are essential tasks of the person's regular or usual employment, taking into account reasonable efforts to accommodate the person's impairment and the person's reasonable efforts to use the accommodation to allow the person to continue employment,
>
> ii. be necessary to perform the activities that are essential tasks of the person's training for a career in a field in which the person was being trained before the incident, taking into account the reasonable efforts to accommodate the person's

> impairment and the person's reasonable efforts to use the accommodation to allow the person to continue his or her career training,
>
> iii. be necessary for the person to provide for his or her own care or well-being, or
>
> iv. be important to the usual activities of daily living, considering the person's age.

[33] In *Ahmed v. Challenger,* [2000] O.J. No. 4188 (S.C.), the court at para. 18, in making reference to *Meyer*, emphasized the necessity of distinguishing between functions which are important to the injured person and those that are not. The test of whether the impaired function is "important" is a qualitative test: *Page*, at para. 32.

[34] Regarding "important," Toscano Roccamo J. in *Hartwick v. Simser,* states at para. 88:

> In *Meyer, supra*, it was held that an "important" bodily function is one that plays a major role in the health, general well-being and way of life of the particular injured plaintiff. The determination of what is an important function invokes a subjective analysis, as there are bodily functions important to some but not others.

[35] Pursuant to s. 4.2(1)1 of O. Reg. 461/96, to be "serious" 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 person's 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 person's impairment and the person's reasonable efforts to use the accommodation to allow the person to continue his or her training, or
>
> iii. substantially interfere with most of the usual activities of daily living, considering the person's age.

[36] In determining whether the impairment of an important bodily function is "serious" it is the seriousness of the impairment to the person that is to be considered and not just the injury itself: *Meyer,* paras. 28-36; *Mohamed v. Lafleur-Michelacci*, [2000] O.J. No. 2476 (S.C.), at para 56. Soft tissue type injuries can be as crippling and devastating as other major or mental injuries: *Snider v. Salerno*, [2001] O.J. No. 5752 (S.C.), para. 17.

[37] Regarding the degree of impairment to the plaintiff's daily life which is necessary in order to be serious, the court confirmed in *Frankfurter v. Gibbons* (2004), 74 O.R. (3d) 39 (Div. Ct.), at paras. 22-24, that it must go beyond tolerable.

[38] An interference with the ability to perform a certain number of the daily activities performed pre-accident, while frustrating and unpleasant, is not necessarily beyond tolerable and, therefore, serious: *Branco v. Allianz Insurance Co. of Canada*, [2005] O.J. No. 6056 (S.C.), at para. 25.



[39] It is "the effect of the injury" on the person and not the "type of injury," or labels attached to it, which should be the focus of the threshold analysis. The effects of chronic pain are just as real and just as likely to meet or not meet the threshold as any other type of injury or impairment. It all depends on the manner in which the plaintiff has been impacted. The threshold determination is to be done on a case-by-case basis and is fact specific: *Malfara v. Vukojevic*, 2015 ONSC 78, at para 23.

[40] Again, as Toscano Roccamo J. states in *Hartwick v. Simser*, at para. 89:

> The more litigious component of the threshold test surrounds the question of what functional limitations will constitute a "serious" impairment. It is now clearly established that one who can carry on daily activities, but is subject to permanent symptoms including sleep disorder, severe pain, headaches, having a significant effect on the enjoyment of life, will demonstrate symptoms constituting a serious impairment. Ongoing and debilitating pain, even in the absence of objective findings by medical experts, will constitute serious impairment: see *Chrappa v. Ohm*, [1996] O.J. No. 1663 (S.C.J.); *Skinner v. Goulet*, [1996] O.J. No. 3209 (S.C.J.); *May v. Casola*, *supra*.

[41] It is important to note that the threshold contained in the Act, and the corresponding sections of O. Reg. 461/96 as amended by O. Reg. 381/03, referred to above, have no application to the determination of a plaintiff's entitlement to, and assessment of, income-related pecuniary loss claims.

[42] In setting forth the criteria to be used in determining whether the threshold has been met, section 4.2 of the regulation makes reference in part to various employment and accommodation requirements. These employment- and accommodation-related requirements apply only to the determination of the threshold in relation to claims for non-economic loss and healthcare expenses. A plaintiff is not required to prove and meet the specified requirements set forth in the regulation as a precondition to recovery of income-related pecuniary loss claims.

[43] In civil cases the standard of proof for past pecuniary claims is a balance of probabilities. The standard of proof for future income-related pecuniary loss claims is a real and substantial possibility or risk that such losses may occur. *Schrump v. Koot*, [1977] O.J. No.2502, 18 O.R. (2d) 337. The plaintiff's burden of proof regarding these pecuniary claims is not altered in motor vehicle tort cases as a result of the threshold and the regulation 461/96 wording as it relates to regular or usual employment.

**Relevant Evidence**

**(a) Amanda Valentine**

[44] Amanda was a 17 year old, grade 12 high school student at the time of the accident. She was a passenger in the motor vehicle being driven by Sasha Ruddock ("Sasha") which was involved in a rear end collision with another vehicle.

[45] Prior to the accident of January 21, 2011 she worked part time at McDonalds, a job she had had since August 2010. She testified that before the accident there was no part of her job that she was not able to do. She had no plans to leave that job.

[46] Prior to the accident she was physically fit and was very involved in extra- curricular activities. She played varsity soccer in the spring/summer months and varsity basketball in the fall/winter months. She had no pre-accident physical limitations or difficulties when playing soccer or basketball.

[47] She lived with her mother and younger brother prior to the accident. She was responsible for and did many chores including washing dishes, laundry, mopping and sweeping. She testified that doing household chores was mandatory in her culture. Saturday was the day where they did a full cleaning. She also helped out a lot with cooking. Prior to the accident she had no difficulties performing her chores and never paid anyone to do them. She had no difficulties with balancing her chores, work, school and sports.

[48] As a result of the accident she now experiences neck pain 3 to 4 times per week depending on the activities she does. She testified that standing or sitting for long periods of time and working makes her neck pain worse. Resting makes it better.

[49] She testified that she now experiences left and right shoulder pain depending on the activity she's engaged in. Standing, lifting her arms, and reaching make her shoulder pain worse. Resting makes it better.

[50] As a result of the accident she injured her back. She testified that her back hurts daily. Lower back pain is the worst pain. Bending, lifting, pulling, and reaching make her pain worse. Exercises and stretches make it temporarily better.

[51] Following the accident she briefly returned to her job at McDonalds in May, 2011 and then quit because she said the job was too hard on her body and because she was unhappy with the changes being made to her work schedule. She had returned after finishing physiotherapy and wanted to push herself to see if she could do it. She subsequently worked at the Pickle Barrel restaurant for a month or two. She testified she had difficulties working there because of the constant standing required. She left the Pickle Barrel in part because of her manager changing her schedule at the last-minute. These employers were not called.

[52] She next worked at Best Buy as a cashier. She testified that she has to take more breaks to accommodate her back pain. The nature of the job required that she stand constantly. She next worked at East Side Mario's where she bussed tables, greeted, and seated people. She then

worked at a recycling plant. She testified that she worked at the recycling plant in part for only three weeks because of the pain and because it was not a place where she wanted to stay. These employers were not called.

[53] The plaintiff then worked at Wicked Sticks landscaping for 3 months. She testified that she left this job because of the constant kneeling, bending and lifting which was too much on her body. No modifications were made by the employer notwithstanding her testimony that she advised her employer that the constant kneeling bending and lifting was too much for her. The employer was not called. She then worked at Ridgeview trim and doors for a few months. There she used a nail gun. She was being trained on how to use saws and power tools. She worked full time without accommodation. The plaintiff testified that it was hard on her body to stand for long periods of time.

[54] She then took a job at Value Village for approximately 5 months. She left that job because she wanted to move on and also because of the physical aspects of the job. She then tried working as a gardener for the Gardener Brampton South. She worked there for only 2 days because she said could not handle it as result of her back pain. That employer was not called.

[55] Following the accident the plaintiff testified that she has not played a soccer or basketball match. She admitted that she can now kick a soccer ball and shoot around a basketball.

[56] Immediately after the accident she was unable to complete any of her housekeeping chores which included sweeping, mopping, laundry, and dishes because she could not stand for long periods of time and could not bend. As a result, immediately after the accident, her mother did all of the housekeeping chores. She testified that she has difficulty completing heavy housekeeping tasks and heavier employment tasks.

[57] Today however the plaintiff is able, notwithstanding the pain and with modification, to sweep, mop, do laundry, wash dishes, make her bed, cook, cut grass, grocery shop, drive and use a computer. Bending, lifting, pulling and reaching aggravate her injuries.

[58] In 2013 when she moved in with Emecca Burton ("Emecca"), Emecca would do approximately 80% to 85% of the chores. Emecca still assists two to three times a week with only heavier household chores.

[59] The plaintiff gave evidence that she currently experiences neck pain 3 to 4 times per week. She testified that she experiences left and right shoulder pain daily. Regarding her lower back, it is the worst pain and the most significant injury.

**(b) Andrea Valentine**

[60] The plaintiff's mother Andrea Valentine ("Andrea") confirmed that prior to the accident she required her daughter Amanda do housekeeping chores which included laundry bathrooms, vacuuming, dusting, mopping and cooking. She testified that it is part of their culture to clean a

lot and it is expected of a young girl to learn how to take care of a home. Andrea never observed any limitations in Amanda's pre-accident ability to do these housekeeping chores.

[61] Andrea observed that when Amanda tried to do these housekeeping chores after the accident she could not perform her chores despite trying to do so. She observed that Amanda could not stand for long periods of time. Amanda never returned to her pre-accident chores while she continued to live with her mother until the fall of 2012.

**(c) Emecca Burton**

[62] Emecca has known Amanda since 2013. She lived with Amanda from December, 2013 to the summer of 2014. When they lived together, Emecca observed Amanda sweeping, mopping, making the bed, and taking out light garbage since she met her in 2013. She has observed Amanda having difficulty with housekeeping and home maintenance chores, specifically, doing the bed, dishes, taking out the garbage and cleaning. Emecca, although she no longer lives with Amanda, helps her with her chores several times a week.

**(d) Sasha Ruddock**

[63] Sasha Ruddock ("Sasha") was the driver of the vehicle in which the plaintiff was a passenger at the time of the subject collision. She has known the plaintiff for a little over 10 years. In the three years before the collision she saw Amanda every day. She never observed any limitations in Amanda prior to the accident. She described Amanda as a very strong, bubbly and athletic person before the accident. She testified that Amanda has not been the same since the accident.

**(e) Dr. Robert Urback**

[64] Dr. Robert Urback has been Amanda's family doctor for many years. He testified that the plaintiff enjoyed excellent health prior to the accident and was in good physical shape.

[65] Dr. Urback testified that it has been five years since the accident and she is stuck with a bad back. She's not doing very much and not participating in sports.

[66] His clinical note of May 22, 2012, states "MVA not yet settled but no longer symptomatic". The plaintiff told him on May 22, 2012 that she is no longer symptomatic from the motor vehicle accident.

[67] In his opinion the back pain limits the type of work she can do. Every time she attempts to do repetitive physical tasks, she will have a flare up or aggravation or amplification of her back pain due to the underlying mechanical back pain from the accident, whether it be sports, work or housekeeping chores.

[68] He testified that there is probably no chore that she cannot do but there are some chores, depending on when and how she does them, she will have a tough time doing. There is no reason

why she cannot try to re-engage in sports. He doubts that she will ever return to competitive soccer.

**(f) Dr. Joseph Wong**

[69] Dr. Joseph Wong ("Wong") was qualified as an expert in physiatry and chronic pain diagnosis and management. He does not see any potential for improvement in the plaintiff's condition. His opinion the plaintiff's injuries to her neck and back are the direct result of the accident and are permanent.

[70] Dr. Wong admitted that if the family doctor's note of May 22, 2012 (which states that the plaintiff was not symptomatic) was accurate, then his opinion that the plaintiff's impairment is permanent would change.

[71] Amanda can do light work. She is restricted in performing heavier work, mainly work which involves pulling and pushing for long periods of time. She can kick a ball and shoot a basketball but cannot play a full game due to the moderate to severe damage in her neck. Her pain level will fluctuate; this is typical for chronic pain patients. Her daily level of pain will depend on the activities she does.

**(g) Dr. Joel Nathanson**

[72] Dr. Joel Nathanson was qualified as an expert in chiropractic medicine and functional capacity evaluations. He has been a certified functional capacity evaluator for over 20 years. He testified that Dr. Urback's clinical note of May 22nd, 2012 does not change his diagnosis or opinion. Based on his range of motion testing completed, his opinion is that the plaintiff would have difficulty with the activities or tasks of daily living that involve bending, twisting and reaching.

**(h) Dr. Michael Devlin**

[73] Dr. Michael Devlin was qualified as an expert in physical medicine and chronic pain diagnosis and management. His diagnosis is cervical strain and non-specific low back pain. Regarding the plaintiff's neck, his diagnosis is ongoing neck pain. He agreed that the prognosis with respect to the ongoing neck pain will likely continue given that she has been symptomatic over two years. Regarding the plaintiff's back, his diagnosis is ongoing non-specific low back pain. He agreed that the prognosis with respect to the ongoing non-specific low back pain is that the situation will likely continue.

[74] In his opinion the plaintiff did not sustain a serious and permanent impairment because the plaintiff had returned to work, school, and her housekeeping. This did not reflect a serious impairment of function.

**(i) Vincenzo Marci**

[75] Vincenzo Marci is the President and owner of Ridgeview doors where the plaintiff previously worked as a frame assembly nailer following the accident between August and October 2014. Amanda worked 9.5 hours per day mailing and gluing the casing to door jams. She used a pneumatic nail gun complete this work.

[76] The plaintiff was able to stand for prolonged periods of time and to bend, reach and push as required by the job. No request for accommodation was ever made or received. She sustained a workplace injury to her hand on September 29, 2014. Prior to this workplace injury, he observed that she was doing well at her job. After the workplace injury she was placed on modified duties within the office. The framers job requires lifting, standing, some bending and reaching.



**Analysis**

[77] Based on the evidence in this case, for the reasons that follow, I find that the plaintiff does not meet the statutory exception (threshold) allowing her to recover damages for non-pecuniary loss. I find that the effect of the plaintiff's impairments, while supportive of the general and special damages awarded by the jury, do not satisfy all the necessary requirements of s. 4.2 of O. Reg. 461/96, as amended by O. Reg. 381/03 and the applicable jurisprudence.

**(i) Permanent Impairment**

[78] Based on the principles set forth in *Bos v. James*, *Skinner v. Goulet*, and *Hartwick v. Simser*, referred to earlier, I find that the evidentiary record supports the conclusion that the plaintiff's impairments are permanent. As a result of the injuries sustained in the subject accident the plaintiff has a weakened condition lasting into the indefinite future without any end or limit.

[79] I accept and rely on the evidence of the plaintiff's family doctor (who treated the plaintiff both before and after the accident) and Dr. Wong that it is probable that the plaintiff has reached maximum medical recovery and will likely experience the effects of her injuries indefinitely and it is a problem she will continue to have. In considering the evidentiary record as a whole, I accept that Dr. Urback's clinical note of May 22, 2012 which stated that the plaintiff was no longer symptomatic, related to that specific time period only.

**(ii) Important Impairment**

[80] I find that the plaintiff's functions which are permanently impaired do play a major role in the health, general well-being and way of life of the plaintiff pre-accident. The impaired functions are important to the usual activities the plaintiff engaged in pre-accident, namely soccer, basketball and housekeeping. Her ability to bend and lift are important in order to participate in, and carry out these activities of daily living.

**(iii) Serious Impairment**

[81] I find, however, that the plaintiff has not sustained a serious impairment.

[82] Her family doctor confirmed that there is no reason why the plaintiff can't try to reengage in sports. He confirmed further that she can perform the majority of her housekeeping tasks. The evidence confirms that today the plaintiff is able, albeit with pain and modification, to sweep, mop, do laundry, wash dishes, make her bed, cook, grocery shop, drive and cut the grass. I find that the interference she experiences as a result of the accident-related injuries, while clearly frustrating and unpleasant, are not beyond tolerable. The plaintiff is not experiencing debilitating pain when engaging in her sporting activities. The plaintiff is able to kick a soccer ball and shoot baskets. There is no evidence that after leaving high school that the she intended to play these sports at a competitive level only, rather than recreationally. There is no question that she still has difficulty with some heavier household chores and that her ability to play competitive sports, and to some degree non-competitive sports, has been affected but, with respect, that is not enough to meet the requirements of s. 4.2(1)iii of O.Reg.461/96 as amended by O.Reg.381/03.

[83] The plaintiff does not meet the requirements of s. 4.2(1) i. Following the accident she engaged in a number of physically demanding full-time jobs at a landscaping company, recycling plant, and as a frame assembly nailer between August and October 2014.

[84] The evidentiary record confirms that the injuries and impairments have had and will continue to have, to some degree, a negative effect on the plaintiff's ability to work post-accident as well as on her earning potential in the future. This is reflected in the jury's award for past loss of income and loss of competitive advantage. However, having regard to the requirements of s. 4.2(1)1, the evidence does not support the conclusion that the plaintiff's impairments have substantially interfered with her ability to continue regular or usual employment on a full time basis.

[85] In addition s. 4.2(1), as it relates to employment, requires a plaintiff to make efforts to use accommodation. An employer can only provide accommodation if efforts to request accommodation are made by the plaintiff. In this case the employers were not called to give evidence regarding any and all requests for accommodation made by the plaintiff; whether the employer provided accommodation; and whether reasonable efforts were made by the plaintiff to use the accommodation provided. Evidence of such accommodation efforts on the part of the plaintiff and employer are a specific requirement under the regulation.

[86] Accordingly, I find that the plaintiff has failed to discharge her onus of proof on a balance of probabilities that this case falls within the exception to the statutory immunity (threshold) provided for in s. 267.5(5) of the Act and O. Reg. 461/96 regarding non-pecuniary loss.

**Which deductible Applies**

[87] Pursuant to s. 267.5(7) 3. of the Act the court is to reduce the jury's award for non-pecuniary loss by the statutory deductibles applicable to both the claimant's main award as well as awards for loss of guidance, care and companionship under s. 62(2)(e) of the *Family Law Act*.

[88] Ontario's first statutory deductible was implemented under Bill 164 and took effect on January 1, 1994. The application of a statutory deductible continued under the following insurance regime, namely Bill 59, where the deductible amounts increased. Pursuant to O. Reg. 381/03 effective October 1, 2003, O. Reg. 461/96 was amended to increase the statutory deductible to $30,000 from $15,000 for the main claimant and to $15,000 from $7,500 for *Family Law Act* claimants. Pursuant to s. 267.5(8) of the Act as amended by s. 120(4) of Bill 198, effective October 1, 2003, what is commonly referred to as the "vanishing" deductible (the amount over which there is no deductible to be applied) was implemented. For non-pecuniary damages, the vanishing deductible amount for the main claimant was $100,000 and was $50,000 for *Family Law Act* claimants. Effective September 1, 2010, under s. 267.5(8.1.1) of the Act, the deductible which had been previously applied in fatality claims was abolished.

[89] As a result of various regulatory and legislative changes effective August 1, 2015, both the deductible and vanishing deductible amounts increased. Pursuant to O. Reg. 221/15, which amended O. Reg. 461/96, the deductible for the main claimant increased (for the period August 1, 2015 to December 31, 2015) to $36,540.00 and the *Family Law Act* deductible increased (for the period August 1, 2015 to December 31, 2015) to $18,270.00.

[90] Pursuant to O. Reg. 221/15 on January 1, 2016 and every subsequent year, these deductible amounts are to be revised by adjusting the amount by the indexation percentage published under the Act for that year. In accordance with the regulation for 2016 the deductible for the main claimant increased to $36,905.40 and for *Family Law Act* claimants to $18,452.70.

[91] Pursuant to sections 267.5(8), (8.1), (8.2), (8.3) and (8.4) of the Act, from August 1, 2015 until December 31, 2015, the vanishing deductible amount increased to $121,799.00 for the main claimant and $60,899.00 for *Family Law Act* claimants. For 2016 the vanishing deductible amount for the main claimant is $123,016.90 and $61,507.99 for *Family Law Act* claimants.

[92] Notwithstanding that the jury's award of $30,000 for general damages would be reduced to nil dollars, irrespective of whether the deductible to be applied is 30,000 or $36,905.40, the parties provided submissions and properly sought clarification of the deductible issue.

[93] The question to be answered is which deductible amount is to be applied. Is it the one in place at the time of the accident or the one in place at the time the court makes the threshold determination? For the reasons below, I find that for accidents that occur on or after October 1, 2003 it is the indexed deductible amount in place at the time the court is called upon to make the threshold determination that is to be applied.

[94] When the non-pecuniary loss and *Family Law Act* deductible amounts were first introduced under Bill 164, it was the intention of the Legislature that these amounts would be and continue to be indexed. Pursuant to s 267.2(2) of the Act, the deductible amounts were to be determined by adjusting the deductible for the previous year by the percentage change in the Consumer Price Index for Canada (All Items) as published by Statistics Canada under the authority of the *Statistics Act* (Canada) for the period from September in the year immediately

preceding the previous year to September of the previous year. The superintendent was given authority, in certain circumstances, to determine the deductible amounts in a manner that is considered will provide a reasonable reflection of changes in consumer prices.

[95] In determining this issue, the wording of the various regulations which have increased the deductible amounts is an important indicator of which deductible amount was intended to, and which does, apply.

[96] Effective October 1, 2003 O. Reg. 312/03 states that the increased deductible amounts of $30,000.00 and $15,000.00, respectively, are prescribed "in respect of incidents that occur on or after October 1, 2003". The clear intention at that time was that the increased deductible was not to apply to accidents prior to October 1, 2003.

[97] Subsequently however, section 1 of O. Reg. 221/15 provided that section 5.1 of Regulation 461/96 was revoked and the following was substituted:

**DEDUCTIBLE AMOUNTS**

5.1(1) For the purpose of sub-subparagraph 3 i B of subsection 267.5(7) of the Act, the prescribed amount is the amount determined in accordance with the following rules:

1. Until December 31, 2015, the prescribed amount is $36,540.

2. On January 1, 2016, the prescribed amount set out in paragraph 1 shall be revised by adjusting the amount by the indexation percentage published under subsection 268.1(1) of the Act for that year.

3. On January 1 in every year after 2016, the prescribed amount that applied for the previous year shall be revised by adjusting the amount by the indexation percentage published under subsection 268.1(1) of the Act for the year.

(2) For the purposes of sub-subparagraph 3 ii B of subsection 267.5(7) of the Act, the prescribed amount is the amount determined in accordance with the following rules:

1. Until December 31, 2015, the prescribed amount is $18,270.

2. On January 1, 2016, the prescribed amount set out in paragraph 1 shall be revised by adjusting the amount by the indexation percentage published under subsection 268.1(1) of the Act for that year.

> 3. On January 1 in every year after 2016, the prescribed amount that applied for the previous year shall be revised by adjusting the amount by the indexation percentage published under subsection 268.1(1) of the Act for the year.



[98] The amended s. 5.1 containing the new deductible amounts, in contrast to the previous wording, makes no reference to any incidents that occur on or after a specific date as was done previously. This is because the increased deductible amounts are based on the prior deductible amounts, namely, $30,000 and $15,000 as indexed on a yearly basis, as provided for in the regulation.

[99] FSCO Bulletin No. A-05/15 is also instructive. In making reference to *Ontario Regulation 461/96 (Court Proceedings For Automobile Accidents That Occur On Or After November 1, 1996*) it states in part:

> This regulation has been amended to ensure that the deductible amounts for non-pecuniary loss (pain and suffering) reflect the effects of inflation since 2003.

[100] The prior change in the deductible amounts on October 1, 2003 from $15,000 to $30,000 and $7,500 to $15,000 respectively were not to apply to incidents prior to October 1, 2003 given that this increase was not based on indexation of the deductible amounts in place at the time. In contrast, the August 1, 2015 increases to the deductible amounts were clearly based on an indexing of the existing deductible amounts.

[101] I agree with the reasoning of James J. in *Vickers v*. *Palacious*, 2015 ONSC 7647, where at paras. 13 and 14 he states:

> Both the cap on damages and the statutory deductible were implemented to achieve particular policy objectives. Viewed in this light, the statutory deductible can be seen as a *measuring or quantifying* device (procedural) as opposed to the *availability* of a particular head of damage (substantive) …
>
> There is another reason why I am inclined to find, that the larger, newer deductible applies to this case. When implementing the $30,000 deductible in 2003, the legislature stipulated that it was to apply "in respect of incidents that occur on or after October 1, 2003." A similar provision was left out of the replacement provision contained in O. Reg. 221/15.This suggests to me that the legislature intended that the new deductible should apply to all pending cases regardless of when the incident occurred. Also, if the legislature intended to exempt existing lawsuits from the new deductible, why would it specify a deductible that is applicable for the calendar year 2015 only? Under the view urged by the plaintiffs, the new deductible should only apply to lawsuits started after August 1, 2015. Virtually none of these lawsuits would be brought to a conclusion in 2015 so why would the legislature bother to specify a deductible to

> be in effect until December 31, 2015 for cases started on or after August 2, 2015? Recall that the new deductible regime goes on to adjusted deductible in 2016 and subsequent years by providing a formula. The manner in which the provision (now section 5.1(1) of O. Reg. 461/96, as amended) was drafted discloses an intention that it apply to all pending proceedings, including this one.

[102] The plaintiff shall have judgment in the sum of $54,684.17 plus any applicable interest. This consists of $4,684.17 for past loss of income and $50,000 for loss of competitive advantage in accordance with these reasons.

[103] I encourage the parties to agree on costs. If they cannot, the plaintiff's written cost submissions of no more than ten pages is to be provided by June 22, 2016.The defendant's written costs submissions of the same length are to be provided by July 7, 2016. Any reply is to be provided by July 14, 2016.

Firestone J.

**Released:** June 2, 2016

**CITATION:** Valentine v. Rodriguez-Elizalde, 2016 ONSC 3540



**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

AMANDA VALENTINE

Plaintiff

**– and –**

SEBASTIAN RODRIGUEZ-ELIZALDE

Defendant

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**REASONS FOR DECISION**

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Firestone J.

**Released:** June 2, 2016