

CITATION: Taylor v. Durkee, 2018 ONSC 7203
COURT FILE NO.: CV-12-79214
DATE: 20181130

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
DONNA TAYLOR)
) Barry Evans, for the Plaintiff
Plaintiff)
)
– and –)
)
DANIEL DURKEE and GREGORY) Christopher A. Caston and Michelle Farb,
DURKEE) for the Defendants
)
Defendants)
)
)
)
) **HEARD:** August 2, 2018

2018 ONSC 7203 (CanLII)

REASONS FOR DECISION

MCKELVEY J.:

Introduction

- [1] The plaintiff Donna Taylor has brought this action for damages as a result of a motor vehicle accident which occurred on April 13, 2011. The action was tried before a jury.
- [2] At trial the plaintiff submitted to the jury that her general damages should be assessed at \$125,000 - \$175,000. The defence position was that the damages should be assessed between \$0 - \$5,000. In their verdict, the jury awarded the sum of \$62,500. No other claims for damages were advanced by the plaintiff in this action.
- [3] The defence has now brought what is commonly referred to as a “Threshold Motion” for a declaration 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 contained and provided for in s. 267.5(5) of the *Insurance Act*, RSO 1990, c I.8, and the applicable regulations. For purposes of this motion, the plaintiff asserts that the injuries from the accident substantially interfere with most of her activities of daily living, considering her age.

Applicable Legal Principles

- [4] The applicable legal principles with respect to a threshold motion were most recently canvassed by me in my decision in *O'Brien v. O'Brien*, 2018 ONSC 4665 (CanLII). As noted in that decision, the case law has established that the trial judge should sequentially answer the following questions:
1. Has the injured person sustained permanent impairment of a physical, mental or a psychological function?
 2. If yes, is the function which is permanently impaired an important one?
 3. If the answer to question 2 is yes, is the impairment of the bodily function serious?

See *Meyer v. Bright*, 1993 CanLII 3389 (ON CA).

- [5] For the reasons which follow I have concluded that the plaintiff has not met her onus of establishing that she meets the statutory threshold. For purposes of these reasons, my analysis focuses on the issue of whether the plaintiff's impairment as a result of the 2011 accident is serious.

The Evidence of Donna Taylor

- [6] At the time of trial Ms. Taylor was 70 years old. She has been married twice and had three children with her first husband. She currently lives with Mr. Ron McCosh in Oshawa. The motor vehicle accident on April 13, 2011 was a rear-end collision. Ms. Taylor was stopped at a traffic light when she was hit from behind and her vehicle was pushed into the car ahead. As a result of this accident, Ms. Taylor testified that she suffered right shoulder and neck injuries as well as lower back pain and headaches.

- [7] In her evidence at trial, Ms. Taylor described her current condition as follows:

Question: Okay. I'd like to talk to you about your health in the current time, not just today but, generally in the current present tense. Can you describe to the jury please how your lower back is now?

Answer: Well it– it's– I'm in pain every day, and it all depends on what I do or– like I have a great day and then I have really bad days and, I just get through the day, I'm just coping with it– it just becomes the norm, pain in your body becomes the norm and you just, move forward.

Question: Do you have any good days?

Answer: Ya I have good days.

Question: What do you do when there's a good day?

Answer: On a good day, I like to go to Bingo; it's the only place I feel— it's like an escape, I feel like I'm in a— another zone, just enjoy it.

Question: And, when you're at Bingo are you sitting as well?

Answer: Ya I sit and stand; walk around. They have these little slot machines there so I play the slots. My neck aggravates me and so does my back but, I just push through it.

Question: What about a bad day?

Answer: A bad day if I'm having a bad day, I tend to rest a lot; I don't enjoy that but I tend to lay down and rest because I feel sometimes I'm missing life, but I'll use my Dr. Ho and my ice and, I'll do all the treatments that I do and, just take it easy for the day; might last a day it might last three days it might last a week, all depends, but I just take care of it.

Question: And— and usually in a week, how many good days might you have?

Answer: Well maybe, really good days about two.

- [8] Ms. Taylor was involved in a prior motor vehicle accident in 2001. She was driving on the 401 when she was cut off by another vehicle and hit the guard rail. She stated that she developed lower back issues as well as headaches following this accident. She also took physiotherapy which started to improve her condition. She stated that she had occasional back pain and headaches up to the time of the 2011 accident, but that these symptoms were not serious.
- [9] Ms. Taylor has had a number of other significant issues in her life. In June, 2012, her grandson Danny who was 2½ years old at the time was diagnosed with cancer. Ms. Taylor became heavily involved in his treatment and Danny came to live with the family in a basement room. Tragically, Danny subsequently passed away in 2014 as a result of the cancer.
- [10] In the summer of 2014, Ms. Taylor developed heart problems and underwent heart surgery at St. Michaels Hospital. She stated that as a result of the surgery, she was in a coma for about 48 hours. Although she had a good recovery from the surgery, she stated that she has developed some memory loss because of this hospitalization.

Medical Evidence with Respect to the Plaintiff's Condition

- [11] Dr. Stephen Stern is the plaintiff's family physician. He testified that following the 2001 motor vehicle accident, he treated Ms. Taylor for neck and lower back pain as well as

sciatica. He did not believe that there were any shoulder issues as a result of that accident. The last time he treated Ms. Taylor for neck or back problems following the 2001 motor vehicle accident was in 2007. He thought her condition was improving up until the April 2011 accident.

- [12] Following the motor vehicle accident in 2011, he ordered x-rays of the plaintiff's neck. These showed degenerative disc disease which is a common finding for people over 50. This condition would pre-date the April 2011 accident. He prescribed heat, rest, physiotherapy and Tylenol for pain relief.
- [13] On September 8, 2011, Dr. Stern prescribed physiotherapy and referred the plaintiff to Dr. Singh, who is an expert in treating shoulders. Dr. Singh reported that the plaintiff suffered rotator cuff tendonitis.
- [14] When the plaintiff attended at his office on October 11, 2016, there was discussion about the plaintiff's ongoing back pain. The plaintiff told Dr. Stern that she had not visited his office earlier due to other issues she was experiencing in her life, such as her grandson's illness and her heart problems.
- [15] With respect to the plaintiff's condition today, Dr. Stern stated that the plaintiff seems to be having ongoing problems with her neck, shoulder and lower back which are more frequent now than prior to 2011. He has recommended against any heavy lifting.
- [16] In cross-examination Dr. Stern was referred to his report of October 17, 2016 where he reported that the plaintiff attended at his office on only a handful of occasions regarding her ongoing neck and back pain after the accident in 2011. He confirmed that Ms. Taylor attended at his office for accident related complaints only infrequently.
- [17] Dr. Ogilvie-Harris was called by the plaintiff. He is an Orthopedic Surgeon with a special interest in chronic pain caused by musculoskeletal injuries.
- [18] Dr. Ogilvie-Harris described the difference in his view between chronic pain and chronic pain syndrome. Chronic pain is a situation where a patient experiences pain over a long period of time, usually in excess of six months. Chronic pain syndrome in his view is a condition where there are changes in the brain chemistry which cause a patient to have suffering. He stated that in the context of chronic pain syndrome, the prognosis for patients who have experienced pain for more than two years, the vast majority will simply continue to experience pain. Only five percent of patients will experience improvement after two years.
- [19] Dr. Ogilvie-Harris examined the plaintiff on June 7, 2016. At the time of his assessment the plaintiff reported pain in her neck that radiated into her shoulder as well as pain in her lower back. Her walking tolerance had decreased from about 45 minutes to 25 minutes. She also reported sleeping poorly and having low energy levels.
- [20] In his physical examination, Dr. Ogilvie-Harris noted that the plaintiff walked normally. She had some tenderness in her back and reduced range of motion in her neck and back.

- [21] Dr. Ogilvie-Harris on physical examination identified positive Waddell signs. He stated that Waddell signs are not reflective of malingering. Instead they predicted a poor outcome for Ms. Taylor. Dr. Ogilvie-Harris made a diagnosis of chronic pain syndrome which was caused as a result of soft tissue injuries suffered in the 2011 motor vehicle accident. He stated that while the plaintiff had intermittent back pain prior to the accident, this had a minimal effect on her overall life. After the 2011 motor vehicle accident, he stated that the plaintiff suffered soft tissue injury which resulted in pain and impairment and evolved into a chronic pain syndrome. As over two years had passed since the motor vehicle accident, he considered these changes in the plaintiff's condition to be permanent.
- [22] Dr. Hugh Cameron is an Orthopedic Surgeon who was called as a witness by the defence. Dr. Cameron examined the plaintiff on June 23, 2015.
- [23] Dr. Cameron described how he performed a number of "validity" tests on the plaintiff during the course of his examination. These tests indicated inconsistent results. For example, when tests were repeated the plaintiff demonstrated a different level of functional ability. In addition, the plaintiff reported pain in her neck or back when there was in fact no rotation or movement of her back on testing.
- [24] Dr. Cameron was of the view that there was no positive clinical finding on his examination and that the plaintiff displayed symptom exaggeration. He concluded that there was no orthopedic impairment or limitation in Ms. Taylor's case.
- [25] In cross-examination Dr. Cameron agreed that even after surgery, some patients continue to experience pain. He described this as perceived pain and agreed that this pain often has no organic cause. He further agreed that this perceived pain is often very difficult to treat.

Analysis

- [26] Ms. Taylor has faced a lot of difficult challenges in her life and presented as a very sympathetic figure at trial. Nevertheless, there are some significant issues which caused me to question the credibility and reliability of her evidence about the nature and extent of her injuries. In cross-examination, there were a number of inconsistencies between her evidence at trial and her examination for discovery. She attempted to explain the discrepancies on the basis that she was confused at her examination for discovery. At page 2 of her evidence on November 23, 2007 she testified as follows:

Question: Ya. I appreciate that you can't remember what you said at your discovery is which is why I- I- I'm- I'm showing you what you said at your discovery to- you know to help you out. If you can't remember that far back, Ms. Taylor, then how how- how do you know that- that you needed to change your answer yesterday, from - from a "yes" previously to a "no". That the- p that the pain- back pain in 2007 was not the same back pain as the 2001 accident, are you sure of that answer?

Answer: I'm not sure of anything to tell you the truth, I'm confused.

Question: Okay.

Question: Just on that point, on your memory concerns; your evidence at this trial was that ever since your heart surgery, you've been suffering from memory problems, is that right?

Answer: Memory loss, yes.

Question: And is, the heart surgery, which was August 20, 2014, correct?

Answer: Yes.

Question: Was that when your memory problems started?

Answer: Yes.

Question: Okay.

Question: And those memory problems persist, to today?

Answer: Well to be honest with you, it started then but, you're asking me to remember, ten years ago, four years ago, I just can't— just can't remember what took place during those years.

Question: Right. But just going to your point that your memory problems started in August 2014, with— with your heart surgery, that you agree with?

Answer: Yes.

Question: Okay. You would agree then, that your memory must have been better in April 2014, when you had your examination for discovery, and we've been reading from the transcript?

Answer: Yes, but, during that, procedure I was emotionally— I was under a lot of emotional, stress at the time, and I thought that I could go through with the discovery, and I realize that I wasn't in any shape or form to go through with it, and I didn't know, that I could stop it and just end it.

- [27] It became apparent to me during the course of the plaintiff's cross-examination that there were significant issues with respect to the credibility and reliability of the plaintiff's evidence. At one point during the plaintiff's cross-examination she agreed that all of the pain she had been experiencing at the present time might in fact pre-date the April 2011 motor vehicle accident.
- [28] Because of the frailties inherent in the plaintiff's evidence and the conflicting opinions from the medical experts, I have given particular consideration to other evidence which

might clarify the nature and extent of any impairments she suffered as a result of the April, 2011 accident.

- [29] As previously noted, the plaintiff had rather infrequent attendances after October, 2012 at her family doctor's office with respect to any complaints relating to the 2011 motor vehicle accident. Her family doctor, Dr. Stern, referred her initially to a shoulder specialist. She saw the shoulder specialist on one occasion but did not return for any further visits.
- [30] Her family doctor did refer her to physiotherapy and the plaintiff took physiotherapy following the accident for about six months. It is apparent, however, that after around October 2012, the plaintiff did not seek much in the way of medical assessment or treatment for her condition.
- [31] It is also apparent that the plaintiff has been able to continue with her normal activities of daily living following the accident. In her evidence the plaintiff described taking care of her grandson, Danny, during his illness and she has also been taking care of her grandchild, Octavia, who lives in their home. In her examination-in-chief she testified as follows,

Question: Is there anything you absolutely can't do?

Answer: No.

- [32] This evidence was supported by other family members who testified at trial. For example, Deborah LoPatriello is Ms. Taylor's daughter. She testified in chief as follows:

Question: What, do you see? What can you tell us?

Answer: She's the primary, babysitter, for Octavia, Taylor's in school and Jason works, which is Octavia's parents; and she does the normal things that you do for a baby, you know, changing her and feeding her, putting her asleep and rocking her and all those things that you would do when you're caring for a child.

- [33] In addition, there is evidence that in March 2012, following the motor vehicle accident, the plaintiff obtained a part-time job as a waitress at a local Coffee Time restaurant. She was an acquaintance of the owner and worked on a part-time basis until the restaurant closed. In her evidence she agreed that she was able to do the job and did not require any job modifications other than occasionally sitting on a stool behind the counter.
- [34] There was also surveillance evidence introduced by the defence of the plaintiff's activities. Perhaps the most significant surveillance evidence was taken in August 2013 which is a little more than two years post-accident. In a video taken on August 8, Ms. Taylor can be seen picking up a child who appears to be 8 or 9 years of age. She lifts the child easily off the ground and places him in the back of an SUV without any apparent hesitation or problem. On August 9, 2013 she is observed for about 10 minutes cleaning

her car. This involved significant bending, use of both arms and turning of her head from side to side. During this timeframe there is no sign of any impairment or limitation of movement. All of this appears inconsistent with the plaintiff's evidence in chief where she stated that she does not put herself in situations where she is going to create or trigger pain.

- [35] In the *Meyer v. Bright* decision, the Court of Appeal defines a serious impairment as one which causes substantial interference with the ability of the injured person to perform his or her usual daily activities. I accept that the plaintiff must do more than simply experience pain order to bring herself within the exception to the threshold wording. The onus is on her to prove on a balance of probabilities that the pain she is experiencing has substantially interfered with most of her activities of daily living. See *Sabourin v. Dominion of Canada General Insurance Company*, 2009 CanLII 15902 (ON SC).
- [36] In the present case I accept that the plaintiff has experienced intermittent pain in her right shoulder, neck and lower back, as well as headaches. Even accepting that the pain she may currently experience is greater than the level of pain she experienced prior to the accident in April 2011, I have concluded that any injury the plaintiff has suffered has not substantially interfered with her usual activities of daily living for the reasons set out above. It therefore does not meet the requirement of a serious impairment under the *Insurance Act*.
- [37] In coming to this conclusion I have carefully considered the verdict of the jury of \$62,500 which is a significant amount. It represents the mid-way point between the defence position of zero and the plaintiff's position of \$125,000. It would suggest that the jury did find that the plaintiff suffered a significant injury as a result of the accident. It likely reflects an assessment by the jury that the injuries suffered by the plaintiff were greater than my assessment as reflected in these reasons. Nevertheless, when determining whether the threshold has been met, the verdict of the jury is a factor to be taken into account, but it is not binding on the trial judge's determination. See *Kasap v. MacCallum*, 2001 CanLII 7964 (ON CA).
- [38] While I have seriously considered the jury verdict which was rendered in this case, it does not persuade me based on my analysis of the evidence that the injuries sustained in the motor vehicle accident of April 2011 have substantially interfered with the plaintiff's ability to perform most of the usual activities of her daily living.

Conclusion

- [39] For the above reasons, I find in favor of the defence on this motion and have concluded that she has not established that the plaintiff has suffered a permanent serious impairment in relation to her activities of daily living. Based on these findings, the defence motion is therefore granted.
- [40] If counsel cannot agree on the costs of this motion, then an appointment should be taken out through the trial coordinator within 30 days of the release of this decision to address

the issue of costs, not only of this motion, but of the action itself. Of course, if there are any other outstanding issues they should be addressed before dealing with costs. Counsel are to deliver written briefs with respect to costs at least five days in advance of any hearing which is requested.

Justice M. McKelvey

Released: November 30, 2018

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SUPERIOR COURT OF JUSTICE

BETWEEN:

DONNA TAYLOR

Plaintiff

– and –

DANIEL DURKEE and GREGORY DURKEE

Defendants

REASONS FOR DECISION

Justice M. McKelvey

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