

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Plaintiff

- and -

Defendant

FACTUM OF THE DEFENDANT (MOVING PARTY)

or

DEFENDANT'S STATEMENT OF LAW

THRESHOLD ISSUE

OVERVIEW

1. Section 267.5(5) of the *Insurance Act*, R.S.O. 1990, c.l.8, as amended, provides that there shall be no liability for non-pecuniary loss resulting from a motor vehicle accident unless, as a result of the accident, the injured person has died or has sustained (a) permanent serious disfigurement; or (b) a permanent serious impairment of an important physical, mental, or psychological function. This subsection is commonly referred to as the 'threshold' provision. This is a motion to determine whether this Plaintiff meets the threshold in this action.

THE LAW AND ARGUMENT

THE CURRENT TEST

2. Bill 198 brought changes to the *Insurance Act* for automobile accidents on or after October 1, 2003 to which this case is subject. The Regulation was amended to include a definition of “permanent serious impairment of an important physical, mental or psychological function” as well as the evidence required to prove same.

**Sections 4.2 and 4.3 of Ontario Regulation 381/03 of the *Insurance Act*,
R.S.O. 1990, c.I.8 as amended**

3. Section 4.2 has three parts. The first part defines what is meant by “serious.” The second part defines what is meant by “important.” The third part defines what is meant by “permanent”:
 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



47. The Courts have found that the following interference or restriction with activities, or prevention from performing some of the following activities (besides employment), do not constitute a "serious injury":

a. Diminished energy and pain restricting ability to socialize and Latin dance;

[REDACTED]

b. Considerable recurring discomfort that was "tolerable" and did not prevent from continuing with the operation of a catering business;

[REDACTED]

c. Unpaid work including not being able to knead, stretch and roll pizza dough;

[REDACTED]

d. Camping and an active lifestyle maintained by a woman who had sustained Whiplash Associated Disorder, Grade III injuries, but made a decision to reduce working hours three and a half years post accident without being recommended by a doctor;

[REDACTED]

e. Inability to do household activities such as shoveling snow and yard work, no longer playing hockey, basketball and soccer, in part because he was too busy;

[REDACTED]

f. Pain in the neck and right shoulder when engaging in heavy lifting, pushing, pulling and long car drives;

[REDACTED]

- g. Working full days, running a household, single parenting and maintaining romantic relationships;

[REDACTED]

- h. Not being able shovel snow, cut grass, lift heavy objects and performing other activities with difficulty;

[REDACTED]

- i. Some impairment of activities involving athletic or heavy physical activity, and grieving reduced vitality;

[REDACTED]

- j. Increased difficulty with home maintenance, recreational activities, housekeeping and self-care;

[REDACTED]

- k. Inability to play competitive sports, some non-competitive sports, and do some heavier household.

[REDACTED]

IMPACT OF CREDIBILITY

48. The credibility of the evidence of the plaintiff will impact on whether the statutory test is met. Where complaints are subjective, credibility is of primary importance to the case.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]