

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Plaintiff

- and -

Defendant

FACTUM OF THE PLAINTIFF (RESPONDING PARTY)

or

PLAINTIFF'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



37. A person who is able to undertake many activities, but cannot enjoy consistent completion and enjoyment of normal activities of daily living has been found to suffer serious impairment.

[REDACTED]

[REDACTED]

38. A serious impairment is one that causes “substantial interference with the ability of the injured person in question, not of a “reasonable person” by an objective standard. Thus, a person who lived a sedentary lifestyle before the collision and continued to do so afterwards has been deemed to have suffered a serious impairment where daily function and work had been impacted.

[REDACTED]

39. It is respectfully submitted that the Court should decide the issue based upon a review of the activities of the plaintiff’s daily living prior to the collision and determine which of those activities are impaired and to what extent.

40. The Courts have found that an injury which interferes with or restricts some of the following activities, or prevents the injured person from performing some of the following activities (besides employment), constitutes a “serious injury”:

a. weight training, snowmobiling, bicycling and other outdoor activities;

[REDACTED]

b. baby-sitting, playing bridge, and gardening;

[REDACTED]

c. gardening, vacuuming, housecleaning and interference with the ability to seek employment;

[REDACTED]

- d. vacuuming, riding a road bike, driving a car, walking up a flight of stairs, planning, organizing, implementing and sustaining activities of employment, and/or maintaining an orderly, uncluttered home;

[REDACTED]

- e. "walking, standing and getting around", taking long walks, visiting an ill relative, "puttering" around the house, and fishing;

[REDACTED]

- f. walking and dancing;

[REDACTED]

- g. shopping, household chores, and maintaining contact with family and friends; and

[REDACTED]

- h. participating in recreational and sporting activities, home renovating, gardening and yard work;

[REDACTED]

- i. a lack of energy which prevents full time work and the ability to engage in "normal activities of daily living".

[REDACTED]

- j. riding horses, studying and dancing.

[REDACTED]

- k. cleaning, cooking meals, reduced energy to volunteer and socialize.

[REDACTED]

- l. socializing with others, relationship with partner, raising child (sent away to be raised by grandmother).

[REDACTED]