

CITATION: Hyeon Joo Kim Lee v. Fahime Rezai, 2015 ONSC 1926  
COURT FILE NO.: CV-12-464652  
DATE: 20150325

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:** )  
 )  
HYEON JOO KIM LEE ) Sang Jae Bae, for the Plaintiff  
 )  
 ) Plaintiff )  
 )  
- and - )  
 )  
 )  
FAHIME REZAI ) William M. Sproull, for the Defendant  
 )  
 ) Defendant )  
 )  
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 )  
 ) **HEARD:** March 16, 2015

2015 ONSC 1926 (CanLII)

**FAIETA, J**

**REASONS FOR DECISION**

[1] The An eleven-day jury trial was held with respect to a personal injury claim brought by the plaintiff arising from an automobile collision that occurred on March 23, 2011. The plaintiff claimed that a minor rear end collision, which resulted in no physical injuries, left her with extensive and long lasting soft tissue injuries to most of the left side of her body. Liability for the rear-end collision was admitted by the defendant. The jury returned a verdict awarding the plaintiff no damages for general damages, special damages and future care costs. The defendant brought this motion for a declaration that the plaintiff's claim for non-pecuniary loss and health care expenses is barred by subsections 267.5(3) and (5) of the Insurance Act, R.S.O. 1990, c. I.8 ("the Act"), because the plaintiff did not suffer a permanent serious impairment of an important, physical, mental or psychological function as a result of the collision.

[2] For the reasons described below I have granted the motion.

**The Applicable Law**

[3] The Act provides in s. 267(3) and (5) that the owner of an automobile, the occupant of an automobile and any person present at the incident are not liable in an action in Ontario for damages for non-pecuniary loss and health care expenses 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: (1) died; (2) sustained permanent serious disfigurement; or (3) sustained permanent serious impairment of an important physical, mental or psychological function. For purposes of this motion the first two exceptions are inapplicable. [emphasis added]

[4] The onus of proof to establish that the impairment meets the threshold described in the Act rests with the plaintiff.<sup>1</sup>

[5] An analysis of whether the above threshold has been satisfied requires a three part inquiry:

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?<sup>2</sup> [emphasis added]

[6] The meaning of the phrase “permanent serious impairment of an important physical, mental or psychological function” used in the Act is prescribed by O. Reg. 461/96, as amended, (“the Regulation”).<sup>3</sup>

### **Is the Impairment Serious?**

[7] The impairment suffered by the plaintiff must be of sufficient seriousness to satisfy one of the three following tests:

1. The impairment must substantially interfere with the person’s ability to continue his or her regular or usual employment, despite reasonable efforts to

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<sup>1</sup> *Meyer v. Bright* (1993), 15 O.R. (3d) 129, at para. 50 (C.A.); *Berji v. Muthusamy*, 2015 ONSC 981, [2015] O.J. No. 675, at para. 11; *Malfara v. Vukojevic*, 2015 ONSC 78, at para. 11.

<sup>2</sup> *Meyer*, at para. 16; *Berji*, at para. 8; *Malfara*, at para. 12.

<sup>3</sup> O. Reg. 381/03 amended the Regulation by adding sections 4.1, 4.2 and 4.3. It came into force on October 1, 2003. The requirement that all three of the criteria in relation to the seriousness, importance and permanence of an impairment be satisfied is found in section 4.1 of the Regulation.

accommodate the person's impairment and the person's reasonable efforts to use the accommodation to allow the person to continue employment;

2. The impairment must 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
3. The impairment must substantially interfere with most of the usual activities of daily living, considering the person's age.<sup>4</sup> [emphasis added]

[8] The weighing of seriousness is more objectively viewed than the assessment of the importance of an impaired function or else all important bodily impairments would be "serious."<sup>5</sup>

[9] Some relevant indicia include:

1. Substantial interference with daily activities and near inability to continue to work are sure markers of seriousness. Less clear is where an injured person has continued to work and tried to do other activities of daily life.<sup>6</sup>
2. Tolerable symptoms are not indicative of a serious impairment. The impairment must be beyond what is tolerable.<sup>7</sup>
3. The impairment must be more than frustrating and unpleasant to be "serious."<sup>8</sup>

[10] The plaintiff submits that soft tissue injuries can be as "crippling and devastating as other major physical or mental injuries." It will depend on the effect of the injury on the plaintiff's life and activities.<sup>9</sup> However, the evidence of impairment arising from the soft tissue injuries in this case, primarily headaches and neck pain, do not support a finding that the threshold has been met.

[11] The plaintiff and her husband are co-directors of the Orangeville branch of a missionary organization called Youth With a Mission ("YWM"). There is no evidence that the plaintiff was an employee of YWM. The plaintiff described herself as a volunteer. She received donations

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<sup>4</sup> Regulation, s. 4.2(1)1.

<sup>5</sup> *Dennie v. Hamilton*, [2006] O.J. No. 4227, 44 C.C.L.I. (4th) 243, at para. 37.

<sup>6</sup> *Dennie*, at para. 38.

<sup>7</sup> *Frankfurter v. Gibbons* (2004), 74 O.R. (3d) 39, at para. 26.

<sup>8</sup> *Smith v. Sabzali*, [2005] O.J. No. 2014, at paras. 21-22.

<sup>9</sup> *Snider v. Salerno* (2001), 58 O.R. (3d) 209.

from supporters of YWM. Based on the limited evidence tendered on this point, in my view the plaintiff was not employed by YWM within the meaning of s. 4.2(1)1 of the Regulation using the plain meaning of the word "employee" (namely, someone who works in the service of another person under an express or implied contract of hire, under which the employer has the right to control the details of work performance<sup>10</sup>) or even using the expanded definition of "employed" found in the Regulation that applies only for purposes of s. 4.1(2). The donations received by the plaintiff do not amount to "salary, wages, other remuneration or profit."<sup>11</sup> Accordingly, the test under section 4.2(1)1 is inapplicable.

[12] Even if s. 4.2(1)1 were applicable, I find that the impairments suffered by the plaintiff as a result of the collision did not substantially interfere with her ability to continue her volunteer activities. Even though the plaintiff testified numerous times at trial that she is prevented from a number of activities due to limitations on walking, standing, and sitting, the evidence showed that the plaintiff was not impaired to the degree she claimed. The evidence shows that:

- She returned to her volunteer activities several months after the collision, albeit on a part-time basis;
- She has remained a co-director of YWM at all times following the collision, although after the collision her administrative tasks were taken over by an individual who would call her to answer questions if she was not in the office;
- She and her husband authorized the issuance of a letter by YWM which confirmed her fulltime employment status for the period following the collision in order to facilitate a tax receipt to a person that had made a donation to her;
- At trial the plaintiff confirmed that she could stand for at least an hour and drive long distances for work;
- A video on YWM's website (now removed) showed that, as of October 18, 2011, the plaintiff was able to stand, engage an audience, and give a sermon for one hour; during that time she was seen gesturing with her left hand, holding a microphone with her right hand, and rotating her neck to look behind her;

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<sup>10</sup> Black's Law Dictionary, 10th ed. (St. Paul, MN: Thomson Reuters, 2014).

<sup>11</sup> Regulation, s. 4(3) expands the circumstances under which a person is considered "employed." It states: "a person is employed if, for salary, wages, other remuneration or profit, the person is engaged in employment, including self-employment, or is the holder of an office, and "employment" has a corresponding meaning."

- Another video on YWM’s website (also now removed) showed that, as of January 24, 2012, the plaintiff was able to stand, engage with an audience and give a sermon for over 30 minutes;
- At her examination for discovery on March 15, 2013, the plaintiff alleged that she could no longer attend prayer meetings as she had difficulty standing despite the above videos.

[13] Similarly the plaintiff states that she has only resumed light housekeeping activities and is not as socially active as prior to the collision. However, she has not established that the impairments have substantially interfered with most of the “usual activities of daily living”, as:

- She is able to walk around stores to shop (as shown by the surveillance video);
- She is able to load bags into the back seat of her car and then remove them (as shown by surveillance video);
- She is able to drive for long distances (as shown by surveillance video);
- She is able to read for leisure (which is an activity she enjoys); and
- She is able to travel by plane to Hawaii, Korea, Japan, Baltimore and Brazil.

[14] Accordingly, I find that the plaintiff’s impairment did not satisfy the threshold requirement of “seriousness” under s. 4.2(1)1 of the Regulation.

### **Is the Impaired Function Important?**

[15] For the function that is impaired to be *important*, the Regulation requires that:

1. The function must 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;
2. The function must 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;

3. The function must be necessary for the person to provide for his or her own care or well-being; or
4. The function must be important to the usual activities of daily living, considering the person's age.<sup>12</sup>

[16] The test of whether an impaired function is "important" to the injured person is a qualitative test.<sup>13</sup>

[17] The plaintiff is able to meet the performance demands of her employment in her managerial capacity with reasonable efforts to accommodate her, including by using an ergonomic chair as recommended by Dr. Kekosz's opinion evidence, and perhaps by offering sermons and lectures from a seated position.

[18] With respect to s. 4.2(1)2(iii), the plaintiff is independent in her own care and does not fall within this condition to establish that any impaired function she might have is important.

[19] Finally, in relation to s. 4.2(1)2(iv), the plaintiff has been shown to engage in activities of daily living, and the surveillance video reflects her doing so without impairment of an important function.

[20] Accordingly, I find that the plaintiff's impairment did not satisfy the threshold requirement of "importance" under s. 4.2(1)2 of the Regulation.

### **Is the Impairment Permanent?**

[21] For the impairment to be *permanent*, the impairment must:

1. 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,
2. Continue to meet the criteria in paragraph 1 [described above in paragraph 7 of this decision], and
3. Be of a nature that is expected to continue without substantial improvement when sustained by persons in similar circumstances.<sup>14</sup> [emphasis added]

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<sup>12</sup> Regulation, s. 4.2(1)2.

<sup>13</sup> *Malfara*, at paras. 18-19.

<sup>14</sup> Regulation, s. 4.2(1)3.

[22] A “permanent” impairment need not be an impairment that will last until death; however, the impairment must have no predicted end date. Continued improvement is an indicator that impairment may not be “permanent.”<sup>15</sup>

[23] The plaintiff reported intense pain after the rear-end collision in Toronto. There was about \$1,000 of damage to the right side of the rear fender. She stated that vehicle was hit so hard that she was in shock. No airbags were deployed as a result of the collision. At examination for discovery she stated that no part of her body hit the inside of the vehicle. She said that the collision caused her to heavily hit her head on the headrest and the impact felt like lightning had hit her. She told the defendant that she was in pain at the scene of the accident. Neither police nor other emergency personnel were called to the scene. She drove her automobile to her home in Orangeville. She did not visit her family doctor for five weeks following the collision nor did she visit a hospital for five months after the collision. However, she visited her physiotherapist the following day.

[24] The plaintiff relied upon the opinion evidence of Dr. Veronica Kekosz, a physiatrist, who examined the plaintiff on August 18, 2013. Dr. Kekosz opined that the plaintiff had a sustained a WAD (Whiplash Associated Disorder) II injury to the cervical spine and has been left with cervicogenic headaches as well as some mild loss of function in the neck and lower back. The plaintiff had mild weakness of the left shoulder, left elbow, left hip and left knee. She found that the plaintiff had a partial disability related to spinal and left extremity soft tissue impairments. She found that the plaintiff could not return to her previous employment in a fulltime capacity.

[25] Dr. Kekosz offered that she “does not deal with insurers” and that she is “plaintiff oriented.” Dr. Kekosz acknowledged that she relied on the plaintiff’s truthfulness about her pain and other impairments. She took the reported information at face value. The plaintiff did not advise Dr. Kekosz of (1) her history of dizziness or headaches; (2) her rheumatoid arthritis; or (3) an earlier automobile accident that required treatment to her neck and back. Further, Dr. Kekosz had not seen the surveillance or other videos of the plaintiff carrying out sermons, speeches and activities of daily living a few years earlier without any apparent difficulty.

[26] Jeffrey Ford, an occupational therapist, conducted an in-home assessment of the plaintiff on December 13, 2011. He obtained objective measures of the plaintiff’s range of motion, strength and functional abilities in her home. He noted significant differences between formal and informal examination of the plaintiff. For instance, when she was asked to try to touch her chin to her chest he measured 7 degrees of neck flexion. However, later he measured 27 degrees of neck flexion when the plaintiff was performing another task. Similarly, when asked to rotate her neck, the plaintiff demonstrated 34 degrees of rotation. Later when the plaintiff spoke with her interpreter, he observed full neck rotation.

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<sup>15</sup> *Malfara*, at paras. 14-17.

[27] Dr. Frank Lipson, a physiatrist who indicated he accepted referrals from both plaintiff and defendant counsel, examined the plaintiff on August 18, 2014. Amongst other things, he found it abnormal that the plaintiff reported pain over the entire left side of her body due to the collision given that she was in a minor rear-end collision that would normally be associated with whiplash and shoulder injury. This was especially true given that the plaintiff denied that any part of her body, other than her head, hit any part of the inside of her car upon collision.

[28] Dr. Lipson stated that the examination of the plaintiff was essentially a normal examination with “pain magnification” and “pain focused” behavior. Dr. Lipson found that there were no diagnosed physical impairments or conditions caused by the collision. Dr. Lipson found that the plaintiff sustained a soft tissue injury to her cervical spine, soft tissue injury to her left shoulder, and perhaps a minor soft tissue injury to her lower back. However he found that the collision did not contribute materially to her symptoms and impairments for more than four months after the collision. Dr. Lipson also assessed the plaintiff’s complaints against guidelines for the confirmation of pain-related impairments developed by the American Medical Association. Applying these criteria, he could not confirm any impairment that was related to the collision.

[29] I prefer the evidence of Dr. Lipson over that of Dr. Kekosz, given that he performed a more critical assessment of the subjective complaints presented by the plaintiff.

[30] Accordingly, I find that the plaintiff’s impairment did not satisfy the threshold requirement of “permanence” under s. 4.2(1)3 of the Regulation.

**Has sufficient medical evidence been provided?**

[31] A person who claims to have sustained permanent serious impairment of an important physical, mental or psychological function must adduce the evidence of a physician:

1. Who is trained for and experienced in the assessment or treatment of the type of impairment that is alleged;
2. Which is based on medical evidence, in accordance with generally accepted guidelines or standards of the practice of medicine;
3. That explains the nature of the impairment;
4. That explains the permanence of the impairment;
5. That explains the specific function that is impaired;



6. That explains the importance of the specific function to the person; and
7. That concludes that the impairment is directly or indirectly sustained as the result of the use or operation of an automobile.<sup>16</sup>

[32] The defendant submits that the plaintiff has failed to provide any medical evidence that explains: (1) the importance of each of the plaintiff's impaired functions; and (2) the seriousness of the impaired functions. However, it is my view that nothing in s. 4.3 of the Regulation requires the plaintiff to adduce medical evidence to explain the seriousness of the impairment.

[33] Turning to the requirement that medical evidence be provided to explain the importance of the impairment in accordance with s. 4.3(2)(d) of the Regulation, the plaintiff's written submissions do not refer to the specific evidence provided by those doctors that explains the plaintiff's impairment. In reviewing my notes of the evidence adduced at trial, I find that Dr. Kekosz did indicate that the plaintiff was having difficulties returning to work on a fulltime basis and resuming heavy household chores due to headaches and neck pain. Accordingly, the plaintiff satisfies the medical evidentiary requirement under s. 4.3 of the Regulation even though, as I noted earlier, I prefer Dr. Lipson's evidence.

### **Other Considerations**

[34] A trial judge may consider, but is not bound by, the jury verdict in making a threshold determination.<sup>17</sup> I have considered the jury's verdict and find that it is consistent with the conclusion that I have reached on the outcome of this motion.

### **Conclusion**

[35] For the reasons given above I declare that the plaintiff's claim for non-pecuniary loss and health care expenses is barred by subsections 267.5(3) and (5) of the Act.

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Mr. Justice M. Faieta

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<sup>16</sup> Regulation, s. 4.3(1)-(4).

<sup>17</sup> *Berfi*, at para. 12. *Malfara*, at para. 7.

**Released:** March 25, 2015

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**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

HYEON JOO KIM LEE

Plaintiff

– and –

FAHIME REZAI

Defendant

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**REASONS FOR JUDGMENT**

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Mr. Justice M. Faieta

**Released:** March 25, 2015