

*Indexed as:*  
**Trench v. Samy**

**Between**  
**Philip Trench, plaintiff, and**  
**Farouk Samy, defendant**

[1994] O.J. No. 3068

Court File C23896/93

Ontario Court of Justice - General Division  
Brampton, Ontario

**Dunn J.**

December 5, 1994.

(6 pp.)

*Insurance -- Automobile insurance, compulsory government schemes -- Bodily injury and death benefits -- Permanent serious impairment of important bodily function, what constitutes.*

This was an application to determine whether the injuries of an insured accident victim came within the provisions of section 266 of the Insurance Act. In the accident the plaintiff suffered a serious fracture of his leg, necessitating traction and the operational insertion of a metal plate to bind the lower part of his upper leg together at the knee. As a result of the accident, the outside of the plaintiff's right leg was misshapen with a large scar. At the trial, which took place a number of years following the accident, his knee still appeared to be swollen and misshapen and he walked with a noticeable limp. The plaintiff's injuries rendered him somewhat handicapped in his ability to perform his clerical job and also diminished his prospects of future advancement with the company. In addition, the plaintiff was no longer able to participate in his favourite sporting activities.

HELD: The application was allowed. The injuries suffered by the plaintiff as a result of the motor vehicle accident consisted both of permanent serious disfigurement and permanent serious impairment of an important bodily function caused by a continuing injury that was physical in nature. Consequently, he fell within one of the statutory exceptions to section 266 immunity.

**Statutes, Regulations and Rules Cited:**

Insurance Act, s. 266.

J. Paul Bannon and Carla S. Falkeisen, for the plaintiff.  
D. Zarek, for the defendant.

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**1** **DUNN J.:**-- This is a matter which came before me as a jury trial and in which the jury awarded certain damages to the plaintiff for personal injuries and for loss of future income. After a trial of the matter in which the only issue was assessment of damages, liability having been admitted.

**2** At the conclusion of the trial and on consent, counsel addressed the matter of whether or not the injuries of the plaintiff came within one of the exceptions outlined in the Insurance Act, R.S.O. 1990, s. 266.

**3** I am indebted to both counsel for their concise and compelling argument on the matter heard on September 22, 1994.

**4** The issue is whether or not the plaintiff falls within one of the statutory exceptions to s. 266 immunity. The plaintiff in order to succeed must show either:

- (a) permanent serious disfigurement; or
- (b) permanent serious impairment of an important bodily function which is caused by continuing injury and which is physical in nature.

**5** The relevant interpretation of the section as it applies in this case is contained in the recently reported case of Meyer et al. v. Bright et al. (1993), 15 O.R. (3d) 129.

**6** The facts in the case before me indicated that the plaintiff was injured in a head-on collision between two motor vehicles. The injuries sustained by the plaintiff caused a fairly serious fracture of his leg, just above the knee, necessitating traction and subsequently the operational insertion of a metal plate to bind the lower part of his upper leg together at the knee. He was several weeks in hospital and subsequently confined to his home for several months.

**7** As a result of that accident, his leg was at first misshapen with a large scar on the outside of his right leg above the knee. At trial, after some years, his knee still appeared to be swollen and misshapen and to my eye the scar was quite apparent on the outside of his thigh.

**8** The evidence also reflected that the plaintiff currently walks with a noticeable limp.

**9** The injuries complained of have necessitated the plaintiff obtaining a clerical job which is admittedly somewhat better than the job he held at the time of the accident. Notwithstanding the generous comments of his employer, it was obvious that the plaintiff's ability to do that job was somewhat handicapped in that he was unable to get out to the plant to check and expedite orders in the way that he would like and as was expected of others. He is also unable to attend trade shows. At frequent intervals he gets up from his desk to stretch for a few minutes and this is a source of annoy-

ance to himself and apparently others. In addition, he gave evidence of the continual problems that the leg is giving him with respect to his ability to sleep.

**10** The evidence, in my opinion, indicates that as a result of the accident and the injuries suffered by the plaintiff, that he has some diminished prospects as to his future advancement with the company. The plaintiff gave evidence that he would prefer to do sales, a field in which he has exceeded in the past, but his capacity to do this for the company would be curtailed by his disability notwithstanding the employer's willingness to grant him a small nearby territory.

**11** In addition, the plaintiff is unable to play sports with his child and with the neighbourhood children as he used to and he is unable to play golf.

**12** Section 266 of the Insurance Act provides as a third exception to the immunity:

In the case where an injured person has sustained permanent serious impairment of an important bodily function caused by a continuing injury which is physical in nature.

**13** To determine the answer to the question, the above cited case reflects that one should approach the matter to answer the following questions:

- (1) Has the injured person sustained a permanent impairment of a bodily function caused by a continuing injury which is physical in nature?

**14** The answer that I would make to this question is yes. The knee, even at trial, compared to the ability of the plaintiff to do his job in the maker in which he would otherwise be able to do if uninjured. Certainly, it is a bodily function and it has been interrupted by or curtailed by a continuing injury which is physical in nature.

- (2) The answer then is yes, then I must go on and ask whether or not "the bodily function which is permanently impaired is an important one, that is, one that plays a major role in the health, general well-being and way of life of the injured plaintiff?" My answer to this is easily ascertained from the facts as I have recited them above. Clearly, the evidence establishes that the bodily function, that is, the use of his knee and his ability to walk and play sports as well as to do his job is an important one, or one that played a major role in the health, general well-being and way of life of the plaintiff.

**15** My conclusion to the above questions might very well dispose of the matter. The evidence also indicates that, in this case, the second exception to the immunity of s. 266 of the Insurance Act is, in my opinion, answered in the affirmative, as well. The scar, the swollen and misshapen nature of the leg and the evidence reflects as "permanent", mars the appearance of the individual and, in my opinion, is a serious one. I accept the evidence of the plaintiff that he seldom wears shorts, except in the presence of his close relatives and that he feels quite self-conscious of the disfigurement. The disfigurement, in my opinion, is permanent notwithstanding the evidence that sometime in the future an osteotomy or a total knee replacement may improve the appearance of the knee in question. The expert evidence given at trial reflects that at the present time neither of these operations

are recommended for the plaintiff. It is easy to conclude therefor that the disfigurement is in fact permanent.

**16** As a consequence, it is my opinion, based on the evidence that I heard at trial that the injuries suffered by the plaintiff as a result of the motor vehicle accident consists both of permanent serious disfigurement and permanent serious impairment of an important bodily function which is caused by continuing injury and which is physical in nature as interpreted by the case law.

**17** In the circumstances, the plaintiff should have his costs, subject to the parties addressing me on the subject matter within 21 days hereof.

DUNN J.

qp/s/mes/DRS/DRS