

CITATION: Osmani v. State Farm, 2023 ONSC 5438
COURT FILE NO.: CV-15-4729-00
DATE: 2023 09 26

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ILAZ OSMANI, FAKETE OSMANI and EGZON OSMANI, Plaintiffs

AND:

MARK JOHNSON and STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, Defendants

BEFORE: L. Shaw J.

COUNSEL: G. Masgras, for the Plaintiffs

B. Yung and KJ. Edmunds, for the Defendants

HEARD: September 26, 2023, in writing

RULING ON THRESHOLD AND COSTS

L. Shaw J.

[1] The plaintiffs sought damages for injuries they alleged were sustained in a motor vehicle accident on October 24, 2013. Liability was not an issue. The nine-day trial was heard by a jury.

[2] The parties could not agree on the jury questions. The defence argued that the only issue for the jury to determine was an assessment of general damages. The plaintiffs asserted that questions regarding future medical expenses and damages for past and future housekeeping losses should also be put to the jury.

[3] Pursuant to an oral ruling, I found that there was insufficient evidence led at trial to permit the jury to be asked to determine damages for past and future housekeeping losses or future medical and rehabilitation expenses. Plaintiff's counsel conceded that there was insufficient evidence to put to the jury any question regarding Ms. Osmani's claims for past or future loss of income or earning capacity. The plaintiffs also requested that the first question for the jury was whether the car accident caused or contributed to their ongoing pain and impairments.

[4] The jury returned a verdict and found that the motor vehicle accident did not cause or contribute to any ongoing pain and impairments suffered by the plaintiffs, Ilaz Osmani and Fakete Osmani and awarded no damages.

[5] Despite this verdict, counsel requested that I rule on threshold. I asked for written submissions which I have reviewed. I also requested written submissions on costs if the parties could not reach an agreement. I have reviewed those submissions.

[6] For the reasons that follow, I grant the defendant's motion and find that the plaintiffs' claim for non-pecuniary loss is barred as their injuries do not fall within the exception set out in s. 267.5(5) of the *Insurance Act*, R.S.O. 1990 c. I-8 (the "*Insurance Act*")

1. Threshold

a) Legal Framework

[7] Section 267.5 of the *Insurance Act* requires that I determine the threshold issue. The defence argues that the plaintiffs' claim for general damages is barred on the basis that they have failed to establish that because of the collision they have sustained a permanent, serious impairment of an important physical, mental or psychological function.

[8] As directed by the Divisional Court in *Mandel v. Fakhim*, 2018 ONSC 7580 (Div. Ct.), even if a jury returns a verdict in which no damages are awarded, the court must still determine the threshold issue.

[9] While both parties filed written submissions on the threshold issue, neither addressed what I consider to be a preliminary issue relating to the jury's finding that causation was not proven.

[10] During submissions regarding the questions for the jury to answer, plaintiffs' counsel requested that the first question to be answered was whether the accident caused or contributed to the plaintiffs' ongoing pain and impairments. Counsel for the defendant did not propose this question. The jury's answer was "no".

[11] That finding is binding on me as trial judge. This differs from the threshold issue where a jury's assessment of damages is not binding on my determination on whether the threshold has been met but is a factor I can consider.

[12] By answering this first question in the negative, in my view, the jury rejected the plaintiffs' evidence that any of their ongoing pain or limitations were caused by this accident. In essence, they found the plaintiffs to not be credible as the plaintiffs both testified that their current limitations only arose following the accident.

[13] Given that finding, there is no threshold issue as causation was not proven by the plaintiffs.

[14] In the event I am incorrect, I will address the threshold issue.

[15] Section 267.5(5)(a) and (b) states as follows:

Non-pecuniary loss

(5) Despite any other Act and subject to subsections (6) and (6.1), the owner of an automobile, the occupants of an automobile and any person present at the incident are not liable in an action in Ontario for damages for non-pecuniary loss, including damages for non-pecuniary loss under [clause 61\(2\)\(e\) of the Family Law Act](#), 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 died or has sustained,

(a) permanent serious disfigurement; or

(b) permanent serious impairment of an important physical, mental or psychological function.

[16] Section 267.5(12) of the *Insurance Act* requires that a judge "shall" determine whether the plaintiff has sustained injuries that meet the test as

described in (a) and (b) above. In this matter, there was no issue of disfigurement so only (b) applies.

[17] The regulations that must be considered in defining the words “permanent serious impairment of an important physical, mental or psychological function” are found in sections 4.1, 4.2 and 4.3 of *Court Proceedings for Automobile Accidents That Occur on or After November 1, 1996*, O Reg 461/96 as amended by *Court Proceedings for Automobile Accidents that Occur on or After November 1, 1996*, O. Reg 381/0. The regulations state:

4.1 For the purposes of section 267.5 of the Act,

“permanent serious impairment of an important physical, mental or psychological function” means impairment of a person that meets the criteria set out in section 4.2.

4.2 (1) A person suffers from permanent serious impairment of an important physical, mental or psychological function if all of the following criteria are met:

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 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,

iii. be necessary for the person to provide for his or her own care or well-being, or

iv. be important to the usual activities of daily living, considering the person's age.

3. For the impairment to be permanent, the impairment must,

i. 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,

ii. continue to meet the criteria in paragraph 1, and

iii. be of a nature that is expected to continue without substantial improvement when sustained by persons in similar circumstances.

[18] In *Ayub v. Sun*, 2015 ONSC 1828, at para. 13, Diamond J. summarized the findings of Firestone J. in *Malfara v. Vukojevic*, 2015 ONSC 78, regarding the jurisprudence dealing with threshold motions as follows:

- In rendering its threshold decision, the Court is not bound by the jury verdict. However, the verdict is nevertheless a factor the trial judge may consider in determining the issues on the threshold motion. See: *DeBruge v. Arnold*, 2014 ONSC 7044 (Ont. S.C.J.) at para. 10.

- The burden of proof to establish that the plaintiff's impairments meet the statutory exceptions or "threshold" rests squarely with the plaintiff. In *Lento v. Castaldo* (1993), 15 O.R. (3d) 129 (Ont. C.A.), the Court set out the following three part inquiry:

- a) Has the injured person sustained permanent impairment of a physical, mental or psychological function?

b) If yes, is the function impaired important?

c) If yes, is the impairment of the important function serious?

- While the word “permanent” does not mean forever, it nevertheless requires that the impairment last into the indefinite future as opposed to a predicted time period with a definite end. Put another way, permanent impairment means the sense of a weakened condition lasting into the indefinite future without any end or limit. See: *Brak v. Walsh*, 2008 ONCA 221 (Ont. C.A.) and *Bos Estate v. James* (1995), 22 O.R. (3d) 424 (Ont. Gen. Div.).

- The test of whether the impaired function is “important” is a qualitative test. See: *Page v. Primeau* [2005 CarswellOnt 5919 (Ont. S.C.J.)], 2005 CanLII 40371 at para. 32.

- The determination of whether the impairment of an important bodily function is “serious” relates to the seriousness of the impairment to the person and not to the injury itself. See: *Mohamed v. Lafleur-Michelacci*, [2000] O.J. No. 2476 (Ont. S.C.J.) at para. 56.

- When assessing whether the degree of impairment in the Plaintiff’s daily life necessary to be “serious”, the degree of impairment must be beyond tolerable. See: *Frankfurter v. Gibbons* (2004), 74 O.R. (3d) 39 (Ont. Div. Ct.) at paras. 22-24.

[19] With this analytical framework, I will now review the trial evidence.

b) Review of the Evidence – Ilaz Osmani

[20] Mr. Osmani was born on April 29, 1957 in Kosovo and moved to Canada in 1999. He was 56 at the time of the accident and 65 at the time of trial. He was married in 1982 and had five children. At the time of the accident, four of his children lived in the home. At the time of trial, he was living with his spouse, son, daughter, and a grandchild.

[21] Mr. Osmani last worked in 2005. At the time of the accident, he was a full-time caregiver for his spouse who has a condition that limits her mobility. He did not advance a claim for any past or future income loss.

[22] Mr. Osmani claimed that the car accident caused soft tissue injuries that resulted in ongoing pain to his right shoulder, lower back, hips, headaches, and dizziness.

[23] He testified that before the accident, he did most of the housework including helping his daughters cook, wash dishes, sweep, vacuum, and mop. He did all the outdoor work including shovelling in the winter, cutting the grass, and maintaining a garden in the summer. He also worked on cars doing tasks such as changing oil, tires, and transmissions.

[24] Before the accident, he would go with his wife to parks or malls when she felt well. He would play soccer once per week and play cards with friends at the Albanian club.

[25] Mr. Osmani testified that since the accident, he spends his time on the couch or in his garage smoking. His daughters clean the house and he no longer did any of the outdoor maintenance work.

[26] Shkurte Osmani, Mr. Osmani's daughter, was living with her father at the time of the accident. Her evidence was that prior to the accident, her father took

care of their mother. She also testified that since the accident, he could no longer care for her.

[27] She testified about the changes in her father's personality since the accident. She also testified about the restrictions he now has with respect to his activities around the house including limited housework and yard work. She described his sedentary lifestyle. Ms. Osmani also testified about his physical restrictions such as bending, sitting, and walking.

[28] Although Mr. Osmani denied having any of physical problems prior to the car accident, the medical evidence suggested otherwise. His evidence was problematic as he denied knowledge of several entries in various clinical notes and records. His evidence contradicted the medical records and he alleged that various physicians made incorrect notes. In my view, Mr. Osmani's credibility was called into question given this evidence.

[29] Dr. Abdalla was Mr. Osmani's family doctor prior to the accident. There were several entries in his clinical notes and records between September 24, 2007 and August 2009 that Mr. Osmani complained of right shoulder pain. Despite these notes, Mr. Osmani denied having shoulder pain prior to the accident. He also testified that he did not recall complaining of right shoulder pain prior to the car accident and denied being prescribed medication for it in July 2008 and August 2009. He testified that the medical records were not accurate.

[30] Mr. Osmani was also cross-examined about the records from the KW Urgent Care Clinic when he complained of left knee pain in May 2011 and July 2012, and right knee pain in March 2013. Mr. Osmani testified that he only went to the clinic once for knee pain and he did not recall being sent for an x-ray of his left knee in March 2013.

[31] He did not recall going to the KW Urgent Care Clinic in May 2013 for right hand pain or being sent for an x-ray of his right hand. He said the record was not correct.

[32] He did not agree that he was prescribed Celebrex for his right shoulder in 2009 and for his knees between 2011 and 2013 although this was referenced in Dr. Abdalla's records.

[33] He saw his family doctor, Dr. Abdalla, after the accident, on November 13 2013. He testified that he told Dr. Abdalla about the accident. He testified that he saw him on other occasions but could not recall what problems he had when he saw him.

[34] He was never prescribed pain medication following the accident. His evidence was that he used Advil or Tylenol due to the pain in his neck, low back and shoulder and that the pain has been constant since the accident.

[35] Mr. Osmani attended for physiotherapy treatment at Spinetec Heath Centre for more than three years with the last treatment on May 11, 2016. He was treated with heat, a tens machine, and exercises. Mr. Osmani testified that he continues to use a tens machine on his shoulder at home and does exercises.

[36] Mr. Osmani did not tell his new family doctor, Dr. Rrafshi, about any pain complaints although he saw him several times between November 2020 and September 2022.

[37] The last reference in the medical records of any complaint of back, neck or shoulder pain to any doctor was in February 2017. Mr. Osmani's did not agree and testified that he always complained of the pain, and he would be told to take medication and go to therapy.

[38] The inconsistency between Mr. Osmani's evidence and the medical records and his failure to report any problems since February 2017 is inconsistent with his evidence of ongoing pain. This calls into question his credibility.

[39] Dr. Pilowsky is a clinical rehabilitation psychologist. She saw Mr. Osmani once, on December 12, 2014. Her evidence was as follows:

- Mr. Osmani told her he was healthy before the accident.
- He was a caregiver and homemaker.
- Since the accident, he has been in pain and emotionally down and no longer able to do his chores and needs help from his daughters.

- Before the accident his life was pleasant.
- Since becoming dependent on others, his self-concept changed; he is depressed, sad, angry and suffers from anxiety; he feels that he was no longer the same father or husband.
- Socially he has become isolated from friends and his social support is gone.
- She administered the Beck Depression Inventory which is a self-administered test and he scored in the severe level for depression. On the Beck Anxiety Inventory, he scored in the severe level. He also did a pain inventory test which indicated that his response to pain was dysfunctional meaning it was interfering with many aspects of his life.
- She recommended that he attend psychosocial treatment including pain management.

[40] She was not given any documents to review before she met Mr. Osmani. She agreed that it would have been helpful to have documents available for her review such as the family doctor's records.

[41] She agreed that she relied on the truthfulness and accuracy of Mr. Osmani's self-report when she administered the tests.

[42] She was unaware that since her assessment in December 2014, Mr. Osmani had never received the treatment she recommended or been prescribed any medication for depression or anxiety. She was unaware that he had never reported his psychological symptoms to his family doctor.

[43] Given Mr. Osmani's questionable credibility, I place little weight on Pilowsky's evidence as her assessment relied on Mr. Osmani's self-report.

[44] Two medical experts examined Mr. Osmani and provided an opinion to the court.

[45] Dr. Wilderman was retained by the plaintiff. He was qualified as an expert in the field of chronic pain and chronic pain management. He testified that Mr. Osmani sustained the following injuries in the accident:

- Chronic pain disorder
- Chronic whiplash associated disorder (WAD) type II vs. III
- Mechanical lower back pain
- Lumbago
- Bilateral sacroiliac joint dysfunction
- Piriformis syndrome on the right
- Post-traumatic chronic headaches
- Impingement syndrome of shoulder on the right
- Myofascial pain syndrome of rhomboid region on the right
- Dizziness not yet diagnosed.

[46] He concluded that Mr. Osmani's prognosis was guarded. Dr. Wilderman did not find anything other than the car accident as the cause of Ms. Osman's condition. He considered his condition to be a permanent and serious impairment of an important bodily function. Dr. Wilderman recommended that Mr. Osmani attend a multidisciplinary pain program that would include chiropractic and physiotherapy treatment, attend a gym and an aqua-fit program, the use of

medication for his headaches, attend a psychotherapy program, and the use of a back brace.

[47] He agreed that the medical documentation he received for Mr. Osmani ended in 2015 and that it would have been better to have more updated records. He agreed that he relied upon what Mr. Osmani told him about the housekeeping he could do before and after the accident.

[48] Dr. Lang examined Mr. Osmani on November 6, 2019 at the request of the defendant. He was qualified as an expert in physical medicine and chronic pain. He testified that Mr. Osmani told him that he was in excellent health before the accident. Mr. Osmani denied any history of musculoskeletal pain or headaches before the accident. He testified as follows:

- He did not agree with Dr. Wilderman's finding that Mr. Osmani met the criteria for chronic pain syndrome. He did not agree that he had excessive dependence on doctors or his family; he did not have impairments that would prevent him from doing work around the home; he was not profoundly deconditioned. While he may have muscle tightness, he did not have a loss of muscle tone; he was still engaged in society noting his trips to Cuba.
- His opinion was that Mr. Osmani suffered soft tissue muscle strain caused by the accident which resulted in headaches and pain in his neck and lower back. The diagnosis was muscle strain of his neck and upper back – WAD 1. This means he had pain but no objective findings on examination. He also had muscle strain of his lower back with no objective findings and headaches that came from his neck.
- According to Dr. Lang, muscle strains normally improve within 6 weeks to 3 months and in some cases can take 6 months to improve.

- His pre-accident shoulder pain did not contribute much to his current condition.

[49] He concluded that the physical injuries that Mr. Osmani sustained in the car accident did not cause a permanent and serious impairment of an important physical function.

c) Analysis - Ilaz Osmani

[50] The credibility and reliability of witnesses is central when dealing with soft tissue injuries. The reason for that is that soft tissue injuries are often not detectable through any imaging such as an x-ray or MRI. Furthermore, resulting limitation from soft tissue injuries is often ongoing pain that again cannot be measured in any objective fashion but relies on the self-report of the individual in describing their pain and the limitations imposed upon them.

[51] I am concerned with the inconsistencies between Mr. Osmani's evidence and the medical records. When confronted with inconsistencies, such as complaints of prior shoulder pain, Mr. Osmani alleged that the medical records were incorrect and that he had no such issues.

[52] He did not report any of his pre-existing problems to either Dr. Wilderman or Dr. Lang. Dr. Wilderman, in particular, relied on Mr. Osmani's self-reports regarding the restrictions he now has as a result of the pain he has in his shoulders, neck and back.

[53] In my view, Mr. Osmani was neither a credible nor reliable witness. He misled the court regarding the nature and extent of his pre-accident health issues. It is clear from the jury's finding that it also rejected his evidence regarding the nature of his ongoing restrictions and whether those were caused by the accident.

[54] When I also consider that the jury did not award him any damages together with the challenges to his credibility, I am satisfied that his claim does not meet threshold.

d) Review of the Evidence – Fakele Osmani

[55] Ms. Osmani was born April 4, 1990 and is 33 years of age. She was 23 at the time of the accident. She is married with two children who are 5 years and 8 months of age. She has been married for 6 years. She has a minimal work history. She was a full-time caregiver for her children. Her husband worked and she looked after the children when he was at work. Prior to the accident she could do all her housekeeping. She spent 2 to 3 hours per day on housework.

[56] She was not working at the time of the accident and currently does not work.

[57] She was taken by ambulance to the hospital after the accident. She was assessed but not admitted. She visited her family doctor at the time, Dr. Abdalla, two days later.

[58] She sustained soft tissue injuries in the accident. She complained of pain in her entire back and neck. She denied having any health issues such as headaches, anxiety, or back pain prior to the car accident. She testified that she continued to have pain in her back and neck at the time of trial.

[59] Despite denying any pre-accident health issues, when she was cross-examined, Ms. Osmani agreed that she told her new family doctor, Dr. Zemerli in November 2022 about a near-drowning accident that occurred when she was 9 or 10 of age. She told Dr. Zemerli that she was in a coma for one month after the near drowning and had amnesia for 6 months. She needed hearing aids after the near drowning. She was in a special education program at school and had a teacher assigned to help her. She told Dr. Zemerli that she thought her mood had always been irritable since the near drowning. At that same office visit, she told Dr. Zemerli that she had headaches that were worse since she had her baby.

[60] Ms. Osmani initially denied having any problems with headaches, anxiety, or back pain in the two years before the accident. She did not recall going for an x-ray of her back in August 2011 but then later agreed that she went as she had some pain in her lower back. She agreed that she did have back pain but may have forgotten about it when she initially testified that she did not have any back pain before the accident.

[61] She was sent for an x-ray of her neck in June 2012, one year before the accident. She did not recall having any issues with her neck before the accident. She repeatedly testified that she had an issue with her memory. More than once, she was asked if her memory issues arose following the near drowning incident. In one response she testified that her memory problems were made worse by the 2013 accident and in another response, she said her memory issues were caused by the 2013 accident.

[62] Dr. Zemerli's records make no reference to the car accident, or any complaints associated with that accident. Nonetheless, Ms. Osmani insisted that she reported the accident and her ongoing neck and back pain related to that accident to Dr. Zemerli.

[63] Ms. Osmani had difficulty remembering the purpose of her various visits to see Dr. Zemerli. For example, she did not recall telling her in February 2017 that she had back pain for over one year. She did not recall being sent for an x-ray of her back in February 2017 or discussing the result with Dr. Zemerli. Ms. Osmani questioned the accuracy and truthfulness of Dr. Zemerli's records.

[64] She did not recall talking to Dr. Zemerli about headaches in October 2017 or telling her that she had them since she was 10, when she almost drowned. She did not recall complaining of knee pain in March 2018 or being prescribed Naproxen.

[65] Dr. Zemerli has been Ms. Osmani's family doctor since November 2, 2016. She testified that at the initial visit, Ms. Osmani completed an intake form about her medical, surgical, and social history that Dr. Zemerli reviewed with her. She complained of a sinus headache and sinus pressure for the past year. She prescribed her a nasal spray that day. At an office visit on February 3, 2017, Ms. Osmani complained of back pain for one year and Dr. Zemerli sent her for an x-ray that was negative. On a follow-up visit, on February 21, 2017, Dr. Zemerli prescribed her ibuprofen or voltaren gel for her back pain.

[66] According to Dr. Zemerli, Ms. Osmani had been prescribed medication by an ear nose and throat doctor for sinus headaches.

[67] At a visit on October 16, 2017, Ms. Osmani complained of headaches that started in the back of her head and came to the front that she had since she was 10 and drowned.

[68] On March 7, 2018, Ms. Osmani complained of knee pain for two months and she was sent for an x-ray and prescribed medication.

[69] At an office visit on November 14, 2022, Ms. Osmani told Dr. Zemerli about the near drowning. Dr. Zemerli testified that Ms. Osmani told her that she thought her mood has always been irritable since the drowning. She also told Dr. Zemerli that she was lately angrier and more anxious and always worried that something was going to happen. She complained of more frequent headaches, since

delivering her baby. She complained of nausea with her headaches and wanting to go into a quiet room. She did not have a history of migraines. Dr. Zemerli diagnosed her as suffering from headaches, not yet diagnosed, meaning they could be tension headaches. She also diagnosed her as suffering from an anxiety disorder but was not sure if it was a generalized anxiety disorder. She prescribed anti-depressant medication.

[70] Dr. Zemerli testified that Ms. Osmani never told her that she was in a car accident in 2013 or that she suffered any injuries in that accident. Her evidence was that if Ms. Osmani had told her, she would have recorded it in her notes.

[71] Ms. Osmani attended at Spinetec for physiotherapy, chiropractic, and massage therapy treatment after the accident. According to the records, the first attendance was on June 24, 2014 and the last was on May 18, 2016. She said the treatment helped temporarily but the pain would return.

[72] Ms. Osmani testified that she continued to have pain in her entire back and her neck. Her memory was worse since the accident. She continued to use Tylenol and Advil when needed for her pain. She slept with a triangle pillow and used a tens machine for her pain. Her husband massaged her back each day.

[73] She testified about her restrictions with housework. She said she was more limited and when she did any work, she needed to take breaks, or her husband would have to finish for her.

[74] She testified about difficulties with childcare such as bathing her children and playing with them. However, her husband testified that he worked and she was home alone caring for the 8-month-old baby.

[75] Ms. Shkurte Osmani testified about her sister's complaints of pain in her back and shoulders. She also testified about restrictions with Ms. Osmani's ability to do housework. She described Ms. Osmani as having a lot of energy before the accident. She liked to go for walks and bike ride. She described Ms. Osmani as getting irritated easily after the accident. She did not have patience for children.

[76] Mr. Egzon Hoti is Ms. Osmani's spouse. He moved to Canada from Kosovo in September 2016. When Ms. Osmani first went to Kosovo to meet him in 2014, she told him that she was in an accident in 2013. She told him that she had an injury to her back and neck.

[77] Mr. Hoti was unable to testify about Ms. Osmani's condition before they met or if she had any pre-existing limitations.

[78] He testified that he saw Ms. Osmani having difficulties with her housework. She took breaks and sat down because of pain in her back. He helped with the housework. He testified that they tried to go for walks, but they stop due to her pain. He helped to bath and carry the children.

[79] He testified that when Ms. Osmani was in pain, she was difficult to deal with and wanted to be alone. She did not interact with the children when she wanted to be alone. When she was not in pain and in a good mood, she tried to do things around the house.

[80] Dr. Basile is a neurologist. He examined Ms. Osmani once, on September 23, 2015. He testified as follows:

- Ms. Osmani was independent prior to the accident. While she had some minor lower back and neck issues, she had no restrictions in her activities or housekeeping.
- When he saw her, she complained of neck and back pain and some headaches and some memory and concentration problems which he said were features of post concussion syndrome.
- He testified that post concussion syndrome can occur when there is a rapid acceleration and deceleration of the brain. There does not have to be an impact or loss of consciousness.
- She had decreased abilities with her household chores and family members had to help her. She could do some housework but with pain. She reported mood changes, a short fuse, and increased agitation.
- She suffered from post traumatic headaches, migraine headaches and tension headaches in the back of her head that shoot to the top and persistent post concussion syndrome and some musculoskeletal pain in her spine.
- He recommended an MRI of her brain, a physiatry evaluation, chiropractic treatment and medication for her migraines.
- On cross-examination, he agreed that it is important to have a complete and accurate medical history from the patient. He agreed that she told him that she had no neck, back or memory issues before the accident.
- He agreed that Ms. Osmani did not tell him about the near drowning when she was 9 or 10, that she was in a coma for a month, had amnesia for six

months, had to get hearing aids, was in a special class at school, was always irritable and had headaches prior to the accident.

- He did not agree that this information would have changed his diagnosis but that it would be helpful.

[81] Dr. Wilderman's opinion was that Ms. Osmani suffered the following injuries in the accident:

- Chronic pain disorder
 - Post-concussion syndrome
 - Chronic whiplash associated disorder (WAD) type II
 - Mechanical lower back pain pattern 1 PEN
 - Lumbago
 - Bilateral sacroiliac joint dysfunction
 - Bilateral trochanteric bursitis
 - Bilateral piriformis syndrome
 - Post-traumatic chronic headaches
 - TMJ syndrome on the right
 - Bilateral myofascial pain syndrome of rhomboid region
 - Dizziness not yet diagnosed
- Dr. Wilderman's opinion was that Ms. Osmani's prognosis was guarded.
- It was his opinion that the accident caused her injuries and that they were a permanent and serious impairment of an important bodily function.

- He made treatment recommendations which included attending a multidisciplinary pain program, attending a gym and an aqua-fit program, medication for her headaches, psychotherapy, and a back brace.
- He agreed on cross-examination that he relied on what Ms. Osmani told him about the housekeeping she did before the accident and what she could no longer do.
- He agreed that what Ms. Osmani described was the same as what her father described as it relates to the restrictions on her housekeeping activities.
- He testified that everything in pain management is based on the patient's self-report as pain cannot be measured.
- He agreed that the criteria used to diagnose both plaintiffs were based on their self-reports and that if someone was an unreliable historian that could impact his diagnosis.
- He agreed on cross-examination that Ms. Osmani did not tell him of her near drowning when she was 9 or 10 that resulted in her being hospitalized and requiring hearing aids.
- He agreed that if he was told that she had headaches since this near drowning it may have changed his opinion regarding the cause of her headaches.
- On re-examination he testified that not knowing of this near drowning did not have had an impact on his diagnosis of chronic pain as it would not have impacted the criteria used for that diagnosis.

[82] Dr. Lang examined Ms. Osmani and testified as follows regarding his assessment of Ms. Osmani:

- She said she experienced immediate whole-body pain when the accident occurred.
- She went to the hospital complaining of neck pain and pain in her left side near her ribs.
- Her family doctor did not send her for any investigation or to any specialist.

- She went for treatment for about 3 years and said she had no benefit from it.
- An x-ray of her back in February 2017 was normal.
- She only used over-the-counter Tylenol.
- When someone is suffering from chronic disabling pain, you expect them to use prescription medication.
- She said she did almost all the housekeeping before the accident and now does 50% with her husband doing the other 50%.
- She does 50% of the caregiving.
- She said she had pain in her neck and upper back that was constant and rated it as 7 to 8 on the pain scale, numbness and tingling in both hands which she first complained of in May 2016, pain in her mid and lower back that she rated as 7 to 8, and daily headaches.
- She walked with a normal gait and did not appear to be in distress.
- On examination, she had normal range of motion in her neck with some discomfort at the end range of extension or looking back. She was tender to touch in that area but there was no evidence of objective muscle spasm. She had full range of motion in her lumbar spine with some discomfort at end range of motion. Her shoulder exam was normal.
- His opinion was that she suffered soft tissue injuries to her neck and mid and low back in the accident. He said it was a WAD 1 injury meaning there was no objective finding. She had normal strength and range of motion. In his opinion, there was no significant impairment and no reason why she could do most of what she wanted to, even with pain.
- He did not agree with Dr. Wilderman that she met the criteria for chronic pain syndrome. In his opinion, she was not excessively dependent on her family, she was independent with her selfcare, there was no evidence of deconditioning or disuse, she was able to travel, she had not withdrawn from her social milieu as she married, had a child, and moved out of the family home after the accident, and she was still socializing. He found there was no evidence of disability.

- In his opinion, she did not suffer a permanent and serious impairment of an important bodily function as a result of physical injuries sustained in this accident.
- Her headaches were more probably due to the near drowning but could have been temporarily exacerbated by the 2013 car accident. The fact that she had headaches before the car accident predisposed her to experiencing an exacerbation of her headaches.

e) Analysis – Fakele Osmani

[83] As with Mr. Ilaz Osmani, Ms. Osmani's credibility and reliability is central to the threshold analysis.

[84] I am concerned with the inconsistencies in her evidence. In particular, she failed to testify in chief about the near drowning. She did not acknowledge the extent of her pre-existing health issues. I found her to not be forthcoming about the extent of her pre-existing health issues. Furthermore, she disagreed with many entries in Dr. Zemerli's records. Most notably, despite claiming ongoing pain and impairments, she failed to report any of these issues to Dr. Zemerli.

[85] Ms. Osmani's evidence of her limitations was inconsistent with her family doctor's evidence. It is an exceptional circumstance for a plaintiff's family doctor to testify in a way that supports the defence. In my view, this is what transpired during this trial. It is to be expected that a person who is experiencing the pain and limitations as described by Ms. Osmani would be discussing this with her family doctor. Ms. Osmani discussed several health issues with Dr. Zemerli but never

told her about the car accident. I found her failure to do so called into question her credibility regarding the extent to which she has ongoing complaints and the extent to which any such complaints are related to the accident.

[86] I found Dr. Zemerli's evidence to be critical as family doctors are often in the best position to testify about the struggles a patient faces when dealing with ongoing pain issues. Ms. Osmani's failure to discuss pain issues connected to the car accident with Dr. Zemerli contradicts her evidence of the extent of her ongoing limitations.

[87] There were also conflicting medical opinions about Ms. Osmani's injuries. I note that for the most part, the doctors relied on her self-reports. She did not disclose the significant injuries she sustained in the near-drowning accident. She was not forthcoming about the extent of her pre-accident health issues. In my view, this was critical in the jury's assessment of her credibility.

[88] Given the jury's verdict, it rejected Ms. Osmani's evidence about the nature and extent of the injuries she sustained in the accident.

[89] When I consider the jury's damage assessment together with my findings regarding her lack of credibility, I find that Ms. Osmani's injuries do not meet threshold.

2. Costs

[90] The starting point in determining costs is s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended. Section 131 provides that subject to the provisions of an Act or rules of court, costs are in the discretion of the court, which may determine by whom and to what extent the costs shall be paid.

[91] Rule 57 of the *Rules of Civil Procedure*, R.R.O. 1990 Reg. 194 sets out the factors to be considered by the court in exercising its discretion with respect to costs in accordance with s. 131 of the *Courts of Justice Act*. The factors relevant to this case are:

- (a) the result of the proceeding;
- (b) any offer to settle;
- (c) the principle of indemnity;
- (d) the reasonable expectations of the unsuccessful party;
- (e) the complexity of the proceeding;
- (f) the conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding;
- (g) the importance of the issues; and
- (h) other issues relevant to the question of costs.

[92] I will now review each of these factors as it relates to this case.

a. The Result of the Proceeding

[93] Based on the jury verdict, the defendant was the successful party.

b. Offers to Settle

[94] Only the defendant served an offer to settle. That offer, dated January 2, 2020, was for a dismissal of the action on a without cost basis. The offer was open for acceptance until ten minutes after the commencement of trial. The plaintiffs did not make an offer.

[95] Rule 49 is designed to encourage offers to settle. I am concerned that the plaintiffs made no attempt to settle the matter.

[96] The defendant did not do better than its offer to settle. Its offer was for zero, the same amount the jury awarded. In my view, this is not an offer that encourages settlement but rather one that compels plaintiffs who may have a modest claim, to proceed to trial. I would have awarded the defendants more costs had it made an offer to settle that involved something more than no damages.

[97] I have nonetheless considered the offer in assessing costs.

c. The Principle of Indemnity

[98] When considering the principle of indemnity, I am required to consider the costs outline, including the time spent by counsel and the rates charged. I have no issue with the rates charged by the defendant's lawyers nor did the plaintiff raise any such concern.

[99] According to the defendant's bill of costs, the total amount claimed on a partial indemnity basis for fees is \$81,265.20. Their costs on a substantial indemnity bases are \$104,483.84 and \$116,093.15 on a full indemnity basis. The disbursements, including HST, are \$33,110.85. The only amounts that I would deduct from the disbursements are for parking, meals and travel expenses for the trial, mediation, motion, and discovery.

[100] The total time spent on each step of the litigation and the fees claimed are reasonable amounts. Quite frankly, the costs sought are modest.

d. The Reasonable Expectations of the Unsuccessful Party

[101] I must also consider the reasonable expectations of the unsuccessful party when fixing costs. The overall objective of fixing costs is to fix an amount that is fair and reasonable for an unsuccessful party to pay in the circumstances, rather than an amount fixed by actual costs incurred by the successful litigant: *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.); *Davies v. Clarington (Municipality) et al.*, 2009 ONCA 722.

[102] The plaintiffs did not file a bill of costs regarding the fees they incurred. The fees an unsuccessful party incurred is often the best barometer for assessing its reasonable expectations. The defendant's failure to do so makes it very difficult to assess this factor and in the absence of that evidence, I consider that the fees were within the defendant's reasonable expectation.

e. Complexity of the Proceeding

[103] While claims of soft tissue injuries and chronic pain can be difficult to assess, I consider this matter to be of moderate complexity.

f. Importance of the Issues

[104] The matter was important to the parties.

g. Other Issues

[105] The plaintiffs have an adverse cost policy for \$100,000. They argue that it is unrealistic for the parties to pay any amount beyond the policy limits as they do not have the financial means to pay any costs. Neither plaintiff is employed.

[106] The plaintiffs argue that the overriding principle to consider when assessing costs is reasonableness – what is a reasonable amount for the plaintiffs to pay. The plaintiffs argue that it is not in the interests of justice to impose a cost award that exceeds the adverse cost policy as this will cause undue financial distress and economic hardship on them: *Bains v. Hehar*, 2019 ONSC 849, at paras. 20 and 30.

[107] While I have some sympathy for the plaintiffs' position, I am also concerned with their failure to make an offer to settle this matter. Their inability to pay costs, while a factor, is not the overriding consideration particularly as I was not informed of any attempt that they made to settle this matter.

Conclusion

[108] When I consider all the factors, I find that the defendant is entitled to costs on a partial indemnity basis that I fix at \$81,265.70, inclusive of HST, and disbursements of \$30,348.95, inclusive of HST for a total of \$111,614.65.

L. Shaw J.

Released: September 26, 2023

CITATION: Osmani v. State Farm, 2023 ONSC 5438
COURT FILE NO.: CV-15-4729-00
DATE: 2023 09 26

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

ILAZ OSMANI, FAKETE OSMANI and
EGZON OSMANI

Plaintiffs

- and -

MARK JOHNSON and STATE FARM
MUTUAL AUTOMOBILE INSURANCE
COMPANY

Defendants

RULING ON THRESHOLD AND COSTS

L. SHAW J.

Released: September 26, 2023