CITATION: Maxwell v. Luck, 2014 ONSC 7179
BARRIE COURT FILE NO.: 08-1313
DATE: 20141212

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Sarah Maxwell, Plaintiff

AND:

William Luck and Purolator Courier Ltd., Defendants

BEFORE: THE HON. MR. JUSTICE P.H. HOWDEN

COUNSEL: M. Lemieux and R. Littlejohn, Counsel for the Plaintiff

D. Craig and M. Grant, Counsel for the Defendants

HEARD: December 3, 2014

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ENDORSEMENT

[1] This is what is called a threshold motion brought by the defence following completion of the evidence and final addresses to the jury. It is brought pursuant to s. 267.3(b) and 267.5 (3)(b) of the *Insurance Act,* RSO 1990, c.I.8. The motor vehicle collision in question occurred on February 12, 2007 in Barrie.

[2] Ms. Grant, on behalf of the defendants in this case, submitted that the plaintiff has failed to meet the threshold in the Act, or more properly, has not brought herself within the exceptions to the statutory immunity from liability of occupants and the owner for damages arising from the use or operation of a motor vehicle. Ms. Grant argues that the plaintiff has failed to prove to the civil standard of proof that she has sustained permanent serious impairment of an important physical function.

[3] As Ms. Grant rightly submitted, the plaintiff must bring herself also within the requirements of Regulation 381/03 ss. 4.1, 4.2, and 4.3. These provisions provide minimum criteria and evidentiary essentials in order to qualify for an exception to the general immunity. These essentials include proof of the following: substantial interference with the plaintiff’s ability to continue her regular employment or training for employment; the function is necessary to perform the essential tasks of employment; the impairment must be necessary to performance of the essential tasks of employment, training, personal care, or to the usual activities of daily living; it must continue without expectation of substantial improvement and be such that a person in similar circumstances would be similarly affected; and these and the statutory factors must be attested to by a physician experienced in assessment of the same type of impairment in question acting within generally accepted guidelines of medical practice.

[4] The analysis required under this statutory scheme has been developed by common law means using the statutory framework. It follows the methodology developed in the leading case on this subject from the Ontario Court of Appeal, *Meyer v. Bright*, [1993] O.J. No. 2446. According to the *Meyer* decision, three questions are to be answered, to at least the minimum standards set out in the above regulation. They are:

(i) Has the plaintiff sustained a permanent impairment of a physical, mental or psychological function?

(ii) If yes, is the function so impaired an important one?

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

1. Has the plaintiff sustained a permanent impairment of a physical function?

[5] The major medical witness for the plaintiff was Dr. Brian Alpert, an able and experienced orthopedic surgeon who practices in the field of chronic pain and does assessments of a variety of cases within his field of expertise. Dr. Alpert was a member for years of the DAC panels, specializing in the area of chronic pain assessment for the insurance industry.

[6] Dr. Alpert stood up to cross-examination, maintaining his opinion throughout that, on a review of all the medical, massage and chiropractic history of treatment up to and including this year and in his own assessment after a complete physical examination and considering the history put to him by the defence, this plaintiff suffered a severe whiplash injury from the heavy jolt of the impact from a 14,000-pound truck. That injury has worsened a prior mild pain condition to become a chronic moderate to severe musculo-skeletal injury. The injury is to her neck and surrounding area and more specifically to the muscles and ligaments in the cervical and trapezial regions which affect the joints in her upper spine, and to the occipital area of her neck as well. He was very clear in expressing his opinion that she is permanently restricted or limited in these ways: no prolonged overhead activity, no prolonged bending or twisting, no prolonged posture of head and neck, no heavy lifting, and no heavy pushing/pulling. His meaning for "prolonged" is "for more than a brief time."

[7] In Dr. Alpert's view, she had to stop working at her regular job as an exotic dancer at a local nightclub despite a fruitless attempt to continue and she cannot return to it when she returns to the work force after her youngest child attains school age. Ms. Maxwell was a young woman of 24 years when she was rear-ended by the defendants' vehicle. She is now 31 with three young children, all born since the collision. Dr. Alpert accepts that she could not continue her courses toward qualifying to be a Developmental Services Worker, is too restricted by the chronic pain in her upper body to do the heavy work required of a DSW, and will be at a serious disadvantage in the workplace when she attempts to retrain and re-enter it in about four years' time. She has tried massage and chiropractic treatment for several years without significant improvement.

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[8] Dr. Alpert sees her now as permanently disabled, not totally but seriously for the rest of her working life by chronic neck and upper back pain and headaches.

[9] Dr. Alpert ascribes to the collision impact the increase from a mild back/neck condition which had little effect on her activities and work to an at-times severe pain condition with the limitations and restrictions above when she returns to work. His opinion is that the injury and resulting partial disability is due to the chronic pain in her neck and upper body which was required by her activities to retain its strength and flexibility sufficient to continue working and to ride horses and those essential qualities are weakened or lacking so that she could no longer work as a dancer and she could no longer ride horses though, like her work, she tried.

[10] Dr. Michael Ford, the orthopaedic surgeon called by the defence, dismissed Ms. Maxwell's as a case of recovery some time ago from the injuries caused by the collision. He therefore concluded that her injuries were far from permanent, that she has recovered from them. I will deal with his opinion later under the third question in this decision because his opinion, if sustained, would produce the same negative answer to each of the three questions. He did not deny that she was complaining of some pain but he ascribed her present complaints to her extra-collision medical history without any analysis using the medical records documenting that history as to how any other past injury she suffered, other than the collision, had such lasting effects that could account for it.

[11] Counsel for the defence submitted that Ms. Maxwell returned to work within two to three months of the collision, that her condition could not be permanent because occasionally she reported some improvement, and that she left work in September 2008 because of pregnancy and remains off now because she has chosen to until her younger child is in school full time. There is no doubt that her pregnancy was part of the reason for her stopping work in 2008, but it was not the only reason. The injury from the collision on February 12, 2007 is the other. And the time when Ms. Maxwell is noted as saying she is eighty percent improved was a particular day amid other notes of continuing pain at a severe level and records of scar tissue and muscle tightness months and even years after the collision.

[12] I accept that she stopped work when she did simply because she could not perform the same high-energy, high flexibility dancing to support herself due to her post-collision condition as well as the added difficulties presented by her pregnancy. Her chronic pain and disability continues. There is no doubt in my view that Ms. Maxwell will indeed return to the work force and she will find it a much less friendly environment than when she was physically active and working at a frenetic job at a fast and furious pace in her shows. I say this because of her consistent work history from the time of her mother's marriage breakup. She has worked since she was 15, part-time after school to help her mother at first, and since high school full time, since 2002 at Crossroads. As her husband said and she appears to recognize, their home will require two wage-earners in the household and when her return occurs, she will require retraining, which the jury recognized, I believe, has a cost to it, and she will be limited to much less active jobs where some accommodation is possible for her limitations, and no longer as a DSW.

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[13] I accept Dr. Alpert's view as being consistent with the medical history and work ethic of this plaintiff, that this injury became permanent and chronic with pain to greater and lesser intensity day-to-day impairing her neck and upper body functioning which in turn has such important functions that the injury to those parts of her body has compromised her ability to work and to carry on her riding and her day to day activities significantly. The answer to the first question is yes. I accept Ms. Maxwell's evidence of her significant difficulties at work, at home and in her activities of daily life as credible in light of the other evidence of her treating health practitioners, Dr. Alpert, and the lay witnesses who seemed quite forthright without exaggeration.

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2. Is the function impaired permanently an important one?

[14] According to Dr. Rae in 2007 and after and in the opinion of Dr. Alpert, the function in question was important to her being able to carry on her career at Crossroads. He understood, and this was corroborated by two other dancers there as well as Ms. Maxwell, that her shows involved vigorous stretching of her body often for six to seven shows a shift, six nights every week. They witnessed her decline at Crossroads after initially taking over two months off work and then trying until her pregnancy in the summer/fall of 2008 coupled with chronic pain forced her out of work.

[15] There is no doubt that Ms. Maxwell had a pre-existing condition of neck and back pain but it never limited her at work or in her horse activities. Dr. Alpert dealt with it saying that she had a mild pain condition which all the records but Dr. Advent's showed had been aggravated moderately and severely by the car accident. To Ms. Maxwell, Dr. Advent was her family doctor who treated her for non-collision-related issues such as depression and pregnancy but not the collision-related problems for which she saw Dr. Rae; she said she did not want more medication and so did not talk to Dr. Advent about the collision-related problems.

[16] I accept Dr. Alpert's opinion in this regard. The function controlled by Ms. Maxwell's damaged muscles and ligaments in her upper back and neck and to the occipital nerves and soft tissue at the rear of her head was important to her ability to carry on the one recreational activity she loved, riding horses, also her extremely active style of dancing which brought her a substantial part of her income, as well as her studies, requiring as they do, a sustained posture much of the time when reading and taking notes.

[17] The answer to question 2 is yes.

3. Is the impairment serious?

[18] The court heard from the defence expert medical witness, Dr. Michael Ford, a spine and trauma surgeon at Sunnybrook dealing with serious fracture cases. He is still active as a surgeon and does a significant amount of medico-legal assessments. He does not practice in the area of chronic pain but he is experienced in assessing it as an orthopedic surgeon. He categorically dismisses chronic pain complaints unless, as he said, he can see or understand the mechanism causing the complaint. He dismissed Dr. Alpert's opinion as supposition.

[19] Dr. Ford gave this plaintiff a very cursory examination. It was his last appointment of the day. He took Ms. Maxwell's history in ten to fifteen minutes and the physical examination consisted of Dr. Ford watching her walk, do a neck extension and neck rotation. He never palpated her so he could not have found what Dr. Alpert says he found as his own objective findings during his examination. He found that:

- she had a decreased range of motion doing different movements -he saw these as significant and in the 40% to 70% range;
- she had muscle tightness and tenderness to the touch in the cervical area from C2 to C6 - he could feel the tautness and ropiness in the muscles and ligaments there;
- she had tenderness to palpation over the occipital nerves.

[20] These findings were dismissed by Dr. Ford. He saw this case as simple and uncomplicated, where there were no objective mechanisms causing pain, therefore there could be no valid complaint. He understood that she had stopped working because of her pregnancy and that her complaints from the car accident in 2007 had long since resolved.

[21] If he had asked a few questions about these answers, he probably would have learned that she could not do the strenuous dances that success at her job demanded, being very dependent on tips; she could no longer do the one recreational activity she loved, horse-riding, though she did try and was hit in the head once and fell off a second time. Dr. Ford simply dismissed Ms. Maxwell and wrote a report concluding without even a full examination of the patient, that any complaints she had now must come from her prior or other medical history without any analysis as to what exactly in her past would have caused them but the 2007 collision; all other previous traumas were reported and the treating doctor or chiropractor could see no reason to follow up other than to suggest some rest. I do not accept Dr. Ford's opinion nor do I sense that Dr. Ford has an understanding of the fundamental aspect of those chronic pain cases, which lack objective proof. Nevertheless they are very real to the patient. In finding as I do, I am not to be taken to take away from Dr. Ford as an excellent spinal surgeon who works with serious trauma patients often derived from serious fractures, and displacement and other severe physical trauma. But I question his expertise in the area of chronic pain due to his offhand examination, his failure to test by palpation or to observe a variety of movements, and his very brief approach to her medical history which is by no means a simple one to understand, both orally and through the many records from the treating practitioners.

[22] In the area of chronic pain, I am satisfied that Dr. Alpert has the experience and the more relevant expertise to assess this patient who is affected not by a broken bony mechanism but by less obvious musculo-ligamentous or tissue/nerve trauma and chronic pain which is only partially understood (See excerpt, *Nova Scotia v. Martin* in para. 24 of these Reasons). Dr. Alpert found on his examination objective evidence of denser tighter muscle tone and ropiness that is evidence of the residue of inflammation within the tissue and its component parts in muscle and ligament tissue. We charge juries on the objective

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and subjective reports of symptoms and how to approach them. The charge on this subject reads, in part:

> The opinion of a doctor .may be based entirely on objective symptoms revealed through observation, examinations, tests or treatments, or the opinion may be based entirely upon subjective symptoms…in part upon objective symptoms and in part upon subjective symptoms.

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[23] It should be noted that included in the standard charge as objective symptoms are those based upon physical examination and observation. Dr. Alpert's objective corroboration through his observations on physical examination would meet the definition in the charge of objective symptoms when he said he could feel or see certain muscle and ligamentous tone or tightness and limitation in range of movement and on palpation, something Dr. Ford never engaged in. I accept his evidence in this regard.

[24] As the Supreme Court of Canada said in *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur,* [2003] 2 S.C.R. 504, 2003 SCC 54:

> There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real. While there is at this time no clear explanation for chronic pain, recent work on the nervous system suggests that it may result from pathological changes in the nervous mechanisms that result in pain continuing and non-painful stimuli being perceived as painful. These changes, it is believed, may be precipitated by peripheral events, such as an accident, but may persist well beyond the normal recovery time for the precipitating event. Despite this reality, since chronic pain sufferers are impaired by a condition that cannot be supported by objective findings, they have been subjected to persistent suspicions of malingering on the part of employers, compensation officials and even physicians.

[25] I accept Dr. Alpert's opinion. I do not accept that of Dr. Ford.

[26] The jury's verdict, while not large, is not merely nominal either, as the verdicts were in several of the cases cited by the defence. The verdict totalled $108,000, a significant part being for future income loss and general damages. I have taken into account the

important threshold enunciated in *Strangis v. Patio*, [2013] O.J. No. 4498 at para. 33 that injured persons are required to endure some basic level of non-trivial non-pecuniary losses without compensation. I would have assessed damages at the higher end of the range in which the jury assessed. This case is close to the line in *Strangis*, it is true, but there is no question in my view that on the legislative criteria, this case has been proven on a balance of probabilities to meet the requirements of the exception to immunity from liability set by the *Insurance Act* and the regulation.

[27] Accordingly, the motion is dismissed.

HOWDEN J.

Date: December 12, 2014

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