

CITATION: Arteaga v. Poirier, 2016 ONSC 3712
COURT FILE NO.: CV-12-1238
DATE: 20160603

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
ELIANA ARTEAGA)
) Mark Elkin and Natasha Skupsky, for the
Plaintiff) Plaintiff
)
- and -)
)
MICHEL POIRIER and PRO-LAND)
LANDSCAPE CONSTRUCTION INC.,)
) Joseph Villeneuve and Agatha Dix, for the
Defendants) Defendants
)
)
) **HEARD:** June 2, 2016
)

2016 ONSC 3712 (CanLII)

REASONS FOR DECISION ON THRESHOLD MOTION

DiTOMASO J.

INTRODUCTION

[1] The Plaintiff Eliana Arteaga (Ms. Arteaga) brings this action for damages as a result of a motor vehicle collision on March 15, 2011. The defendants admitted liability. The jury trial was limited to the issues of causation and damages. On June 2, 2016, the jury awarded the plaintiff \$20,000 for general damages and nothing for future loss of income due to early retirement. The jury awarded the plaintiff damages for future cost of care as follows:

- i. Medical rehabilitation expenses - \$11,000
- ii. Driving desensitization - \$0
- iii. Occupational therapy - \$0
- iv. Medical/assistive devices - \$150
- v. Housekeeping expenses - \$2,000

- [2] Following my jury charge, the defendants brought what is commonly referred to as “threshold motion” seeking a Declaration that the plaintiff’s claim for non-pecuniary loss is barred by, and does not fall within the exceptions, to the statutory exceptions set out in s. 267.5(5) of the *Insurance Act*, R.S.O. 1990 c.I. 8 and the applicable regulations.

LEGISLATIVE FRAMEWORK

- [3] This accident occurred on March 15, 2011 and is therefore governed by Regulation 381/03, known as Bill 198 (the Regulation).
- [4] The defendants submit that the plaintiff’s claim for general damages is barred by the Regulation, as the plaintiff cannot meet the exceptions to exempt herself from the statutory bar contained in s. 267.5(5) of the *Insurance Act*. Section 267.5(5) of the *Insurance Act* stipulates that the owner of an automobile is not liable for non-pecuniary losses unless the injured person has sustained “a permanent, serious impairment of an important physical, mental or psychological function”.
- [5] The Regulation provides definitions for the terms “permanent”, “serious impairment”, and “important function”. Healey, J. in *Pomeroy-Arenes v. Blair*, 2015 ONSC 7819 at para. 8 summarized the statutory language set out in the Regulation at s. 4.2(1) as follows:

The impairment must,

- (a) 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;
- (b) 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
- (c) substantially interfere with most of the usual activities of daily living, considering the person’s age.

For the impairment to be of an important function, the function must,

- (a) 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;

- (b) 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;
- (c) be necessary for the person to provide for his or her own care or well-being; or
- (d) be important to the usual activities of daily living, considering the person's age.

For the impairment to be permanent, the impairment must,

- (a) have been continuous since the accident 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;
- (b) continue to meet the above criteria; and
- (c) be of a nature that is expected to continue without substantial improvement when sustained by persons in similar circumstances.

[6] Section 4.3(1) of the Regulation specifies what evidence shall be adduced to prove permanent serious impairment of an important, physical, mental or psychological function.

[7] It is well established that courts hearing threshold motions are to apply the three-part approach first established by the Court of Appeal in *Meyer v. Bright* (1993), 15 O.R. (3d) 129 (C.A.): *Hayden v. Stevenson*, [2009] O.J. No. 2571 at para. 7-13 (S.C.J.); *Nissan v. McNamee* (2008), 62 CCLI (4th) 135 at para. 14 (S.C.J.); *Ahmed v. Challenger*, [2000] O.J. No. 4188 at para. 17 (S.C.J.); *Frankfurter v. Gibbons* (2004), 74 O.R. (3d) 39, at para. 22 (Div. Ct.).

[8] The test to determine whether an injured party meets the requirements of s. 267.5(5)(b) requires a sequential assessment of three questions which are as follows:

- (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 an important one?
- (3) If yes, is the impairment of the important function serious?¹

[9] Before reaching the stage of assessing whether the injuries claimed by the plaintiff meet the Legislative threshold, the plaintiff must establish that 1) the plaintiff actually suffers from injuries as claimed and 2) the injuries were caused by the subject motor vehicle accident. A plaintiff needs to prove both general causation, that a particular cause is capable of causing a particular effect and specific causation, that the cause did actually cause the injury in the case before the court.²

[10] Assuming the plaintiff can do both, the plaintiff has the onus of proof to establish that her injuries or impairments meet the threshold. With respect to past or existing matters, this standard of proof is on a balance of probabilities. With respect to what will happen in the future, a party can satisfy the onus by demonstrating, via expert or cogent evidence, that there is a real and substantial possibility that a particular event or condition may occur.³

“PERMANENT” IMPAIRMENT

[11] Defence counsel submits that the plaintiff fails to meet the first branch of the *Meyer* test, as the accident did not result in a permanent impairment.

[12] Our courts have commented that the word “permanent” does not necessarily mean “strictly forever until death”, but rather refers to a “sense of weakened condition lasting into the indefinite future without any end limit”.⁴ Our courts have also adopted the interpretation of permanent as meaning “lasting” (as opposed to temporary).⁵ A permanent injury meets the threshold if the limitation and function is unlikely to improve for the indefinite future.⁶

[13] Chronic pain arising from injuries sustained in a motor vehicle accident, and which accounts for limitation and function unlikely to improve for the indefinite future, will meet the requirement of permanence under the threshold.⁷

¹ *Meyer v. Bright*, supra at para. 16

² *Saleh v. Nebel*, 2015 ONSC 747 at para. 38

³ *Meyer v. Bright* (1993), 15 O.R. (3d) 129, at para. 50 (C.A.); *Chilman v. Dimitrijevic* (1996), 28 O.R. (3d) 536 at para. 13 (C.A.); *Sabourin v. Dominion of Canada*, [2009] O.J. No. 1425 at para. 78 (S.C.J.)

⁴ *Morrison v. Gravina*, [2001] O.J. No. 2060, at para. 10 (S.C.J.)

⁵ *Coulter v. Liberty Mutual Insurance*, [2003] O.J. No. 2088 at para. 22 (S.C.J.)

⁶ *Nissan v. McNamee* (2008), 62 C.C.L.O. (4th) 135 (S.C.J.) at paras. 31-33; *Brak v. Walsh*, [2008] O.J. No. 1173 (C.A.) at para. 4.

⁷ *Hartwick v. Simser*, 2004 O.J. No. 4315 (S.C.J.) at para. 87; *Tulloch v. Akogi*, [2007] 85 O.R. (3d) 793 (S.C.J.) at para. 87; *Golab v. Schmidt*, [2007] O.J. No. 1412 (S.C.J.), at para. 10.

IMPAIRMENT OF AN “IMPORTANT FUNCTION”

- [14] Defence counsel further submits that the plaintiff fails to meet the second branch of the *Meyer* test as the plaintiff has failed to prove that the impairment in issue is “important”. The determination of whether the impairment in issue is “important” is a subjective analysis. The court must determine whether the permanently impaired function is important to the particular injured person. An important function is one that plays a major role in the health, general well-being, and way of life of the particular injured plaintiff: *Meyer*, at paras. 19-27.
- [15] The court must have regard to the injured person as a whole, and the effect the impaired function has upon that person’s way of life in the broadest sense of that expression.⁸
- [16] In determining whether a function is important to a person’s employment, it is necessary to consider the specific person’s job. In determining whether a function is important to a person’s activities of daily living, it is important to consider the specific activities in which the person engages. This is apparent from the decision of the Court of Appeal in *Meyer* at para. 25.
- [17] Where a plaintiff has been impaired in important aspects of his or her life, or where the activities that are curtailed are really those that constitute the plaintiff’s life, and the ability to do those activities has been substantially impaired or given up, then the impairment is “important”.⁹

“SERIOUS” IMPAIRMENT

- [18] Defence counsel also submits that the plaintiff has failed to meet the third branch of the *Meyer* test as she did not establish a serious impairment of an important bodily function.
- [19] Whether an impairment of an important function is serious relates to the nature of the impairment rather than the injury itself.¹⁰ The definition in the Regulation of whether an impairment is serious is taken directly from *Meyer*. A serious impairment is one which causes, in general terms, substantial interference with the ability of the injured person to perform his or her usual daily activities or to continue his or her regular employment.¹¹ The issue is one of fact to be determined according to the evidence in each case.
- [20] In determining whether the impairment is serious, it is important not to focus on any particular aspect of the plaintiff’s impairment, but rather the totality of his or her circumstances and the cumulative effect on his or her life.¹²

⁸ *Meyer v. Bright*, supra at para. 25 (C.A.); *Abdallah v. Snopek*, [2006] O.J. No. 2778 at para. 29 (S.C.J.).

⁹ *Knudsen v. Tyckyj*, [1994] O.J. No. 2763 at para. 29 (Gen. Div.).

¹⁰ *Meyer*, supra, at para. 32.

¹¹ *Meyer*, supra, at para. 34.

¹² *Sasso v. Copeland*, [2005] O.J. No. 5226 (S.C.J.), at para. 19; *Rizzo v. Johnson* 2006, 82 O.R. (3d) 633 (S.C.J.) at para. 28.

- [21] For some plaintiffs with chronic pain, it may be possible for them to do all of the things that they did before the injury on an occasional basis. The requirement that the impairment be “serious” may be satisfied even though, through determination, the plaintiff resumes the activities of employment or the responsibilities of the household but continues to experience pain.¹³
- [22] A return to work, even where a person actually earns more money, will not necessarily result in a finding that the plaintiff does not have a permanent and serious impairment of an important physical, mental or psychological function. The plaintiff’s ability to return to work and continue his or her employment is not fatal to a threshold motion. The courts look at the totality of the evidence, including the impact of the impairment on the plaintiff’s ability to continue working and the impact of continued work on the plaintiff.¹⁴
- [23] Our courts have held that the fact that a plaintiff continues to work in the face of significant pain can be attributed to the plaintiff’s work ethic, not an admission of freedom from pain, particularly when the plaintiff is left exhausted with an inability to enjoy his or her previous daily activities once home from work.¹⁵

RULING

- [24] I find that Eliana Arteaga suffered physical and psychological injuries caused by the motor vehicle accident of March 15, 2011. I further find that the resultant injuries and disabilities constitute a permanent and serious impairment of an important physical, mental or psychological function as defined in the Regulation, and in accordance with the test in *Meyer v. Bright*.
- [25] I have considered the jury’s verdict but choose not to speculate on how the jury arrived at its ultimate decision. It is not my function to do so on a threshold motion. A consideration of the jury’s verdict is only one factor to be taken into account when deciding a threshold motion. Rather, I have taken all of the evidence into account and the submissions of counsel in answering the essential questions I am obliged to answer.

FACTUAL BACKGROUND

- [26] The plaintiff’s action is for damages for personal injury including pain and suffering and for damages for future loss of income due to early retirement and future care costs.
- [27] On March 15, 2011 at approximately 5:50 p.m., Eliana Arteaga was stopped in a line of traffic in the left of two northbound lanes on Highway 50 just north of Queen Street in Brampton. While stopped, her vehicle was rear ended by a dump truck operated by the defendant Michel Poirier and owned by the defendant Pro-Land Landscape Construction

¹³ *Brak v. Walsh*, supra, at para. 7 (C.A.).

¹⁴ *Cadorette v. Cadorette*, [1998] O.J. No. 2993, at paras. 23-26 (Gen. Div.); *Brak v. Walsh*, supra, at para. 7.

¹⁵ *Jones v. Mazolla*, [2004] O.J. No. 366, at paras. 44-48 (S.C.J.); aff’d, [2205] O.J. No. 5541 (C.A.); *Skinner v. Goulet*, [1999] O.J. No. 3209, at para. 38 (S.C.J.); *Del Rio v. Lawrence*, [2009] O.J. No. 676, at paras. 7-9 (S.C.J.)

Inc. The dump truck was traveling at approximately 60 kilometers per hour. As a result of rear end impact, Ms. Arteaga's motor vehicle was propelled forward and collided with the vehicle ahead which was also stopped. Ultimately, other drivers were involved in this five vehicle chain reaction collision. The damage to the Arteaga motor vehicle was in the amount of \$32,978.07. Her vehicle was a write off.

- [28] Ms. Arteaga and her son Marc, who was 10 years old at the time, had difficulty exiting their motor vehicle. At the accident scene, she told PC Santos that she was not alright and that she had pain in her chest and all of her left side. She and her son were emotional at the accident scene. She was taken to hospital by her sister where Ms. Arteaga was treated and was admitted overnight. Her neck was x-rayed and she underwent a MRI. She was discharged the following day with medication and with instructions to see her family doctor.
- [29] Ms. Arteaga testified that she suffered injuries to her jaw, neck, left shoulder and left side. She suffered from numbness in her left arm and left hand. She underwent physiotherapy treatments and was prescribed pain medication. She also experienced driving anxiety and depression for which she was prescribed anti-anxiety medication.
- [30] She was off work for two weeks and then returned to work at a rehabilitation clinic.
- [31] She saw Dr. Ivan Hanna, her family doctor, as a result of injuries sustained in this motor vehicle accident. Dr. Hanna testified at trial in respect of Ms. Arteaga's complaints, his findings and treatment after this accident and his clinical notes and records were marked as an exhibit at trial.
- [32] Ms. Arteaga was involved in a motor vehicle accident on March 9, 2012. She was rear ended in that accident and her evidence was that her vehicle sustained between \$1,800 and \$2,000 property damage. She testified she suffered no personal injury. This accident did not add to her anxiety problem and she did not sue anybody.
- [33] In April 2012 she was involved in another motor vehicle accident. She was stopped when her vehicle was again rear ended. Her vehicle suffered between \$1,800 and \$2,000 damage. She was not hurt and she did not sue anybody. Further, this accident did not add to her anxiety. She was involved in a third motor vehicle accident on September 25, 2015. This accident was not her fault. She was alone in her vehicle when another vehicle "t-boned" Ms. Arteaga's vehicle on the passenger back side. Her car suffered \$5,000 damage. She was not injured in this collision and she did not sue anybody. I accept her evidence regarding the three subsequent motor vehicle accidents and there is no evidence to the contrary.
- [34] Ms. Arteaga was also involved in two subsequent slip and falls. She fell at a grocery store in September 2012 fracturing her right patella. She fell when her right knee locked in May 2013 while walking towards her place of work. In this fall, she suffered a fractured right fibula. I find these are distinct injuries that do not overlap the injuries she sustained in the March 15, 2011 motor vehicle accident.

- [35] It is position of the defendants that the plaintiff recovered from any injuries from the motor vehicle accident of March 11, 2015. Shortly after the accident occurred, and as of the date of trial, she suffered from no symptoms, or if she did suffer from symptoms, they were unrelated to the motor vehicle accident of March 15, 2011.
- [36] Further, the defendants take the position that the plaintiff has failed to prove that she suffers the current impairments as alleged. Alternatively, if she has proven any current impairments, she has failed to establish that the motor vehicle accident of March 15, 2011 caused her current injuries.
- [37] It is submitted that Ms. Arteaga sustained minor soft tissue injuries in this accident. If there any claim for future loss of income such loss is related solely to her slip and fall injuries and/or other accidents. Further, it is submitted that Ms. Arteaga will not suffer any future care costs.
- [38] The position of the plaintiff was that as a result of the March 15, 2011 accident, she sustained permanent and serious injuries giving rise to significant general damages and a real and substantial risk that she would incur future care costs and be forced to retire earlier than her planned retirement. In addition to the bodily injuries sustained to her jaw, neck, left shoulder and left arm, she also developed anxiety with respect to driving which continues to cause serious problems up to the present. In addition, she also suffered from depression.

FINDINGS

Question 1: Has the plaintiff sustained a permanent impairment of a physical, mental or psychological function?

- [39] Ms. Arteaga did not have any pre-existing injuries to the parts of the body she identified as being injured in the motor vehicle accident of March 15, 2011. She had two short episodes of anxiety prior to the motor vehicle accident which were resolved and non-contributory. As of the date of the accident, she was not depressed nor did suffer from any anxiety.
- [40] Ms. Arteaga testified about the nature and extent of pain that she suffers to this day. The pain is constant. She has good days and bad days. Since the accident of March 15, 2011, the pain has not gone away, in fact it has worsened. She testified that she now suffers from chronic pain arising from her injuries sustained in the motor vehicle accident. She testified that her personality has changed. Her husband, sister, daughter and co-worker/friend all testified about her change in personality as a result of the accident. They spoke of her decreased activity, driving phobia, and fatigue as a result of the injuries sustained in this accident.
- [41] I find that Ms. Arteaga has sustained a permanent impairment of a physical, mental or psychological function. In coming to this conclusion, I find that she suffers from chronic pain in her neck and left shoulder with radiating numbness down the left arm and into the left hand. She also suffers from anxiety, driving phobia and depression. I find that she

suffers from chronic pain because of the injuries sustained in the motor vehicle accident of March 15, 2011. I am satisfied on all the evidence at trial from the plaintiff, her family members and co-worker, Dr. Hanna and medical doctors and Dr. Bhatia that she has suffered a permanent impairment of a physical, mental or psychological function. The plaintiff has proven on the balance of probabilities that she sustained injuries in the March 2011 motor vehicle accident and went on to develop chronic pain. She has satisfied her onus to establish not only that she sustained a permanent impairment of a physical, mental or psychological function but also that impairment was generally and specifically caused by the motor vehicle accident of March 2011.

- [42] As previously cited, chronic pain arising from an injury sustained in a motor vehicle accident, and which accounts for limitation in function unlikely to improve for the indefinite future, will meet the requirement of “permanence” under the threshold.¹⁶
- [43] I find the medical evidence in this case is cogent and compelling proof that the injuries sustained by Ms. Arteaga are not likely to improve in the future and are permanent.
- [44] Dr. Howard Jacobs, a clinic pain physician, testified that Ms. Arteaga had ongoing problems related to chronic pain. Even though there was no evidence on a MRI of a disc lesion, this did not exclude discogenic pain and edema around discs at C5-C6 and C6-C7 of the cervical spine which would be consistent with the numbness that Ms. Arteaga had in the fingers of her left hand. In his opinion, she had a poor prognosis as a result of the injuries she sustained in the motor vehicle accident. The injuries to her cervical spine and to her upper limb were likely related to permanent damage to the pain sensitive structures and nerves supplying them. Dr. Jacobs diagnosed Ms. Arteaga suffering from the following:
1. Zygapophyseal joint pain involving C2, C3, C4, C5 and C6 on the left-hand side;
 2. Discogenic pain at the levels of C5-C6 and C6-C7 on the left-hand side;
 3. Left shoulder pathology; and
 4. Chronic pain, pain lasting longer than normal healing times.
- [45] In his opinion, Ms. Arteaga’s complaints were permanent as they had been present for a long period of time and they had not improved. The prognosis again was guarded because of the length of time she had her pain which was ongoing and related to her injuries sustained in the March 15, 2011 motor vehicle accident.
- [46] Dr. Jacobs testified that just because Ms. Arteaga had an essentially normal MRI of the cervical spine, this did not mean that there was no ongoing pathology. Dr. Jacobs was of the opinion that the edema around Ms. Arteaga’s cervical discs could come and go

¹⁶ *Meyer v. Bright*, supra.

depending on the activity of the spinal structures as she did not have numbness in her left hand all the time. He testified that the MRI results were not perfect and could not rule out any ongoing pathology.

- [47] Dr. Brian Alpert, an orthopedic surgeon, testified that Ms. Arteaga's cervical spine and left trapezius likely underwent sudden overstretching and partial tearing and strain injury as a result of the acceleration/deceleration impact forces involved during the motor vehicle accident on March 15, 2011. Chronic inflammatory scar tissue develops in approximately five to ten per cent of the cases, leading to a chronic, painful and disabling course, consistent with the history and mechanism of injury from the March 2011 motor vehicle accident. Dr. Alpert placed Ms. Arteaga in that five per cent – ten per cent category.
- [48] With respect to Ms. Arteaga's left shoulder, Dr. Alpert opined that Ms. Arteaga developed moderate acute and chronic left shoulder strain and rotator cuff tendinopathy, associated with subacromial/subdeltoid bursitis. The MRI scan of her left shoulder done on December 20, 2013 supported the findings of tendinopathy and bursitis.
- [49] In his orthopedic opinion, the injuries sustained by Ms. Arteaga to her neck and left shoulder were permanent.
- [50] Dr. Alpert, also a specialist in chronic pain, testified that MRI scans of the spine as well as the shoulder are not perfect investigations and they miss post-traumatic pathology in these areas. In his opinion, Ms. Arteaga would continue to have moderate to severe chronic pain in her cervical spine, left trapezius and left shoulder as a result of the motor vehicle injury of March 15, 2011, associated with acute chronic flare up of pain in future years. Both Dr. Jacobs and Dr. Alpert were of the opinion that Ms. Arteaga's chronic symptoms would deteriorate and worsen over time.
- [51] Dr. Maneet Bhatia, a clinic psychologist, also testified. Based on his clinic interview as well as test results, he was of the opinion that Ms. Arteaga met the diagnostic criteria for:
1. Major Depressive Disorder;
 2. Somatic Symptom Disorder;
 3. Specific Phobia (Isolated) Automobile Anxiety; and
 4. Post-traumatic Stress Disorder.

He stated that her psychological symptoms should be considered permanent as they have persisted since 2011 and current testing supported a worsening of her psychological diagnoses.

- [52] Dr. Erin Boynton is an orthopedic surgeon who testified on behalf of the defence. She was of the opinion that Ms. Arteaga's injuries were minor. She testified that Ms. Arteaga's neck and shoulder pain complaints would be potentially reversible with the

appropriate gentle exercise to improve her posture and core muscle strength. She testified that there was no evidence of impairment of a significant orthopedic function that had been continuous since the date of loss. She attributed Ms. Arteaga's current pain complaints to abnormal posture and deconditioning, which were potentially reversible with exercise. It was Dr. Boynton's opinion while Ms. Arteaga had pain in her neck and left shoulder, this had nothing to do with the motor vehicle accident, but was related to the way that Ms. Arteaga carried her head. There were no problems with the way that Ms. Arteaga carried her head or with her posture or with her muscle conditioning before this motor vehicle accident. Nevertheless, Dr. Boynton was of the opinion that Ms. Arteaga's pain was not caused as a result of trauma. She disagreed with the opinions of Dr. Alpert and Dr. Jacobs that Ms. Arteaga did suffer from an inflammation of her nerves and chronic pain. Dr. Boynton believed that Ms. Arteaga suffered muscular pain after the accident but this was temporary because there was no serious injury.

- [53] I do not accept the evidence of Dr. Boynton and much prefer the evidence of Drs. Hanna, Jacobs, Alpert and Bhatia when determining whether Ms. Arteaga sustained a permanent impairment of a physical, mental or psychological function. The chronic nature of Ms. Arteaga's injuries, the worsening of her pain over time and the totality of the evidence does not support a potential reversible solution to her chronic pain upon the performance of exercises to improve posture and conditioning.
- [54] I find that the evidence is overwhelming that Ms. Arteaga has met the first part of this threefold test and has proved that her injuries both physical and psychological are permanent.

Question 2: Is the function that is permanently impaired an important function?

- [55] In determining whether the bodily function, which has been impaired, is an important bodily function, the court must consider whether the bodily function is important to the injured person in question.¹⁷
- [56] The determination of whether the impairment in issue is "important" is a subjective analysis. It is a fact to be determined on a case by case basis. An important function is one that plays a major role in the health, general well-being, and way of life of the particular injured plaintiff. The court must have regard to the injured person as a whole, and the effect the impaired function has upon that person's way of life in the broadest sense of that expression.¹⁸
- [57] Dr. Jacobs testified that Ms. Arteaga's work has been markedly affected because of the fact that she cannot sit at the computer for long periods of time and because the pain itself is intrusive and becomes more severe during the day. He found that she had difficulties in respect of activities of daily living and had not been able to return to these activities

¹⁷ *Meyer v. Bright*, supra.

¹⁸ *Meyer v. Bright*, supra; *Abdallah v. Snopek*, supra.

because of the injuries sustained in the motor vehicle accident. These activities were listed as follows:

1. Vacuuming;
2. Mopping;
3. Lifting;
4. Laundry washing; and
5. Heavy loads.

[58] Activities such as gardening and household activities like cleaning the bathroom and the toilet are affected by her pain. I accept her evidence and the evidence of Mr. Arteaga that he has now assumed much more of these heavy tasks. He also does more of the driving because of Ms. Arteaga's driving anxiety which was also supported by the evidence of family members, co-worker Jena Hayward and Dr. Bhatia.

[59] Dr. Alpert stated that in respect of Ms. Arteaga's neck complaints, these complaints increased with bending and twisting. As for her left shoulder, the pain would increase with attempts at reaching, lifting and the pain would interfere with her sleep. Dr. Alpert opined that in respect of Ms. Arteaga's injuries to her cervical spine, left trapezius and left shoulder as a result of the March 2011 accident, her permanent physical restrictions included no prolonged postures of her head and neck, no prolonged bending or twisting, no prolonged forceful reaching with her left shoulder, no overhead work, no heaving pushing or pulling and no heaving lifting.

[60] In his opinion, Ms. Arteaga was substantially disabled and unable to perform her pre-accident essential heavy housekeeping/home maintenance duties as a result of the motor vehicle accident of March 2011.

[61] Dr. Bhatia stated that her phobic behaviours likely interfered in some significant way in her life. He felt that it was probable that Ms. Arteaga monitors her environment in a vigilant fashion to avoid contact with a feared object or situation. He stated this was supported by her reporting that she would engage in backseat driving behaviours and that she was hyper vigilant and overly cautious when in her car.

[62] I find that Ms. Arteaga has also met the second part of threefold test and has proved that the function which is permanently impaired is an important one.

Question 3: Is the impairment of an important bodily function serious?

[63] The court in *Meyer v. Bright* held that in determining whether an impairment of an important function is a serious impairment, the court must consider whether the function is serious to the injured person in question. The court stated as follows:

...generally speaking, a serious impairment is one which causes substantial interference with the ability of the injured person to perform his or her usual daily activities or to continue his or her regular employment.¹⁹

- [64] The word “serious” relates to impairment and not to the injury. A serious impairment is one which causes substantial interference with the ability of injured person to perform her usual daily activities or to continue her regular employment.²⁰
- [65] In determining whether the impairment is serious, it must be determined whether the impairment goes “beyond the tolerable to the serious” or “something beyond frustrating and unpleasant”.²¹
- [66] To determine whether an injury is “serious”, it is important to focus on the totality of the plaintiff’s circumstances and cumulative effect of the injury on her life.²²
- [67] I have considered totality of Ms. Arteaga’s circumstances and the cumulative effect of the injuries on her life. I find that the impairment is serious.
- [68] Dr. Jacobs was of the opinion that Ms. Arteaga continues to suffer with ongoing impairments that are serious in that they continue to affect markedly her quality of life, her vocational and avocational activities and the pathology is consistent with her complaints and her ongoing difficulties. His prognosis was guarded because of the length of time she had her pain. Her injuries to her cervical spine and left shoulder were serious because of the fact that they affected many of the activities that she enjoyed doing prior to the accident. He referred to household and gardening activities as well as activities in the workplace that were affected.
- [69] Dr. Alpert was also of the opinion that her impairments had a significant negative impact on Ms. Arteaga’s ability to compete in the workforce. In his opinion, Ms. Arteaga was substantially disabled and unable to perform her pre-accident essential heavy housekeeping/home maintenance duties as a result of the motor vehicle accident injuries of March 15, 2011. She also appeared to have lost enjoyment of activities of daily living due to the accident. Her orthopedic prognosis remained poor with respect to her residual impairments to the neck and left shoulder resulting from that accident.
- [70] Also, Dr. Bhatia was of the opinion that Ms. Arteaga’s psychological symptoms should be considered serious, in that these symptoms affected virtually every aspect of her life. Again, the lay witnesses gave evidence about Ms. Arteaga’s daily activities at home and at work before and after the accident. This evidence supports a change in personality, a

¹⁹ *Meyer v. Bright*, supra

²⁰ *Meyer v. Bright*, supra

²¹ *Frankfurter v. Gibbons*, [2004] O.J. No. 4969 at para. 22 (Div. Ct.); *Golab v. Schmidt*, [2007] O.J. No. 1412 at para. 32 (S.C.J.)

²² *Sasso v. Copeland*, supra at para. 19 (S.C.J.); *Rizzo v. Johnson*, supra at para. 28 (S.C.J.)

diminishment in her relations with family and in particular, with Mr. Arteaga and her difficulties arising from her driving phobia.

- [71] I accept the evidence of Dr. Bhatia that notwithstanding she drives to work every day she still suffers from anxiety while driving which takes an exhaustive toll on her.
- [72] I do not accept the evidence of Dr. Boynton who testified that, in her opinion, Ms. Arteaga did not suffer from any injuries as a result of the March 2011 accident that would substantially interfere with Ms. Arteaga's ability to continue her regular usual employment. Further, I do not accept Dr. Boynton's opinion that there was no evidence of traumatic injury that interfered with Ms. Arteaga's ability to perform activities of daily living including housekeeping activities resulting from the March 2011 accident. I do not accept Dr. Boynton's opinion that if Ms. Arteaga pursued a course of treatment to improve her posture and weakness in her shoulder flexibility and core muscles, then Ms. Arteaga would be all better within three to six months and her pain would go away.
- [73] I found Ms. Arteaga to be a credible witness. I did not share the concerns of the defence that she exaggerated or magnified her complaints. In fact, all of the medical witnesses who testified including Dr. Boynton found that Ms. Arteaga was an honest person who did not exaggerate or magnify her complaints and was not a complainer. To the contrary, Ms. Arteaga was a dedicated and hardworking employee who did her best at every job she took. She advanced through the workforce and was promoted because of her determination and perseverance. Her employment was important to her. The totality of the evidence clearly demonstrates that in the face of her chronic pain, she returned to work and continued to work notwithstanding the nature and extent of the impairments which I have described. Although not free from pain, she had a strong work ethic which is not an admission of freedom from pain. Once home from work, she was left too fatigued to enjoy her previous daily activities with her family.
- [74] For these reasons, I find that Ms. Arteaga has satisfied the third part of the threefold test and proved that her impairment of an important function is serious.

CONCLUSION

- [75] For the reasons set out above, I find that Ms. Arteaga has sustained a permanent serious impairment of an important physical, mental or psychological function within the meaning of s. 267.5(5) of the *Insurance Act*. The defendants' motion is therefore dismissed.
- [76] If the parties cannot agree on the costs of this motion, they may make written submissions to me. The plaintiff's submissions are to be filed by June 17, 2016 and the defendants' response is to be filed with my judicial assistant by June 24, 2016. No reply submissions are to be filed without leave.
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Date: June 3, 2016