CITATION: Rodriguez v. Parsley, 2018 ONSC 3486
COURT FILE NO.: CV-14-4752 -00
DATE: 2018 06 05

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:		
OLIVIA RODRIGUEZ	Plaintiff	Kal Stoykov and Christina Campoli, for the Plaintiff
- and -		
PATRICK PARSLEY	Defendant	Ari Krajden, for the Defendant
		HEARD: May 22, 2018

REASONS FOR DECISION: THRESHOLD MOTION

MCSWEENEY, J.

Introduction

[1] Ms. Olivia Rodriguez was injured in a motor vehicle accident in 2013 when her car was rear-ended by Mr. Patrick Parsley. Her action was tried with a jury. Liability was admitted by the defendant. At trial, Ms. Rodriguez argued that she suffered from chronic pain syndrome, and that her back, neck and shoulder injuries were caused or aggravated by the accident. The defendant contended that the

plaintiff had pre-existing psychological and chronic pain issues. At most, he argued, the accident caused a brief flare-up.

[2] While the jury was deliberating, the defendant brought a motion under sections 267.4 – 267.12 of the *Insurance Act*, R.S.O. 1990, c. I.8 (i.e. the "threshold motion"). The parties asked that I reserve my decision until the jury returned its verdict. They further agreed that, consistent with the prevailing jurisprudence, I am entitled to consider the jury's verdict in deciding the threshold motion, but that I am not bound by it.

[3] The jury returned a verdict awarding Ms. Rodriguez $12,000.00 in general damages for pain and suffering, and loss of enjoyment of life. They made a $0 award in the remaining damages categories: past loss of income; future loss of income/loss of competitive advantage; and future medical costs.

[4] Neither party moved to set aside or otherwise challenge the jury's verdict. It is agreed that the applicable mandatory deductible amount under the *Insurance Act*, s. 267.5(7), for non-pecuniary damages is $37,983.33 (the "statutory deductible"). Application of this statutory deductible reduces the jury's general damages award to nil.

[5] The question I must now is consider whether the threshold motion is still necessary because the jury's award has been reduced to nil by application of the statutory deductible. Defendant's counsel takes the position that the threshold

issue is not moot because the jury's award, before the deductible, was not zero. Plaintiff counsel did not take a position on this issue.

[6] For the reasons that follow, I conclude that deciding the threshold motion is not required by statute and is not necessary for cost purposes. Conducting the threshold analysis will not resolve a live question between the parties. The threshold motion is therefore moot. Further, it will consume judicial resources better allocated to live disputes.

The Statutory Framework and the Threshold Inquiry

[7] Section 267.5 of the *Insurance Act* states:

> (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 ... unless as a result of the use or operation of the automobile the injured person has died or has sustained,
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> ...
>
> (b) permanent serious impairment of an important physical, mental or psychological function.
>
> ...
>
> (15) If no motion is made under subsection (12), the trial judge shall determine for the purpose of subsections (3) and (5) whether, 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.

[8] In *Meyer v. Bright* (1993), 15 O.R. (3d) 129 (C.A.), at para. 16, the Ontario Court of Appeal set out the applicable analytical approach for motions to determine the threshold issue in motor vehicle accident claims. In order to determine whether a plaintiff has met his or her onus to demonstrate a "permanent serious impairment of an important physical, mental or psychological function," the court must consider all the evidence in the case and then answer the following three questions:

1) Has the injured person sustained permanent impairment of a bodily function caused by continuing injury which is physical, mental, or psychological in nature?

2) If the answer to question number 1. is yes, is the bodily function, which is permanently impaired, an important one?

3) If the answer to question number 2. is yes, is the impairment of the important bodily function serious?

Is a threshold determination necessary where non-pecuniary damages are nil after the deductible is applied?

[9] Judges of this court have taken three different approaches in considering whether it is necessary to rule on the question of whether the plaintiff's injuries meet this "permanent impairment" threshold where damages have been reduced to nil after the statutory deductible has been applied to a jury's award. All of these approaches reach the same conclusion: that the trial judge should decline to determine the threshold issue. I will briefly review each line of analysis.

[10] The decision most cited on this issue is *Mandel v. Fakhim*, 2016 ONSC 6538, 272 A.C.W.S. (3d) 621 (Myers J). In that case, as here, the defendant was

wholly liable for the automobile accident. Similarly, the jury's general damages award (of $3,000) was eliminated by the statutory deductible.

[11] Myers J. declined to decide the threshold motion, reasoning that to do so would be "unseemly and inappropriate" as it would amount to duplication of an issue implicitly decided by the jury:

> [38] As a result of the application of the statutory deductible, the plaintiff has not succeeded in obtaining any award of damages in this case. As a result, resolution of the threshold issue does not change the facts that will affect the costs outcome. The plaintiff's recovery is the same regardless of the outcome of the threshold issue. The resolution of the threshold issue raises squarely factual issues that duplicate issues implicitly decided by the jury. There were no bases argued to set aside the jury's verdict. Therefore, it would be unseemly and inappropriate to engage in the threshold decision were the court inclined to exercise its discretion to do so despite the mootness of the issue. [Emphasis added.]

[12] The analysis of Myers J. has been followed in recent decisions including: *Bodenstein v. Penley*, 2018 ONSC 116, 288 A.C.W.S. (3d) 62, at para. 41(d); *Hinds v. Metrolinx*, 2017 ONSC 6619, 17 M.V.R. (7th) 137, at paras. 48-49; *Shipley v. Virk*, 2017 ONSC 4941, 283 A.C.W.S. (3d) 401, at paras. 6-10; and *Sharma v. Stewart*, 2017 ONSC 4333, 282 A.C.W.S. (3d) 255, at para. 3.

[13] A second approach was taken in *Peterson v. Phillips* (2008), 167 A.C.W.S. (3d) 391 (Ont. S.C.). In that case, Gray J. analysed the mootness question by applying the Supreme Court of Canada's foundational decision of *Borowski v. Canada (Attorney General),* [1989] 1 S.C.R. 342. Gray J. concluded that the issue

of whether the plaintiff met the threshold was rendered "purely academic" by the jury's verdict:

> 15 There is no question that the jury's award makes the threshold issue moot. The plaintiff collects nothing as a result of the law suit, and it will be of no practical benefit to either the plaintiff or the defendant to have a decision on whether or not the plaintiff meets the threshold.
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> 16 The leading case on mootness is *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (S.C.C.). While the judgment of the Supreme Court of Canada deals with mootness in the context of appeals, the principles discussed in that case are applicable to any case that has become moot.
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> 17 At page 353, Sopinka J., for the Court, noted that the doctrine of mootness applies "when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties." On the same page, he stated that the proper approach involves a two-step analysis. First, it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issue has thus become academic, and second, if the answer to that question is in the affirmative, it is necessary to decide if the Court should exercise its discretion to hear the case.
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> 18 In terms of the exercise of discretion, the Court will consider a number of factors: the presence or absence of an adversarial relationship; the need to promote judicial economy; and whether there is a matter of public importance or public interest that ought to be determined.
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> 19 In this case, as noted, the issue of whether the plaintiff meets the threshold is now plainly academic. The real issue is whether I should exercise my discretion to determine the question notwithstanding that it is moot. In my view, I should not.
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> 20 There clearly exists the necessary adversarial relationship. Indeed, the parties have fully, and ably, argued the matter.
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> 21 I do not think there is any need to determine the matter on grounds of judicial economy. Dozens of motor vehicle cases make their way through the courts each year, and issues similar to this one are bound to come up. It is better, in my view, that the Court decide the issue in a case where it will be meaningful to the parties.
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> 22 While it is urged upon me by counsel for the defendant that this is a matter of great interest to the profession and to parties involved in this sort of litigation, I do not think this is a matter having the elements of public importance or broad public interest that would require the Court to decide a moot point.
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> 23 For these reasons, I decline to determine the issue of whether the plaintiff has met the threshold under s. 267.5(5) of the Insurance Act.

[14] This reasoning was adopted by M.F. Brown J. in *Johnston v. State Farm Mutual Automobile Insurance Co.*, 2011 ONSC 3675, 203 A.C.W.S. (3d) 391, at paras. 6-11.

[15] A third analytical approach was taken by Faieta J. in *Grajqevci v. Rustaie*, 2017 ONSC 2535, 278 A.C.W.S. (3d) 163. In that case the defendant insurer had argued that the court was required by s. 267.5(15) of the *Insurance Act* to determine whether the plaintiff's injuries met the prescribed threshold even though the amount awarded for pain and suffering was nil.

[16] Faieta J. applied the principles of statutory interpretation to conclude that the trial judge is not required by the *Insurance Act* to make a threshold determination where the plaintiff is not entitled to an award of damages after application of the statutory deductible:

> 6 In Rizzo & Rizzo Shoes Ltd., Re, 1998 CanLII 837, [1998] 1 S.C.R. 27 (S.C.C.), the Supreme Court of Canada endorsed the following approach to statutory interpretation articulated by Elmer Driedger, at para. 21:
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> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
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> 7 The requirement under s. 267.5(15) for a judge to determine whether the plaintiff has met the statutory impairment threshold is only for purposes of ss. 267.5(3) and (5). If, after the application of the mandated deductibles, the plaintiff is not entitled to an award of damages, then it serves no purpose in relation to subsections (3) and (5) for a judge to determine whether the statutory impairment threshold has been satisfied. Accordingly, I find that the Act does not require a judge to make a threshold determination under s. 267.5(15) when the plaintiff is not entitled to an award of damages after the application of the deductibles required by the Act.

[17] Whether approached from a starting point of pragmatic utility, traditional mootness analysis, or statutory interpretation, each of these cases reaches the same conclusion: I find each persuasive.

[18] In this case, as mentioned earlier, neither party has challenged the jury's verdict. The jury's modest general damages award is consistent with the defendant's position that the plaintiff suffered minor injuries, which have since resolved. In any event, my determination of the threshold issue would have found no serious impairment within the meaning of the statutory language above.

[19] I conclude for the reasons above that it is not necessary to decide the defendant's threshold motion and decline to do so.

MCSWEENEY J

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Released: June 5, 2018