**CITATION:** Shipley v. Virk, 2017 ONSC 4941
**COURT FILE NO.:** CV-12-3992-00
**DATE:** 2017 08 18

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

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| **B E T W E E N:** | ) | |
| Karen Shipley | ) | S. Katz, Counsel for the Plaintiff |
| | ) | |
| **- and -** | ) | |
| Sukhdev Singh Virk and Gurpreet Gill | ) | A.Krajden, Counsel for the Defendants |
| | ) | |
| | ) | |
| | ) | **HEARD:** May 23, 2017 |

**REASONS FOR JUDGMENT: THRESHOLD MOTION**

**TRIMBLE, J.**

[1] On May 30, 2017, the Jury awarded Mrs. Shipley $7,500.00 in general damages and $0 for past or future loss of income, housekeeping, and medical and rehabilitation costs.

[2] In light of the jury's verdict, I invited counsel to make submissions on whether the $7,500.00 award for general damages would be eliminated by the statutory deductible under the *Insurance Act*, and if so, whether the threshold motion was moot. These submissions were provided in writing.

**Result**

[3] For the reasons that follow, the threshold motion is moot. The jury's award of $7,500.00 for general damages will be eliminated by the statutory deductible. Ms. Shipley will recover $0 in any Judgment. Deciding the threshold motion will not assist the Plaintiff.

[4] In the event that I am wrong on the question of mootness, I find that Ms. Shipley has not discharged her onus to prove that, on a balance of probabilities, she suffered a permanent, serious impairment of an important physical, mental or psychological function.

**Is the Threshold Motion Moot?**

[5] The parties provided a joint submission on this question. They say that the threshold motion is not moot. It remains important for two reasons:

1. Given the amendment to s. 267.5(9) of the *Insurance Act* on August 1, 2015, if Ms. Shipley is successful on the threshold motion, she is partially successful at trial. This is a factor to be considered in awarding costs under s. 131 of the *Courts of Justice Act*, and Rule 57.
2. Second, and more particularly, the parties say that since the issue of the retroactive effect of the amendment to s. 267.5(9) has not been determined by the Court of Appeal and there is conflict in trial level case law on theissue, I should err on the side of caution and decide the threshold motion.

[6] I disagree; the threshold motion is moot.

[7] The pre-August, 2015 version of s. 267.5(9) of the *Insurance Act* required the Court to determine costs of an action without regard to the statutory deductible. In August, 2015, the section was amended to provide that entitlement to costs "...shall be made with regard to [the non-pecuniary damage award net of the statutory deductible]".

[8] The leading case on mootness of the threshold is that of Myers, J. in *Mandel v. Fakhim*, 2016 ONSC 6538, in which the Defendant was wholly liable to the Plaintiff for the automobile accident, but the jury awarded general damages of only $3,000.00.

[9] Myers, J. dealt with three issues: 1) is the issue on the threshold the same issue as the jury was required to decide? 2) what effect has the jury's award of damages on the Court's decision on the threshold?, and 3) are the amendments to 267.5(9) retroactive in effect? Myers, J. concluded:

> [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.
>
> [39] Finally, it is possible that the threshold decision would not be moot if the provisions of s. 276.5(9) that existed prior to August, 2015 apply to the costs decision in this case. If the old law applies, the plaintiff's costs entitlement would be based on him obtaining an award of $3,000 rather than $0. That could give the plaintiff a better argument at least to resist costs being awarded against him if not positively in his favour. However, the amendment to s. 267.5(9) affected a future decision to be based on numerous factors including some that might pre-date the amendment. That means that the amendment is retrospective rather than retroactive. The plaintiff was not deprived of a right that was already vested in him or his to enjoy. Rather, a factor available for him to claim costs or to resist a costs claim was altered. That does not amount to an arbitrary deprivation of any settled expectation nor otherwise provide a basis to find that the Legislature intended that the amendment would not operate prospectively in cases that were commenced prior to its proclamation. That is, the plaintiff's case falls to be decided under the current version of s. 267.5(9). As such, the plaintiff concedes that the threshold issue is moot.

**Threshold Motion**

[10] Archibald, J., in *Nguyen v. Szot*, 2017 ONSC 3705, para. 7, noted that *Mandel* is under appeal to the Divisional Court (File No.: 533/16). Like Archibald, J., I find Myers, J.'s analysis persuasive. Accordingly I would dismiss the threshold motion as moot.

[11] Like Archibald, J., in the event that I am incorrect on the issue of mootness, I address the threshold motion. The parties say that should I find that the Plaintiff met the threshold, it may be said that she succeeded in one aspect of the trial even though she received a judgment of $0. The parties say that should Ms. Shipley be said to have succeeded in one aspect of the trial, this is a factor relevant to assessing who should pay costs to whom and in what amount.

[12] The parties agree that even though the Defendant brought the Threshold motion, it is for the Plaintiff to prove that she met the verbal threshold.

[13] The motion is dismissed. Ms. Shipley has not proved that she suffered a permanent, serious impairment of an important physical, mental or psychological function

*1. The Law*

[14] Section 267.5(5) of the Insurance Act states:

> 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.

[15] The Court of Appeal explained in *Meyer v. Bright* (1993), 15 O.R. (3d) 129, at para. 16 that the court must answer the following three questions:

> (1) Has the injured person sustained permanent impairment of a 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 function, which is permanently impaired, an important one?

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

[16] Further, the Court must focus on the effect of the injury on the Plaintiff and not just the type of injury. Justice Firestone said in *Valentine v. Rodriguez-Elizalde*, 2016 ONSC 3540 (CanLII), at para. 39 "[i]t is the 'effect of the injury' on the person and not the 'type of injury,' or labels attached to it, which should be the focus of the threshold analysis."

[17] The Plaintiff has the onus of proof to establish, on a balance of probabilities that her alleged injuries fall within the statutory exceptions in the *Insurance Act*. The Plaintiff must also establish that the injuries complained of were caused by the motor vehicle collision in question: *Meyer v. Bright, supra,* at para. 50; *Page v. Primeau*, 2005 CarswellOnt 5919, at para. 11 (Ont. S.C.). The usual test is the "but for" causation test: *Clements v. Clements*, 2012 SCC 32 (CanLII), [2012] 2 SCR 181.

[18] The term "permanent serious impairment of an important physical, mental or psychological function" is defined by regulation: O. Reg. 461/96, s. 4.2, which says:

> 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.

[19] S. 4.3 of the same Regulation stipulates the evidence by which the Plaintiff must prove that her impairments meet threshold. It says:

4.3 (1) A person shall, in addition to any other evidence, adduce the evidence set out in this section to support the person's claim that he or she has sustained permanent serious impairment of an important physical, mental or psychological function for the purposes of section 267.5 of the Act. O. Reg. 381/03, s. 1.

(2) The person shall adduce evidence of one or more physicians, in accordance with this section, that explains,

(a) the nature of the impairment;

(b) the permanence of the impairment;

(c) the specific function that is impaired; and

(d) the importance of the specific function to the person. O. Reg. 381/03, s. 1.

(3) The evidence of the physician,

(a) shall be adduced by a physician who is trained for and experienced in the assessment or treatment of the type of impairment that is alleged; and

> (b) shall be based on medical evidence, in accordance with generally accepted guidelines or standards of the practice of medicine. O. Reg. 381/03, s. 1.
>
> (4) The evidence of the physician shall include a conclusion that the impairment is directly or indirectly sustained as the result of the use or operation of an automobile. O. Reg. 381/03, s. 1.
>
> (5) In addition to the evidence of the physician, the person shall adduce evidence that corroborates the change in the function that is alleged to be a permanent serious impairment of an important physical, mental or psychological function. O. Reg. 381/03, s. 1.
>
> (6) This section applies with respect to any incident that occurs on or after October 1, 2003. O. Reg. 381/03, s. 1.

[20] Where a plaintiff has suffered from previous injuries or conditions before the accident at issue, the question is whether accident at issue caused permanent, serious impairments of an important function, when compared to the plaintiff's condition immediately before the accident: *Austin-Cooke v. Reid*, 2005 CarswellOnt 7923 (S.C.J.); *Chrappa v. Ohm*, 1996 CarswellOnt 1743, [1996] O.J. No. 1663 (S.C.J.).

[21] In *Briggs v. Maybee*, [2001] O.J. No. 941 (S.C.J.), Mr. Briggs was injured in an automobile accident, but had suffered from many pre-accident conditions, including Crohn's Disease and kidney malfunction, such that at the time of the accident he was on CPP disability benefits and his activities were seriously limited. Belch, J. said at para. 29:

> Is the injury one that has created a permanent serious impairment of important physical, mental or psychological functions? Again, the medical evidence presented at trial has suggested the injury is permanent. To decide whether it is serious to this plaintiff, one must look at how it has affected his life. Acknowledging he was on CPP disability prior to the accident, he was already functioning at a level far below what a usual healthy person would enjoy. He could only participate in activities at his own pace, and while those activities may not be seen as significant to others who enjoy a more active lifestyle, free of disability, this injury has further marginalized the existence of this plaintiff and has had a serious physical and psychological impact on the future enjoyment of his life. He cannot lift his son, cut grass, shovel snow, or do some of the housework. These had been his contributions to the marriage, given his disabilities.

[22] In other words, one measures the seriousness of the impairment and the importance of the bodily function against the ability and function of the individual claimant immediately before the accident. Assuming that the accident at issue causes an

injury that affects a physical, mental or psychological function, depending on the plaintiff's pre-accident limitations, it may not take much further impairment for the accident caused impairment to be serious and the function important.

*2. The Evidence*

Ms. Shipley

[23] She is 58 years old. On June 6, 2012, she turned 53.

[24] Ms. Shipley says that as a result of her June 6, 2012 automobile accident, she injured her neck, upper and lower back, left hip, left knee, and right jaw. She suffers from frequent, long lasting post traumatic headaches. She has chronic pain in all of these areas which is unremitting. Her pre-existing arthritis and fibromyalgia have been aggravated by the accident.

[25] Because of her pain, Ms. Shipley has difficulty sitting, standing or walking for any length of time. She cannot lift or carry anything. Almost any activity or prolonged posture aggravates her pain. It is eased (but never eliminated) by medication and rest.

[26] In addition to her physical injuries, Ms. Shipley says she has suffered psychological injury as a result of the accident. She has suffered major depression and post-traumatic stress disorder. While she was depressed from time to time before June 6, 2012, it has been major depression only since the accident. She is anxious when in or near a car. She has flashbacks of the accident. She has gained weight and lost interest in that from which she took pleasure before the accident. Her memory is poor. She cannot concentrate. She has constant fatigue. She has no sense of self-worth. She has what she calls "brain fog" since the accident. Therefore, she isolates herself as she feels she is a burden on everyone. She rarely goes out, and when she does, she only wants to come home and rest.

[27] The consequence of her injuries is that she cannot work or do most housework. She has to live with her daughter and family since a) she cannot do the work related to maintaining her own home, and b) without being able to be employed, she cannot afford to live on her own.

[28] Ms. Shipley says that she will require continued physiotherapy, occupational therapy, and psychiatric assessments. She will need a detailed rehabilitation plan and

chronic pain management program, plus counselling, medication and braces, and housekeeping assistance for the balance of her life.

[29] Ms. Shipley admits that she had pre-existing fibromyalgia, arthritis and depression before her accident. She says that the February, 2011 accident caused only minor aggravation of her pre-existing symptoms. Ms. Shipley admits that by the time of the June 6, 2012 automobile accident she was still suffering the effects of her 2011 accident and pre-existing arthritis, fibromyalgia and depression, although only slightly. By June, 2012, she was almost recovered. She was back to work, and doing much (if not most) of her pre-February 2011 accident activities. She says that almost all of her current problems arise from the 2012 accident.

[30] Ms. Shipley returned to work on May 24, 2102, working for a courier company delivering envelopes and light packages. She worked 10 days up to and including the day of the accident. She returned to work on June 8 and continued to June 15. She did all deliveries she was assigned. She made the same or more deliveries than the average driver. She only stopped working on June 15 when, during a delivery, she felt panicked, had 'brain fog' and anxiety, and could not understand the directions from the GPS. She called her daughter who gave her instructions over the phone as to how to get home. Ms. Shipley never returned to work following that incident.

[31] Ms. Shipley's daughter, Ms. Stewart, confirmed much of Ms. Shipley's evidence.

[32] Ms. Shipley's credibility is poor.

[33] Assessing a witness's credibility requires an assessment of the witness's trustworthiness and the reliability of the witness's memory and evidence. At trial, no one questioned Ms. Shipley's honesty. I do not do so. However, Ms. Shipley's evidence at trial is not reliable. Her memory was poor. The history she gave to doctors was flawed, containing significant gaps and omissions. The history she gave to doctors often contradicted her evidence at trial.

[34] It is clear from all of the evidence that Ms. Shipley suffered from many conditions that she said prevented her from doing her activities of daily living and from working after the June, 2012 accident, long before her June, 2012 accident. Some examples of the gaps, omissions and contradictions in her evidence are:

a. Dr. Wilderman records (but Ms. Shipley does not recall telling him) that for 8 years before the 2012 accident, she worked on and off as a courier. She agreed that the statement was inaccurate at the time she made it.

b. Notwithstanding giving oral evidence of working for Eberspatch, Chrysler, as a Personal Support Worker, for a courier, and for scaffold business, she produced no documents to substantiate this.

c. She produced no documents about her time at CDI College to qualify as a PSW, or of her PSW designation.

d. She admitted that she filled out the January 10, 2005 Literacy Screening Test (Ex. 28) and completed all components. She completed the entire form including the mathematical questions. She verified that the information was true at the time she filled out the form;

e. She admitted that she was able to fill out the May 21, 2009 Literacy Screening Test (Ex 29), only partially because of "arthritic pain and poor consentration (sic)". She also indicated that she no longer had any employment goal. She verified that the information was true at the time she filled out the form;

f. While Dr. Chiang filled out the May 27, 2009 Limitations to Participation document (Ex. 36), Ms. Shipley admitted that the information it contained came from her and was true at the time. That document recorded that Ms. Shipley was prevented from doing her daily activities of living including walking, operating machinery, standing, and lifting because of rheumatoid arthritis in her hands, feet and hips, and low stamina. Her prognosis was guarded;

g. Ms. Shipley confirmed that she suffered from the complaints as listed in Dr. Bajaj's record of August 17, 2009 (Ex. 37). She complained of having arthritis in her feet, with swelling, pain in her hips, constant pain in her shoulders and occasional pain in her neck. She felt chronically fatigued and had poor sleep;

h. She confirmed the complaints listed in the Patient Questionnaire she competed for Dr. Bansal on June 7, 2011 (Ex. 38) and the information contained in it were true at the time. She reported at the time that her limitations made it very difficult for her to work and do her daily activities. These limitations include several days of feeling depressed nearly every day, having little interest or pleasure in doing things, trouble falling and staying asleep, feeling tired with little energy, trouble concentrating, and moving or speaking so slowly that others have noticed;

i. Ms. Shipley confirmed in her evidence given at her June 4, 2014 Examination for Discovery that her December 8, 2011 report to Dr. Bansal that her pain from the 2011 accident was not resolving, was still accurate when she spoke to Dr. Bansal, and was in fact getting worse;

j. She confirmed that she filled out the Brief Pain Inventory of February 21, 2012 (Ex. 10, page 134-5), 4 months before her June, 2012 accident, and that the

contents of the form were true when she filled it in. In that Pain Inventory she rated her pain at between 6 and 9/10 and the resulting impairments in her daily activities and work as being 10/10;

k. She confirmed that she filled out the Pain Disability form for Dr. Kostovic on April 16, 2012 (Ex. 39), two months before her June, 2012 accident, and that the complaints recorded in it were true when she filled it in. In that Pain Disability form, she listed her disability level for from her normal activities at 8 to 10/10, and her disability level for work at 10/10;

l. Ms. Shipley confirmed that the complaints and impairments listed in Dr. Kostovic's April 22, 2012 letter (Ex. 10, page 171, *et seq.*), two months before the accident, were correct at the time. As a result of her February, 2011 accident, she reported chronic, intractable, debilitating back pain (also neck pain and headache) for which she was taking medication and physio, with little relief. She reported that before the accident she had been working as a PSW for 80 hours a week, but had not worked since the accident;

m. She confirmed that she filled out the Pain Disability form for Dr. Kostovic on May 28, 2012, less than one month before the June, 2012 accident and around the time that she started work at the courier company, and that it was accurate as of that date. She reported that her pain level was between 6 and 9/10, with an average of 7/10, and that her medication (including nerve blocks) gave her only 60% relief lasting 7 to 8 hours.

o. She conceded that in July, 2009, she told the social worker with Peel Career Assessment services (Ex. 30) that she could not stand, sit or walk for a prolonged periods of time, that she had arthritis in her hands, hips and feet, that she had low stamina, and that she knew that her prognosis was guarded. She verified that the information was true at the time it was recorded;

p. She conceded that in her June 4, 2014 Examination for Discovery she said that her last job was with Eberspatch and she never worked after leaving there in 2007. She never mentioned the scaffolding company, working as a PSW, or working for the courier company;

q. During the years she worked for the Scaffold/Courier company and for Brian Peters as a PSW she reported no employment income. In 2007 to 2010, and after 2013 she reported no earned income, notwithstanding having given evidence that she was employed during these times;

r. She never sought her doctors' opinion before stopping work in June, 2012;

s. Ms. Shipley is not sure if she told Ms. Okell or Dr. Wilderman that she returned to work after the 2012 accident;

t. Ms. Shipley confirmed her Discovery evidence from June 4, 2014 that between the 2011 and 2012 accidents her daughter did most of the cooking,

> cleaning and laundry. Ms. Shipley said she could do no sweeping, vacuuming, or lifting. She could only heat food up. She abandoned all recreational activities

The Doctors

[35] I also heard from a number of physicians. I found each of them to be qualified in their fields, and conscientious giving his or her evidence.

[36] I prefer the evidence of the Defence doctors over that of Ms. Shipley. The Defendants' doctors had a complete medical history. None of the Plaintiff's doctors, neither expert nor treating, had a complete medical chart. Few, if any, of the pain reports that Ms. Shipley filled out were provided to her doctors. Most of those reports indicated that Ms. Shipley's pain and disability were always at the highest or close to highest levels up to and including on May 28, 2012.

[37] Ultimately, the force of Ms. Shipley's treating and expert doctors' evidence was significantly weakened by the significant omissions in the information they were given.

a) Dr. Bansal

[38] While Dr. Bansal did not say it explicitly, the overwhelming inference from his evidence was that he was of the view that Ms. Shipley was completely disabled by her chronic pain, chronic depression, and cognitive issues caused by the 2012 accident.

[39] In cross examination, Dr. Bansal was taken through the Feb. 21, 2012 pain self-report contained in his file in which Ms. Shipley reported that her pain over the relevant time period was at or near the worst it could be, and that the impairment in her function was at or near the worst it could be (Ex. 10, p. 134-135). Dr. Bansal conceded this is the worst pain score she had prior to the May 2012 visit with her, but said she improved after that.

[40] Dr. Bansal conceded that he had not been provided with significant medical records listed above, or not told of the complaints she made at various times and diagnoses she had received. Dr. Bansal said:

> a. As of his last full assessment before the June, 2012 accident, February 21, 2012, Ms. Shipley still showed a pain index total of 67/70, which was significantly worse than her scores in 2011.

b. The pain index addresses function. In her last full exam, Ms. Shipley's pain profile was 9/10 and interference with her activities was 9/10 to 10/10. He said that her improvement began in April, 2012 with a change in medicines.

c. Dr. Bansal was aware that Ms. Shipley had a history of depression, but not that she had suffered from it to two years before he began to see her.

e. Ms. Shipley never told him that before the 2011 accident, she suffered from chronic fatigue or generalized weakness. Knowing that Ms. Shipley had been diagnosed with fibromyalgia would have been important in making his diagnosis that she had chronic paid arising from the accident.

g. He reported significant improvement in Ms. Shipley's symptoms on May 28, 2012 based on his examination. He had not seen Ms. Shipley's self-report pain indices that were prepared for Dr. Kostovic, Dr. Kostovic's April 16, 2012 consult note, or the other pain reports Ms. Shipley filled out.

h. Ms. Shipley did not seek his advice about stopping work as a courier.

b) Dr. Dhaliwal

[41] Dr. Dhaliwal is Ms. Shipley's treating Psychiatrist. He began seeing her on referral from Dr. Bansal on November 30, 2016. At that time, Ms. Shipley was off work. She had dreams and flashbacks of the accident accompanied by increased heart rate, 4 to 5 times per night. She feels overwhelmed by anxiety. She said "I am tired of being tired." She complained of pain in her neck and back, of depression. While she had mild depression before, it was worse after the 2012 accident. She had psychomotor slowing. She reported a history of arthritis, fibromyalgia and periodic sleeplessness but all made worse by the accident. Dr. Dhaliwal diagnosed post-traumatic stress disorder from the accident. She had diminished concentration. She also had a major depression. He prescribed Cymbalta on an increasing dose.

[42] He next saw her on March 30, 2017 at which time she reported increased anxiety and flashbacks, fear of being in a car. Her concentration was still poor. Because she had not improved, he prescribed Xanax, Concerta, increased Cymbalta, Abilify and Restoral.

[43] Dr. Dhaliwal showed some confusion over the accident that he said was the cause of Ms. Shipley's psychological problems. Originally, he said it was the February, 2011 accident. He had to be referred to paragraph 1 of his first report to remember that he ascribed these symptoms to the 2012 accident. Dr. Dhaliwal said:

a. Ms. Shipley told him that she only had mild depression before the 2012 accident. He diagnosed severe depression after the 2016 accident.

b. Dr. Dhaliwal agreed that he received only a brief one page referral from Dr. Bansal (Ex. 11) and that it would have been important to see complete records, and take a full history. He did not see the report from Dr. Sood (Ex. 43) or the Ontario Literacy Screening, May 31, 2009 (Ex.29).

e. He was never told Ms. Shipley was diagnosed as early as 2009 with Fibromyalgia.

f. He agreed that functional capacity is important. Ms. Shipley left him with the impression that her function was much reduced after the 2012 accident – reduced cognition, reduced social life, reduced activities of daily life, and reduced stress threshold. He said that this arose from the second accident. In cross examination, he agreed only saw her after the second accident and therefore ascribed these symptoms to the second accident. In the end, he said he treated the clinical picture that presented itself.

c) Dr. Igor Wilderman

[44] Dr. Wilderman was qualified as a medical-legal expert in Chronic Pain.

[45] Ms. Shipley told him in December 10, 2015 that she had mild arthritis and fibromyalgia diagnosed in 2000, which did not bother her. She had an accident in 2011 which caused neck and back pain which was exacerbated in the June, 2012 accident. From that accident, she complained of neck, upper back, lower back, left hip, and left knee pain, headaches and dizziness. She self-reported the pain in all of these areas as being between 8 and 10 of 10. He diagnosed chronic pain.

[46] His physical examination of Ms. Shipley confirmed moderate to severe pain in all areas complained of with limited range of motion in the head, neck, shoulders and back. He diagnosed fibromyalgia. The psychological questionnaire indicated anxiety and depression since the 2012 accident, with loss of interest in things she used to enjoy. She had flashbacks and anxiety in a car. She has memory and concentration problems. She self-isolates. Dr. Wilderman also diagnosed chronic whiplash (grade III) and post-traumatic stress disorder, caused or aggravated by the 2012 accident.

[47] His prognosis was poor due to the severity of her complaints, the duration of her symptoms, the unavailability of modified work, psychological complications, and that they arise from multiple accidents. She had PTSD, depression, and anxiety. He found it

hard to believe that she would improve. He said that Ms. Shipley was unemployable given her job as a delivery driver because of pain and her inability to remain alert. Likewise, she was limited by pain from doing housework.

[48] It did not surprise Dr. Wilderman that Ms. Shipley returned to work after the 2011 accident. Many chronic pain patients return to work. He said there is also ample evidence in the literature of a second accident creating or worsening chronic pain and fibromyalgia.

[49] In cross examination, Dr. Wilderman agreed that it is best to obtain as full a history and medical chart as is possible. He conceded that he did not see the documents listed above or was not given the information they contain. Most significantly, Dr. Wilderman was not provided with or told about Dr. Prutis's physiatrist's report of October 6, 2011. He was not told that Dr. Prutis said that Ms. Shipley was completely disabled from work and housework by the injuries from the 2011 accident. Ms. Shipley told Dr. Prutis that she worked 80 hours a week as a PSW before the 2011 accident, whereas she told Dr. Wilderman that she worked for 8 years, on an off, as a courier. Ms. Shipley told Dr. Prutis that her daughter had to do most heavy housework as well as shop and cook for her. She told Dr. Wilderman that she was doing her own housework, recreational activities, and that these stopped after the 2012 accident.

[50] Other physical complaints that Ms. Shipley reported to Dr. Prutis but not Dr. Wilderman, or reported to Dr. Wilderman as starting only after the 2012 accident, include that she had dizziness with her headaches after the 2011 accident; she had numbness in her arms and hands before the 2012 accident; she had low back pain radiating into her buttocks and thighs (she said the 2012 accident aggravated the low back pain but did not say that it radiated before the 2012 accident); memory and concentration problems started with the 2011 accident (she told Dr. Wilderman it was the 2012 accident); she had depression and mood swings before the 2012 accident.

[51] Dr. Wilderman agreed that Dr. Prutis' diagnosis and recommendations are much like his, and that Dr. Prutis, who saw Ms. Shipley 8 months after the 2011 accident and 8 months before the dune, 2012 accident, diagnosed chronic pain before the second accident. He agreed that his comment that Ms. Shipley was managing her conditions before the 2012 accident and functioned well was based on her self-report and that her self-report to Dr. Wilderman was not accurate.

d) Dr. Sturla Bruun-Meyer

[52] Dr. Bruun-Meyer is a psychiatrist who was retained by the Defence for litigation purposes, whom I qualified as an expert in psychiatry. Dr. Bruun-Meyer reviewed the complete medical file. In his opinion, Ms. Shipley had been dealing with work, social and financial stressors since 2004 and had many limitations before her 2012 accident. She did not advise her assessors of these pre-existing issues. He saw Ms. Shipley in September, 2016 and was asked to determine whether she suffered any psychological injury as a result of the 2012 accident. He said she had no psychiatric symptoms other than fluctuating sadness. She specifically denied that she was depressed. If she had sadness, anxiety and depression, it did not impact her function.

e) Dr. Benjamin Clark

[53] Dr. Clark is a physiatrist (doctor of physical and rehabilitation medicine) retained by the Defence as a medical-legal expert for this litigation. He examined Ms. Shipley on February 18, 2016 and was provided with a complete medical file. At the time of examination, Ms. Shipley complained of neck pain (7/10 severity), low back pain (no rating provided – it fluctuated), left knee pain, pain in both hips, and headaches. She had no history of pain pre 2012, just anxiety and depression. The file, however, indicated a history of pain including the 2011 accident and fibromyalgia.

[54] Ms. Shipley showed exaggerated reactions to examination, complaining of extreme pain accompanied by exaggerated facial grimacing on simulated examination (done to verify pain response) or to light touch) which should elicit no pain response). Aside from some muscle wasting and pain in her thumbs from her arthritis and her overreaction, her physical examination showed no limitations.

[55] Dr. Clark diagnosed that Ms. Shipley had long standing chronic pain that predated the 2012 accident. She probably suffered soft tissue strains in the 2012 accident that were superimposed on her chronic pain, but which ought to have resolved within 4 to 12 weeks. He conceded that for chronic pain patients, recovery from these sorts of mild injuries takes longer. He noted that depression is a "huge factor" in chronic pain but noted that Ms. Shipley had stopped taking her anti-depressants by the time he saw her. He conceded that since the beginning of 2012 there have been 22 doctors' visits for pain complaints, 6 before the accident and 16 after. However, he said that none of this indicates findings of clinical impairments arising from the 2012 accident.

f) Dr. Prutis-Misterska

[56] Dr. Prutis was retained by Ms. Shipley to provide an opinion with respect to her injuries related to the 2011 accident. She prepared that opinion 8 months after the 2011 accident, and 8 months before the 2012 accident. She was not called as an expert in this trial, nor was she a treating doctor. She was not provided with a complete medical chart.

[57] Ms. Shipley reported no history of trauma although said that she was on Cymbalta and Seroquel. She was a PSW who was taking care of a disabled boyfriend, working 80 hours a week. She had accepted a job to start in March, 2011 at Chrysler, but could not start work because of her injuries. Before her accident, she did all of her activities of daily living without help. After the 2011 accident, however, Ms. Shipley said that she could not do heavier housework. Her daughter was doing the heavy house work, did the shopping, and frequently brought her prepared food which Ms. Shipley only had to warm up. Before the accident, Ms. Shipley reported that she swam and walked for exercise and had a busy social life, which had stopped because of pain and depression.

[58] Dr. Prutis said that Ms. Shipley complained of pain in her neck that radiated into her arms and hands, headache, numbness in her arms and hands, low back pain and cognitive limitations in short term memory and concentration. Her physical symptoms were brought on by standing, sitting and walking too long, maintaining one position for a prolonged period, and repetitive movement. On examination Ms. Shipley showed reduced range of movement in her neck (by 50%), and low back (by 75%). There was also weakness in her right hand.

[59] In Dr. Prutis' opinion, as a result of the 2011 accident, Ms. Shipley suffered moderate to severe chronic pain in her neck and low back because the pain had persisted beyond 6 months. In addition, she suffered cervicogenic headaches. She had a serious, permanent impairment in her range of motion. Her prognosis was guarded. Therapy did not help. She was disabled from her employment because of limitations in lifting, bending, pushing, pulling, standing, walking and bending. Her activities of daily living were also now beyond her.

[60] Dr. Prutis said:

> a. Had Ms. Shipley mentioned that she was depressed before the 2011 accident Dr. Prutis would have noted it.

b. There were no past health issues raised in the notes and records she was given.

c. It is possible that Ms. Shipley's condition improved after Dr. Prutis saw her.

d. She was not aware that Ms. Shipley was employed before the 2012 accident.

[61] The evidence of the doctors called by the Defence is preferable to that of those called by the Plaintiff. The doctors called by the Plaintiff were not provided with significant evidence speaking to Ms. Shipley`s functional status up to June, 2012. The weight of the evidence indicates that at the time of the June, 2012 accident, Ms. Shipley was impaired by her physical and psychological problems such that she was unable to work and perform most of her daily activities, and the 2012 accident had little impact on her. The one exception to this is her working beginning on May 24, 2012.

[62] Based on the foregoing evidence, I find that Ms. Shipley has failed to prove, by medical evidence that she has sustained permanent impairment of a function caused by continuing injury which is physical, mental, or psychological in nature.

*3. Ms. Shipley`s Return to Work as a Courier Before the 2012 Accident.*

[63] Ms. Shipley argues that even accepting the conflicting evidence of her pain and impairments up to one month before the accident, the uncontroverted evidence is that she returned to work on May 24, she worked 10 days up to and including the day of the accident, she returned to work on June 8 and continued to June 15. She did all deliveries she was assigned. She made the same or more deliveries than the average driver. She only stopped working on June 15 because she suffered low back pain and suffered a panic attack while driving. In short, she returned to work and tried to `tough it out`, but could not. This indicates that her injuries from the automobile accident impaired her ability to sit and drive, which resulted in her not being able to work. These impairments are of a serious permanent nature as they affect her ability to work, and they are permanent.

[64] The evidence about Ms. Shipley returning to work and the days she worked, is uncontroverted. The relevant issue, however, is why she stopped. We have only her evidence on this point. She said that she quit on June 15 because, while on a delivery, she suddenly developed 'brain fog', did not know where she was, and could not

understand the instructions from her GPS. She became panicked and had to have her daughter give her instructions over the phone in order to get home.

[65] There is no contemporaneous evidence of why she stopped working. She told her courier employer before she began working that she had an accident before June, 2012 and that she had an accident on June 6, 2012. She did not tell her courier employer why she stopped working. She merely quit. She saw her family doctor a month after the accident. His note does not indicate that she was working or that she quit because of her accident related injuries.

[66] Given:

1. the lack of contemporaneous recording of Ms. Shipley telling anyone that she quit work as a courier because of her 2012 accident related physical or psychological injuries,
2. her return to work was 17 days after her May 7, 2012 pain report (Ex. 40), reporting her disability levels at between 7 and 10 (with 10 being "worst disability" and work disability at 10/10,
3. her return to work was 4 days beforeher May 28, 2012 pain report (Ex. 41), reporting her pain in the last week at between 7 and 9/10 and in which she answered "no" to the question "Since your last visit are there any activities you were able to do that you could not do before?", and
4. she said on May 7, 2012 that her disability from work was 10/10 and on May 24 said that there were no activities that she could not do at her last visit that she could do now, yet she had started working 4 days earlier and worked on the same day she filled out her May 28 self-report form,

I cannot accept her evidence in the witness box that she stopped working because of pain or psychological issues arising from the 2012 accident.

*4. The Jury's Verdict*

[67] I asked counsel whether, and if so to what extent, I could consider the Jury's verdict in deciding the threshold issue. The parties submitted that the Jury's verdict was

something I could consider in determining the Threshold motion, although it is not determinative. The question of the threshold was predominantly a legal question based on evidence at trial, and was a different question than that which the jury had to answer.

[68] Whether a judge, on a threshold motion, could consider the jury's verdict has not been without controversy. In *Chrappa, supra*, para. 7, Lax, J. said that threshold motions should be decided before the return of the verdict, wherever possible, so that there is no perception that the outcome of the motion is in any way influenced by the findings of the jury. In *Clark v. Zigrossi* (2010 ONSC 6357), Brown, J. (as he then was) echoed the sentiment.

[69] In *Bishop-Gittens v. Lim*, 2016 ONSC 2887 (S.C.J.), para. 5, following *Kasap v. MacCallum* (2001), 144 O.A.C. 369, the Court held that the trial judge MAY consider the verdict on the threshold motion but is not bound by it, which Lemay, J, echoed in *Wheeler v. Rawlings* (unreported, January 27, 2016).

[70] In *Mandel, supra*, Myers, J., without explicitly addressing the question of whether he COULD consider the jury's verdict on the threshold did so, saying:

> [5] It is perfectly clear that the jury believed that the minor contact between the vehicles caused Mr. Mandel only very minor injuries and it awarded him very modest damages accordingly. There is no way to understand the jury's verdict other than to conclude that either: (a) the jury did not believe the plaintiff's testimony as to the extent of his injuries; or (b) they did not believe that the plaintiff proved that his injuries were caused by the trivial contact between the parties' vehicles.

[71] Philosophically, once a party has indicated that it wishes to have liability and damages decided by a Jury, and since the answers to those questions require the Jury to determine causation and perform an assessment of the severity of the injuries and their impact on the Plaintiff's function, the Jury's findings should be taken into account on the threshold motion to the extent that it is reasonable to do so. As Myers, J. put it:

> [8] Of greater concern to me is that in order to find that the plaintiff met the threshold as he argues, I would necessarily be disagreeing with the jury's findings. That is, to hold for the plaintiff, I would have to hold both that the plaintiff suffered at least most of the injuries he claims and that the contact between the cars was a cause of those injuries. Making at least one and perhaps both of those findings would necessarily put me in direct conflict with the jury's verdict.

> [9] While jury trials in civil cases seem to exist in Ontario solely to keep damages awards low in the interest of insurance companies, rather than to facilitate injured parties being judged by their peers, the fact is that the jury system is still the law of the land. This jury has spoken and did so loud and clear. If I find that the plaintiff has proven that he met the threshold, I would not only be making findings of law, but I necessarily would have to disagree with the findings of fact that are implicit in the jury's decision. Yet I told the jury an obnoxious number of times in my charge that they, and only they, were the judges of the facts of the case. I told them that their community had called upon them to take 12 days out of their lives so that they could make findings that only they can make in an act of central importance to our democratic traditions. How can I legitimately now consider whether I find facts that the jury rejected?
>
> [10] What does it say about what I told the jury and about the legitimacy of the jury's role, if the judge may not only ignore their findings, but may make binding pronouncements that fly in the face of the jury's findings? Facts cannot exist and not exist at the same time. The plaintiff's injuries exist or they do not; they were caused by the motor vehicle collision or they were not. I am being invited to find that facts were proven at trial when the jury has already found that those facts were not proven. I cannot do that without undermining the role of the jury as the exclusive finders of fact. I cannot do that without making portions of the standard civil charge to the jury untrue.

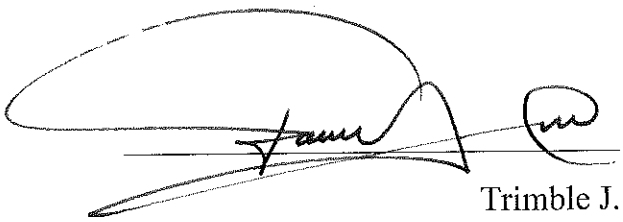
[72] I add to the jurisprudence one comment. The trial judge may consider on the threshold motion the jury's verdict only to the extent that the Jury must have made findings of fact that are relevant to the issues on the threshold motion of a) was there an injury that has caused an impairment of a physical, mental or psychological function, b) is that impairment permanent, c) is the function impaired an important one, and d) is the impairment of the function serious (see *Wheeler v. Rawlings, supra*, para. 19 to 23). The trial judge must ignore a patently unreasonable jury award, one not based on the evidence, or an award which may have several alternate plausible factual bases or explanations.

[73] In this case, the Jury awarded Ms. Shipley $7,500 in general damages and nothing for other heads of damage. The only conclusion that I can draw from the award of general damages is that a) the Jury was satisfied that Ms. Shipley suffered injury that was caused by the 2012 accident or that a pre-existing injury was exacerbated by it, b) that the injury or exacerbation was minor, and c) the impact of that injury on her, seen in its broadest context, is negligible. I cannot draw conclusions beyond that. I cannot, for example, infer from the $0 award for past or future income that the jury concluded that Ms. Shipley's accident related injuries did not interfere with her ability to work. There

are other equally plausible explanations for the $0 award for loss of income that the jury could have accepted, based on the evidence.

**Conclusion**

[74] I conclude, as indicated above, that Ms. Shipley has not met her onus of proving, on a balance of probabilities, that she sustained a serious permanent impairment of an important physical, mental or psychological function as required by the Regulations. The medical evidence she proffered is severely compromised by faulty history she gave, and the failure to give a complete medical chart to her doctors. Her own recollection of her own injuries is unreliable. The medical evidence of her condition immediately before her June, 2012 accident indicates that she was unemployable and unable to do her activities of daily living because of conditions and injuries she suffered before, and unrelated to the June, 2012 accident. Any contribution to her condition by the June, 2012 accident was minor.



Trimble J.

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**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

Karen Shipley

**- and –**

Sukhdev Singh Virk and Gurpreet Gill

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**REASONS FOR JUDGMENT:**
**THRESHOLD MOTION**

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TRIMBLE J.

**Released:** August 18, 2017