

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Martin v. Gibson

BEFORE: Salmers, J.

COUNSEL: D. Schell and G. Frank, for the Plaintiff

T. McCarthy, for the Defendant

THRESHOLD RULING

Nature of the Motion

- [1] Counsel for the defendant has submitted that the plaintiff has not proven that his injuries, suffered in the August 23, 2008 Mosport accident, meet the threshold contained in s. 267.5 (5) of the *Insurance Act*¹. Counsel for the plaintiff submitted that the plaintiff has met that threshold.
- [2] In this case, the threshold would be applicable to the plaintiff's claims for non-pecuniary general damages and future medical rehabilitation expenses. As I considered ruling on this threshold motion, the circumstances of this case led me to believe that the threshold ruling was moot because of the jury's verdict. I asked that counsel re-attend before me on September, 25, 2013 to make submissions as to whether the threshold ruling was moot.
- [3] On September 25, 2013, I advised counsel that I considered the threshold ruling may be moot for the following reasons: 1) the \$30,000 deductible reduced to zero the jury's verdict of \$15,000 for non-pecuniary general damages; and 2) prior to trial, the plaintiff had agreed to a \$122,500 settlement² that included his claim for past and future medical rehabilitation and attendant care benefits, thereby rendering moot the jury's verdict for that head of damages. I asked counsel for submissions on the issue of whether a threshold ruling was moot.
- [4] Neither counsel disputed that the jury verdict for non-pecuniary general damages is reduced to zero because of the deductible.

¹ R.S.O. 1990, c. I.8.

² Trial Exhibit 9

- [5] However, the \$122,500 settlement pertains to the plaintiff's claim and jury award for future medical rehabilitation damages. The evidence included the settlement documents and release³. Therefore, the jury had those documents during their deliberations. The release specifically stated that the plaintiff released an insurer⁴ from all claims under the Statutory Accident Benefits Schedule. There was no release of the defendant Gibson apart from the plaintiff agreeing not to claim or commence any proceedings against Gibson under the Statutory Accident Benefits Schedule. In this trial, the plaintiff was not claiming against Gibson under the Statutory Accident Benefits Schedule. After considering all the evidence, the submissions of counsel, and my legal instructions, the jury decided that the plaintiff had proven damages for future medical rehabilitation in the amount of \$10,000. Based on all of the evidence currently before me and the submissions heard to date, I am not satisfied on a balance of probabilities that the \$10,000 jury award is included in the collateral benefits (including the \$122,500 settlement) paid to the date of trial. Accordingly, I am not satisfied that any amount of collateral benefits paid to the date of trial must be deducted from the jury award for future medical rehabilitation. In these circumstances, the threshold motion is not moot and I will rule on it.
- [6] In the Mosport accident, the plaintiff's left leg, at least the calf and possibly a larger portion, was run over by the defendant's pickup truck. The plaintiff suffered a crush injury to his left leg as a result of the accident. The plaintiff submitted and adduced evidence supporting that this had become chronic pain and/or complex regional pain syndrome, type I. The plaintiff further submitted and adduced evidence supporting that he also suffered back and neck injuries as a result of the accident. The plaintiff also submitted and adduced evidence supporting the development of consequential injuries and problems – namely, headaches, a major depressive disorder, post-traumatic stress disorder, sleep problems, and alcohol abuse. The plaintiff's position is that since the date of the accident he has had a permanent impairment of physical, mental, and psychological functions that has prevented him from working since the accident and will prevent him from working at any time in the foreseeable future.
- [7] Relying on the evidence of Dr. Bushuk and Dr. Bail, the defence submitted that the threshold has not been met. The defence theory is that, since the accident, the plaintiff has continuously told and demonstrated by his conduct an inaccurate version of his physical and mental problems to everybody. The defence position was that having regard to all of the evidence and the jury's verdict, the plaintiff has not satisfied the threshold contained in s. 267.5 (5) of the *Insurance Act*.
- [8] For the following reasons, I disagree. I am satisfied that the plaintiff has satisfied the threshold.
- [9] Both counsel agreed on the law that is applicable on threshold motions. Pursuant to s. 267.5(3) and (5) of the *Insurance Act*, in order to recover non-pecuniary general damages

³ Trial Exhibits 8 and 9

⁴ State Farm Mutual Automobile Insurance Company

or damages for future medical rehabilitation from the defendant, the plaintiff must establish that as a result of the Mosport accident, the plaintiff sustained permanent serious impairment of an important physical, mental or psychological function. Counsel further agreed that the definitions or criteria to be applied when addressing the threshold test are set out in s. 4.2(1) 1, 2 and 3 of Ontario Regulation 461/96 as amended.

- [10] Each of Dr. Bushuk and Dr. Bail saw the plaintiff on only one occasion for the purpose of preparing medical-legal opinions for the defence. Both doctors reviewed the very significant medical brief and opined that based on that review and the plaintiff's presentation before them, they did not find the plaintiff to be credible and that he had continuously misled and deceived every other health care provider other than Dr. Bushuk and Dr. Bail. Based on their opinions of credibility, both Dr. Bushuk and Dr. Bail provided opinions and testified that the plaintiff had suffered no significant injuries or damages as a result of the Mosport accident and that the plaintiff could return to work.
- [11] Both Dr. Bushuk and Dr. Bail were repeatedly evasive during cross-examination. Each of them repeatedly avoided answering questions, choosing instead to almost constantly merely restate their beliefs that the plaintiff was not credible and their opinions that he had not suffered significant injuries in the Mosport accident. Their repeated refusals to answer questions and instead respond in this manner leads me to find that neither Dr. Bushuk nor Dr. Bail truly understood the duty of an expert that was set out in the Acknowledgment of Expert's Duty that was signed by each of them. Rather than providing independent, unbiased assistance to the jury by answering the questions that were asked during cross-examination, each of Dr. Bushuk and Dr. Bail repeatedly advocated for the position of the party that hired them.
- [12] The evidence of Dr. Bushuk and Dr. Bail was in stark contrast to the evidence of all of the experts and healthcare providers called as witnesses by plaintiff's counsel. The evidence of those healthcare providers supported the determination that all criteria of the threshold have been met. I refer to Dr. Wong, Dr. Kwong, Dr. Fern, Dr. Abrams, Dr. Smith, Dr. Ballard and Dr. Gladstone. With the exception of Dr. Gladstone, each of those healthcare practitioners saw the plaintiff multiple times. In particular, each of Dr. Wong, Dr. Kwong, and Dr. Ballard have seen the plaintiff on many occasions and Dr. Kwong and Dr. Ballard continue to see and treat the plaintiff. There were few, if any significant inconsistencies between the diagnoses and prognoses of all of these healthcare practitioners. When they testified, all of these healthcare providers gave responsive answers to questions that were asked. Unlike Dr. Bushuk and Dr. Bail, they did not merely act as advocates for a position.
- [13] For all of these reasons, I prefer and accept the evidence adduced by the plaintiff, including the Gladstone report and the testimony of the many physicians and healthcare providers called as witnesses by the plaintiff. I reject and do not accept the testimony of Dr. Bushuk and Dr. Bail. I am satisfied that because of the Mosport accident, the plaintiff has sustained a permanent serious impairment of important physical and mental functions and that his impairments arising from the Mosport accident have substantially interfered and continue to substantially interfere with his employment and with his enjoyment of life. As such, these impairments are serious to the plaintiff.

- [14] To be precise, as a result of the crush injury sustained in the Mosport accident, the plaintiff has suffered and continues to suffer from: leg injuries that significantly reduce his mobility and strength; chronic pain in his leg and back; and consequential psychological and/or psychiatric damage of depression. I find that the plaintiff will suffer indefinitely from his physical and psychological injuries.
- [15] The evidence was undisputed and I find that the plaintiff has little education and little prospects for employment other than his pre-accident employment as a mover.
- [16] For reasons stated earlier, I accept the evidence of the doctors and healthcare providers called as witnesses by the plaintiff. I also accept the undisputed evidence of Debbie Couture, a manager at his pre-accident employer, about employment available to the plaintiff based on his skills and experience if he were capable of working.
- [17] Considering the plaintiff's skills, experience and injuries, I find that it was not possible for his employer or potential employers to make any accommodation for the plaintiff's impairment.
- [18] There was much evidence about the many treatments and medications undertaken by the plaintiff in the hopes of improving his condition so that he could return to some sort of work. I find that, since the Mosport accident, the plaintiff has pursued every recommended treatment and that nothing has improved his condition to enable him to work. Based on his efforts and the evidence of the witnesses that I do accept, I find that his condition is unlikely to improve and it will continue indefinitely.
- [19] Considering all of the evidence and for those reasons, I find that the criteria in s. 4.2(1) of O. Reg. 461/96 have been met.

Conclusion

- [20] For the reasons set out above, I find as a result of injuries suffered in the Mosport accident, the plaintiff has sustained permanent serious impairment of important physical and mental functions as contemplated in s. 267.5(5) of the *Insurance Act*.
- [21] The issue of costs remains. Counsel are to contact the trial co-ordinator to arrange an appearance before me to make costs submissions.



Salmers, J.

Date: October 29, 2013