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Mader v. Hunter

Helen-Marie Mader, Plaintiff and Warren W. Hunter, Defendant

Ontario Superior Court of Justice

Moore J.

Heard: January 25, 2012

Judgment: January 26, 2012

Docket: 07-CV-340202

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Counsel: David Lavkulik, George Frank, for Plaintiff

Jon Schrieder, Alex Reyes, for Defendant

Subject: Insurance; Torts

Insurance --- Automobile insurance — Catastrophic impairment — Extent of impairment — Serious impairment of important physical or psychological function

Insured was injured in motor vehicle accident — Insured complained of chronic neck, back and shoulder pain; continuous headaches; severe fatigue and exhaustion; severe stress and anxiety; frustration/depression; poor sleep; and cognitive problems including difficulties focusing, concentrating and remembering — Insured brought action against insurer — During jury deliberations, insurer brought motion to dismiss action on ground that insured had not suffered permanent impairment — Motion dismissed — Insured suffered from permanent impairment — Impairments of insured were serious and impacted upon all facets of her well being and her ability to maintain normal healthy body, lifestyle, career and home — Accident produced chronic, daily symptoms including pain that could vary in intensity but seriously limited her physical functioning — Evidence existed upon which jury could find that insured's ability to obtain and maintain employment suiting her education, training and experience was compromised after and by reason of physical, psychological and/or psychiatric injuries brought about by accident, as well as problems with social life — Insured was unable to maintain proper housekeeping and living quarters were in state which constituted safety and hygiene issues — Insured unlikely to return to pre-accident levels of functioning.

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Cases considered by *Moore J.*:

Kayhan v. Greve ([2011](#)), [2011 CarswellOnt 663](#), [2011 ONSC 872](#) (Ont. S.C.J.) — referred to

Lento v. Castaldo ([1993](#)), (sub nom. *Meyer v. Bright*) [17 C.C.L.I. \(2d\) 1](#), (sub nom. *Meyer v. Bright*) [15 O.R. \(3d\) 129](#), (sub nom. *Meyer v. Bright*) [48 M.V.R. \(2d\) 1](#), (sub nom. *Meyer v. Bright*) [67 O.A.C. 134](#), (sub nom. *Meyer v. Bright*) [110 D.L.R. \(4th\) 354](#), [1993 CarswellOnt 51](#) (Ont. C.A.) — followed

Statutes considered:

Automobile Insurance Rate Stability Act, 1996, S.O. 1996, c. 21

Generally — referred to

Insurance Act, R.S.O. 1990, c. I.8

Generally — referred to

MOTION by defendant to dismiss action arising out of automobile accident.

***Moore J.*:**

1 Ms Mader was involved in a motor vehicle accident on 11 May 1998. She brings this action for damages arising from that accident and asserts that her ongoing limitations are permanent serious impairments of important physical, mental or psychological function, within the meaning of those terms as used in the *Insurance Act*.

2 She testified that she stopped her car, first in line for a red light, on Walker Road and was struck from behind. Ms Mader recalls striking her head on the back of the seat of her car. She was not unconscious. Her recall for the circumstances surrounding the accident is intact. Almost immediately, she felt that she was in shock and her head was throbbing.

3 She was seen, examined and treated after this accident and over the years since. She has described persistent complaints, both physical and mental, including:

- chronic neck, back and shoulder pain;
- continuous headaches;
- severe fatigue and exhaustion;

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- severe stress and anxiety;
- frustration/depression;
- poor sleep; and
- cognitive problems including difficulties focusing, concentrating and remembering

4 This action proceeded to trial before a jury on 9 January 2012, over 13 years after the accident. The trial continued through 11 days, during which Ms Mader insisted, both personally and in the evidence lead from other witnesses and in cross examination of defence witnesses, that she suffered significant, ongoing physical and psychological injury and damage and that the universe of complaints that she has voiced over the years since the accident confirm the permanence, seriousness and importance of her limitations.

5 Following the closings and jury charge, while the jury was deliberating, defence counsel brought this motion to establish whether the plaintiff's claims are barred by the applicable threshold established under Bill 59.

6 My task is to answer questions that were not specifically asked of the jury. I will assess the plaintiff's entitlement to non pecuniary damages despite rather than because of what I might suspect may motivate the jury in answering its jury questions.

Background

7 Ms Mader testified that she was a well woman, a high functioning person before the accident. She attended upon her family doctors with various complaints over the years but none so significant that she was unable to function at school, at work or in her personal life for more than a few days at a time.

8 Shortly before this car accident, Ms Mader suffered a fall on stairs in a Leon's store and sprained an ankle. This injury cost her time from work and ongoing pain and limitations but this injury is otherwise irrelevant to the injuries and limitations that followed from this car accident.

9 Ms Mader was also injured in a single vehicle accident in February of 2005. She suffered a broken clavicle and went on to experience a frozen shoulder as a result. Those injuries may be relevant to the jury in connection with its assessment of certain of the damages claims but the evidence that I heard and accept does not connect ankle or shoulder injuries with the neck and back injuries resulting from the accident of 11 May 1998 or the chronic pain complaints that flow from them.

10 Incorporated by reference into this endorsement is the description of the evidence at trial given by Ms Mader and the expert witnesses. I will not repeat that description again here.

11 Throughout her examination I found Ms Mader to be largely flat of affect, quiet and sad looking. She was

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responsive and polite. She was animated times and demonstrated a sense of humour. She was articulate and showed no significant problems with concentration, fatigability, cognitive or physical dysfunction; but she did sit in a slouched position through much of the time she occupied the witness stand. She often held her neck as though in pain but she did not complain of pain or discomfort, except in response to questions asked of her. She did not embellish her answers. If anything, she downplayed her description of her life and limitations after the accident of 11 May 1998 and particularly was this evident in her description of her home life. She spoke very little of the cluttered condition of her home. She was vague on historical matters, at times, but that's not surprising given that she was taken to so many insignificant events occurring as far back as 20 years ago.

12 I am satisfied that Ms Mader has provided this court with credible and helpful evidence of her functioning in her home, work, social and recreational environments before and after the accident of 11 May 1998. Her complaints of chronic pain, fatigability, insomnia and cognitive functioning difficulties, among others, are extensive and are documented in the notes and records of the many doctors she has seen about them over the years and they are supported by the observations in evidence from her former employer and her friends and neighbor.

13 There is evidence upon which the jury may find that Ms Mader's ability to obtain and maintain employment suiting her education, training and experience has been compromised after and by reason of physical, psychological and/or psychiatric injuries brought about by the accident. I accept the evidence of Ms Mader and her former employer, Mr Rankine, that she has not been able to function in the workplace at the high level of enthusiasm, efficiency and productivity that she had done before this accident and I find that this change is as the result of her chronic complaints following and produced by the May 1998 accident. Whether or to what extent this dysfunction will translate into damages in the collective mind of the jury is not yet known, but I am satisfied that the dysfunction is significant and ongoing.

14 So too is the impact of Ms Mader's physical and psychological injuries and limitations upon her ability to engage her friends and family in meaningful, mutually rewarding life experiences. She is quite reclusive now. She is unable to enjoy the social and recreational pursuits of the variety, frequency and intensity that she could and did do before this accident.

15 Perhaps more importantly, this case is marked by the consistent, compelling and tragic evidence describing the dramatic change in Ms Mader's ability to maintain her home after this accident to a standard of normal, tidy house-keeping that she was able to manage before.

16 Over the years, her home has become cluttered by papers, boxes, clothing and even food waste such that it is more than cosmetically unattractive; now it presents very real safety and hygiene concerns that Ms Mader's psychological condition prevents her from appreciating and correcting. This situation has not, in my view upon the whole of the evidence, been the result of compulsive behaviour on the part of the plaintiff to acquire and hoard items, but rather an inability to sort through her possessions and discard those things that she does not need or use and organize those remaining as a normal, tidy housekeeper would do.

17 Dr. Doxey provided his opinions as a psychologist. He opined that Ms. Mader met the diagnostic criteria for a diagnosis of "pain disorder due to psychological factors — chronic" (lasting more than six months). He described three

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types of pain disorder:

- pain due to physical factors or a general medical condition;
- pain due to psycho emotional factors without a physical basis; and
- pain due to a combination of both physical (organic) and psychological factors. This, he called a mixed type of pain disorder.

18 Dr. Doxey also diagnosed an "adjustment disorder with mixed anxiety and depressed mood — chronic". Over time he revised his diagnosis to remove anxiety from its scope but it has remained otherwise the same over the many years of his involvement with Ms Mader.

19 Dr. Doxey concluded that the triggering event for largely all of the consequences that followed after the 1998 accident arose from that accident.

20 Dr. Abrams is a psychiatrist. She examined Ms Mader and she diagnosed adjustment disorder with mixed depression and anxious mood — chronic — of moderate severity; and pain disorder — chronic — associated with general medical condition and psychological factors. The two psychiatric conditions that she diagnosed were brought about by the 11 May 1998 car accident and injuries. She said this was a major factor.

21 Following her second assessment, made just a few months before trial, Dr. Abrams diagnosed a pain disorder again and a major depressive disorder; she said that Ms. Mader was currently in a major depressive episode — chronic.

22 The diagnosis of a major depressive disorder is made where the patient presents with a major depressive episode for a minimum of two weeks characterized by several symptoms including depressed mood or markedly depressed loss of interest or pleasure in most activities, psychomotor agitation or retardation, inability to concentrate, indecisiveness, decreased appetite, insomnia, fatigue or low energy, feelings of worthlessness, low self-esteem or guilt and suicidal thoughts.

23 Dr. Abrams said that only five of these criteria were needed to support the diagnosis and that Ms. Mader satisfied at least seven in November of 2011.

24 Dr. Abrams agrees with the very similar diagnoses given by Dr. Doxey, the psychologist, but she goes further to speak to the general medical condition that was diagnosed and treated by Dr. Kerr, Dr. Bernholtz and Dr. Wong, including fibromyalgia, myofascial injuries, chronic pain and chronic fatigue syndromes and a whiplash disorder.

25 Dr. Abrams sees a very poor prognosis because of the passage of time dealing with symptoms and the fact that there had been no improvement over time and with treatment.

26 For purposes of this decision, I accept the evidence of Drs. Kerr, Bernholtz, Doxey and Abrams that Ms Mader

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has suffered chronic, disabling symptoms and diagnosable disorders following and as the result of the accident of 11 May 1998. I also accept the opinions of those doctors that predict that Ms Mader is most unlikely now to ever return to her pre-accident level of functioning.

27 Dr. Tafler, a psychiatrist who saw Ms Mader in 2006, at the behest of the defendant, was not cross examined at trial; rather, in the interests of expediting the trial process, counsel agreed to file redacted versions of Dr. Tafler's medical legal reports.

28 Dr. Tafler concluded from her review of medical records that Ms Mader suffered a concomitance of chronic pain and emotional distress before the car accident of May 1998. After the accident, physical symptoms evolved and took over her life.

29 Dr. Tafler diagnosed an undifferentiated somatoform disorder that existed before the accident and continued in a fluctuating, chronic fashion over the years.

30 Dr. Tafler's opinion notwithstanding, I agree with Dr. Bushuk who stated that a doctor who has the opportunity to examine and assess the patient is better able to provide an opinion than is someone who has just read file materials. Seeing the patient and seeing the patient repeatedly are both important, he testified.

31 Drs. Kerr and Bernholtz saw Ms Mader many times in the months and years immediately surrounding the time of this accident. Dr. Kerr was taken through her clinical notes and records, beginning with her first note on 17 April 1989. Dr. Kerr has known Ms Mader personally and professionally for almost 23 years. She reviewed allergy related and other symptoms, including anemia, some complaints of pain and repeated complaints of stress produced exhaustion, sleep disruption and headaches over the years leading up to the time of the car accident in May of 1998. Overall the plaintiff's health was generally good, she said.

32 There was a certain pattern of problems of aches and pains and the plaintiff was under a lot of stress and not sleeping enough but she was functioning and very busy. This was the result, Dr. Kerr concluded, of life style choices and a very busy schedule.

33 In my view, there is no basis in the evidence of the doctors that actually saw and treated Ms Mader before and after the accident to conclude that she was anything other than an active and high functioning person before this accident. I prefer the evidence of Drs. Kerr and Abrams to the impression that Dr. Tafler took from her review of the medical records, some of which did not become evidence at this trial. I do not accept Dr. Tafler's professional opinion that Ms. Mader demonstrated a tendency before this accident to have physical complaints in excess of what would be expected or that she would have gone on to the life experience, the limitations and complaints that were described in the evidence at this trial.

34 I cannot explain the obviously different findings made by Drs. Wong and Bushuk on their physical examinations regarding tightness in the muscles of Ms Mader's neck and back except to say that it tends to prove the accuracy of my view that a physical examination is not an exact science. There clearly is a subjective element of examiner interpretation at play in assessing muscle tone or tightness on palpation. There may also be an element of examiner

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bias. Whereas Dr. Wong found moderate tightness in muscles, Dr. Bushuk found none.

35 It must be said that I found Dr. Bushuk to be overly loquacious throughout his evidence and he was argumentative and somewhat unresponsive in cross examination. He found Ms Mader to be an inconsistent historian regarding information she apparently gave to certain unnamed medical examiners over the years, as recorded in the file materials Dr. Bushuk reviewed. He compared the extent of the property damage to her car recorded in the file to the information Ms Mader actually gave him. He referred to these discrepancies about nine times in his defence medical legal report despite the fact that the information Ms Mader gave him was, he eventually, reluctantly admitted in cross examination, accurate and he knew it. His objectivity and impartiality was damaged by this exchange and by the manner in which he comported himself in general in the course of his testimony.

36 In the result, where Dr. Bushuk's findings and opinions differ from those of Dr. Wong and the other medical doctors whose views concur with Dr. Wong's, I must accept the latter over those of Dr. Bushuk in this matter.

Analysis

37 The issue before this court is whether the plaintiff has sustained impaired functioning as a result of her accident so as to overcome the prohibition against suing the driver and owner under Bill 59 enacted under the *Insurance Act*. Bill 59 was applicable to motor vehicle accidents which occurred in Ontario at the time of the accident in question, in May of 1998. Although the jury has not yet spoken in answer to the liability questions on negligence issues, for purposes of this decision, I will assume that there will be a determination of a degree of liability on the defendant, a likely outcome given the fact situation here and the fact that the defendant did not give evidence and none was otherwise lead for the defence.

38 The statutory bar provides immunity for the "at fault" party from liability unless the plaintiff can satisfy the court on a balance of probabilities that she has sustained...

(a) Permanent serious disfigurement; or

(b) Permanent serious impairment of an important physical, mental or psychological function.

The issue on this motion deals with part (b) of this exemption.

[\[FN1\]](#)

39 The leading authority on the interpretation of the "threshold" under Bill 59 is [Lento v. Castaldo](#), 1993 CanLII 3389, (1993), 15 O.R. (3d) 129 (Ont. C.A.). There, the court articulated the three questions which must be posed when considering whether a plaintiff has fallen within the ambit of one of the statutory sections relevant to this action. Those questions are:

a. Has the injured person sustained a permanent impairment of a physical, mental or psychological function?

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b. If yes, is the function one which is permanently impaired an important one?

c. If yes, is the impairment of the important function serious?[\[FN2\]](#)

40 Clearly, Ms Mader is convinced that she suffered a permanent impairment of the physical functioning of her brain. The medical evidence that I accept and value demonstrates that she suffered myofascial injuries to her neck and back that have been resistant to recovery over time and treatment. I further find that Ms Mader has acquired a chronic pain syndrome and a chronic fatigue syndrome which manifest in pain plus resultant sleep deprivation, fatigue, difficulty with concentration and the functional limitations that such symptoms produce.

41 The medical evidence clearly does establish that Ms Mader has, on the basis of a balance of probabilities, suffered a permanent impairment of a physical function. In addition to the limitations of the physical functioning of her neck, back and arms through normal movements of the kind required to lift relatively heavy objects, to vacuum, to ride a road bike, to comfortably drive a car or walk up a flight of stairs without becoming winded, for example, Ms Mader's brain is not functioning normally so as to allow her to plan, organize, implement and sustain activities of employment and/or to maintain an orderly, uncluttered home.

42 The plaintiff has established a permanent impairment of physical, psychological and mental functioning.

43 There can be no doubt that the physical, mental, psychiatric and psychological functions that are impaired in this case are chronically and at this point, thirteen and a half years post accident, permanently impaired.

44 In my judgment, the impairments at issue are important, not only to the plaintiff but to any person. Ms Mader's ability to undertake the usual activities of daily living, to obtain and maintain meaningful and financially rewarding employment in a competitive, business environment as she had done before this accident are important to her and are clearly impaired. It is a credit to her work ethic and attempts to mitigate her losses that Ms Mader has tried to work in office settings, from her home, on full time and on part time bases since this accident but she has fallen far short of her former functioning. I accept Dr. Doxey's prognosis that this pattern of vocational limitations is not likely to change in the future.

45 Ms Mader's social and recreational pursuits are important to her and they are clearly impaired. She had been an active woman in all facets of her life but is now living a quite reclusive, lonely and inactive life. This too is unlikely to change.

46 The impairments in this case are very serious indeed. They impact upon all facets of Ms Mader's well being and her ability to maintain a normal healthy body, lifestyle, career and home. Upon the whole of the evidence, I conclude that the accident of 11 May 1998 has produced chronic, daily symptoms including pain that can vary in intensity but that is weather and activity sensitive such that it seriously limits Ms Mader's physical functioning. In addition, the limitations that result from her chronic pain and chronic fatigue syndromes, as described above, are serious and impact all too many aspects of her physical and mental functioning. She is left with abilities to undertake and even enjoy

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many activities to various, though unpredictable, degrees on various days but she cannot enjoy consistent completion and enjoyment of the normal activities of daily living.

47 Therefore, the defendant's motion fails.

Motion dismissed.

[FN1](#) *Kayhan v. Greve*, [2011 ONSC 872](#) (Ont. S.C.J.) at paras. 4 & 5

[FN2](#) *Bid at para 24*

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