COURT FILE NO.: 3948-06
DATE: 2009/01/07

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

MELISSA MURCELL

Plaintiff

- and –

ANIK LECLAIR and PIERRE LECLAIR

Defendants

REASONS FOR JUDGMENT

The Honourable Mr. Justice Norman M. Karam

Released: January 8, 2009

COURT FILE NO.: 3948-06
DATE: 2009/01/08

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
MELISSA MURCELL	T. Lever, for the Plaintiff
Plaintiff	
- and -	
ANIK LECLAIR and PIERRE LECLAIR	D. Lynn Turnbull, for the Defendants
Defendants	
	HEARD: December 11, 2008.

The Honourable Mr. Justice Norman Karam

[1] This is a motion brought by the defendants for an order declaring that the plaintiff did not sustain a permanent and serious impairment of an important physical, mental or psychological function pursuant to S. 267.5 (5) of the Insurance Act and hence is excluded from bringing this action; the motor vehicle collision in question occurred May 22, 2005, so it is governed by Bill 198.

[2] This motion was brought after the jury had retired to render its verdict. I was unable to consider and complete my ruling before the jury returned, so the ruling was reserved.

[3] The plaintiff sued for damages for pain and suffering arising from soft tissue injuries, loss of future income and the cost of future housekeeping expenses. Liability was an issue at trial. The trial lasted nine days.

[4] The jury returned with its verdict, dismissing the action on the basis of liability, awarding general damages of $37,000, nothing for future loss of income and $10,000 for future housekeeping expenses. Although my ruling is therefore redundant, I have been requested to provide it, in the event that an appeal is undertaken.

[5] The plaintiff, who is a qualified child and health care worker, was injured while traveling by car from her job in the village of Loring to her home in North Bay, about an hour's travel. She had been employed at a lodge for young children suffering from behavioural problems for about six months by that time. She was a passenger in a vehicle operated by the defendant Anik Leclair, a co-worker, which struck a moose. The plaintiff did not suffer a loss of consciousness, abrasions or cuts and was able to remove herself from the vehicle without assistance. However, as a result of soft tissue injuries, she did not return to her job and within about six months of the accident, her employer permanently closed down its operation for unrelated reasons, so that the position was no longer available to her.

[6] Since the collision, the plaintiff, who is now 26 years old, has not worked in any capacity, nor has she made any attempt to seek employment. She was married within a year of the accident and moved to Lasarre P.Q. shortly thereafter, to follow her husband's career, as a helicopter mechanic. She gave birth in May of 2007, about two years post-accident, and has been a "stay-at-home" mother since that time. She is presently pregnant again and is scheduled to give birth to a second child in May of 2009.

[7] Although maintaining that she has been unable to work since the accident, particularly because of disabling pain in her low back and right hip, she testified that it had always been her intention to remain at home for a year, after the birth of each of her children. At trial, three and one-half years after the accident, she stated that she now feels that she is capable of working regularly, but only on a part-time basis; however, opportunity for employment in Lasarre is hindered by her inability to speak French. Therefore, she intends to wait to seek employment until she and her husband move to Montreal, at some undetermined point in the future, after the birth of their next child. In the meantime she has continued to receive accident benefits throughout.

[8] At trial, she complained of continuous headaches, back pain in the lumbar region of her spine and right hip pain. Both she and her husband testified that her pain and an accompanying lack of mobility have interfered with her ability to participate fully in activities with their infant son, although she appears to manage, with difficulty. Similarly, she described an inability to do heavy household chores, such as snow removal, grass-cutting and heavy lifting but otherwise seems to complete other household tasks without outside help, again with difficulty. Because of his job, her husband is away for thirty-day periods, so during those periods she has had to perform household duties and childcare largely on her own.

[9] From a recreational standpoint, she stated that she is unable to walk for periods longer than an hour, whereas she had previously been able to walk for at least three hours at a time. She finds it too painful to ride a snow machine with her husband, although she is able to go boating in the summer. Generally, she finds that she is unable to be as physically active as she had been pre-accident, although she left the impression that there were few recreational pursuits, other than hiking in which she had been involved.

[10] She has been treated with several courses of physiotherapy treatment, massage, exercise programs, chiropractic treatment, and psychological counseling; in addition, she has undergone extensive testing, including bone scans, x-rays, MRI's, ultra sounds and blood tests, the results of which were primarily negative.

[11] The plaintiff has been examined by numerous medical doctors, including her treating physicians, Dr. E. D. Vaughan and a general practitioner from LaSarre, Quebec, Dr. Sylvie Wattele; Drs. D.J. Olilvie-Harris, and Jordi Cisa, experts in the area of orthopaedics, were retained by the plaintiff; Dr. Ian Blackstone, also an orthopaedic surgeon saw her for her accident benefits insurer; and Drs. Richard Tarek-Kaminker, also an expert in orthopaedics and Benjamin Clark, a physiatrist, were both retained by the defendant. In addition, reference was made to an examination and report of Dr. Thomas Wallace, a general surgeon.

[12] Dr. Ogilvie–Harris diagnosed soft tissue injuries to the lumbar spine, which he thought probably radiated into her right hip. He was of the view that by the time of trial, three and a half years post-accident, the plaintiff's symptoms and complaints had become permanent. He attributed her ongoing condition to a congenital abnormality, caused by certain transverse processes which results in the spine being more rigid than otherwise and accordingly causes her to be more susceptible to injury from trauma. He purported to find objective proof of his diagnosis because of a decreased range of motion and some abnormal imaging in the area of her sacroiliac joint and lower lumbar region discovered in the early stages of her recuperation. The decreased range of motion, and the imaging which was not described, were unconvincing and inconsistent with the findings of other medical experts. Significantly, Dr. Ogilvie-Harris also testified during his examination in chief, "Now, in my case, I accepted what she told me. If she lied to me, if she told me things which are not true, my conclusion would be different", leading to the conclusion that his conclusions were actually based upon subjective complaints.

[13] Her condition, he testified, had and would continue to restrict her ability to bend, lift, turn or run. He felt that because of pain when attempting to do these activities she would therefore be unable to carry out heavier household chores, recreational activities and would be relegated to activities that are sedentary in nature. Her disability would prevent her from working in her former employment, although he conceded that he was not familiar with the demands of her pre-accident employment. Although there seemed to be a general consensus among all of the doctors that the greatest danger would be created by having to restrain ten to twelve year old children, no other specific concerns were raised. In fact, Dr. Clark was of the view that her duties as a child and health care worker were very similar to her normal household responsibilities, which she has been able to complete, albeit with some difficulty. It was pointed out that in the six month period

during which the plaintiff had worked in that capacity, she had never encountered a situation requiring her to restrain a ten or twelve-year old.

[14] There appears to be no question that the plaintiff's impairment results from the accident, since she had been healthy and active before that. Dr. Ogilvie-Harris concluded that the impairment was serious because the pain involved in the movement earlier mentioned, interfered substantially with her day-to-day recreational, social and work-related activities. Counsel pointed out, and I agree, that his description of loss of function was extremely vague and accordingly was unconvincing. This is especially so, in light of the opinions of Drs. Clark and Tarek-Kaminker that there has been no loss of function.

[15] Dr. Blackstone whose medical report was filed by the defendant, examined the plaintiff in October of 2005, five months after the accident, and found that she had a minor neck strain, a minor lumbar strain and a contusion around her right thigh, which resulted in right trochanteric bursitis. This latter injury he concluded caused a "minor impairment" Together with medication and an injection of cortisone to the right trochanteric bursa, he suggested an exercise program. His prognosis for a complete return to work was "very favourable".

[16] Drs. Tarek-Kaminker and Dr. Clark examined the plaintiff in 2008. They made the same diagnosis as Dr. Blackstone had, and felt that by the time that they conducted their examinations, all injuries had resolved, with the exception of a right trochanteric bursitis. Each of them was satisfied that a single cortisone injection, in conjunction with an exercise program, would resolve the plaintiff's complaints, and that she was capable of returning to work immediately.

[17] In addition, Dr. Clark testified that he found upon examination that the plaintiff's responses to certain touching of her back were inconsistent and inappropriate to her complaints and therefore challenged her credibility. A similar finding, it was put to him, had been made by another doctor, Thomas Wallace, who had examined the plaintiff on an earlier occasion.

[18] Dr. Ogilvie-Harris disagreed with the cortisone treatment suggested because in his view there was no evidence of trochanteric bursitis and therefore a cortisone injection was unnecessary to treat her injuries as he had diagnosed them. Dr. Vaughn, her family doctor, complained of not being informed until too late that Dr. Blackstone had proposed this treatment and was of the view that one could never be certain whether such a treatment would resolve the problem. He stated however that it was the patient's decision. Dr. Watelle, who saw the plaintiff once in December of 2007, at the referral of her family doctor in Lasarre, apparently for that very purpose, was of the view that an injection of cortisone should first await the outcome of physical treatments. Accordingly, on that occasion, she had ordered massage and chiropractic treatment, which to that point had not been tried. The plaintiff has not returned to see Dr. Watelle.

[19] In assessing the evidence with respect to the plaintiff's condition, her credibility is an important consideration, since her injuries are soft tissue in nature and her complaints almost completely subjective. In that respect, she made three different pre-action approximations of the defendant's speed at the time of the accident, inconsistent with her evidence at trial, and offered no credible explanation for the difference. Both Doctors Clark and Wallace felt that her

responses to pressure applied to her lower back during physical examination were inconsistent and inappropriate. Dr. Clark, whose evidence impressed me, challenged the validity of her complaints on that basis. In fact, her complaints appear to be out of proportion to her capabilities. Although she has made no effort to find employment, even from her own evidence she is now capable of returning to work, albeit on a part-time basis. Despite her complaints, she has managed to cope with her injuries in performing household chores and in childcare with little outside help and for lengthy periods, by herself.

[20] The test with respect to the "threshold" was provided in *Meyer v. Bright* (1993), 15 O.R. (3D) 129, in accordance with the legislation as it then was, and is as follows:

1. Has the injured person sustained permanent impairment of a bodily function caused by continuing injury which is physical in nature?

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

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

[21] The onus rests upon the plaintiff to bring herself within the exemptions listed in S.267.5 (5). For the purposes of the legislation as amended, ss. 4.1 and 4.2 of Reg. 381/03, appear to codify the existing common law, including definitions of the factors to be considered. I find on the basis of the medical evidence and of the plaintiff herself, as well as the members of her family who testified, that she was a normal healthy individual prior to the accident. Therefore the impairment, the soft tissue injuries of which she complains, results from the accident. Furthermore, I am satisfied upon the evidence that the soft tissue injuries suffered by the plaintiff, whether located in the right hip or in the area of the lower spine, and whether resolvable with an injection of cortisone or not are "important" as the term is defined in the regulation.

[22] The real issue to be considered is whether the impairment is "permanent". For that purpose, S. 4.2(1)3 provides in part that the impairment must "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".

[23] Aside from the evidence of Dr. Ogilvie-Harris, who felt a cortisone injection to be unnecessary, Dr. Vaughn who did not offer an opinion, and Dr. Watelle who preferred to delay that treatment, all of the medical practitioners who examined the plaintiff were of the view that a single cortisone injection to the right trochanteric bursa, in combination with an exercise program, would probably resolve her symptoms. Dr Clark felt that such treatment would completely eradicate them. All of the doctors, without exception, were of the view that there was a very slight risk, if any, associated with using this treatment.

[24] However, the plaintiff has refused to undergo the cortisone treatment, apparently a relatively simple and safe medical procedure, because she claims concern about the risk of long-term effects, a conclusion reached after conducting her own research on the internet and contrary to the view of all of the numerous doctors who testified at this trial who described any risk as miniscule. Her position in this respect reflects upon her credibility and makes little sense.

[26] Considering the plethora of other treatments, tests and medical examinations that she has undergone and the cost, time and inconvenience involved, Dr. Ogilvie- Harris' opinion that it was unnecessary to have her try this rather simple and safe procedure is very difficult to understand. This is especially so, in view of Dr. Clark's opinion that the treatment would totally eradicate the plaintiff's complaints. In light of my concerns with respect to the credibility of the plaintiff, and the vagueness of the objective proof to which he referred, I find that I must reject his conclusions where they differ from the other doctors, particularly Drs. Clark and Tarek-Kaminker, whose opinions as to diagnosis, treatment and prognosis I accept.

[27] Accordingly, there being no credible reason for the plaintiff to refuse to undergo the procedure, which according to much of the evidence in this trial is likely to succeed, I find her refusal to do so, unreasonable. Accordingly, she has failed to satisfy the requirements of S. 4.2(1)3, in order to establish that her impairment is permanent.

[28] For similar reasons, I am not satisfied that her impairment substantially interferes with either her "ability to continue her regular or usual employment" as a child and health care worker or "with most of the usual activities of daily living, considering her age". The plaintiff, without any attempt to see what her limits are to work, testified that she is able to do so, but only on a part-time basis. There was no satisfactory evidence to support this view and no sufficient reason why she could not do so on a full-time schedule, other than her inability to speak French which cannot be the responsibility of the defendants.

Drs. Clark and Tarek-Kaminker were of the view that she is able to work full-time. Although Dr. Ogilvie-Harris disagreed, he did not apply his opinion to the actual job requirements of the position. There was reference made to the possibility of having to subdue an older child; considering the infrequency with which this happens, the ability to compensate for it, it does not impose a realistic impediment.

With respect to the usual activities of daily living, aside from the strenuous activities such as snow shoveling, grass-cutting and heavy lifting, the evidence demonstrated that she can perform her other activities, with some difficulty. On the evidence, not only is she able to carry out almost all of her normal activities, but I am satisfied that there has not been a significant effect upon her enjoyment of life. Accordingly, I do not accept that her impairment 'substantially" interferes "with most of the usual activities of daily living, considering the person's age".

[29] The plaintiff has therefore failed to discharge the onus of satisfying the threshold on a balance of probabilities. The record will be endorsed "In accordance with the verdict of the jury, action dismissed. The matter of costs may be spoken to, on four days' notice."

The Honourable Mr. Justice Norman Karam.

Released: January 8, 2009