CITATION: Johnston v. Walker, 2017 ONSC 3494
COURT FILE NO.: CV-10-100148
DATE: 20170612

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Carmen Johnston	)	
	)	Andrew R. Kerr, for the Plaintiff
Plaintiff	)	
	)	
– and –	)	
	)	
Allen Walker and Sandra Walker	)	David Merner, for the Defendants
	)	
Defendants	)	
	)	
	)	
	)	**HEARD:** May 23- 31, 2017

REASONS FOR DECISION

CHARNEY J.:

Introduction

[1] This case involves a claim for personal injury by the plaintiff Carmen Johnston arising out of a motor vehicle accident on July 20, 2008. Liability in the action was admitted by the defendant. There is no dispute that the plaintiff was injured in the motor vehicle accident and was diagnosed with whiplash. The dispute related to the seriousness and the duration of the injury. The issues at trial were limited to causation and damages.

[2] Following my oral ruling on May 30, 2017 (with written reasons provided on May 31, 2017) the only question that went to the jury was: In what amount, if any, do you assess the damages of the plaintiff, Carmen Johnston, arising out of the accident on July 20, 2008, for general damages (pain and suffering and loss of enjoyment of life).

[3] At trial the plaintiff sought general damages of $200,000, while the defence position was that general damages should be assessed in the range of $15,000 to $20,000.

[4] While the jury was deliberating the defence brought what is commonly referred to as a "threshold motion" for a declaration that the plaintiff's claim for non-pecuniary loss is barred on the basis that the plaintiff has failed to establish on the evidence that as a result of the collision she has sustained a permanent, serious impairment of an important physical, mental or psychological function. Only if she meets this threshold does she fall

within the exceptions to the statutory immunity provided for in s. 267.5(5) of the *Insurance Act*, R.S.O. 1990, c. I.8 (the Act) and the applicable regulations and thereby entitled to a non-pecuniary damages award.

[5] On June 1, 2017 the jury returned its verdict and awarded the plaintiff $60,000 for general damages. After taking into account the current deductible provided in the regulations this would entitle the plaintiff to non-pecuniary damages in the amount of $22,614.83 if she meets the statutory threshold.

The Legislative Scheme

[6] The relevant statutory and regulatory provisions to be applied in determining the threshold are contained in sections 267.5 of the Act and sections 4.1, 4.2 and 4.3 of O. Reg. 461/96 as amended by O. Reg. 381/03.

[7] Sections 267.5(5)(a) and (b) of the Act provide that the owner of an automobile is not liable in an action in Ontario for non-pecuniary loss resulting from bodily injury unless the injured person has sustained "permanent serious disfigurement" or "permanent, serious impairment of an important physical, mental, or psychological function." It states:

> **Non-pecuniary loss**
>
> (5) Despite any other Act and subject to subsections (6) and (6.1), the owner of an automobile, the occupants of an automobile and any person present at the incident are not liable in an action in Ontario for damages for non-pecuniary loss, 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.

[8] The regulation helps to define what is meant by the threshold wording contained in s. 267.5 of the Act by defining the meaning of the words "permanent serious impairment of an important physical, mental or psychological function". Sections 4.1, 4.2 and 4.3 of O. Reg. 461/96 (as amended by O.Reg.381/03) provide as follows:

> 4.1 For the purposes of section 267.5 of the Act,
>
> "permanent serious impairment of an important physical, mental or psychological function" means impairment of a person that meets the criteria set out in section 4.2.

4.2 (1) 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.

(2) This section applies with respect to any incident that occurs on or after October 1, 2003.

[9] This regulation also sets out the expert medical evidence which must be adduced to prove that the statutory exception or "threshold" has been met.

Evidence Adduced to Prove Permanent Serious Impairment of an Important Physical, Mental or Psychological Function

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.

(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.

(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.

(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.

(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.

(6) This section applies with respect to any incident that occurs on or after October 1, 2003.

The Law

[10] In *Malfara v. Vukojevic*, 2015 ONSC 78, Firestone J. set out a summary of the relevant jurisprudence relating to threshold motions, and the principles to be considered and applied by the court. In *Ayub v. Sun*, 2015 ONSC 1828, Diamond J. set out the highlights of this summary as follows:

- In rendering its threshold decision, the Court is not bound by the jury verdict. However, the verdict is nevertheless a factor the trial judge may consider in determining the issues on the threshold motion. See: *DeBruge v. Diana Arnold*, 2014 ONSC 7044 (CanLII), 2014 ONSC 7044 (S.C.J.) at para. 10.

- The burden of proof to establish that the plaintiff's impairments meet the statutory exceptions or "threshold" rests squarely with the plaintiff. In *Meyer v. Bright* (1993), 15 O.R. (3d) 12 (C.A.), the Court set out the following three part inquiry:

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

  (b) If yes, is the function impaired important?

  (c) If yes, is the impairment of the important function serious?

- While the word "permanent" does not mean forever, it nevertheless requires that the impairment last into the indefinite future as opposed to a predicted time period with a definite end. Put another way, permanent impairment means the sense of a weakened condition lasting into the indefinite future without any end or limit. See: *Brak v. Walsh*, 2008 ONCA 221 (CanLII) and *Bos v. James* (1995), 22 O.R. (3d) 424 (Gen. Div.).

- The test of whether the impaired function is "important" is a qualitative test. See: *Page v. Primeao*, 2005 CanLII 40371 (ON SC), at para. 32.

- The determination of whether the impairment of an important bodily function is "serious" relates to the seriousness of the impairment to the person and not to the injury itself. See: *Mohamed v. Lafleur-Michelacci,* [2000] O.J. No. 2476 (S.C.J.) at para. 56.

- When assessing whether the degree of impairment in the Plaintiff's daily life necessary to be "serious", the degree of impairment must be beyond tolerable. See: *Frankfurter v. Givons* (2004), 74 O.R. (3d) 39 (Div.Ct.) at paras. 22-24.

[11] In *Meyer v. Bright* the Ontario Court of Appeal held (at paras. 70 and 93):

> Because it is only serious impairment which will qualify as an exception under s. 266(1)(b) it is apparent that the Legislature intended that injured persons are required to bear some interference with their enjoyment of life without being able to sue for it.

[12] This observation has been repeated in several cases since. See for example *Malfara* at para. 28, *Girao v. Cunningham*, 2017 ONSC 2452 at para. 43.

[13] In this regard it is instructive to consider the facts set out by the Ontario Court of Appeal in *Meyer v. Bright*. In that case the Court dealt with a number of factual scenarios. In one the plaintiff complained that after the accident she could walk recreationally for only 30 minutes a day and in good weather whereas before the accident she walked more quickly and for much longer periods regardless of weather. After walking she had pain and swelling in her foot and ankle. The Court of Appeal concluded (at paras. 69-70) that while this qualified as a permanent impairment of an important bodily function the detrimental impact was not of such a degree that it would qualify as a serious impairment.

[14] In a second scenario the evidence indicated that the plaintiff was no longer able to do gardening, snow shovelling and cutting the grass and she had to adjust her shopping habits, buying small amounts of groceries on a more frequent basis. She also had to do the indoor activities like vacuuming at a slower pace and could no longer clean windows or wash curtains. Again the Court of Appeal concluded (at paras. 92, 95) that while the impairment of the plaintiff's important bodily functions had impacted detrimentally upon her life, it was not of such a degree that it would qualify as a serious impairment

The Evidence

[15] Ms. Johnston was 43 years old at the time of the motor vehicle accident on July 20, 2008. She is currently 52 years old.

[16] As a result of the impact of the accident from behind, her head went fully back, forward and then back again. The trunk of her vehicle was smashed in and her car was a "write-off".

[17] She was not in pain immediately after the accident, and did not ask to go to the hospital.

[18] The day after the accident she testified that she felt swelling in the glands around her neck, and she called the chiropractor, Dr. Stewart. Her first appointment with Dr. Stewart was on July 23, 2008. She saw Dr. Stewart for four months – until November 10, 2008 – but testified that she stopped going because she did not like the chiropractor cracking her neck.

[19] She also called her family doctor, Dr. Williams. She was now feeling aches in her neck when she put her head back when showering. Her first appointment with Dr. Williams was on July 28, 2008. She testified that she complained of swelling in her neck, achiness and burning sensation in her neck and shoulder.

[20] Dr. Williams diagnosed Ms. Johnston as having a whiplash injury to her cervical spine.

[21] On August 10, 2008 Ms. Johnston applied for accident benefits from her insurance company. On her application she described the accident and stated: "Within the next day and a half I returned to normal activities".

[22] On August 20, 2008 Ms. Johnston took her younger son – then 8 years old – and his friend to Canada's Wonderland. Since her son did not meet the height requirement, she had to accompany him on the bumper cars. While on the bumper car she was hit from behind, and her head flung back. She felt what she described as "excruciating pain". She testified that the pain was "10+" and between her shoulder blades. She attributed that pain to the earlier injury in the motor vehicle accident. She testified that the pain was so great that they had to go home as soon as the ride was over. Her evidence on this latter point was contradicted by her son. He testified that they remained at the park and he continued to go on rides that did not require adult accompaniment. I am inclined to accept her son's evidence on this point because I believe that having to leave the park early is something that an 8 year old would have remembered for a long time. While this is not a pivotal point, it does indicate that the plaintiff's recollection of events is not entirely reliable.

[23] She saw Dr. Stewart on August 21, 2008. His notes indicate that she was experiencing a sore neck after doing "a few rides" at Wonderland. He testified that she did not describe the pain as "excruciating" or he would have made a note of that.

[24] Dr. Williams referred Ms. Johnston to a physiotherapist, and she began physiotherapy in February of 2009.

[25] Ms. Johnston testified that she found the physiotherapy helpful the first two years. It would improve her range of motion, but it would not last.

[26] The plaintiff testified that she still gets pain in her neck, shoulder and the top of her shoulder blade. The pain tends to move downwards – she described it as "trickling down". She gets a burning sensation in her neck and shoulders at random times, and feels the pain more often when it is damp and cold.

[27] She must sleep on a contour pillow or she gets headaches that affect her range of motion. When she once used a different pillow in 2010 her neck was sore for 3 weeks.

[28] When she drives her car her range of motion is affected – she has difficulty turning from side to side.

[29] Until the year before the accident Ms. Johnston worked for the March of Dimes in addiction counselling, but stopped that work in 2007 because she did not want to drive into Toronto and wanted to stay close to home to care for her children and her husband who had become ill that year.

[30] As of the date of the accident she had two part-time jobs. One was working for a house cleaning service cleaning houses, the other was working as a dispatcher for Mr. Rooter on weekends.

[31] She left Mr. Rooter in September of 2008, but acknowledged that this had nothing to do with the accident. It was weekend work and she wanted to be at home with her children, so she wanted to work only Monday to Friday. In addition, her car was paid off so the extra money was not as important.

[32] Ms. Johnston continued to work for the house cleaning service after the accident until 2010, when she started her own house cleaning business. At one point she testified that she did not enjoy working for one of the house cleaning companies because they hurried people, but she could not recall whether she stopped working for that company before or after the accident. At another point in her testimony she stated that she started her own company because she did not like being rushed, "because when you are rushed you make mistakes". She went right from working for the house cleaning service to her own company because she had clients handed to her.

[33] She also recalled working for a drug and alcohol facility in Stouffville for about a month in 2009. There is no evidence as to why she ended that job.

[34] Ms. Johnston testified that she operated the house cleaning business on her own until 2013 or 2014 when she began cleaning with the help of her boyfriend, Tim, who she started dating in 2013 after her husband died. Occasionally her sons will also help (her younger son testified that he has helped about 5 or 6 times).

[35] She testified that when she was cleaning on her own she would usually clean 1 house per day, and sometimes 2 houses. Now that Tim is helping she sometimes cleans 2 or 3 houses per day. She testified that with two people the work is cut in half, so she can clean more houses. The odd time she will clean just one house per day.

[36] Her business has continued to grow since she started it in 2010.

[37] She testified that as a result of the pain in her neck and shoulder she has had to change her work habits and adapt. For example, instead of using her hand to hold a cloth to clean a mirror she will use a cloth on a stick so she does not have to get up on the counter. Instead of getting into a bathtub to clean it, she will use a swivel sponge on a pole. She cleans the bathrooms, kitchen and does the dusting and emptying to garbage, while Tim usually does the vacuuming, mopping and mirrors. It usually takes about 4 hours to clean a home (2 hours per work each).

[38] She carries the cleaning supplies into the homes from the trunk of her car. These include the vacuum cleaner and various cleaning supplies and buckets. She stated that she does not ask Tim to do everything because she is still very capable. On days that Tim cannot help her she does the vacuuming and the mopping. She stated: "I am capable. I can still do everything I ever did, I just pay for it, it aches more later".

[39] Defence introduced surveillance videos of Ms. Johnston taken in 2015 and 2016. They show Ms. Johnston bending, lifting cleaning supplies and the vacuum cleaner out of the trunk of her car, putting the objects back in the trunk of her car, and carrying the cleaning supplies. She performs all of these activities without assistance and there is no indication that she is in pain.

[40] She plans to continue with her cleaning business until something more secure comes along. The cleaning business is the longest she has ever worked at one job. It has given her financial security. She is also thinking of hiring more staff so she can grow the business.

[41] Her husband passed away in December 2012 after a lengthy illness that began in 2007 and caused a great deal of stress and anxiety in her life.

[42] She testified that apart from stress and anxiety related to her husband's ill health, her pre-accident physical health was good and that she led an active life. She never had any trouble with her neck prior to the motor vehicle accident in 2008.

[43] She participated in recreational activities such as karate, bicycle riding, pilates, taking the children swimming in the summer and going to Canada's Wonderland.

[44] Ms. Johnston testified that she participated in karate classes with her children until 2007. She achieved a yellow belt. On cross-examination she was reminded that in her examination for discovery she had stated that she last participated in karate in 2004, four years before the accident. She testified that she could not now recall when she last participated in karate classes, but did know that it was when she was employed at the March of Dimes, where she worked from 2004 until 2007. In my view her evidence from the examination for discovery, which took place in 2011, is more likely to be accurate. Accordingly, I conclude that at the time of the motor vehicle accident in 2008 karate was not a significant or important recreational activity or part of her life. Significantly, Ms. Johnston did not refer to either bike riding or swimming as activities that had been affected by the accident in her examination for discovery in 2011. In her examination for discovery she referred to rollerblading as a recreational activity that she could no longer do, but she could not recall when she had last rollerbladed before the accident.

[45] She testified that it is "not a big deal" to keep her own house clean because it is a small house. She cleans a little at a time, when and as needed and Tim, who has lived with her since 2014, also helps with house cleaning.

[46] She does not do a lot other than work. She testified that she does not feel comfortable on a bike; the last time she was on a bike was 2012 or 2013, and it was "just not the same". She was not sure whether she had ridden the bike between 2008 and 2013. She has not

gone swimming at all since 2008. She was hoping to take up swimming again when she retires, but now does not know if she will be able to do that.

[47] She testified that she has not done a lot in the last eight years. After work she usually just goes home and watches T.V. On weekends she usually goes to her church.

Dr. Robert Williams

[48] Dr. Williams is a family doctor and practiced for 44 years before he retired in 2014. He was Ms. Johnston's doctor since 2005. He first saw the plaintiff on July 28, 2008, the week following her motor vehicle accident. He treated the plaintiff until he retired in 2014.

[49] At the time of the plaintiff's initial attendance, Dr. Williams diagnosed a whiplash injury to her cervical spine, which he described as a soft tissue injury. After examining her he found that she had a full range of movement of the neck, but did complain of pain. She had tenderness at the base of her neck and some pain on the left side flank area but nothing significant. He testified on cross-examination that he saw no evidence of swelling of glands in her throat or neck.

[50] Dr. Williams saw Ms. Johnston again on October 21, 2008. That was the first time he saw Ms. Johnston after the bumper car incident at Wonderland in August 2008. She complained of tightness across her neck and across her collarbone. She did not tell him that she had "excruciating pain" at the ride, and he did not find that she had exacerbated her previous condition.

[51] Ms. Johnston did not see Dr. Williams again with regard to her neck until January 20, 2009, at which point he noted that she had "a full range of movement of her neck but with pain".

[52] On July 22, 2009 he noted that Ms. Johnston had a "torticollis from time to time and she has this now. She feels that she slept with 1 pillow too many".

[53] Ms. Johnston had an MRI in August 2010, and Dr. Williams' note for August 12, 2010 states that the MRI identified a "disc bulge with mild compression on the anterior thecal sac", which all the physicians who testified agreed was not related to the motor vehicle accident. In all other respects the cervical spine appeared normal. Dr. Williams' recommendation was that she continue with the physiotherapy.

[54] Dr. William's later notes do indicate that Ms. Johnston continued to report having trouble with her neck from time to time, often related to sleeping. She continued to report ongoing pain across her neck and back.

Dr. Murray Stewart

[55] Dr. Stewart is a chiropractor with 30 years' experience. He first saw Ms. Johnston on July 23, 2008, just 3 days after the accident.

[56] Dr. Stewart did a physical assessment of the plaintiff and found mild and moderate reduced range of motion in the neck and mid-back. He concluded that this was a typical whiplash. His notes indicate that his treatments appeared to provide consistent improvement, but she did continue to experience discomfort and tightness in the neck and upper back. He provided therapy that would get the muscles to relax.

[57] He treated the plaintiff from July 2008 to November 2008, and does not know why she did not return after that date.

[58] He saw Ms. Johnston again in April 2011. On April 18, 2011 his notes indicate that Ms. Johnston experienced acute lower back pain from cleaning one house per day as well as the "usual stiffness" in her neck and upper back. On cross-examination he agreed that most jobs will cause an initial aggravation of symptoms at the beginning, especially for older workers.

[59] He last saw Ms. Johnston on April 25, 2011. He testified that he thought that her prognosis would be good, but that she would be left with mild pain and stiffness and restriction of motion.

Carole Moore

[60] Carole Moore is the physiotherapist who has been treating Ms. Johnston from March 2009 to the beginning of 2017. She has been a physiotherapist since 1968, and she treats soft tissue injuries.

[61] Ms. Moore testified that Ms. Johnston reported neck stiffness and pain. Her objective findings included forward head posture and neck movements limited to ½ to ¾ range and very tight neck and shoulder muscles. She testified that her treatments were having a benefit and the movement increased following treatment, but the benefits were temporary. Sometimes Ms. Johnston reported pain, sometimes no pain. At best pain level was reported as 0/10, at worse 7-8/10. Ms. Johnston would have flare-ups, and the problem was never fully resolved.

[62] Ms. Moore testified that in 2012 Ms. Johnston started to experience left shoulder pain, but it was not constant pain. In October 2016 Ms. Johnston had another ultrasound. Ms. Moore testified that the results of the ultrasound made her feel good because there was no indication of muscle tear. This means that it was still within the realm of physiotherapy to stop things from getting worse.

[63] Ms. Moore testified in her opinion Ms. Johnston will always need physiotherapy or some kind of treatment. Her overall diagnosis was that Ms. Johnston suffered a moderately severe neck injury. She stated that the best round of healing is the first round, if she continues to injure she will develop scar tissue. The goal of continued physiotherapy is to enable Ms. Johnston to work and take care of herself.

Dr. Dhadwar

[64] Dr. Dhadwar is a family physician and Ms. Johnston has been a patient of Dr. Dhadwar since February 2014.

[65] Dr. Dhadwar's clinical note of September 14, 2015 indicates that Ms. Johnston told her that she has not slept well since the car accident, but did not know what part of sleep bothers her. Dr. Dhadwar indicates that she discussed "sleep hygiene" with the patient and suggested that she keep a "sleep diary" and attend a sleep study if necessary.

[66] On January 25, 2016 the clinical notes indicate that Ms. Johnston complained of left shoulder pain that trickled down 2-3 years after the motor vehicle accident. Dr. Dhadwar diagnosed Ms. Johnston as having a left rotator cuff strain and ordered an x-ray and ultrasound. The x-ray came back negative, meaning that it had nothing to contribute to the joint issue. The ultrasound showed minimal degenerative changes to the acromioclavicular joint. Dr. Dhadwar stated that these degenerative changes were the general wear and tear of the joints.

[67] The next appointment was on July 19, 2016 to follow up on the ultrasound. Dr. Dhadwar recommended rest, ice, compression if needed and elevation\exercise. That was Ms. Johnston's last visit to Dr. Dhadwar.

Other Expert Evidence

Dr. Ogilvie-Harris

[68] Dr. Ogilvie-Harris is an orthopaedic surgeon. He was qualified to give evidence as an expert in pain arising from the muscular-skeletal system and chronic pain syndrome arising from that source.

[69] He testified that he examined the plaintiff in November 2013 and again in November 2016.

[70] Dr. Ogilvie-Harris testified that he measured the angles of her neck movements with an inclinometer. Her bending forward was normal and rotation to the left and right was normal. Her extension backward was at 80%, and her side bending was 70% to the left and 80% to the right. There was no evidence of nerve damage.

[71] Dr. Ogilvie-Harris examined the plaintiff for what he described as "Waddell's signs", and she was positive for tenderness, positive for distraction, positive for simulation, negative for overreaction and negative for regional pain. In his opinion this indicates a poor prognosis for recovery and is a feature of chronic pain syndrome. In his opinion Ms. Johnston has an impairment due to her ongoing chronic pain.

[72] In Dr. Ogilvie-Harris' opinion 10% to 15% of patients with soft tissue injuries are left with residual problems. If they have pain for more than 2 years they are unlikely to improve and their symptoms are likely to remain permanent. These patients have developed chronic pain syndrome. He explained that chronic pain syndrome affects the

physiology of the brain by affecting the chemicals that control the brain's pathways. When neo-transmitters are altered the condition spreads.

[73] Having reviewed her ultrasounds in 2008 and 2014 he saw no significant change and no progressive deterioration. He concluded, therefore, that the pain was the result of the soft tissue injury and was not age related.

[74] In his opinion Ms. Johnston has chronic pain syndrome and it is highly unlikely that the symptoms will improve. He testified that she will continue to have pain into the long term and this will interfere with her activities such as yoga, pilates, and heavy household chores.

[75] Having seen her twice Dr. Ogilvie-Harris was of the opinion that there was little in the way of change and that the plaintiff has plateaued – she has reached the best she is going to be. She will likely continue where she is with ongoing pain related symptoms. He stated that chronic pain can vary in intensity from day to day and week to week, with no pain some days.

Dr. Nathanson

[76] Dr. Nathanson is a chiropractor and was qualified as an expert in disability and impairment assessment. He testified that he assessed the plaintiff in her home in December 2013. He found that the plaintiff had "hypertonic activity" in her right rotation and right lateral flexion, which he explained meant that her muscles were not working with normal tones. Her cervical spine range of motion testing was 96% flexion (leaning head forward), 64% extension (leaning head back), 93% left lateral flexion (tipping your head to the side), 71% right lateral flexion, 81% left rotation (turning your head) and 85% right rotation. She had some restrictions in her right and left shoulder range of motion, with the greatest restriction being her left shoulder internal rotation. Bending to the left was normal but bending to the right was at 80%. Her grip strength was normal.

Dr. Boynton

[77] Dr. Boynton is an orthopaedic surgeon and was qualified as an expert in orthopaedic medicine and pain issues arising out of orthopaedic issues. She performed an orthopaedic assessment of Ms. Johnston in August of 2016.

[78] Dr. Boynton testified that based on her review of Ms. Johnston's medical records the motor vehicle accident of July 20, 2008 resulted in delayed muscle soreness that generally resolves in 7 – 10 days. There was no evidence of direct injury to either of her shoulders as a result of the accident and, based upon the lack of immediate pain and the lack of signs of trauma like bruising, no evidence of serious injury as a result of the accident. In Dr. Boynton's view there was no impairment as a result of the motor vehicle accident. The injury associated with the motor vehicle accident will not limit her employment or daily living activities.

[79] Dr. Boynton testified that in her opinion Ms. Johnston's symptoms are consistent with head forward posture, minor degeneration consistent with the normal aging as well the

wear and tear associated with her job as a house cleaner. There is no evidence of a structural injury as a result of the accident that would explain her current pain. If Ms. Johnston could correct her posture the pain would be relieved.

[80] Dr. Boynton testified that, based on her review of the surveillance video Ms. Johnston appeared to move easily and she saw no adaptive or compensatory movements. This was consistent with her previous observations and, in her view, substantiated her opinions.

[81] In Dr. Boynton's opinion the fact that Ms. Johnston's pain symptoms come and go is not consistent with chronic pain syndrome caused by changes to the brain.

Dr. Lipson

[82] Dr. Lipson is a physician with over fifty years' experience. He was qualified as an expert in rheumatology, physiatry and the treatment of chronic pain syndrome.

[83] Dr. Lipson conducted an assessment of the plaintiff. He testified that Ms. Johnston sustained a WAD Type I whiplash as a result of the motor vehicle accident on July 20, 2008. This means that she has neck pain but a normal range of motion and no neurological deficits.

[84] In his opinion neither the torticollis nor the disc bulge were related to the motor vehicle accident.

[85] In Dr. Lipson's opinion the immediate post-accident period is critical because pain from a minor accident does not occur after 3–4 years. Pain from an accident is usually self-contained, and does not cause other areas that were not injured to be painful. A soft tissue injury to the neck would not cause a disease process in the shoulder.

[86] Dr. Lipson testified that while the car accident, the incident on the bumper cars and the house cleaning might all play a part in causing an increase in pain, the car accident was a minor factor in causing the neck pain.

[87] In Dr. Lipson's opinion Ms. Johnston does not have chronic pain syndrome. Her pain is appropriate to the changes in her spine associated with the disc bulge and the normal changes of age. Even though there are no changes to the MRI and x-ray results between 2010 and 2014 it is his opinion that pain can increase from the same source as a person gets older. The fact that there are periods of time when Ms. Johnston is not in pain negates the concept of chronic pain. When you have chronic pain you have pain all of the time, not intermittent pain.

[88] Based on his assessment Ms. Johnston had a normal range of motion and is able to perform the activities of daily living. This view was confirmed by the video, which in his opinion showed very little loss of function in her lower back and cervical spine.

[89] Dr. Lipson disagreed with Dr. Boynton's assessment that Ms. Johnston should have recovered from her whiplash injury in 7–10 days. In his estimate the recovery time should have been approximately 3 months, and 7–10 days is very optimistic. He also

disagreed with Dr. Boynton's opinion that a whiplash injury is like muscle stiffness after exercising at the gym.

[90] Unlike Ms. Moore and Dr. Boynton, Dr. Lipson did not find that Ms. Johnston had forward head posture and would not attribute her pain to forward head posture.

Analysis

[91] Based on the evidence, I am not satisfied that the plaintiff has met all the requirements of s. 4.2 of O. Reg. 461/96 and the applicable jurisprudence which require that the impairment(s) be permanent, important and serious. To be serious the impairment(s) must substantially interfere with the plaintiff's ability to continue her regular or usual employment or substantially interfere with most of her usual activities of daily living considering her age. The plaintiff has not met these requirements.

[92] While I can take into account the jury's verdict in determining the threshold issue, the amount of the verdict does not assist me with regard to the threshold issue. The jury's verdict confirms that Ms. Johnston sustained an injury as a result of the motor vehicle accident on July 20, 2008, and that at least some measure of pain and suffering was caused by that injury. That, however, was not in dispute. The dispute in this case involved the seriousness and the duration of that injury, and the jury's monetary award does not reveal an implicit finding on those issues.

[93] I turn first to an analysis of the medical evidence relied on by the plaintiff to support her position. In this regard it is worth repeating what this evidence must prove:

> (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.

[94] There is a disagreement between the physicians as to whether Ms. Johnston is properly diagnosed with chronic pain syndrome, and whether the motor vehicle accident of July 20, 2008 is the cause of her current pain. Dr. Ogilvie-Harris diagnosed Ms. Johnston as having chronic pain syndrome. He testified that chronic pain syndrome does not require constant pain, and that a person can be diagnosed with chronic pain syndrome even if their pain is intermittent. Dr. Ogilvie-Harris also testified that the motor vehicle accident was the most likely cause of Ms. Johnston's current pain. Dr. Boynton and Dr. Lipson both testified that intermittent pain does not equate to chronic pain syndrome, and that Ms. Johnston's current symptoms were not caused by the motor vehicle accident but were more likely caused by the disc bulge in her spine and were the ordinary degenerative process of aging combined with the strenuous work Ms. Johnston performs as a house

cleaner. Dr. Boynton was also of the view that Ms. Johnston's forward posture contributed to her pain.

[95] This is not a dispute that I have to resolve for the purposes of this motion.

[96] Since this case deals with a diagnosis of chronic pain syndrome, Firestone J.'s observation in *Malfara* at para. 23 is relevant:

> It is important to recognize that it 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. The effects of chronic pain are just as real and just as likely to meet or not meet the threshold as any other type of injury or impairment. It all depends on the manner in which the plaintiff has been impacted. The threshold determination is to be done on a case by case basis.

[97] In *Sabourin v. Dominion of Canada General Insurance Company*, 2009 CanLII 15902 (ON SC), Valin J. stated at para. 99:

> The plaintiff must do more than simply experience pain in order to bring herself within the exception to the threshold wording. The onus is on her to prove on a balance of probabilities that the pain she is experiencing has substantially interfered with most of her activities of daily living.

[98] Another relevant reference to chronic pain syndrome is in Leach J.'s decision in *Mayer et al. v. 1474479 Ontario Inc.*, 2013 ONSC 6806, where he states at para. 18:

> A claimant must do more than simply experience ongoing pain or discomfort to bring himself or herself within the statutory exceptions permitting litigation. It is apparent that the Legislature intended injured persons to bear some interference with their enjoyment of life without being able to sue for it, and only a "serious" impairment will qualify. Tolerable symptoms that still permit a claimant to function well do not bring a claimant within the statutory exceptions. However, symptoms that go beyond the tolerable and significantly impair a plaintiff's enjoyment of life will be sufficiently serious.

[99] Nor does my decision turn on whether the plaintiff's pain is constant or intermittent. The fact that a symptom is intermittent does not, by itself, prevent the injury from being permanent or continuous. The courts have held that there is no requirement that symptoms be constant or unrelenting. In *Frankfurter v. Gibbons* [2004], 74 OR (93rd) 39, the Divisional Court (at para. 16) rejected the suggestion that "permanent means constant", and held that "A continuing impairment, albeit experienced intermittently, can satisfy the plain language of the statute". See also: *Bishop-Gittens v Lim*, 2016 ONSC 2887, where McKelvey J. states (at para. 34):

> The Regulation does not mean that a plaintiff is required to experience symptoms on a constant basis as suggested by the defence. Rather what is

> required is a pattern of continuing symptoms in the areas described by the plaintiff which may wax and wane over time but which persist on a long term basis.

[100] In this case, I have no doubt that the plaintiff has experienced intermittent pain in her neck, back and shoulder since the accident. Even accepting that the pain she currently experiences was caused by the motor vehicle accident, the issue is the severity of the pain and whether it has substantially interfered with her regular employment or most of the usual activities of daily living for a person her age.

[101] In this regard the Court of Appeal in *Meyer v. Bright* emphasized the necessity of distinguishing between the functions which are important to the injured person and those which are not, considering (at para. 24) "the obvious intention of the legislature to reduce substantially the number of personal injury claims coming before the courts as a result of motor vehicle accidents". If the impairment complained of relates to activities that the plaintiff infrequently did before the accident, difficulty doing them after the accident may qualify as an inconvenience but not as an important impairment: *Dennie v. Hamilton*, 2006 CanLII 35618 (ON SC) at para. 34.

[102] Finally, for the purposes of determining whether or not the plaintiff's injuries fall within the exemption contained in s. 267.5(5) of the Act, the court must consider the condition at the time of trial. It is not open to the Court to make determinations on the basis of conjecture as to what additional impairments the plaintiff may develop in the future: *Pinchera v. Langille*, 2005 CanLII 3391 (ON SC) at para. 10.

[103] In my opinion Dr. Ogilvie-Harris' opinion regarding both the specific function that is impaired and the importance of the specific function to the person was based on information that was not correct. For example, he stated that he understood that Ms. Johnston gave up her weekend job as a dispatcher at Mr. Rooter because the neck pain made it difficult for her to do this job. As indicated above, Ms. Johnston acknowledged during the trial that she gave up the dispatch job at Mr. Rooter because she wanted to spend more time with her children and did not want to work weekends. Dr. Ogilvie-Harris conceded on cross-examination that this was significant. He also understood that she had been active in karate right up until the accident. If he had known that she had not been involved in karate for four years before the accident that would also have been significant.

[104] Dr. Ogilvie-Harris' opinion does not set out the specific functional limitations Ms. Johnston has as a result of the injury. He states that the ongoing pain-related limitations affect her ability to seek and find suitable employment, but this observation is inconsistent with Ms. Johnston's own evidence that her house cleaning business has continued to grow since she started the business two years after the accident.

[105] The regulation provides that to qualify as a serious impairment of an important physical function, the impairment must:

> [S]ubstantially 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…

[106] Ms. Johnston's own evidence is that she continues to perform her regular employment as a house cleaner with minor adaptations and accommodations such as using a sponge or duster on a pole. In my view the use of such adaptations does not qualify as "a serious impairment of an important physical…function" for the purposes of s. 267.5 of the Act. While her boyfriend has helped her clean houses since 2013, her evidence is that this has enabled her to clean more houses than she had previously cleaned, not that it was necessary to maintain the status quo. This evidence is, in my view, confirmed by the video surveillance evidence that showed Ms. Johnston bending, lifting cleaning supplies and the vacuum cleaner out of the trunk of her car, putting the objects back in the trunk of her car, and carrying the cleaning supplies, all without assistance.

[107] Finally, there was no evidence that Ms. Johnston's injuries prevented her from returning to her pre-accident employment as a drug and alcohol counsellor. As indicated above, she stopped doing this work prior to the accident for reasons unrelated to the accident.

[108] Similarly, the evidence of restricted recreational activities such as karate, bicycle riding, pilates and going on rides at Canada's Wonderland do not qualify as a substantial interference with "most of the usual activities of daily living, considering the person's age". Based on the evidence in this case, these were activities that Ms. Johnston engaged in on an intermittent and infrequent basis prior to the accident. Some of these activities, like going on rides at Canada's Wonderland and bicycling, were activities that she did with her children when they were young and required her supervision.

[109] Accordingly, even assuming that her ongoing pain was caused by the motor vehicle accident of July 20, 2008, I do not find that the evidence tendered supports a conclusion that the plaintiff's impairment substantially interferes with her ability to continue her regular or usual employment, or substantially interferes with most of her usual activities of daily living, considering her age.

Conclusion

[110] For these reasons I conclude that the plaintiff does not fall within the statutory exception set out in s. 267.5(5) of the Act and the defendant's motion to dismiss the plaintiff's claim for non-pecuniary damages is granted.

[111] If the parties cannot agree on costs the defendants shall serve and file their written costs submissions totalling no more than 5 pages (not including offers to settle and costs outline) within 30 days of the release of this decision. The plaintiff shall serve and file her responding costs submissions on the same terms within 15 business days thereafter.

R. E. Charney

Justice R.E. Charney

Released: June 12, 2017

CITATION: Johnston v. Walker, 2017 ONSC 3494

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Carmen Johnston

Plaintiff

– and –

Allen Walker and Sandra Walker

Defendants

REASONS FOR DECISION

Justice R.E. Charney

Released: June 12, 2017