CITATION: Imelda DeBruge v. Diana Arnold, 2014 ONSC 7044
NEWMARKET COURT FILE NO.: CV-12-110914-00
DATE: 20141210

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Imelda DeBruge	)	Andrew Iacobelli, for the Applicant
Plaintiff	)	
– and –	)	
Diana Arnold	)	Linda Matthews, for the Respondent
Defendant	)	
	)	**HEARD:** June 4, 2014

REASONS

EDWARDS J.:

Overview

[1] After nearly a three week jury trial the jury in this matter returned a verdict of $75,000 for general damages, nothing for past wage loss, nothing for future loss of income, $8,300 for future housekeeping expenses and $5,000 for future medical rehabilitation expenses. The total award, net of the $30,000 statutory deductible on the general damages comes to $58,300, an amount well below the $100,000 limit for simplified procedure cases. These awards of damages arise out of a motor vehicle accident which occurred on November 13, 2011 ("the Accident").

[2] The plaintiff's injuries, in part, consisted of a frozen left shoulder, which according to her family doctor has left her with a mild restriction in her range of motion. The plaintiff also complains of significant lower back pain, neck pain and other soft tissue injuries.

[3] In my charge to the jury I suggested that they may wish to consider an award of general damages in the range of $20,000 to $50,000. In her closing argument, defence counsel suggested that the jury should award the plaintiff $20,000 for general damages, and nothing for any of the other heads of damages claimed. In his closing argument, plaintiff's counsel chose not to suggest any particular figure that the jury should award for general damages. With respect to the

past wage loss, plaintiff's counsel suggested that the figure presented to them by Mr. Wollach of $4,842 was a fair and reasonable amount that the jury might wish to award for past wage loss. Mr. Wollach is a forensic accountant who was called by the plaintiff to calculate the plaintiff's wage loss claim, as well as the claims for future care and future housekeeping.

[4] As to the claim for future loss of income, plaintiff's counsel suggested to the jury a range of between $71,000 to $281,000, with further guidance that if the jury accepted that the plaintiff would retire at age 70 the appropriate award would be $179,468, and that if she retired at age 72.5 the appropriate award would be $281,174.

[5] Dealing with the claim for future housekeeping, plaintiff's counsel suggested that the jury consider awarding the plaintiff something in the range of $37,900 to $56,800. As for the future medical expenses, plaintiff's counsel suggested that the jury award $10,785 for future care and $5,696 for future massage therapy.

[6] While it is often impossible to understand how a jury arrives at its verdict, what seems clear from the verdict in this case is that the jury appears to have viewed the plaintiff's physical injuries as more significant than how the defence viewed them, or for that matter how I viewed them. That is, of course, something that the jury is told in the judge's charge to the jury that they can do. They are under no obligation to accept the court's suggested assessment of the plaintiff's general damages any more than they are required to accept (whether from the court or counsel) the suggested range for any of the other heads of damages.

[7] While the jury's award of general damages did not reflect the suggested range put to them either by myself or defence counsel, it is equally fair to take note of the fact that the jury clearly did not find favour with the theory presented to them by plaintiff's counsel as it relates to the claim for past and future wage loss, as well as the claims for future care and future housekeeping. This is made evident by the fact that the jury only awarded relatively nominal amounts for future housekeeping and care, and nothing at all with respect to the plaintiff's claims for past and future wage loss.

[8] The defence, at the completion of the trial, brought a motion commonly known as a threshold motion. It is that motion which these Reasons deal with. If the defence succeeds in this motion the award made by the jury, almost in its entirety, will be wiped out. If the threshold motion is not successful, then the plaintiff will recover $45,000 for general damages net of the statutory deductible, plus the $13,300 for the future housekeeping and future care costs. Looking further down the line, a successful threshold motion in favour of the defence could, depending on any formal offers to settle, also potentially trigger a claim for the costs of the action against the plaintiff.

The Interaction of the Jury Verdict and the Threshold Motion

[9] Before embarking on my analysis of the medical evidence there is a fundamental question that in my view needs some analysis, and that is whether this court should pay any attention to the jury's verdict insofar as the threshold motion is concerned. The question of

whether the plaintiff's injuries meet the so-called "threshold" is a question of mixed fact and law for the trial judge to decide.

[10] It is entirely conceivable that a jury may see a plaintiff's injuries as far more serious than does the trial judge. Clearly in this case the jury, given its award of $75,000 for general damages, must have viewed the plaintiff's injuries as being more serious than did I. However, the Court of Appeal has made it clear in *Kasap v. MacCallum*, [2001] O.J. No. 1719, that a jury verdict at its highest is only one factor that the trial judge may consider, but is not bound to consider in coming to its ultimate conclusion regarding the threshold motion. In that regard, the Court of Appeal stated as follows:

> Nowhere does the legislature say that the judge is bound to consider the jury verdict much less that the judge is bound by an implied finding of credibility of the jury. By the same token the legislation does not suggest that a trial judge cannot, in the exercise of judicial discretion, consider the verdict of the jury. The legislation is clear: the judge must decide the threshold motion, and in doing so, the judge is not bound by the verdict of the jury. The timing of the hearing is in the discretion of the trial judge.

[11] It should be noted that *Kasap* dealt with a threshold motion under section 266(3) of the *Insurance Act*, under what was then commonly known as the OMPP. Since the OMPP, there have been at least three more versions of the "threshold". The Legislature has, therefore, had at least three separate occasions when it could have stipulated that the trial judge hearing a threshold motion must, before arriving at his or her decision, consider the implications of the jury's verdict before deciding whether the plaintiff's injuries pass the threshold. The Legislature chose not to do so and, therefore, in my view *Kasap* remains good law.

[12] The trial judge is tasked with the responsibility of determining whether a plaintiff's injuries pass the so-called threshold. The trial judge may, but is not bound to give any weight to the verdict of the jury. Nonetheless, some might argue that it would be a rare case where the trial judge would totally ignore the jury verdict in making his or her decision on the threshold. The issue of the interplay between a jury's verdict and the trial judge's determination of a threshold motion has been the subject matter of considerable judicial comment. A recent analysis of the competing positions in this regard can be found in a decision of D.M. Brown J. in *Clark v. Zigrossi*, 2010 ONSC 5403, where D.M. Brown J. noted that there is almost an even split amongst the judges of this court considering the timing of a threshold motion in a jury trial.

[13] As D.M. Brown J. discussed by reference to the decision of Reilly J. in *Parks v. Peter*, [2007] O.J. 4904, there is an inherent danger of hearing and deciding threshold motions after a jury has rendered its verdict which then leaves open the possibility of inconsistent findings of fact by the trial judge and by the jury.

[14] One of the first things that a civil jury is told, even before the jury is selected from the jury panel, is that the jury is the judge of the facts and determines what the facts are of the case. They are also told in the standard opening:

> While I am the judge so far as the law, you have the sole and exclusive authority to determine the facts. As jurors it is your exclusive duty to decide all questions of fact submitted to you, and for that purpose determine the effect and value of the evidence.

[15] Similar guidance is given to the jury at the completion of the trial when the trial judge gives his or her final instructions to the jury. In that regard, in my closing comments to the jury I gave them the following guidance with respect to their role as the triers of fact.

> Under our system of law, the judge has the right to comment upon the evidence of witnesses, their credibility or the inferences to be drawn from the evidence.
>
> If I say anything that you take to be a comment on the evidence, or credibility or possible inferences to be drawn, you are in no way bound to follow my recollection of the evidence nor my opinion so far as the facts are concerned. It is your duty to place your interpretation on the evidence, and, if your views are different from mine, or if you disagree with my comments, not only may you disregard them----it is your duty to disregard my views, comments, or opinions on the facts and give effect to your own. As I have said you are the sole judges of the facts, not me.

[16] It has been said many times that the right to a jury trial is both a substantive and a statutory right. The Supreme Court of Canada in *King v. Colonial Home Ltd.,* [1956] S.C.R. 528, establishes that the exercise of a right to a jury trial in the civil context should not be interfered with without just cause or cogent reasons. The statutory right to a jury trial in Ontario is found in Section 108 of the *Courts of Justice Act*, which allows a party to require that the issues of fact be tried and damages assessed by a jury. Some might argue that to the extent a trial judge does not give effect to a jury verdict by ruling against the plaintiff on a threshold motion is to fundamentally interfere with the plaintiff's right to a jury trial.

[17] To the extent that the decision of the trial judge on a threshold motion does not give effect to the decision of the jury in its award of damages, it may be seen by many as judicial interference with the findings of fact made by the jury, thereby flying in the face of the guidance

given to the jury both at the beginning and at the end of the trial by the trial judge that they are the sole judges of the facts. In that regard, the comments of D.M. Brown J. in *Clark v. Zigrossi* are worth highlighting.

> The danger of threshold motions after the jury has rendered its verdict is, as has been indicated in Justice Riley's [sic] decision in *Parks v. Peter,* the possibility of inconsistent findings of fact by the trial judge and by the jury. If a jury has been selected as the trier of fact and if we are to preserve the jury system in civil cases in this Province, in my respectful view judges must take great care in avoiding interfering with findings of fact made by the jury which are implicit in their verdicts. Where the trial judge can infer what those findings of fact were, a jury verdict should not be interfered with, directly or indirectly, unless the rigorous test for setting aside a jury's verdict is met.

[18] The Legislature in its wisdom has not required a trial judge to endorse the verdict of the jury. To the contrary, the Legislature has reserved to the trial judge the sole and exclusive authority for determining whether or not a plaintiff's injuries pass the threshold. The Court of Appeal in *Kasap* has endorsed the view that the trial judge may, but does not have to take into account the jury's verdict. Fundamentally, a jury's assessment of damages does not turn a case of a minor injury into a serious injury which passes the threshold any more than a jury's assessment of damages would turn a case of a serious injury into a minor injury. It is precisely because of this dichotomy that the trial judge should, in my view, determine a threshold motion independent of the jury's verdict. This is more particularly the case in determining a threshold motion under what is now described as Bill 198. This is because the plaintiff is required to call evidence of a medical practitioner that explains the nature and permanence of the impairment, the specific function impaired, and the importance of that factor – see *Ontario Regulation* 381/03 and section 4.3(2) ("the Regulation").

[19] While my colleague D.M. Brown J. is quite correct that trial judges must take great care in avoiding any appearance of interfering with the findings of fact made by a jury, it is equally true that trial judges when faced with a threshold motion must, as a matter of law, make their determination based on the evidence that is required by the Regulation. If the evidence called by the plaintiff does not meet the requirements of the Regulation the plaintiff's motion must fail regardless of the jury verdict.

The Facts

[20] At the time of the accident on November 13, 2011, the plaintiff was approximately 63 years of age. At the time of the accident the plaintiff did not require the assistance of emergency

personnel, and did not seek out medical attention until approximately three days following the accident when she saw a nurse practitioner, Gordina Schellenberg.

[21] Prior to the accident the plaintiff was employed as an insurance broker and office manager with a local insurance brokerage. She had been employed by Al Dorman Insurance since 2003. For the most part her responsibilities were sedentary in nature, although she did have responsibilities that would occupy upwards of 20 minutes per day for filing customer files that she had been working on.

[22] When the plaintiff first sought medical treatment she saw her nurse practitioner Nurse Schellenberg complaining of a sore left arm and hand, as well as a stiff neck, intermittent headaches, a sore left knee, sore lumbar spine and a sore cervical spine. The plaintiff began physical therapy on January 12, 2012, at which time she reported that she was only experiencing shoulder and neck pain, but no back or hip pain.

[23] On May 2, 2012, Nurse Schellenberg completed a Disability Certificate for filing with the plaintiff's accident benefit insurer, which certificate identified that her only injuries suffered in the accident included bilateral shoulder pain, cervical spine pain and right elbow pain. When Nurse Schellenberg last saw the plaintiff on April 11, 2013, the right elbow pain had resolved.

[24] The plaintiff was referred to an orthopedic surgeon, Doctor Robert Wang, who saw her in the latter part of 2012. Doctor Wang prepared a consultation report. In that report the plaintiff gave a history to Doctor Wang that at the time of the accident she had bilateral shoulder and elbow pain, as well as pain in her back and left knee. Most significantly, Doctor Wang noted that with physiotherapy and anti-inflammatory medications the plaintiff gave him a history that "with treatment all painful areas have significantly improved except her left shoulder".

[25] As far as the plaintiff's left shoulder complaints were concerned, Doctor Wang stated:

> She has sharp pain in her left shoulder, mostly over the side. She has intermittent pain but feels it on a daily basis including at rest and waking her from sleep. She has not had a cortisone injection. Her pain affects her routine daily activities. Sedentary activity such as working on a computer is not problematic but any physical activity is limited due to pain and decreased motion.

[26] Doctor Wang concluded his consultation note to Nurse Schellenberg by indicating that the plaintiff's predominant problem was persistent left shoulder pain and recommended conservative treatment. Doctor Wang also suggested that if the plaintiff required any follow-up he would be available to do so. No such follow-up was sought by the plaintiff.

[27] The plaintiff's family doctor, Doctor Eloskouf, was called to give evidence. Doctor Eloskouf had been the plaintiff's family doctor prior to the accident. Doctor Eloskouf resumed her role as the plaintiff's family physician when she returned from maternity leave. What is

particularly noteworthy from a review of Doctor Eloskouf's evidence, by reference to her clinical notes and records that were entered into evidence, is the fact that between October 15, 2013 and April 14, 2014 there were no complaints made with respect to accident-related injuries or pain complaints. The plaintiff did see Doctor Eloskouf on October 22, 2013 and provided a history of various pain complaints, but thereafter when the plaintiff was seen on November 27, 2013 through and until April 14, 2014 there are no recorded complaints reflecting issues concerning injuries related to the accident. This is particularly relevant given that this is the time period when the plaintiff began thinking of reducing her hours at her place of employment, and ultimately terminating her job for reasons that she attributes to the injuries suffered in the accident.

[28] After the accident the plaintiff took one day off work to take her vehicle in for servicing and then returned to her place of employment. She did miss one week in February 2012 due to accident-related pain, and thereafter did not miss any additional time off work until she quit her job in April of this year.

[29] The plaintiff's employer, Ms. Armstrong, testified at trial that after her initial one week period that she took off in February 2012, thereafter her attendance was more or less the same as it had been prior to the accident. The plaintiff was provided with a special type of executive chair to assist her with her post-accident injuries. She was also provided with a minor modification of her responsibilities through the assistance from her colleagues for 20 minutes per day to assist with respect to her filing of files at an overhead level. Other than this accommodation, the evidence of Ms. Armstrong made clear that the plaintiff was capable of managing her files at her desk and going about the responsibilities of her job.

[30] In December 2013, the plaintiff requested a reduction in her hours from four and a half days per week to three days per week. Ms. Armstrong testified that she had agreed to reduce the plaintiff's hours from four and a half days per week to four days as of December 2013. This amounted to a reduction in the plaintiff's earnings of $81.00 per week. Prior to December 2013 the plaintiff suffered no loss of income.

[31] The plaintiff accepted the reduction in her work week to four days per week, and continued in this role from December 2013 through April 9, 2014 when she provided two weeks' notice to her employer. When she did give her notice to Ms. Armstrong, Ms. Armstrong testified that she was taken completely by surprise as she had every expectation that the plaintiff would continue working as she had since the accident.

[32] The trial of this action commenced on May 21, 2014. As such, the plaintiff's change in employment status from four days per week to the status of being unemployed effectively occurred on the eve of trial.

[33] The plaintiff testified that the pain symptoms in her neck, shoulders and lower back had made it difficult for her at work, and ultimately forced her to seek the reduction in hours that she did and, thereafter, to terminate her position of employment. As well, the plaintiff testified that because of her injuries she had difficulty participating in some of the following activities of daily living that she participated in prior to the accident, specifically fishing every other weekend from

June through October; bowling; outdoor horseshoes; darts and Wii bowling. She further testified that she had difficulties with her responsibilities in outdoor yard maintenance and housekeeping, and that while she was able to do some light housekeeping she had received the assistance of various family members. Various lay witnesses were called to testify about the extent of the plaintiff's participation in recreational activities referenced above, and how they had observed her inability to participate in these recreational activities since the accident.

[34] The plaintiff called the evidence of one medical expert to opine on the issues relating to the threshold as required by the Regulation. Doctor Fern was qualified as an expert in the field of orthopedic surgery. It was conceded by plaintiff's counsel that Doctor Fern was not qualified in the field of chronic pain. Doctor Fern testified that he diagnosed the plaintiff with the following conditions: chronic mechanical neck pain; chronic mechanical back pain; rotator cuff tendonitis; impingement; and frozen shoulder.

[35] Doctor Fern, at the request of plaintiff's counsel, saw the plaintiff for the purposes of a medical legal assessment on August 22, 2013. He saw the plaintiff for approximately one hour. He took a history from the plaintiff, both pre and post-accident. He also conducted a physical examination.

[36] Doctor Fern took a medical history from the plaintiff which she described as "constant neck dominant pain", as well as a "constant back dominant pain". This history needs to be contrasted with the recorded history provided by the plaintiff to the various treatment providers already referenced above. It is extremely difficult to reconcile the history provided by the plaintiff to Doctor Fern with the other medical evidence, particularly the histories provided by the plaintiff to her various treatment providers.

[37] In cross-examination, Doctor Fern was taken to the clinical notes of Nurse Schellenberg. In those notes for the time period covering August, October through November 2012, Doctor Fern agreed that Nurse Schellenberg had made no notation of any neck or back complaints.

[38] The clinical notes of Nurse Schellenberg were typed, and therefore clearly legible. A review of those records for the entirety of 2012 through May 2013 are noteworthy for the lack of virtually any pain complaints with respect to the neck or back being voiced by the plaintiff to Nurse Schellenberg. The records do reflect ongoing complaints with respect to the left shoulder, and to a lesser extent the right shoulder.

[39] When Doctor Fern was confronted with this apparent inconsistency between the history that he took from the plaintiff about ongoing significant pain complaints in the neck and back, Doctor Fern simply responded by indicating that Nurse Schellenberg's notes were "not as detailed as mine". This statement by Doctor Fern lacks complete objectivity on his part. Nurse Schellenberg's notes were complete, accurate and reflected the subjective history of the plaintiff's recorded pain complaints as documented by a treatment provider.

[40] Doctor Fern was taken to the history reflected in Doctor Wang's consultation note of November 2012, in which he indicated that there had been significant improvement in all areas except the plaintiff's shoulder. Doctor Fern sought to explain this discrepancy by simply

indicating that the only purpose for which the plaintiff was referred to Doctor Wang was her shoulder and, therefore, there would have been no concentration placed on any other areas of injury by Doctor Wang during the course of his assessment.

[41] Doctor Fern struck me as a witness who sought to justify his opinion at every opportunity regardless of other evidence that might call his opinion into question. To suggest, as Doctor Fern did by implication, that he was in a better position to assess the plaintiff than anyone else who saw her, even her treating doctors, flies in the face of reality.

[42] In addition to the evidence of Doctor Fern, the court had the benefit of receiving the evidence of Doctor Holtby who conducted a defence medical examination of the plaintiff on January 28, 2014. Doctor Holtby was qualified as an expert in orthopedic surgery. The vast majority of Doctor Holtby's practice is in the management of shoulder pathology.

[43] Doctor Holtby agreed with the opinion of Doctor Fern that the plaintiff's shoulder injury is permanent. Doctor Holtby expressed the prognosis that the plaintiff would be left with a mild to moderate permanent impairment of the function in her left shoulder, which could possibly be alleviated with further treatment. Fundamentally, Doctor Holtby expressed the opinion that the plaintiff's impairment was relatively mild. Doctor Holtby testified that there would not likely be any further deterioration, and that the plaintiff would not develop degenerative arthritis. Doctor Holtby was asked whether or not, in his view, the plaintiff had suffered a permanent and serious impairment of an important bodily function, to which he answered in the negative.

[44] At the completion of the plaintiff's evidence and after the defence had begun its case, I raised with plaintiff's counsel a concern that he had not complied with section 4.3 of the Regulation, which states:

> 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*.

Specifically, section 4.3 goes on in subsection 2 to require the plaintiff to adduce evidence of at least one physician 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.

[45] As well, the evidence of the physician who is called to comply with the provisions of the Regulation must provide a conclusion that the impairment is directly or indirectly sustained as the result of the use or operation of an automobile.

[46] Plaintiff's counsel sought to re-open his case so that "threshold" evidence could be placed before the court. Defence counsel, quite understandably, took the position that because she had begun her case she would be irreparably prejudiced if the plaintiff was allowed to re-

open the case in this regard. Ultimately, counsel came to an agreement pursuant to which Doctor Fern would be presumed to have opined that the plaintiff's alleged impairment was permanent, serious and of an important function. Counsel for the defence now takes the position in her factum, filed in support of the threshold motion, that Doctor Fern's opinion was based on his assessment of the plaintiff as suffering from a chronic pain condition. Doctor Fern, as conceded by plaintiff's counsel, was not qualified as an expert in the field of chronic pain and as such the defence, therefore, takes the position that Doctor Fern's opinion does not satisfy the evidentiary requirements of section 4.3 of the Regulation.

[47] Doctor Fern offered a diagnosis that the plaintiff's pain complaints to him with respect to her neck and back were consistent with chronic neck and back pain due to soft tissue injuries that were caused by the accident. He further diagnosed frozen shoulder in both shoulders, more so in the left than the right. He suggested that the plaintiff's various injuries would impact on her day to day activities, especially with respect to her neck if she was required to look up or down, and with respect to her back if she needed to bend forward. The injuries to her shoulders would impact on her ability to push and pull and to do any overhead work. The pain complaints in her back would make it difficult for her to sit for long, and that she would be better standing than sitting. In that regard it is worth noting that in my observations of the plaintiff during the course of her evidence, as well as throughout the trial in the body of the court, she never once demonstrated any pain complaints with respect to her ability to sit.

Analysis

[48] The new threshold requirements of Bill 198, while relatively new, have been around for a number of years. The requirements of the Regulation have been in place as well for a number of years, and experienced counsel would know of their obligations to lead the evidence that they are required to lead pursuant to the Regulation.

[49] Even if Doctor Fern had been qualified as an expert to give evidence in the area of chronic pain, which he was not, and even assuming that Doctor Fern was taken through the evidence that the Regulation requires counsel to place before this court, I would not have accepted Doctor Fern's opinion evidence. Doctor Fern struck me as an advocate who believed that he was in a better position to assess the plaintiff in the one hour time period that he spent with the plaintiff, than those medical practitioners who had seen her in the intervening time period from the time of the accident through to trial. The evidence of those various practitioners, particularly the evidence of Nurse Schellenberg, makes quite clear that the plaintiff was not complaining of neck and back pain throughout most of 2012 and 2013. What is particularly noteworthy is the fact that the plaintiff was not making the same types of pain complaints that she made to Doctor Fern as she did to Doctor Eloskouf during the latter part of 2013 through April 2014. If the plaintiff was experiencing the extent of the pain complaints that she testified to, and confirmed by Doctor Fern, one would have expected contemporaneous type complaints to be found either in the records of Doctor Eloskouf or Nurse Schellenberg. The absence of these types of complaints in the visits to Doctor Eloskouf and Nurse Schellenberg calls into question the credibility of the plaintiff and, therefore, further undermines the opinion of Doctor Fern.

[50] Doctor Fern was retained on behalf of the plaintiff by her lawyer. A conscious decision was therefore made by the plaintiff, through her lawyer, to call the essential evidence concerning the threshold as required by the Regulation through an expert who had seen the plaintiff for little more than one hour. One might rhetorically ask the question as to who is in the better position to deal with the evidence required by the Regulation; an expert who has been retained by the plaintiff or the plaintiff's treating doctors.

[51] There was nothing in the evidence before me that would suggest that any of the plaintiff's treating doctors would not have been willing to provide the necessary Rule 53.03 compliant expert report that is required to address the opinion required by the Regulation. In many cases treating doctors may be reluctant to offer opinion evidence on behalf of the plaintiff that addresses threshold issues. There are some treating doctors who may see their role in court as that of a fact witness to offer evidence about the treatment they have given to their patient and not to offer opinion evidence on threshold related issues. Such an approach is perfectly understandable. In those cases where there is evidence that confirms that a treating doctor will only testify as a fact witness as opposed to an opinion witness, it is entirely appropriate for counsel to retain a medical legal specialist to offer opinion evidence on the threshold.

[52] Where a medical legal expert like Doctor Fern is retained to provide the only opinion evidence on the threshold it will, in my opinion, be a rare case where that opinion evidence will carry the day on a threshold motion. This is particularly so where there is evidence of treating doctors that conflicts with the evidence of the expert who many might call a "hired gun".

[53] Trial judges are constantly reminded about the gate-keeper function which we must perform when dealing with the evidence of experts. We are also constantly reminded about how experts have, in many respects, become the "life-blood" of personal injury litigation. The facts of yesterday's motor vehicle claim are no different than the facts of today's motor vehicle claim. A broken bone 25 years ago is the same broken bone today. A whiplash injury 25 years ago is the same whiplash injury today.

[54] The biggest difference in trials today is the time now required to try a personal injury claim that twenty-five years ago took four or five days. The same trial today is now four to five weeks. The reason for the length of trials today is often multi-faceted, but much of the blame for the length of trials today are the experts called by both the plaintiff *and* the defence bar. In many cases this evidence is both reasonable and necessary. However, where there are treating doctors, many of whom are more than qualified to give opinion evidence (provided the provisions of rule 53.03 are complied with), it is difficult to understand why a medical legal expert is required as well.

[55] In this case the evidence of the plaintiff's various treatment providers, as reflected in both their medical records and oral evidence, was quite different from the evidence of Doctor Fern. What the plaintiff gave to her various treatment providers by way of a history was also quite different from the history that she gave by way of oral evidence to this court, as well as the history that she gave to Doctor Fern. Doctor Fern failed to consider the history provided by the plaintiff to her treatment providers where it conflicted with the plaintiff's history as provided to him by the plaintiff.

[56] For reasons best known to Doctor Fern he believed that he was in a better position to assess the plaintiff and give an opinion to the court than the plaintiff's treatment providers. Doctor Fern was not the unbiased and objective witness that the court expects of an expert. Doctor Fern, in my view, did not understand his role. The Rule 53 Acknowledgement of Expert Certificate that Doctor Fern signed says, amongst other things:

> I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:
>
> a) To provide opinion evidence that is fair, objective and non-partisan…

[57] Doctor Fern did provide opinion evidence but his opinion was neither fair, objective nor non-partisan. Doctor Fern, unfortunately, like so many other experts that this court sees both in court and in reports filed in pre-trial memorandums, completely failed to understand the role of an expert, that being to assist the court in an unbiased objective manner. I do not make this statement lightly and it applies equally to both sides of the bar – Plaintiff and Defence.

[58] Fundamentally, if an expert does not present his evidence in a fair, objective and non-partisan fashion the court can have little comfort in accepting such opinion. Having rejected the opinion evidence of Doctor Fern, the plaintiff has failed to meet the requirements of the Regulation. The plaintiff chose to call the evidence mandated by the Regulation through a physician who saw her for one hour. The Regulation requires the evidence of a physician to support a claim that the plaintiff has suffered a permanent serious impairment of an important physical, mental or psychological function. There is a heavy onus on that medical legal physician. If that onus is not discharged, as it was not in this case, the results are fatal.

[59] The jury in this case has taken a different view than mine on the issue of general damages. That does not mean that the jury's view was in any way unreasonable. The jury was perfectly entitled, and in fact was charged with the responsibility of reaching its own conclusions based on their view of the evidence. My responsibility as the trial judge when confronted with a threshold motion is to make a legal determination based on the evidence and independent of the jury verdict.

[60] While the totality of the evidence heard by this jury, which included the evidence of Doctor Fern, may have more than justified the award made by the jury, the plaintiff fails in her threshold motion because she has not met the evidentiary requirements specified in the Regulation. The defendant's motion succeeds. The plaintiff's injuries as a question of law do not pass the threshold. The plaintiff's claim for general damages, as well as the claim for future medical rehabilitation expenses is also dismissed.

[61] I began my Reasons expressing a concern about the extent to which the trial judge should or should not take into account the findings of a jury. As may be evident from these Reasons, there may be cases – this being one of them, where it is incumbent upon the trial judge to come to a conclusion different from the ultimate conclusion reflected in the jury verdict. This is precisely so because the trial judge is required to do an analysis of the evidence as it relates to

the determination of the threshold motion; an analysis which the jury is not required to do. The fact-finding role of the jury in my view, in those types of cases, is not interfered with by a decision of the trial judge that essentially flies in the face of the jury verdict. In this case, while my determination that the plaintiff has not met the threshold may appear to some to be contrary to the jury's verdict, I cannot leave these Reasons without pointing out the obvious, and that is the theory of the plaintiff was not accepted by the jury as it relates to the plaintiff's claims for past and future wage loss, as well as her claims for past and future housekeeping and future medical care. Regardless of whether my decision may be seen by some to fly in the face of the jury verdict, the fact remains that a determination of the threshold is a legal issue to be determined by the trial judge not the jury.

[62] The trial record shall reflect an award of $8,300 for future housekeeping expenses. If counsel cannot agree on the issue of costs written submissions may be provided to the court, limited to five pages in length, to be received by December 31, 2014. If submissions are not received within that time frame the court will assume that the issue of costs has been resolved by counsel.

Justice M.L. Edwards

Released: December 10, 2014