CITATION: Trieu v. Aubin, 2025 ONSC 1141
COURT FILE NO.: CV-17-66
DATE: 2025 02 21

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Phillip Phong Khahn Trieu, Plaintiff

AND:

Hayden MacKenzie Aubin, Defendant

BEFORE: M.T. Doi J.

COUNSEL: Matthew D. Reid, Matthew Rynan, and Rachel Martin (student-at-law). for the Plaintiff

David J. Strangio and Tom Maidson, for the Defendant

HEARD: November 28, 2024

RULING ON THRESHOLD MOTION AND COSTS

Overview

[1] The plaintiff brought an action for injuries that he allegedly sustained in a motor vehicle accident on March 3, 2015. The trial was heard by a jury. The defendant conceded liability.

[2] After the jury retired to consider its verdict, the defendant brought a threshold motion for a declaration that the plaintiff's claim for health care expenses and non-pecuniary damages is barred as his injuries do not fall within the exceptions set out under ss. 267.5(3) and (5) of the *Insurance Act*, RSO 1990, c I-8 (the "*Act*") and applicable regulations. While the motion was being argued, the jury returned a verdict that awarded no damages. I finished hearing the motion and indicated that I would rule on the motion as the threshold issue must be decided even if a verdict awarding no damages is delivered: *Mandel v. Fakhim*, 2018 ONSC 7580 (Div Ct) at para 33.[1]

[3] At the conclusion of trial, I gave directions for delivering written costs submissions if the parties could not resolve costs for the action. The parties delivered written submissions on costs as directed.

[4] For the reasons that follow, I am allowing the defendant's threshold motion and awarding the defendant $150,000.00 in costs for the action.

I. Threshold Ruling

Legal Principles for the Threshold Motion

[5] While the jury was deliberating, the defendant brought a co-called "threshold" motion for a finding that the plaintiff's claim for health care expenses and non-pecuniary loss is barred as he failed to establish on the evidence that, as a result of the motor vehicle accident, he sustained a permanent, serious impairment of an important physical, mental or psychological function. Only if the plaintiff meets this threshold would he fall within an exception to the statutory immunity under ss. 267.5(3) and (5) of the *Act* and applicable regulations and be able to recover health care expenses and/or an award of non-pecuniary damages.

[6] In deciding the threshold motion, the relevant statutory and regulatory provisions to consider are set out in ss. 267.5 of the *Act* and ss. 4.1, 4.2, and 4.3 of O.Reg. 461/96 (*COURT PROCEEDINGS FOR AUTOMOBILE ACCIDENTS THAT OCCUR ON OR AFTER NOVEMBER 1, 1996*), as amended by O.Reg. 381/03 (the "*Regulation*").

[7] Subsections 267.5(3), (5), (12), and (15) of the *Act* provide as follows:

> **Protection from liability; health care expenses**
> (3) 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 expenses that have been incurred or will be incurred for health care resulting from bodily injury 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.[2]
>
> …
>
> **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.

…

Motion to determine if threshold met; non-pecuniary loss
(12) In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, a judge shall, on motion made before trial with the consent of the parties or in accordance with an order of a judge who conducts a pre-trial conference, determine for the purpose of subsections (3) and (5) whether, 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.

…

Determination at trial; non-pecuniary loss
(15) If no motion is made under subsection (12), the trial judge shall determine for the purpose of subsections (3) and (5) whether, 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. [Emphasis added]

[8] The Regulation assists in defining the threshold terminology in s. 267.5 of the *Act* by defining a "*permanent serious impairment of an important physical, mental or psychological function*." Sections 4.1, 4.2, and 4.3 of the *Regulation* 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. [Emphasis added]

[9] The sub-components of the first and second criteria under s. 4.2 of the Regulation are disjunctive such that the first two criteria will be satisfied if any one of the sub-components are established. The third of the criteria under s. 4.2 is conjunctive, such that all sub-components must

be satisfied before that criterion will be met. All three criteria must be met to meet the threshold test: *Sauve v. Steele*, 2021 ONSC 4053 at para 32; *Mayer v. 1474479 Ontario Inc.*, 2013 ONSC 6806 at para 16.

[10] Section 4.3 of the Regulation sets out the expert medical evidence that must be led to show that the statutory exception or "threshold" has been satisfied. The provision reads as follows:

> **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.
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> (2) The person shall adduce evidence of one or more physicians, in accordance with this section, that explains,
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> (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.
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> (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.

[11] Diamond J. in *Ayub v. Sun*, 2015 ONSC 1828 at paras 13-14 adopted the fulsome summary that Firestone J. (as he then was) gave in *Malfara v. Vukojevic*, 2015 ONSC 78 at para 7 onwards, of the relevant jurisprudence and principles to consider on a threshold motion, and highlighted this summary as follows:

[13] In *Malfara v. Vukojevic* 2015 ONSC 78 (S.C.J.), Justice Firestone set out a fulsome and helpful summary of the relevant jurisprudence relating to threshold motions, and the principles to be considered and applied by the motions judge. The highlights of this helpful summary are 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, 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), 1995 CanLII 7162 (ON SC), 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), 2004 CanLII 45880 (ON SCDC), 74 O.R. (3d) 39 (Div.Ct.) at paras. 22-24.

[14] Finally, in *Malfara* Justice Firestone stated at paragraphs 16 and 23 that a diagnosis of chronic pain, by definition, does not indicate by itself that the injuries are permanent. While the effects of chronic pain are just as real and likely to meet or not meet the threshold as any other type of injury or impairment, it is the "effect of the injury on the person" and not the "type of injury" which forms the focus of the threshold analysis. The Court is concerned with the manner in which the plaintiff has been impacted, and the evidence presented at trial.

See also *Osmani v. State Farm*, 2023 ONSC 5438 at para 18 and *Moustakis v. Agbuya*, 2023 ONSC 6012 at para 17.

[12] A physician's evidence of a change in function requires corroboration under s. 4.3(5) of the Regulation. Any other person, including the plaintiff, may corroborate the evidence given by a physician of a change in function: *Gyorffy v. Drury*, 2015 ONCA 31 at paras 25 and 36-37; *Sanei v. Debarros*, 2024 ONCA 104 at para 28.

[13] The threshold serves to limit the rights of motor vehicle accident victims to ongoing health care costs and non-pecuniary damages in exchange for "*more generous first-party benefits, regardless of fault, from their own insurer*": *Meyer v. Bright* (1993), 15 OR (3d) 129 (CA), leave to appeal refused *sub nom Lento v. Castaldo*, [1993] SCCA No 540. As Schabas J. aptly noted in *Robichaud v. Constantinidis*, 2019 ONSC 5995 at para 2, "*the limitations, therefore, focus on the seriousness and permanence of the injury and its importance to the victim in allowing claims for damages only in more serious cases*."

Background

[14] The plaintiff was born on June 22, 1989 and is now 35 years of age. After separating from his ex-spouse in October 2023, he re-partnered and now co-parents a son from his former marriage and a daughter from his current relationship. Both children are toddlers.

[15] Before the March 3, 2015 accident, the plaintiff reported no physical or mental health issues. However, his pre-accident weight at times approached 300 lbs that, according to his family physician, made him overweight given his height of 5'8". The plaintiff also suffered depression due to relationship issues with his girlfriend who became his wife. He received treatment for a mood disorder that impacted his post-secondary education.

[16] On the afternoon of March 3, 2015, the plaintiff was involved in a two-vehicle accident in which his vehicle was "t-boned" by a vehicle that the defendant was driving. The plaintiff was wearing a seat belt when the accident occurred. He did not lose consciousness and did not sustain any head injury. His vehicle's air bags did not deploy, but the vehicle was quite damaged in the accident. He was 25 years old at the time. He reported no injuries in his statement to police.

[17] After the accident, a tow truck driver dropped him off at the University of Guelph where he was to deliver a group presentation for a class that he was taking. After arriving at the campus, the plaintiff felt his body stiffen to the point where he could not move his neck or shoulders. He

also developed chest pains. He called his roommate who drove him home. Later that evening, he went to hospital after experiencing dizziness and nausea. He saw an emergency physician who made a soft tissue injury diagnosis and prescribed muscle relaxants and Advil before discharging him. At trial, the plaintiff testified that he left hospital with radiating nerve pain along his left thigh that he later reported in February 2017. He did not return to hospital for any accident-related health issues.

[18] The plaintiff did not go to university for about two weeks after the accident. On March 10, 2015, he attended a walk-in clinic where a physician referred him to a rehabilitation clinic. On the advice of a family member, the plaintiff went to a different clinic on March 11, 2015 where he was assessed by a physiotherapist who set up a biweekly physiotherapy program for him over several months. After attending about 30 physiotherapy sessions, the plaintiff had a full range of motion in his neck and back. On July 7, 2015, he was discharged from physiotherapy with a treatment plan that included a self-directed home exercise program. He received massages while vacationing abroad in 2017.

[19] After the March 3, 2015 motor vehicle accident, the plaintiff first saw his family physician, Dr. Yu, on March 23, 2015 for neck, shoulder, and back pain, among other things. As the plaintiff acknowledged, his back pain did not solely result from the accident. At trial, he could not recall whether he ever directly told Dr. Yu that his back pain was due to the accident, but said that he did not during his examination for discovery. The plaintiff told Dr. Yu that he had seen an emergency physician and started physiotherapy. On examination, Dr. Yu found that Mr. Trieu had a normal range of movement, no head injury, clear respiration, and pain in his neck, shoulder, arm, chest, and abdomen that was consistent with accident-related trauma. Dr. Yu diagnosed Mr. Trieu with soft tissue injury to the neck, shoulder, and back, and advised him to continue with physiotherapy as the primary treatment without prescribing pain medication. Dr. Yu did not prescribe medication as he preferred to treat the plaintiff with physical therapy to rehab the muscle injuries that were causing his pain rather than treating the symptoms with analgesics. Dr. Yu advised the plaintiff that the pain would be alleviated by weight loss and by building his core muscles with exercise. During the visit, Dr. Yu charted the plaintiff with having "*no radiation of pain.*"

[20] The plaintiff next saw Dr. Yu on February 1, 2017 when he first complained of lower back pain radiating to his posterior thigh that was said to persist about 70% of the time with restricted

back movement. By this time, the plaintiff had been in three (3) other motor vehicle accidents. Dr. Yu testified that the radiating pain may have resulted from something other than the March 3, 2015 motor vehicle accident, including the other three accidents and the plaintiff's weight. The plaintiff reported that he had exhausted his physiotherapy coverage but the defendant led evidence to show that further physiotherapy treatment benefits were available to him. Dr. Yu recommended local heat therapy (i.e., via a heating pad) and back-stretching exercises to address the pain.

[21] Dr. Yu next saw the plaintiff on May 29, 2017 for lower back pain and radiating leg pain. Mr. Trieu reported not receiving physiotherapy for 2 or 3 months and feeling that his improvement had plateaued. Dr. Yu recommended stretching exercises with heat therapy and physiotherapy.

[22] Dr. Yu referred the plaintiff to a pain clinic. Dr. Esdaile, a physician at the pain clinic, charted that the plaintiff had reported lower back and left thigh pain. After ordering x-rays that showed mild degenerative disc disease expected with aging, Dr. Esdaile recommended that the plaintiff lose weight and perform core strengthening and stretching exercises.

[23] In 2018, Dr. Yu did not see the plaintiff. At trial, Dr. Yu testified that he had expected the plaintiff to report any persisting health issue from the March 3, 2015 accident and presumed that any health issues the plaintiff had did not require medical attention or treatment from him.

[24] Dr. Yu next saw the plaintiff on June 27, 2019 for a routine physical check up. During the visit, the plaintiff did not report any pain or other health issues. Dr. Yu charted that the plaintiff had "*no health issues*" and was taking "*no medications.*"

[25] After May 2017 and until January 2021, the plaintiff did not report any pain to Dr. Yu or advise that he had missed work due to pain. On January 4, 2021, Dr. Yu saw the plaintiff who reported anxiety issues without mentioning the 2015 accident or any pain issues. Thereafter, in January 2021 and February 2021, Dr. Yu saw Mr. Trieu on multiple occasions for mental health issues but not for any pain or other issues related to the 2015 accident. Dr. Yu saw the plaintiff in March, April, June, August, and October 2021. The plaintiff did not raise any pain or accident-related issues during any of these visits.

[26] The following year, Dr. Yu saw the plaintiff for care in September, October, November, and December 2022. The plaintiff did not raise any pain or accident-related issues on these visits.

[27] Dr. Yu saw the plaintiff in February, April, July, August, and December of 2023. No pain or accident-related issues were reported on these occasions.

[28] Dr. Yu saw the plaintiff in January, March, and May of 2024. The plaintiff did not report any pain or other issues related to the 2015 accident on these visits.

[29] On July 8, 2024, the plaintiff saw Dr. Yu for a right upper back strain. This was the first time that he reported any pain to Dr. Yu since 2017.

[30] At the time of the March 3, 2015 accident, the plaintiff was residing in Hamilton and attending his final year of a 4-year undergraduate commerce degree at the University of Guelph. His graduation from university in 2015 was not impacted by the accident.

[31] On January 1, 2016, the plaintiff began to work full-time at a restaurant operated by his uncle and other family members. Due to the physical demands of the position and his accident-related back pain, his uncle accommodated his work limitations by giving him a managerial role to minimize his work-related physical activity. However, during busy periods at the restaurant, particularly around holidays, and after his uncle suffered a heart attack in 2016, the plaintiff felt obliged to work through his back pain to help operate the family restaurant business.

[32] Almost two (2) years after the accident, the plaintiff continued to experience accident-related back pain and purportedly had anxiety when driving through intersections. As a result, he commenced this action on February 16, 2017.

[33] In 2017, the plaintiff started up a children's party equipment rental business. During engagements, he would deliver, set up, and distribute battery-operated ride-on cars for children to play with and use. The venture was modestly profitable.

[34] On January 27, 2018, the plaintiff married. He testified that his accident-related back pain impacted his marriage by limiting activities with his wife, their ability to be intimate, his ability to perform household chores, and his ability to care for their infant son, among other things. After separating from his wife on October 16, 2023 and re-partnering, he claims that his accident-related pain has impacted his new relationship by limiting his ability to engage in similar activities.

[35] In June 2018, the plaintiff settled his claim for statutory accident benefits for $1,500.00 in further medical benefits. He received about $4,500.00 in medical or rehabilitation benefits from his accident benefits carrier on account of the March 3, 2015 accident.

[36] The plaintiff has been and is able to independently perform all of his personal care tasks.

[37] In 2019, the plaintiff vacationed in Japan for three weeks, played laser tag at a rented indoor venue with friends on his birthday, and started up a high-end auto-detailing business for which he personally washed, paint-corrected and detailed the exterior of vehicles with ceramic coatings.

[38] In 2020, the plaintiff started an online retail business. His online sales grew significantly in 2022 and 2023 after the business began to market a popular and lucrative Faraday key-shield box for keyless-entry car fobs to prevent car thefts.

[39] In 2021, the plaintiff was diagnosed with Graves' disease (i.e., a hypothyroidism condition) and diabetes, along with ADHD and OCD issues. In addition, he had career and relationship issues that impacted his health at times. None of these issues are related to the March 3, 2015 accident.

Analysis on Threshold

[40] Based on all of the evidence led at trial, I find that the plaintiff does not meet the statutory exception, or threshold, for recovering health care costs or non-pecuniary damages. I accept that he was injured in the March 3, 2015 accident. However, I find that his accident-related injury did not cause a permanent or long-lasting serious impairment to satisfy the criteria under s. 4.2 of the Regulation.[3] Although the accident caused him pain for a period of time, I find that his accident-related soft-tissue injury had resolved by July 7, 2015 when he was discharged from physiotherapy.

[41] Dr. Max Kleinman, the plaintiff's physiatry expert, testified that the plaintiff has mild to moderate mechanical back pain and myofascial sprain and strain from the March 3, 2015 accident that reached maximum medical improvement and will not resolve over time. Dr. Kleinman opined that the back pain is chronic and advised the plaintiff to avoid activities that will increase his pain by using pacing strategies (i.e., to avoid prolonged sitting and standing), by changing his posture frequently, and by not lifting heavy items that will aggravate his pain. Dr. Kleinman testified that

physiotherapy and chiropractic care are reasonable forms of therapy to address flare ups with the chronic back pain condition.

[42] Dr. Raymond Zabieliauskas, the defence expert physiatrist, disagreed with Dr. Kleinman's opinion. Dr. Zabieliauskas agreed that the plaintiff had strained some muscles in the March 3, 2015 accident. However, he noted that an emergency physician saw the plaintiff that same evening, found a full range of motion with no muscle spasm, had no apparent reason to order x-rays or prescribe any medication, and had recommended physiotherapy. On July 7, 2015, the plaintiff was discharged from physiotherapy with a self-directed exercise plan (i.e., mirroring the treatment plan that Dr. Esdaile proposed in 2017). In light of this, Dr. Zabieliauskas opined that the plaintiff had made a full physical recovery by the July 7, 2015 discharge date. The fact that the plaintiff had discontinued physiotherapy and did not see his family physician for two years further supported Dr. Zabieliauskas' view that the plaintiff made a good recovery from his accident-related injury.

[43] I accept that the plaintiff is experiencing back pain of some permanence that involves a weakened condition lasting into the indefinite future without a definite end: *Brak* at para 4; *Bishop-Gittens v. Lim*, 2016 ONSC 2887 at para 67. I find that his symptoms have been continuous since the 2015 accident that is a cause, albeit not necessarily the sole cause, of his impairment: *Clements v. Clements*, 2012 SCC 32 at para 8; *Castro v. Chen*, 2024 ONSC 6584 at para 83. Despite the intermittent nature of his impairment that waxed and waned over time and was not unrelenting, I accept that his health condition satisfies the permanent impairment requirement: *Noori v. Liu*, 2020 ONSC 3049 at para 101; *Castro* at para 84. However, as discussed below, I am not persuaded that the plaintiff has established an important or serious impairment to satisfy the threshold test.

[44] The plaintiff claims to now suffer chronic back pain that continues to impact him. He gave evidence that the pain improved over time but plateaued and continues to persist. He testified that the pain has not fully resolved, is aggravated by some activities, and affects his ability to work and engage in daily activities, including those with his partner and children. He claims to be incapable of doing certain work, family, and recreational activities including anything involving repetitive movements, bending, prolonged sitting or standing without pacing, and lifting heavy objects repeatedly. He claims to have good days with tolerable pain, and bad days with debilitating pain.

[45] The defendant disagrees with the plaintiff's description of his back pain and submits that he has embellished or exaggerated the nature and extent of the discomfort, if any, with his back. The defence challenged the plaintiff's description of the pain in cross-examination by playing surveillance footage, YouTube videos, and other social media content that depicts him engaged in various physical tasks or activities including auto detailing work, performing lawncare, moving household items, carrying his son, pantomiming in a Halloween costume, and carrying up to three cases of soda at one time. In addition, the plaintiff acknowledged that he renovated his garage for his auto detailing business and relocated a collection of steel shelves in the garage to a different part of his residential property to make room for his detailing work.

[46] I find that the plaintiff's impairment does not substantially interfere with an important aspect of his life: *Meyer* at para 25. After a two week period, the plaintiff resumed his university studies, graduated in 2015 as planned, worked at the family restaurant after graduation, and went on to pursue several entrepreneurial business opportunities in the years that followed. Taking everything into account, I find that the degree of impairment to the plaintiff and his daily life did not go beyond a tolerable level with therapy and pacing: *Frankfurter v. Gibbons,* 2004 CanLII 45880 (Div Ct) at paras 22-24.

[47] In my view, the plaintiff's impairment has not substantially interfered with his work or life to the extent necessary to establish a serious impairment. The term "*serious*" does not mean "*very serious*" or catastrophic: *Meyer* at para 29; *Robichaud* at para 22. As the word "*serious*" is used in s. 267.5 of the *Act*, "*it is apparent the legislature intended that injured persons are required to bear some detrimental impact upon their life without being able to sue for it*": *Meyer* at para 70. That said, a person who carries on with their daily activities while subject to permanent symptoms including sleep disorder, severe neck pain, headaches, dizziness, and nausea that significantly impacts their enjoyment of life must be considered to suffer a serious impairment: *May v Casola,* [1998] OJ No 2475 (CA) at para 1; *Robichaud* at para 23; *Persaud v. Bascom,* 2021 ONSC 4398 at para 33; *Fraser v. Persaud*, 2023 ONSC 1449 at paras 498-504. An impairment can be "*serious*" where the plaintiff is able to resume employment through his own determination but continues to experience pain: *Brak v Walsh*, 2008 ONCA 221 at para 7;

[48] Taking everything into account, I find that the plaintiff's accident-related impairment does not rise to the level of seriousness that would meet the threshold test on this motion. He has been

able to independently perform most if not all tasks of daily living with pacing and the occasional use of over-the-counter Tylenol and marijuana. He performed work and entrepreneurial activities with accommodations or self-accommodations as required. I find on balance that his impairment does not substantially interfere with his work or life to satisfy the threshold test on this motion. Similar impairments involving claimants with soft-tissue injuries in other motor vehicle accident cases were not found to be "*serious*" impairments: *Meyer* at paras 90-96; *Valentine v. Rodriguez-Elizalde*, 2016 ONSC 3540 at paras 82-86; *Robichaud* at paras 24-27.

[49] There were conflicting expert opinions about the plaintiff's injury. For the most part, the medical witnesses relied on the plaintiff's self-reports. Given its verdict, the jury did not accept his evidence about the nature and extent of his injury from the March 3, 2015 accident.

[50] Accordingly, I find that the plaintiff has failed to establish that this case falls within the exception to the statutory immunity under s. 267.5(5) of the *Act* and s. 4.1(1) of the *Regulation*.

II. Costs

[51] This motor vehicle action proceeded to a jury trial that began on November 12, 2024 and was heard over twelve days. The jury's verdict awarded no damages. The defendant was entirely successful in the action and is presumptively entitled to costs.

[52] The court has broad discretion in deciding costs: ss. 131(1) of the *Courts of Justice Act*, RSO 1990, c C.43. Rule 57.01 provides a non-exhaustive list of factors for the court to consider in awarding costs. The overall objective is to determine an amount that is fair and reasonable for the unsuccessful party to pay, and not an amount based on actual costs incurred by the successful party: *Boucher v. Public Accountants Counsel for Ontario* (2004), 71 OR (3d) 291 (CA). The court should also consider the principle of proportionality under Rule 1.04(1.1) and seek to balance the indemnity principle with the fundamental objective of access to justice.

[53] The plaintiff claimed $1 million in damages. The defendant admitted liability for the accident that shortened the trial. In my view, the action was moderately complex.

[54] The plaintiff brought a pre-trial motion to strike the jury notice that led to a mixed result and an award of $1,500.00 in costs in the event of the cause.[4] Despite this, the defendant's bill of

costs appears to claim $6,006.00 in costs for the motion. Having regard to the award of costs for the motion, the defendant shall have costs of $1,500.00 for the motion.

[55] The "nil" judgment for the trial places the plaintiff in the same position as if the action was dismissed: *Dermann v. Baker*, 2019 ONCA 584 at para 25.

[56] The defendant achieved a result that was as favourable as the terms of his offer to settle. This favours the defendant's position that elevated costs may be appropriate, even though there is no entitlement under Rule 49.10 to a higher award of costs. As the plaintiff did not recover any judgment, Rule 49.10 does not apply: *Dermann* at para 24; *S&A Strasser Ltd v. Richmond Hill (Town)* (1990), 1 OR (3d) 243 (CA) at 245. I shall, however, exercise my discretion by taking into account the parties' written offers to settle pursuant to Rule 49.13.

[57] The parties completed examinations for discovery on October 12, 2017. Afterwards, on or about November 17, 2017, the defendant served an offer to settle for a dismissal of the action without costs. The offer expired on December 18, 2017.

[58] On or about July 9, 2019, after incurring further costs, the defendant served a non-severable offer to settle for a dismissal of the action and $1,500.00 in costs payable to the defendant. This offer expired on August 1, 2019.

[59] On or about January 14, 2021, the plaintiff served an offer to settle for $5,000.00 in general damages, $5,000.00 for past and future wage loss and future care costs, $1,174.25 in pre-judgment interest, plus his partial indemnity costs and disbursements. The offer to settle remained open for acceptance until after the commencement of trial.

[60] On or about January 26, 2021, and then on or about February 13, 2024, the defendant served non-severable offers to settle for a dismissal of the action without costs that remained open for acceptance until April 1, 2021 and April 1, 2024, respectively. If not accepted by those dates, each offer to settle was reduced to an offer for a dismissal of the action with partial indemnity costs payable to the defendant up until the acceptance date. Both offers remained open until after the commencement of trial.

[61] Given the result in this case, the defendant's offers to settle were reasonable by correctly predicting the outcome of the litigation. The defendant was entitled to put the plaintiff to the proof, and his offers to settle the action on a without costs basis reflected a true element of compromise: *Mundinger v. Ashton*, 2020 ONSC 2024 at para 20, citing *Foulis et al. v. Robinson; Gore Mutual Ins. Co., Third Party*, 1978 CanLII 1307 (ONCA).

[62] I shall exercise my discretion to disregard the defendant's written costs submissions about an exchange between counsel on November 15, 2024 during trial. As the plaintiff was under cross-examination at that time, his counsel appropriately indicated to defendant's counsel that he could not obtain any settlement instructions. It follows that this exchange by counsel could not give rise to any offer to settle. In the circumstances, I find that this exchange is not relevant to my decision on costs.

[63] I find that the defendant's conduct resulted in a 1½-day *voir dire* due to a last-minute filing (i.e., for the purpose of adducing certain online videos and posts at trial) that did not comply with the notice requirements under ss. 35(3) of the *Evidence Act*, RSO 1990, c E.23. Compliance with the requirements under s. 35(3) would have avoided the *voir dire* and shortened the trial.

[64] The defendant unsuccessfully objected to Ms. Hawley being qualified as an income loss expert for the plaintiff at trial. The objection resulted in a *voir dire* of about a half-day.

[65] In my view, the availability of legal expense insurance in this case is not a relevant factor to consider in deciding costs. Both parties made submissions about the implications of the legal expense insurance available to plaintiff's counsel under a policy that his law firm has purchased. I am advised that specific terms in the policy clearly stipulate that the policy is not to be shared with a non-party, such as the defendant or his insurer. In keeping with this, plaintiff's counsel did not disclose the policy to the defence. I note this for the limited purpose of refuting the defendant's submission that the plaintiff acted unreasonably by not disclosing the policy. Given the terms of the policy as plaintiff's counsel represented as an officer of the court, I accept that his refusal to disclose the policy to the defence was not unreasonable. In any event, the existence and amount of coverage under the legal expense policy is not relevant in awarding costs: *Canfield v. Brockville Ontario Speedway*, 2018 ONSC 3288 at para 59; *Mundinger* at para 16.

[66] The defendant cited a number of cases in which the court awarded costs to the successful defendant ranging from $111,614.65 to $189,298.68 (i.e., that at the high range is said to approach $222,429.00 in 2024 dollars after adjustments for inflation) in somewhat similar circumstances: *Osmani* at para 108; *Mundinger* at para 21; *Nguyen v. Szot*, 2017 ONSC 3705 at para 48; *Loye v. Bowers*, 2020 ONSC 782 at para 48. I have considered these cases in determining what an unsuccessful plaintiff could or should reasonably expect to pay in costs after a similar jury trial.

[67] The plaintiff submits that he should not be liable for the cost of having the defendant's co-counsel attend the trial, particularly as senior counsel for the defendant led for the entire trial except on the threshold motion that he could have argued. However, the plaintiff also had co-counsel to assist senior counsel throughout this 2½ week trial in which multiple witnesses testified and various procedural and evidentiary issues were raised. Given the nature of the trial, I accept that it was reasonable for both sides to have co-counsel to progress the litigation appropriately.

[68] I accept the plaintiff's submission that the defendant's bill of costs (i.e., that aggregates the time claimed and is more in the nature of a costs outline) does not permit a fulsome assessment of the time claimed for duplication or reasonableness by omitting contemporaneous docket entries. As the bill of costs lists eight (8) lawyers and ten (10) law clerks who worked on the file, I have some concern over the potential for inefficiencies or duplication when those new to the file were introduced to the matter. However, I also accept that work likely was delegated to minimize costs.

[69] I find that the hourly rates claimed by the defendant seem fair and reasonable. In my view, the time claimed by the defendant for pleadings, document production, examinations for discovery, offers to settle, and conferences is largely just and proportional. As previously stated, the defendant shall have his costs for the motion to strike the jury notice fixed at $1,500.00 all-inclusively.

[70] The plaintiff submits that the defendant's claim for trial time is excessive. However, I do not find that the trial time claimed by the defendant's senior counsel, co-counsel, and paralegals is overly excessive given the moderate complexity of the action that each side vigorously contested over 12 days of trial. I find that an offset for the defence's unreasonable late filing and unsuccessful challenge to the plaintiff's income loss expert is appropriate in this particular case.

[71] Given the importance of Dr. Zabielauskas' expert physiatry evidence at trial, I find that the defendant's disbursements claim for his expert reports, prep-calls, and attendance in court (i.e.,

totalling $29,704.50) is largely fair and reasonable. I find that the defendant's disbursements for trial transcripts and photocopying are reasonable and I shall allow them. I shall be disallowing the defendant's claim for a $1,582.00 prep-call with Marcus & Associates as they did not produce a report or testify, making this a disbursement that I find should not be borne by the plaintiff.

[72] I shall exercise my discretion to not award costs to the defendant for preparing written costs submissions in this matter.

[73] Taking everything into account, I find that the defendant should have his partial indemnity costs fixed in the amount of $150,000.00, inclusive of taxes and disbursements. In my view, this is a just and proportional award of costs having regard to the plaintiff's reasonable expectations and all of the factors as discussed above.

Outcome

[74] Based on all of the foregoing, I make the following orders:

a. the plaintiff's claim for healthcare expenses and non-pecuniary loss is barred as his injuries do not fall within the exceptions to the statutory immunity provided for in ss. 267.5(2) of the *Act* and applicable regulations; and

b. the plaintiff shall pay the defendant $150,000.00 in costs for the action.

Date: February 21, 2025 M.T. Doi J.

CITATION: Trieu v. Aubin, 2025 ONSC 1141
COURT FILE NO.: CV-17-66
DATE: 2025 02 21

ONTARIO
SUPERIOR COURT OF JUSTICE

RE: Phillip Phong Khahn Trieu, Plaintiff

AND:

Hayden MacKenzie Aubin, Defendant

BEFORE: M.T. Doi J.

COUNSEL: Matthew D. Reid, Matthew Rynan, and Rachel Martin (student-at-law). for the Plaintiff

David J. Strangio and Tom Maidson, for the Defendant

ENDORSEMENT

M.T. Doi J.

DATE: February 21, 2025

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[1] See Trial Endorsement released November 28, 2024.

[2] The term "health care" is defined in Part VI s. 224(1) of the Act as follows:

> "health care" includes all goods and services for which payment is provided by the medical, rehabilitation and attendant care benefits provided for in the *Statutory Accident Benefits Schedule*

[3] The plaintiff did not suffer any permanent serious disfigurement in the March 3, 2015 accident.

[4] See *Trieu v. Aubin*, 2022 ONSC 5842 at para 28 and my Order dated October 14, 2022 (Case Centre B-1-2634 to 2635).