



EXPECT THE BEST

Blaney
McMurtry
BARRISTERS & SOLICITORS LLP

BILL 198 AND THE THRESHOLD

L. Russell Hatch
Blaney McMurry LLP
416.593.3920
rhatch@blaney.com

BILL 198 AND THE THRESHOLD

In October 2003, the Ontario government passed Bill 198 as the successor to Bill 59 for dealing with automobile insurance claims in Ontario which occur on or after October 1, 2003. Bill 198 makes some changes to the threshold requirement, however, no cases have yet interpreted the threshold under Bill 198 in the two and a half years since it was implemented. The aim of this paper is to discuss the changes to the threshold requirement in Bill 198 and the factors that decision makers are likely to look at in interpreting these new changes.

The threshold rule has existed in various forms since the implementation of the Ontario Motorist Protection Plan (“OMPP”) on June 22, 1990. As most of you are aware, the threshold limits claims by imposing a standard of severity of injury that must be met for a plaintiff to be entitled to non-pecuniary (general) damages.

Bill 198 has not changed the wording of the threshold test in section 267.5(5) of the *Insurance Act*. What has changed is that there are now regulations that contain specific requirements to demonstrate that the threshold has been met. In this paper, we will review the wording of the new regulations under Bill 198. Also, we will review some threshold case law under Bill 59, the immediate predecessor to Bill 198, that governed automobile insurance claims that occurred between November 1, 1996 and September 30, 2003, as these decisions under the previous legislation will assist in determining how the courts will interpret Bill 198.

BILL 59

Under Bill 59 (and under Bill 198) the threshold wording is as follows:

Section 267.5 (5) of the Insurance Act, R.S.O. 1990 c. I.8. provides:

Despite any other Act and subject to subsection (6), the owner of an automobile, the occupants of an automobile and any other 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 sustained,

- (a) permanent serious disfigurement; or
- (b) permanent serious impairment of an important physical, mental or psychological function.

Under Bill 59, the important terms in the legislation (“permanent”, “important”, and “serious”) were not defined. Regulation 381/03, which was promulgated to take effect at the same time that Bill 198 came into force, attempts to provide guidance in the analysis and application of these important terms by specifically defining them. The provisions of this regulation must be met in order satisfy the statutory threshold test.

BILL 198

Regulation 381/03 reads as follows:

Definition of Permanent Serious Impairment of an Important Physical, Mental or Psychological Function

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. O. Reg. 381/03, s. 1.

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.
O. Reg. 381/03, s. 1.

(2) This section applies with respect to any incident that occurs on or after October 1, 2003. O. Reg. 381/03, s. 1.

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. O. Reg. 381/03, s. 1.

(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. O. Reg. 381/03, s. 1.
- (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. O. Reg. 381/03, s. 1.
- (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. O. Reg. 381/03, s. 1.
- (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. O. Reg. 381/03, s. 1.
- (6) This section applies with respect to any incident that occurs on or after October 1, 2003. O. Reg. 381/03, s. 1.

The key to the analysis of threshold interpretation under Bill 198 is the reference to the words “substantial interference”. The term “substantial interference” has been used to interpret the threshold since the Court of Appeal case of *Meyer v. Bright* (discussed below), which was decided under the OMPP. Bill 198 is the first auto insurance legislation to specifically incorporate that terminology.

Under Bill 198, a “permanent serious impairment” is one that “substantially interferes” with the person’s ability to continue her usual employment or to continue training for a career or “substantially interferes” with most of her usual activities of daily living, considering her age. “Substantial interference” refers to a scale or range of impairment from no impairment to complete impairment of one’s ability to function. “Substantial interference” with a person’s ability to work and enjoy life continues to be the primary focus of the analysis.

In addition, under Bill 198, a plaintiff must adduce evidence from a qualified physician explaining the nature of the impairment, its permanence, the specific function that is impaired and the importance of that function. The plaintiff must also establish, by medical evidence, a causal link between the injuries and the accident. Additional evidence is also required to corroborate the change in function. While these requirements were not specifically included in the wording of the threshold requirement under Bill 59, the normal practice has been to obtain such evidence in cases under Bill 59.

The requirement in Bill 198 that the impairment would be expected to continue without substantial improvement when sustained by “persons in similar circumstances” appears to impose an element of objectivity into the threshold analysis. This requirement is somewhat vague and will likely be difficult for courts to apply. It will be interesting to see how courts deal with this requirement as cases under Bill 198 come forward.

Bill 198 Changes to Deductible and Excess Health Care Expenses

Under Bill 59, protected defendants were entitled to statutory deductibles provided for in Section 267.5 of the *Insurance Act* of \$15,000.00 and \$7,500.00, respectively, for non-pecuniary damages claims, and for loss of care, guidance and companionship claims.

Bill 198 increases the statutory deductibles for protected defendants to \$30,000.00 and \$15,000.00, respectively, for non-pecuniary damages claims and for FLA loss of care, guidance and companionship claims. However, under Bill 198, if the plaintiff’s non-pecuniary damages are assessed at or over \$100,000.00, the deductible is waived. Also, if FLA damages are assessed at over \$50,000, the FLA deductible is waived. Therefore, the deductibles are now referred to as vanishing deductibles.

Under Bill 198 a plaintiff is now entitled to recover excess healthcare expenses if he or she is able to establish that his or her injury meets the threshold. Previously, under Bill 59, a protected defendant was only liable for excess healthcare expenses if the plaintiff’s injuries were catastrophic as that term is defined in the regulations.

Bill 198 Impact on Vollick Decision

You are likely aware of the Ontario Court of Appeal's decision in *Vollick v. Sheard* [2005] O.J. No. 1601. This decision stands for the proposition that the employer of a protected defendant is not a protected defendant in its capacity as an employer even if it is a protected defendant in any other capacity.

Under Bill 198 section subsection 267.5(10.1) provides:

Despite any provision of this Part, a person vicariously liable for the fault or negligence of a protected defendant is not, in respect of the person's vicarious liability, liable for any amount greater than the amount of damages for which the protected defendant is liable.

The effect of this provision is that the vicariously liable person is never liable for more damages than the protected defendant. Therefore, it eliminates the effect of the *Vollick* decision on vicariously liable owners of vehicles.

DISCUSSION OF CASELAW

Meyer v. Bright

Overall, it appears from the wording of Bill 198 that it was the intention of the legislators to tighten the requirements for non-pecuniary claims. However, the newly defined terms are not expected to displace the historical interpretation of the threshold requirement. At this time, the leading appellate decision on threshold interpretation continues to be *Meyer v. Bright* (1993), 15 O.R. (3d) 129 (C.A.). In fact, the wording of the Bill 198 definition of "serious" is taken directly from the reasons in the *Meyer v. Bright* decision. This would appear to indicate that it will continue to influence interpretation of the threshold.

Meyer v. Bright was decided under the OMPP. However, it has been applied to all threshold cases decided under Bill 59. *Meyer v. Bright* established the following 3-part test for threshold interpretation:

1. Has the injured person sustained permanent impairment of a physical, mental, or psychological function?
2. If yes, is the function which is permanently impaired an important one?

3. If yes, is the impairment of the important function serious?

A plaintiff bears the onus of proving that his or her injuries fall within the threshold under this test.

Ahmed v. Challenger

The first threshold case decided under Bill 59, *Ahmed v. Challenger* [2000] O.J. no. 4188, stated that the rationale behind the *Meyer v. Bright* decision applied to Bill 59, even though it was a new and different no-fault regime than the OMPP. In *Ahmed v. Challenger* the plaintiff was a passenger in a vehicle driven by her husband when it was involved in a collision which caused minor damage to the door next to which she sat. She complained of persistent pain in her back, right shoulder and right leg, as well as anxiety. The court found that the plaintiff's shoulder pain did not start until about a year after the accident, and was therefore not accident related. Also, the court agreed with the defence doctors that the plaintiff's back pain was not permanent. The plaintiff's injuries were found not to meet the threshold since they were not permanent, and the shoulder injury was not caused by the accident.

Cases With More Restrictive Approach

The cases dealing with threshold are fact and evidence driven, and there has been little change in how the courts have interpreted the threshold in the past few years. However there are three recent cases which may signal some shift by the judiciary to a more restrictive application of the threshold.

Frankfurter v. Gibbons

The first case is *Frankfurter v. Gibbons* (2004), 74 O.R. (3d) 39 (Div. Ct.). The plaintiff suffered soft tissue injuries to her neck and right shoulder after having been involved in a minor collision. She was not disabled from employment as a result of these injuries and did not pursue any claim for loss of income. As a result, the plaintiff could not argue that she met the threshold on the basis of impairment to income earning capacity. However, the trial judge held that the plaintiff's soft tissue injuries with associated stiffness and pain significantly interfered with her ability to perform her usual daily activities. In particular, her disability was found to have impacted on her social life, which revolved to a large extent around Latin ballroom dancing. On this basis, the trial judge found that the plaintiff met the threshold

The Divisional Court did not interfere with the finding that the plaintiff had a permanent impairment. However, it overturned the trial judge's ruling on the basis that the impairment was not serious. The plaintiff still went dancing, although not as frequently as before the accident. The Divisional court held that while the impairments were "frustrating and unpleasant", the degree of impairment in her daily life fell below what could be regarded as being serious to the plaintiff.

Bridgewater v. James

The case of *Frankfurter v. Gibbons* was applied to the case of *Bridgewater v. James* [2004] O.J. No. 5282 (S.C.J.). In this case the plaintiff suffered injuries in 2 motor vehicle collisions, one occurring in 1998 (the subject collision) and one occurring in 1999. The plaintiff complained of injuries to her head, migraine headaches, shoulders and neck, as well as low back pain. The migraines allegedly interfered with her ability to work. The court dismissed the action, holding that the headaches and chronic pain arose from the 1999 accident and not from the 1998 accident.

However, the court analyzed the issue of "seriousness" with reference to the *Frankfurter* decision. Specifically, the court asked the question of whether the effect on the plaintiff's employment or the interference with the plaintiff's enjoyment of life "go beyond the tolerable to the serious". The court found that the chronic pain associated with soft tissue injuries to the plaintiff's neck and shoulder and low back and migraine headaches did not constitute serious impairments. The court held that *Meyer v. Bright*, in defining "serious" to mean substantial interference with one's ability to "continue" in his or her regular employment, meant that the plaintiff had to "demonstrate that the extent and regularity of the employee's lost time resulted in, or will result in, a termination of employment or other involuntary retirement of the employee." The court went on to state that even if the plaintiff could establish a loss of employment time representing, on average, between two and three days per month, the plaintiff would not have satisfied the test in *Meyer v. Bright*.

Not surprisingly, this decision and its application of the *Frankfurter* and *Meyer* decisions has been the subject of much criticism from the plaintiff's bar. This criticism appears to be justified to some extent, since courts have consistently held that a change in job function or efficiency is sufficient to constitute "substantial interference".

Pinchera v. Langille

Finally, in the case of *Pindera v. Langille* [2005] O.J. No. 521 (S.C.J.), the plaintiff was injured in an accident which resulted in surgery to L4-L5 including nerve decompression. Post-surgery the plaintiff returned to work driving an industrial catering truck, but suffered mild low back pain. The court appeared to conclude that the plaintiff suffered considerable recurring discomfort, but found that the discomfort was “tolerable” and did not prevent him from continuing with the operation of this catering business. Therefore, it was found that the plaintiff did not meet the threshold.

This decision has been criticized since all of the experts agreed that the plaintiff had potential for future problems. However, Justice MacDonald held that on the basis of the *Meyer v. Bright* analysis she could not look to what the future might hold for the plaintiff in considering whether the impairment was serious and could only look at his current impairment.

Cases With More Liberal Approach

Conversely, there are a few recent cases dealing with chronic pain where the courts have found that the plaintiff has met the threshold even though the relationship between the accident and the impairments was somewhat blurred because of pre-existing conditions and/or embellishment of symptoms. Two examples of these types of cases are discussed below:

Sasso v. Copeland

In the case of *Sasso v. Copeland* [2005] O.J. No. 5226 (S.C.J.), the plaintiff suffered from left shoulder pain, headaches and insomnia as a result of the accident. In addition, evidence was presented that her personality had changed and that she was more anxious, irritable and moody than she was before the accident and that her coping skills were impaired. The plaintiff was a university student at the time of the accident and had not yet established a career. She completed university and was working full-time at the time of trial, and was managing well at her job.

The defendant conceded that the plaintiff sustained a permanent impairment of a physical or psychological function and that the functions permanently impaired were important ones. The question was whether the impairment was serious. In answering that question, the court stated that it was important to focus not on any particular aspect of the plaintiff's impairment, but rather on the totality of her circumstances and the cumulative effect on her life. The court found that the combination of the affects on her ability to carry out the household duties and the fact that the

injuries are likely to have a lasting and serious impact on her future job possibilities that her injuries were “serious” and she was found to meet the threshold.

Fasfous v. Proviso

In the case of *Fasfous v. Proviso* [2005] O.J. No. 882 (S.C.J.), as a result of the accident the plaintiff suffered chronic pain, fatigue and depression. However, the plaintiff had pre-accident complaints of depression and anxiety. Also, the defence argued that the disappearance of the plaintiff's job post-accident, as a result of the company's closure, was the cause of the plaintiff's depression and anxiety and was unrelated to the accident. The court acknowledged the plaintiff's pre-accident condition and the loss of her job after the accident as having legitimate bearing on a calculation of the plaintiff's past losses and future contingencies related to her damages. However, the court found that these pre- and post-accident factors did not negate the causal connection between the accident and the plaintiff's overall condition. The judge went on to apply the material contribution test and found that the accident materially contributed to the plaintiff's current condition. The condition was found to be permanent and the threshold was met.

Court of Appeal and Interpretation of “Seriousness” Requirement

Finally, the Court of Appeal has recently considered the meaning of the word “serious” in the Bill 59 threshold in *Jones v. Mazzolla* [2004] O.J. No. 5541 (C.A.).

Jones v. Mazzolla

In *Jones v. Mazzolla* the plaintiff suffered neck pain, shoulder pain, back pain and headaches. The trial judge found that her job performance had not suffered and awarded nothing for loss of future income. However, the court concluded that her injuries had an impact on her ability to do household chores, share activities with her children and enjoy a social life. Her injuries were found to be “serious” and she met the threshold.

On appeal the issue was whether the trial judge erred in finding that the plaintiff suffered an injury which caused a “serious” impairment under the Bill 59 threshold. In particular, the court considered the submission that its endorsement in *May v. Casola* [1998] O.J. No. 2475 (C.A.), changed the interpretation of the term “serious” as that term had been defined in *Meyer v. Bright*.

In *Meyer v. Bright* the court held that the question of what constituted a “serious” impairment depended on the specific facts of the case, but added, “However, generally speaking, a serious impairment is one which causes substantial interference with the ability of the injured person to perform his or her usual daily activities or to continue his or her regular employment.”

In *May v. Casola*, the endorsement stated, “In our view a person who can carry on daily activities, but is subject to permanent symptoms including sleep disorder, severe neck pain, headaches, dizziness and nausea which, as found by the motions judge, had a significant effect on her enjoyment of life must be considered as constituting serious impairment. The motions judge’s standard was too high and we consider that an error in principle.”

In the *Jones* case the defendant argued that *May v. Casola* (as interpreted and applied by the courts), meant that a serious impairment need no longer affect the person’s ability to perform daily activities, but need only affect the person’s enjoyment of life. The court rejected this argument stating that the endorsement in *May v. Casola* did not change the approach set out in *Meyer v. Bright*. In addition the Court of Appeal concluded that the trial judge did not misinterpret the *May v. Casola* case, as suggested, because the trial judge found that the plaintiff’s injuries had significant effect on Ms. Jones enjoyment of life and her ability to perform her usual activities, in particular her activities outside of the workplace, and was therefore “serious”.

Conclusion

As indicated above, to date there have been no threshold cases decided under Bill 198. It is certain that the courts will continue to look to the 3-part test set out in *Meyer v. Bright* to interpret the threshold under Bill 198, as well as to the threshold cases decided under Bill 59. It remains to be seen whether the *Frankfurter*, *Bridgewater* and *Pinchera* decisions, on the one hand, or the *Sasso* and *Fasfous* decisions, on the other hand, will mark the start of a trend with respect to threshold interpretation or whether they will be confined to their specific facts.

What is clear is that threshold cases will continue to be fact and evidence driven. Despite the changes to the threshold requirement in Bill 198 and the challenges this presents, It is not expected that there will be a dramatic shift in threshold interpretation.