

Is a Fractured Left Knee a Serious and Permanent Injury?

The Issue

In order to recover pain and suffering damages in Ontario, if challenged by the defendant insurer by way of threshold motion, you have to prove that your injuries are a “permanent serious impairment of an important physical, mental or psychological function”.

If as the plaintiff you do not prove your case or surpass this threshold test, then you will be denied the ability to collect pain and suffering damages for your injuries.

Why This Matters

Insurance companies are only required to pay pain and suffering damages to people hurt in Ontario car accidents if the plaintiff’s injuries surpass the Bill 198 threshold described above.

In the long history of cases dealing with this threshold, dating back approximately 20 years, there are a variety of cases that find that the plaintiff either meets or does not meet the threshold applicable at that time. These cases are always fact specific, though general principles obviously apply.

You should be aware that this “threshold” test is very often at issue in Ontario car accidents. In fact, you may be surprised at how often even very serious injuries are challenged as not meeting the threshold.

Such was the case in the recent Ontario Superior Court of Justice case of [Ivens v. Lesperance, 2012 ONSC 4280 \(CanLII\)](#), in which the defendant’s insurance company challenged the plaintiff’s claim for pain and suffering damages, based on injuries described by Judge Mulligan at paragraph 12:

[12] It is the plaintiff’s position that as a result of the motor vehicle accident of November 2, 2007, he suffered a left knee fracture, right knee contusion, back injury,

sleep disorder, mood disorder, chronic pain disorder and loss of function. The left knee and back continue to cause him significant ongoing pain and limitation and function. He continues to have disturbed sleep, depression and headaches. The medical evidence called by the plaintiff suggests that his injuries are serious, permanent and limit important physical, mental or psychological functions. (emphasis added)

The Details

It is not surprising that the Court found that this plaintiff's injuries met threshold. So why would an insurer, being sophisticated and experienced in car accident litigation, challenge a serious injury like a knee fracture?

One reason is that there have been successful cases, challenging other serious injuries, on the issue of the threshold. Aggressive defences by insurers in the past have met with some success. The other reason is that on the facts of this case and including the surveillance commissioned by the defendant's insurance company, which supported an attack by the defendant upon the plaintiff's credibility (i.e. the plaintiff was said to have been exaggerating his injury or consequences thereof), the defendant's insurer here considered their position to be strong on a threshold motion.

Specifically in contention is the following evidence as outlined by Judge Mulligan:

PLAINTIFF'S CREDIBILITY

[39] Mr. Ivens' credibility was challenged on a number of fronts by the defence. It was put to him that he was lying or exaggerating with respect to a number of issues at trial. He was challenged on whether or not he had a mortgage on his house. Subsequent evidence confirmed that he did have a mortgage. He was challenged that he only saw the physiotherapist a few times. Subsequent evidence showed that he visited the physiotherapy clinic over forty times.

[40] Mr. Ivens did exaggerate his income in interviews with a number of medical service providers, a characteristic, perhaps not uncommon for people earning commissioned sales. It is clear that chronic pain is subjective. It is easy to envision situations where an individual may exaggerate pain in seeking some economic advantage. However, in this case, Mr. Ivens' complaints have an objective component as well as his subjective report of pain.

[41] A constellation of factors including the medical evidence, and the jury's verdict awarding significant general damages lead me to accept Mr. Ivens as a credible witness with respect to his chronic pain complaints.

HIS KNEE INJURY

[42] According to all medical experts, his right knee continues to be bothersome, and I am satisfied that it is the source of much of his pain complaints. It is not clear whether or not the back injury was caused by this accident. However, the injury to the knee cannot be disputed and in my view, it is the source of much of the functional capacity limitations that Mr. Ivens has. Although he was subject to surveillance over several dates in the years prior to trial, there was no evidence that he was seen doing the high level of activity he previously enjoyed. Although he was seen walking around the dealership, his evidence and the evidence of his employer was that a golf cart was available as an accommodation to him and any other salespersons who wished to take advantage of it. Mr. Ivens' evidence was that he requested the golf cart and used it frequently to get around the large properties that this dealership maintained for their inventory of cars.

OF AN IMPORTANT FUNCTION

[45] The plaintiff has returned to work with accommodation from his employer. He uses a golf cart. He does not work the long hours that he previously put in. He has difficulty standing for long periods of time, and is tired at the end of the workday. He is unable to perform many of the housekeeping tasks he previously looked after. More importantly, he cannot engage in the high level of physical activity he previously enjoyed, such as weight training, snowmobiling, bicycling and other outdoor activities with family and friends.

For further information on the threshold decisions on challenges to a plaintiff's entitlement to pain and suffering damages, see our previous blogs:

- [**A Tip About Surveillance: Many Car Accident Lawsuits Come Down to the Plaintiff's Credibility**](#)
- [**Lawsuit Damages for Pain and Suffering Injuries from Car Accidents – Bill 198 Threshold**](#)



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