CITATION: *Emmanuel et al. v. RBC General Insurance Co. et al.,* 2022 ONSC 1718
COURT FILE NO.: CV-15-541681
DATE: 2022-05-13

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
EMMANUEL ET AL.	)	Mehta, C., for the Plaintiffs
Plaintiffs	)	
– and –	)	Yung, B. and Fabiano, N., for the Defendants
RBC GENERAL INSURANCE COMPANY ET AL.	)	
Defendants	)	
	)	**HEARD:** March 17, 2022

REASONS FOR DECISION

SUGUNASIRI, J.:

Overview:

On November 14, 2014, an unidentified truck in the left-hand turning lane of Martin Grove Road struck the Plaintiff as she was crossing Martin Grove at Highway 7. As a result of the collision, she suffered a mild concussion, soft tissue injury to the neck, shoulder and back, and depression. The defence theory was that the unidentified truck moved forward on an advanced left turn signal and that Ms. Emmanuel was only half-way across Martin Grove when the pedestrian hand appeared, and the traffic light turned red. They also submitted that in any event Ms. Emmanuel did not suffer injuries that were serious, permanent and of an important physical or mental function.

The jury ruled that Ms. Emmanuel was 75% at fault but awarded her $75,000 in general damages. They awarded Mr. Emmanuel $10,000 for loss of care, guidance and companionship pursuant to section 61 of the *Family Law Act*. Under the *Insurance Act* ("Act"), only plaintiffs who demonstrate that they have suffered a serious and permanent impairment of an important physical, mental or psychological function are entitled to recover general damages (also known as "non-

pecuniary loss").[1] The Defendants argue that Ms. Emmanuel does not meet the threshold and that I should dismiss the action. For the reasons that follow, I agree. While it is clear that Ms. Emmanuel suffered physical injuries from the accident, I am not persuaded that those injuries are permanent as understood by the Act. Further, while Ms. Emmanuel spoke of depression after the accident, her subjective claims are not supported by medical evidence beyond 2017, as they must be. Unfortunately, this means that Ms. Emmanuel is not entitled to compensation from the Defendants.

Analysis:

The Threshold

[1] The accident between Ms. Emmanuel and the unidentified driver was on November 14, 2014. The automotive insurance regime that applies is Bill 59.[2] The following statutory threshold from the Act applies to a claim for non-pecuniary damages:

> 267.5(5) Despite any other Act and subject to subsections (6), 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.

[2] This means that the onus is on Ms. Emmanuel to prove that her "bodily injuries" arose directly or indirectly from the use or operation of an automobile, and that as a result of the injuries sustained in the accident, she sustained permanent serious impairment of an important physical, mental or psychological function.[3] If she is unable to do so, subsection 267.5(5) shields the owner or operator of the unidentified pick-up truck from liability.

The accident caused physical injuries

[3] There is no real dispute that Ms. Emmanuel sustained physical injuries arising from the collision with the unidentified truck. The medical evidence and eye-witness evidence is clear that once struck, Ms. Emmanuel had no recollection of the event. She was taken to *Mackenzie Health* where she complained of shoulder and chest pain. Upon medical follow up with a family physician, Dr. Uddaraju observed pain in the right arm, neck stiffness, shoulder pain, pain in the chest on her

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[1] *Insurance Act*, R.S.O. 1990, c. 1.8, sections 267.4-267.12.
[2] *Del Rio v. Lawrence,* 2009 CanLII 6833 (ONSC) at para. 3.
[3] *Meyer v. Bright,* 1993 CanLII 3389 (ON CA), 110 D.L.R. (4th) 354 (ON CA), at para. 50.

right side and back pain. Ms. Emmanuel was also diagnosed with a concussion. By day ten post-accident, Ms. Emmanuel continued to have shoulder pain, next stiffness and a mild concussion. She no longer complained of tenderness in her back and her neck and appeared to have a normal range of motion. Ultimately Ms. Emmanuel was prescribed anti-inflammatories and pain medication for her headaches and remaining soft tissue injuries. She was also referred to physiotherapy. The dispute is over the extent and duration of these injuries.

Insufficient evidence that the accident caused psychological injuries

[4] There is also dispute over whether the accident caused Ms. Emmanuel psychological injuries. Mr. and Mrs. Emmanuel's evidence was that she suffered from depressive thoughts and feelings after the November 2014 accident. She had psychological counselling between February of 2016 and April of 2017. Between the November 2014 accident and April of 2017, Ms. Emmanuel also gave birth to her first child and was pregnant with a second. The accident need not be the sole cause of the injury or the most important cause, but it must be a necessary cause.[4] Neither Ms. Emmanuel nor Mr. Emmanuel were reliable witnesses on whether the accident was a necessary cause of any depressive feelings or loss of the "heart" to do things. There was also little to no medical evidence of psychological injury beyond Dr. Shaul's double hearsay evidence of what his therapists wrote, and the hearsay evidence of the notes themselves. The therapists did not testify. Section 4.3 of the *Insurance Act* regulation governing the necessary evidence for a plaintiff to prove that she meets the threshold requires a physician's evidence of the nature, and permanence of the impairment.[5] Dr. Shaul's evidence falls woefully short of this requirement. While Dr. Shaul himself was credible, I give little weight to his evidence which was nothing more than reading the notes of the therapists whom he supervised. Ms. Emmanuel provided no explanation of why the therapists themselves were not called. Ms. Emmanuel also did not call any experts qualified to testify about her psychological state or to opine on causation.

[5] We are left then with the question of whether Ms. Emmanuel's concussion and soft tissue injuries amount to a permanent impairment of an important physical function. In my view, the answer is no.

Ms. Emmanuel's concussion and soft tissue injuries are not permanent as understood in the Act

[6] Having found that Ms. Emmanuel suffered physical injuries as a result of the 2014 Accident, analysing the threshold test set out in the Act requires the court to sequentially answer three questions:[6]

a. Has Ms. Emmanuel sustained permanent impairment of a physical function?

b. If yes, is that function and important one?

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[4] *Clements v. Clements,* 2012 SCC 32, at para. 46.
[5] *Court Proceedings for Automobile Accidents that Occur on or After November 1, 1996*, O.Reg. 461/96 at section 4.3.
[6] *Meyer v. Bright* at para. 24; *Shipley v. Virk*, 2017 ONSC 4941 at para 15.

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

A. Ms. Emmanuel has not sustained a permanent impairment of a physical function

[7] Ms. Emmanuel argues that the common thread in her testimony in chief and on cross-examination was that she has continuously been in pain since the 2014 Accident. She has headaches, neck, shoulder and back pain. The Defendants have raised credibility issues with respect to her testimony. Leaving that aside, even if she were to be fully believed, permanence as understood by the Act is strictly defined to be something more than continuous pain.

[8] Sections 4.1-4.3 of O.Reg 461 to the Act defines "permanent" as an impairment that is continuous since the accident. Further, based on the medical evidence, it is expected not to substantially improve, and continues to substantially interfere with most of the person's usual activities of daily living. Our court has confirmed that in applying this test, the mere passage of time is not enough to establish permanence. Further, the lack of impairment of functional abilities, the absence of treatment and unrelated physical stressors like in this case, birthing and caring for three children, prevent a plaintiff from establishing permanence.[7] Ms. Emmanuel's own evidence does not persuade me that she meets this definition. The evidence is clear that:

a. She did not fill all possible prescription refills for pain medication like Tylenol 3;

b. Ms. Emmanuel did not see a physiotherapist after December of 2014;

c. She did not see a doctor for pain nor any doctor at all since the birth of her third child in September of 2019;

d. Ms. Emmanuel worked at Red Lobster in February of 2019 doing kitchen prep until September of 2019 when her third child was due; and

e. She had three children (December 24, 2015, June 23, 2017 and September 21, 2019) for whom she was primarily responsible until the children were eligible to attend junior kindergarten.

[9] Ms. Emmanuel testified about a helper who assisted with the children and Mr. Emmanuel spoke about assisting with child-care. However, Mr. Emmanuel also confirmed on cross-examination that it was Ms. Emmanuel who cared for the children while he was at his two jobs between 6:30 a.m. and 11:30 p.m. with a 1.5-hour gap to pop home. Even when there was a helper, Ms. Emmanuel was still alone with the children in the evenings. In any event the helper has not assisted the family since January 1, 2020. During those times, Ms. Emmanuel did not consult a doctor or seek referrals to manage the headaches or pain in her neck, shoulder or back. There may be many explanations for this. However, Ms. Emmanuel did not provide any. We are left with the reasonable inference that Ms. Emmanuel did not seek further medical treatment because she did

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[7] *Seguin v. Vandinther*, [2002] O.J. No. 3719 (S.C.J.) at para. 41; *Jennings v. Latendresse*, 2012 ONSC 6982 aff'd 2014 ONCA 517 at paras. 69-80.

not require it. Her symptoms had either abated or were manageable and do not appear to have impacted some of the most fundamental aspects of a parent's daily living.

[10] Ms. Emmanuel also worked in 2019 when she had not worked in Canada prior to the accident (Ms. Emmanuel had been a teacher in Sri Lanka). Even though she complained of pain while working and testified about informal accommodations made by co-workers to assist her, no one from Red Lobster verified any formal accommodation requests. Her ability to work, and evidence that she only left the job to have her third child, demonstrates the opposite of a permanent impairment. Again, without further explanation, one is left with the reasonable inference that Ms. Emmanuel was able to work in 2019 because her symptoms were either manageable or had abated.

[11] In order to establish permanence, the Act also requires medical corroboration.[8] To that end, the Plaintiff called Drs. Karmy and Ghouse. Neither doctor assists Ms. Emmanuel in meeting her burden.

[12] Dr. Karmy assessed Ms. Emmanuel on December 9, 2016 to determine her entitlement to accident benefits. His lens was not focused on the definition of permanence for the purpose of establishing her entitlement to non-pecuniary losses from the Defendants. On the agreement of the parties, he testified at this trial as a participant expert. His assessment report was treated as his clinical notes and was tendered as a numbered exhibit. He opined that as of December 2016, Ms. Emmanuel suffered from:

a. Chronic post-traumatic headache and post-concussion syndrome;

b. Post-traumatic fibromyalgia caused by the accident; and

c. Chronic mechanical neck and back pain, bilateral shoulder pain.

[13] He concluded that "the prognosis for her full recovery, complete functional restoration and being pain free, is poor." While I found Dr. Karmy to be credible, his information was dated, and his report was largely based on Ms. Emmanuel's subjective complaints. On cross-examination he acknowledged that he did not conduct any validity testing of her subjective complaints. At best Dr. Karmy provided a snapshot of Ms. Emmanuel's physical condition, as described and experienced by her, in 2016. He candidly admitted on cross-examination that the fact that Ms. Emmanuel worked in the kitchen of a Red Lobster doing food prep suggested that her condition had improved significantly since he examined her. In fairness to Dr. Karmy, his task was never to assess the permanence of Ms. Emmanuel's condition for threshold purposes and his analysis cannot be the foundation for any such claim.

[14] Dr. Ghouse is a Rule 53 physiatrist retained by Ms. Emmanuel to give an opinion on threshold. He assessed her on March 10, 2021 and concluded that she had permanent physical impairments that affected her daily living. He noted that she could only sit for about 20 minutes and stand or walk for 30 minutes at a time. He concluded that she has difficulty bending her back and turning her neck and would have difficulty with moderate to heavy lifting and carrying activities. He also diagnosed that she would be limited in using her shoulder in moderate to heavy

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[8] *Supra* note 5.

lifting and carrying or working at and above the shoulder level. She had limited grip strength. Finally, Dr. Ghouse concluded that the symptoms have been persistent despite "adequate" efforts at rehabilitation and treatment and that Ms. Emmanuel had reached maximum medical rehabilitation potential.

[15] With the greatest of respect, Dr. Ghouse's conclusions are not supported by the objective underlying evidence. It appears the Dr. Ghouse largely relied on Ms. Emmanuel's subjective descriptions and reactions to physical examinations to assess the nature and extent of her injuries. His diagnosis does not reconcile with Ms. Emmanuel being the sole or primary caregiver of three children, one of whom would have been under the age of two at the time he examined her; or working at Red Lobster doing kitchen prep. His observations of her limitations is contrary to her lived experiences, as she described them. His evaluation does not seem to probe the inconsistencies between the inherently physical demands of her daily life and her reactions to his physical examination. There may have been plausible explanations for the differences – however he neither meaningfully explored them nor offered a possible explanation.

[16] The record also does not support Dr. Ghouse's conclusion that Ms. Emmanuel has made adequate efforts to rehabilitate and has reached maximum rehabilitation potential, thereby rendering her impairments permanent as understood by the Act. Ms. Emmanuel did not attend rehabilitation after 2014 nor saw a doctor after 2019. The doctors that she did see were with respect to issue relating to fertility and her pregnancies. Again, there may be an explanation for this – perhaps physiotherapy was too expensive, or Ms. Emmanuel could not get to doctors because she does not drive, or perhaps she was too shy or did not know to ask for help. However, Ms. Emmanuel provided no such evidence or explanation to the court nor to Dr. Ghouse. There was no basis for Dr. Ghouse to conclude that Ms. Emmanuel made adequate efforts towards rehabilitation. This undermines the strength of Dr. Ghouse's opinion that Ms. Emmanuel had reached maximum rehabilitation potential and is permanently impaired.

[17] I prefer Dr. Clark's conclusion that Ms. Emmanuel does not suffer from a permanent impairment as understood under the Act. The Defendants retained Dr. Clark as their Rule 53 physiatrist. I found Dr. Clark to be thorough and persuasive. He outlined in detail, for example, a description of Ms. Emmanuel's tasks with her children. Her activities with the children are highly relevant to evaluating Ms. Emmanuel's reported impairments since the care of toddlers and infants is inherently a physical job. Dr. Ghouse, on the other hand, was not particularly impacted by Ms. Emmanuel's role as a primary caregiver. Dr. Clark conducted a two-hour examination on Ms. Emmanuel with both active and passive testing. Dr. Clark also assessed Ms. Emmanuel's functionality when she was distracted or did not know what Dr. Clark was testing for. He compared her responses to those that she gave when she knew what was being tested. For example, Dr. Clark recounted that when he palpated Ms. Emmanuel's shoulder and neck (her areas of complaint), there was no reaction. It was only after he asked her (through the Tamil interpreter) if there was pain that she flinched and recoiled to the same level of pressure at the same touch points. In Dr. Clark's view, Ms. Emmanuel complaints were not supported by the objective evidence he would have expected to see. For example, she complained of limited shoulder mobility and persistent shoulder pain. After six years, Dr. Clark indicated that he would have expected some measure of visible atrophy or frozen shoulder. He observed no such manifestations. Another example relates to her grip strength. On testing Ms. Emmanuel had a grip strength in each hand that was two to three standard deviations below normal for her age and gender. While Dr. Ghouse accepted Ms.

Emmanuel's purported grip strength as an indicator of her permanent impairment, Dr. Clark was sceptical. He noted that there was roughly a one in 200 chance that the results were from legitimate impairment. He testified that a person with grip strength that low would have obvious objective manifestations like a mangled or visibly weakened hand. Dr. Clark concluded that it was virtually certain that it was Ms. Emmanuel's poor effort that explained her unusually low grip.

[18] I accept Dr. Clark's assessment of Ms. Emmanuel and his conclusion that she has not suffered a permanent impairment of a physical function. Even without Dr. Clark's opinion, the limitations of Dr. Ghouse's report and Ms. Emmanuel's own evidence are fatal to establishing permanence because it is Ms. Emmanuel's burden to meet. On this ground alone, Ms. Emmanuel is unable to fall within the statutory exception set out in subsection 267.5(5) of the *Insurance Act* to recover general damages for either her or Mr. Emmanuel. The Defendants are not liable for any damage for non-pecuniary loss.

Conclusion:

[19] I dismiss the action and strongly urge the parties to resolve costs. If they are unable to do so, they shall advise Ms. Perri and I will endorse a costs procedure. The parties should also agree on a form of draft judgment which the Defendants can submit to Ms. Perri for my signature.

Digitally signed by Justice P. Tamara Sugunasiri
Date: 2022.05.14 13:37:09 -04'00'

Original signed
Justice P.T. Sugunasiri

Released: 2022-05-13

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