CITATION: Brak v. Walsh, 2008 ONCA 221
DATE: 20080401
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COURT OF APPEAL FOR ONTARIO

WEILER, MOLDAVER and JURIANSZ JJ.A.

BETWEEN:

HEIDI BRAK, JOHN BASTIAN BRAK, DAYMIEN JOHN BRAK AND DILLON ROBERT DONALD BRAK, BY THEIR LITIGATION GUARDIAN JOHN BASTIAN BRAK, HILDA CROCKER, DONALD CROCKER AND DARRYL DALE

Plaintiffs (Appellants)

and

BRADLEY WALSH

Defendant (Respondent)

Khalid Baksh and Sharon Hassan for the appellants

William. G. Woodward for the respondent

Heard: March 20, 2008

On appeal from the judgment of Justice G. Killeen of the Superior Court of Justice dated February 23, 2006.

ENDORSEMENT

[1] The appellant, Brak, was the main plaintiff in a jury trial for damages arising out of a motor vehicle accident. At the end of trial, after the jury began its deliberations, the defendant, Walsh, brought a motion that no action lay because the plaintiff did not meet the threshold required under s. 267.5(5) of the *Insurance Act* of suffering a "permanent serious impairment of an important physical, mental or psychological function". The trial judge allowed the motion and the appellant appeals from that decision. The trial judge applied the following test:

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?

[2] The trial judge provided a careful review of the medical evidence. He found that the appellant did sustain a low back injury as a result of the accident. He went on to find that she did not suffer a permanent impairment, the function impaired was an important one, and the impairment was not serious. The trial judge based his conclusion that there was no permanent impairment squarely on the evidence of Dr. Clifford, the appellant's expert witness. He stated his belief that if the appellant followed Dr. Clifford's advice on exercise, the pain she was experiencing would "clear up with time". He also noted the evidence of the respondent's expert, Dr. Heitzner that "her pain symptoms would diminish with time if she followed his recommendation on a regular exercise program." In relation to whether the appellant's injury was serious, the trial judge focused on the appellant's ability to resume "almost all" of her domestic duties and the fact that she was able to hold gainful and steady employment.

[3] The trial judge did not indicate what standard he applied to determine whether the low back pain experienced by the appellant was permanent, nor did he indicate what standard he applied to determine that the impairment was not serious.

[4] The jurisprudence establishes that permanent means lasting indefinitely into the future as opposed to for a limited time with a definite end. See e.g. *Bos Estate v. James* (1995), [1995] O.J. No. 598, 28 C.C.L.I. (2d) 166 (S.C.J.) Howden J.; *Altomonte v. Matthews*, [2001] O.J. No. 5756 (S.C.J.), McDermid J. The requirement of a permanent injury is also met when a limitation in function is unlikely to improve for the indefinite future: See: Roccamo J. in *Hartwick v. Simser*, [2004] O.J. No. 4315 at para. 87 and *Rizzo v Johnson* (2006), 82 O.R. (3d) 633 Smith J. at para. 11 to the same effect.

[5] The respondent conceded at the appeal that there was no evidence that the appellant's pain would "clear up". The only evidence was that her pain would decrease with time. Neither expert offered a date by which she would be pain free, assuming she embarked on a reasonable exercise and weight loss program. In fact, both experts also recommended that she should avoid heavy lifting indefinitely.

[6] The question of whether an injury is serious was addressed by this court in *May v. Casola*, [1998] O.J. No. 2475 (Ont. C.A.). Carthy J.A. said "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 trial judge, had a significant effect on her enjoyment of life must be considered as constituting

serious impairment. The trial judge's standard was too high and we consider that an error in principle."

[7] So here, as well, the trial judge's focus was too narrow in determining whether the appellant's injury was serious. The requirement that the impairment be "serious" may be satisfied even although plaintiffs, through determination, resume the activities of employment and the responsibilities of household but continue to experience pain. In such cases it must also be considered whether the continuing pain seriously affects their enjoyment of life, their ability to socialize with others, have intimate relations, enjoy their children, and engage in recreational pursuits.

[8] Here, the trial judge did not indicate he considered anything other than that the appellant carried on with her full range of activities. This is not significant in itself as judges are presumed to know the law. However, the trial judge also failed to allude to evidence of the lay witnesses, which was important in assessing the appellant's claim that continuing pain affected her overall enjoyment of life. Together these omissions undermine the conclusion he reached.

[9] The trial judge therefore erred in the standard he applied both with respect to the permanency and seriousness of the appellant's injuries.

Conclusion

[10] We would allow the appeal, set aside the decision of the trial judge, and remit the matter to be reconsidered by a different judge. We cannot finally decide this matter because of the credibility issues involved, however, given the amounts involved, the parties may see fit to resolve the matter without a rehearing. We fix costs in favour of the appellant in the amount of $7,500.00 plus disbursements and G.S.T.

"K.M. Weiler J.A."
"M.J. Moldaver J.A."
"R.G. Juriansz J.A."