

BILL 198 THRESHOLD UPDATE

By Katherine A. Badenoch

Introduction

It has been well over five years since Bill 198 was implemented in Ontario in our no-fault regime. The ‘new’ threshold interpretation guidelines apply to car accidents which occurred on or after October 1, 2003. There have now been several decisions wherein the courts have pronounced on those guidelines, and it seems that despite the new guidelines, much remains unchanged in the threshold landscape. As such, a review of the threshold analysis under *Meyer v. Bright*¹ is included in this paper, as well as three cases that remain germane to any threshold analysis: *May v. Casola*²; *Jones v. Mazolla*³; and, *Brak v. Walsh*⁴. This is followed by the Bill 198 statutory wording overview and concludes with a case law survey of Bill 198 threshold decisions.

Meyer v. Bright

Under OMPP, the first no-fault regime in Ontario, the Court of Appeal established a 3-part test in *Meyer v. Bright*. This test was to be used in the determination of falling within the exceptions enumerated in the *Insurance Act*. This test has been applied in all threshold cases under the Bill 59 regime. The test is:⁵

1. Has the injured person sustained permanent impairment of a bodily function caused by continuing injury which is physical in nature?
2. If the answer to question No. 1 is yes, is the bodily function, which is permanently impaired, an important one?
3. If the answer to question No. 2 is yes, is the impairment of the important bodily function serious?

The Court of Appeal further emphasized the necessity of distinguishing between functions which are important to the injured person and those which are not, considering the legislators’ intention to reduce substantially the number of personal injury claims coming before the Courts as a result of motor vehicle accidents. “Important” was described as a bodily function that plays a major role in

¹ *Meyer v. Bright* (1993), 15. O.R. (3d) 129 (C.A.).

² *May v. Casola*, [1998] O.J. No. 2475 (C.A.)

³ *Jones v. Mazolla*, (2004) O.J. No. 366 (Ont. S.C.J.)

⁴ *Brak v. Walsh*, [2008] O.J. No.1173 (C.A.)

⁵ *Meyer v. Bright*, *supra*

the health, general well-being, and way of life *of the particular injured Plaintiff*. It is a subjective analysis.⁶

“Serious impairment” has been defined as one that causes substantial interference with the ability of the injured person to perform his or her daily activities or to continue his or her regular employment. “Serious” relates to the impairment and not the injury.⁷

The Court of Appeal, in *Meyer v. Bright* held that the legislature intended that injured persons are required to bear some detrimental impact on their lives as a result of accidents, without being able to sue for it.⁸

Review of Seminal Bill 59 Case Law

Bill 59 was the threshold definition under consideration in the cases reviewed in this section; however, the analysis of the threshold, and particularly the “serious” component, remains applicable under Bill 198. As we will see below, although Bill 198 contains new guidelines for definitions, in practical terms, the Bill 59 threshold test set out under the prior case law remains much the same.

May v. Casola

This case continues to be cited largely on the issue of the interpretation of the “serious” component of the threshold, and is useful in analyzing the concept of activities of daily living. Here, the Plaintiff did not allege that her ability to pursue her livelihood was in any way affected by her accident-related injuries. Rather, she alleged that the pain affected her enjoyment of life and her ability to pursue her activities of daily living.

Carthy J.A. spoke for the three member panel of the Court of Appeal, when he 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

⁶ *Meyer v. Bright, supra*.

⁷ *Meyer v. Bright, supra*.

⁸ *Meyer v. Bright, supra*

be considered as constituting serious impairment. The trial judge's standard was too high and we consider that an error in principle.⁹

The "enjoyment of life" analysis in the context of activities of daily living continues to be relied upon by Plaintiff's counsel, and remains a consistent thread throughout subsequent case law, including that under Bill 198.

Jones v. Mazolla

The Court of Appeal revisited *May v. Casola*, in the *Jones* case. Here the Court of Appeal applied deference to the conclusions of Justice Herman at trial, and her finding that the threshold had been met. The accident occurred on November 26, 1996. The Plaintiff suffered neck pain, shoulder pain, back pain, headaches, and difficulty sleeping, and on the medical evidence, had developed a chronic pain disorder which would continue indefinitely. She had worked in an office setting as an inventory control analyst, and at the time of the accident, she was on maternity leave from that job. On eventual return to work, she was able to continue her job and the evidence was that her performance did not suffer, though she did miss time due to ongoing headaches and sleeping problems.

Significantly, the Plaintiff had an active social life prior to the accident. She had been a perfectionist at housework before the accident and after, was unable to do much of it although an OT found that she was "managing". She used to coach her daughter's soccer team and did not resume this post-accident. In addition to medical witnesses, there were lay witnesses: a friend, a neighbour and her former work supervisor. They described her before the accident as "superwoman" and "driven". Her house was "immaculate" before the accident and after the accident it appeared as if the Plaintiff's "life was over".¹⁰

Although there was no evidence of permanence of the impairment, the judge applied the theory that permanent means "indefinite" and held that her impairment was indeed permanent, because it had lasted 7 years from the accident until trial and there was no evidence of any improvement. As the ability to sleep, care for one's children, and "lead a normal life without discomfort" is important, the impairment was found to be important. The court applied the *May v. Casola* rationale and held that

⁹ *May v. Casola*, *supra* at parag 1

her impairment was serious, because it had a significant effect on her life. Specifically, the court stated:

The symptoms suffered by the plaintiff in *May v. Casola*, such as nausea and dizziness, were the type of physical problems that did not prevent a person from carrying on daily life, as a person must, but made doing so very difficult and unpleasant. Although the court referred to the effect on the plaintiff's enjoyment of life, that was in the context of carrying out daily activities.¹¹

Here, the threshold was met. This case underscores that in the context of threshold litigation, and a review of the impact on activities of daily living, evidence of interference with one's enjoyment of life remains significant.

Brak v. Walsh

The decision of the Ontario Court of Appeal in *Brak v. Walsh* was delivered on April 1, 2008. The Court of Appeal (Weiler, Moldaver and Juriensz) overturned the trial judge's motion decision on the threshold. Here, the trial judge dismissed the case for not meeting the threshold; mainly because the low back impairment was not felt to be permanent, and the trial judge heard evidence that it might "clear up with time". The Court of Appeal disagreed on this point because the defence admitted that there really was no such evidence, other than that the problem *might* ameliorate with time. The trial judge also held that the impairment was not serious because the Plaintiff was able to return to work and resume almost all of her domestic duties.

The Court of Appeal disagreed, and once again, reiterated the principles from *May v. Casola*:

The question of whether an injury is serious was addressed by this court in *May v. Casola*. 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 a serious impairment. The trial judge's standard was too high and we consider that an error in principle.

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 though the

¹⁰ *Jones v. Mazolla, supra*

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.

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.¹²

It was held that the trial judge therefore erred in the standard he applied both with respect to the permanency and seriousness of the appellant's injuries, and his decision respecting the threshold was overturned.

Bill 198: Threshold Interpretation Guidelines

Since October 1, 2003, we have been operating under the fourth no-fault regime in Ontario. Regulation 381/03, passed in the fall of 2003 as part of "Bill 198", ostensibly made significant changes to the "Bill 59 threshold" by providing guidance in the analysis and application of the definitions of the terms "permanent", "important" and "serious". The defined terms under Bill 198 were not specifically intended to displace the interpretation of the Ontario Court of Appeal in *Meyer v. Bright*, in which the framework for the analysis of the threshold question was established. Indeed, as noted above, *Meyer* has been applied in nearly all threshold decisions since, including those made under the subsequent regimes of Bill 164 and Bill 59, and now it would seem, Bill 198.

Bill 198 Guidelines

On its face, the new definition imposed by Bill 198 appeared to significantly tighten the definitions by which the serious and permanent requirements of the threshold would be gauged.¹³ The Bill

¹¹ *Jones v. Mazolla*, [2005] O.J. No.5541 (C.A.) at parag 9

¹² *Brak v. Walsh*, *supra*, parag 6-8

¹³ The new definitions only relate to threshold motions fro accidents after October 1, 2003.

provided that a person meets the new threshold criteria if they can show that they meet all of the following criteria¹⁴:

4.2(1) A person suffers from a 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,

¹⁴ Ontario Regulation 461/96 as amended by Ontario Regulation 381/03, s.4.1-4.3.

- 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.

Discussion of the Bill 198 Threshold Interpretation Guidelines

Pursuant to the Court of Appeal's ruling in *Meyer*, in determining whether an impairment was "permanent", a court was required to examine both objective and subjective evidence before it. *Meyer* did not re-define the commonly accepted definition of "permanent" as being a weakened condition, lasting into the indefinite future without any limit.

Under Bill 198, the threshold remains the same in terms of language, but contains a regulation and definition of the terms and a prescription of the evidence required to meet the threshold. Under the Bill 198 amendments, Regulation 381/03 mandates various criteria by which to determine whether a serious and permanent injury has occurred. The investigation requires that an injured person prove to the court that the impairment complained of substantially interferes with his or her ability to continue with their former employment or training despite reasonable attempts at accommodation and that the impairment has been continuous since the accident. The Plaintiff is also required to convince the court that based on medical evidence, the impairment is not expected to improve, despite reasonable treatment, and that such an impairment would be expected to continue for others in "similar circumstances". It has been argued with that this last part of the test introduces an objective component not present in *Meyer*; however, review of the subsequent Bill 198 jurisprudence, suggests that the Courts have been reluctant to import an objective analysis in considering this issue.

In terms of the "importance" of the impairment to the individual, the Court of Appeal in *Meyer* directed that the term must be considered in the context of the Plaintiff as a whole. For an impairment to be "important" it must play a major role in the health and well-being of that person. The Bill 198 amendments added a functional component to the analysis and mandated that in order to satisfy the "important" requirement the Plaintiff must suffer an impairment of a function which is

necessary for the Plaintiff in order to allow him or her to perform the “essential” tasks of regular employment, training, care or well being or important to the usual activities of daily living.

Finally, in terms of “seriousness”, the Ontario Court of Appeal held that the question to be considered is whether the impairment is serious to the person in issue, taking into account his or her unique characteristics and held that as a general proposition, 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. Arguably, the Bill 198 amendments significantly tighten the “serious” impairment requirement and mandate that in order to satisfy the regulation, the Plaintiff must provide medical evidence that explains the nature of the impairment, and its permanence, identifies the function that is impaired, comments on the importance of the function to the particular Plaintiff and indicates that the impairment arises directly or indirectly out of the use or operation of a motor vehicle. The requirement that a physician confirm that nature and scope of the impairment appears to be restrictive although, the section is vulnerable to the same types of medical dishonesty apparent in the reports of sympathetic doctors from time to time. In addition, the Plaintiff is obligated to provide further evidence in support of the proposition that the function in question had changed as a result of the accident and to corroborate the alleged extent of the functional change.

Though on its face, the analysis imposed by Bill 198 appeared to significantly tighten the definitions by which the serious and permanent requirements of the threshold will be gauged, a review of the post-Bill 198 case law suggests that this may not be the case, and that in fact, there has not been a significant shift from the prior analysis under Bill 59, as we may have hoped and expected.

Bill 198: Case Law Review

*Nissan v. McNamee*¹⁵

The first case decided under the new regime was *Nissan v. McNamee*. The Plaintiff, Janet Nissan, was involved in a motor vehicle accident on November 2, 2003. At the time of the accident, the Plaintiff was employed part-time in a cleaning company performing general housekeeping functions. Prior to

¹⁵ *Nissan v. McNamee*, [2008] O.J. No.1739 (S.C.J.)

the cleaning job, she had been unemployed for a few months, and prior to that, she had worked in a pizza shop.

As a consequence of the accident, the Plaintiff suffered a whiplash injury and allegedly developed chronic pain. Her experts pronounced that this was due to a combination of physical and emotional factors. After approximately five months, the Plaintiff returned to work at a pizza shop on modified duties.

Counsel for the Defendant asked that the court consider the following:

1. The new regulatory provisions must be interpreted to reflect an intention to change the interpretation given to the threshold under existing case law.
2. The changes imported an objective analysis into the test.
3. The changes were designed to tighten the threshold.

At the end of the day, although the jury assessed zero damages due to the Plaintiff's poor credibility, and Justice Morissette held that the plaintiff had failed to meet the threshold under the test for a serious injury, Justice Morissette concluded that the Bill 198 legislation does not support any significant change in the interpretation of the threshold, and essentially rejected the three points raised by the Defendant. Justice Morissette also dismissed the suggestion that the new legislation intended to import an objective element into the assessment of the threshold. In so doing, she concluded that a Plaintiff with chronic pain should be compared to other individuals with chronic pain rather than to a more objective yardstick.¹⁶ Further, under the new regulations, the Plaintiff was required to use “reasonable efforts” to accommodate an impairment to work. The notion that this imported an objective element into the analysis was rejected, and rather it was held that this reflected an evidentiary burden on the part of a Plaintiff to adduce some evidence as to what steps were taken vis-à-vis accommodation.

Justice Morissette found that Bill 198 appeared to be harmonious with existing jurisprudence, and stated that “most of the regulation does not appear to support any significant change in the

¹⁶ *Nissan, supra, at parag 36*

interpretation of the threshold. In general terms it suggests at best some clarification of the law regarding accommodation.”¹⁷

This case suggests that although Bill 198 contains new definitions and regulations, the Bill 59 threshold test remains largely the same. As such, following *Nissan*, the existing jurisprudence relevant to the threshold remains applicable, including the analysis under *Meyer v. Bright*, and the ensuing decisions of *May v. Casola* and *Brak v. Walsh*.

*Guerrero v. Fukuda*¹⁸

This case is the second Bill 198 decision. In an endorsement dated October 1, 2008, Justice Little held that the Plaintiff’s impairments crossed the threshold. Here, the Plaintiff had suffered whiplash injuries which left her with constant pain in her upper and lower back. Her whiplash injury had existed since the accident, and left her with constant pain in the upper and lower back, and intermittent pain in most other parts of her body. As a consequence, she was unable to work full-time. On the issue of whiplash, Justice Little wrote:

I think we have transcended the era when whiplash, due to the fact that it is often without objective findings, was equated with faking...

...Pain, and its degree of severity, are subjective and can exist without any objective finding. Calling an expert to say that no objective finding equals no pain is no longer acceptable. That same expert will often treat the pain that exists even though it is without objective findings.¹⁹

The Plaintiff was only able to perform part-time work, and suffered lifestyle restrictions, which detrimentally altered her ability to work and her enjoyment of life. As a consequence, her injury was found to meet the threshold.

Once again, we see the application of the rationale applied in the two Bill 59 decisions of *May v. Casola* and *Brak v. Walsh*: even if a person is able to return to working, if other aspects of their life are substantially affected then they can meet the threshold.

¹⁷ *Nissan, supra, at parag 37*

¹⁸ *Guerrero v. Fukuda*, [2008] O.J. No. 3799 (S.C.J.)

Saikaly v. Buck²⁰

This is an endorsement by Justice McLean, which although short, does contain a brief analysis of the decision of Justice Morissette in *Nissan*, and the comment of Justice McLean that he found this decision to be “highly persuasive”²¹. It was noted that Madam Justice Morissette found that the amendments under Bill 198, were confirmatory of the law found in *Meyer v. Bright*. Accordingly, Justice McLean found no basis on which to deviate from those conclusions, and held that counsel may make submissions on the factual basis for a finding on the threshold on the interpretation of the prior law notwithstanding the new regime.

Sherman v. Guckelsberger²²

This very recent judgment (December 29, 2008) involved a March 10, 2004 motor vehicle accident. The Plaintiff sustained soft tissue injuries, and complained of headaches, and neck pain, as well as numbness and tingling in the little and ring fingers of her right hand. She had other problems that resolved with time, including hip pain and right knee pain. At the time of the accident, the Plaintiff worked as an office administrator for a family physician, working eight hours per day. Within weeks of the accident, she did return to work on a part-time basis, and thereafter returned to her full-time employment. Then, after approximately two and a half years of working full-time, the Plaintiff reduced her hours by eight hours per week, and it was her evidence that she could not continue working full-time due to her accident-related injuries. The Plaintiff was active prior to the accident, including camping. She did continue camping after the accident, but testified that she was less active on the camping trips. She continued to regularly attend a gym following the accident.

The Plaintiff conceded that she did not meet the threshold in relation to activities of daily living. Rather, she alleged that her impairment was work related, and that it was in this regard that she met the threshold. Justice Milanetti concluded that he did not doubt that the Plaintiff had residual pain; however, he did not find that her problems were significant enough to meet the Bill 198 threshold. Here, he felt it illogical that the Plaintiff would on one hand state that she was having difficulty

¹⁹ *Guerrero, supra, at para 3 and 5*

²⁰ *Saikaly v. Buck*, [2008] O.J., No. 3996 (S.C.J.)

²¹ *Saikaly, supra, at para. 2*

²² *Sherman v. Guckelsberger*, (2008) CarswellOnt 7969, (S.C.J.)

maintaining her job on a full-time basis, yet on the other hand, would maintain such a high level of function in the rest of her life (camping, going to the gym etc...)

Justice Milanetti reviewed *Brak v. Walsh* and noted that the new legislation does not make prior case law irrelevant. He also reviewed the (at that time) only decision dealing with Bill 198, *Nissan v. McNamee*. He noted Justice Morissette's conclusion in *Nissan* that the Bill 198 legislative changes did little to change the Bill 59 legislation that preceded it, and stated that he did not necessarily agree with this assessment.

In this case, Justice Milanetti stated the Plaintiff's ongoing pain and discomfort was not sufficient to get her over the threshold, given the "increasing specificity: of the no fault legislation".²³ Thus, Justice Milanetti appears to give credence to the views of Defence counsel, that Bill 198 was indeed intended to "tighten" the threshold, contrary to the earlier decision of Justice Morissette in *Nissan*.

Conclusion

Many had hoped that the introduction of Bill 198, would lead to a "tightening up" of the threshold, and the introduction of an objective analysis. Thus far, that does not seem to be the case. Rather, the analysis undertaken in the earlier cases of *Meyer v. Bright*; *Jones v. Mazolla*; *Brak v. Walsh*; and, most significantly, in *May v. Casola*, continues to be prevalent and seems to have survived the change in regime. Accordingly, these cases remain relevant to the threshold analysis under Bill 198. Thus, it appears that even where a Plaintiff returns to work, the concept of enjoyment of life, when viewed in the context of activities of daily living, remains a significant part of any case involving threshold analysis and interpretation. In order to respond to this contention, we as Defendants must continue to use the tools of investigation, surveillance and the Plaintiff's evidence at discovery in order to ascertain the all-important activity levels of a Plaintiff, both pre and post-accident, and thereby attempt to diffuse this argument.

²³ *Sherman, supra*, at page 19