

## INSURANCE LAW BULLETIN

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### Judges, Juries and the Threshold

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Over the past few years, there have been various cases dealing with the interpretation of the Ontario statutory “threshold” for an award of general damages and future care costs. In the recent decision of *Mayer et al v. 1474479 Ontario Inc. et al, 2013 ONSC 6806*, Justice I.F. Leach did a comprehensive review of what the court will consider when evaluating whether the plaintiff meets the threshold. Justice Leach also reviewed the dichotomy between a jury’s damages award and a judge’s ruling on the threshold motion.

#### BACKGROUND

This case arises from a 2008 motor vehicle accident. The defendants moved for a judicial ruling that the plaintiff’s claim for future care costs and non-pecuniary general damages were barred by section 267.5(3) and 267.5(5) of the *Insurance Act*, R.S.O. 1990 on the basis that the plaintiff’s injuries did not meet the statutory threshold. These sections state that the owner, occupant and any person present at an incident, are not liable for expenses relating to health care or for damages for non-pecuniary losses, unless the injured person has sustained a “permanent and serious impairment of an important physical, mental, or psychological function.”

In *Mayer*, Justice Leach ultimately found that all of the requirements had been satisfied and that the plaintiff’s injuries met the threshold. In coming to this conclusion, Justice Leach thoroughly reviewed the applicable legislation and case law and detailed the requirements necessary for a plaintiff to meet the threshold.

#### THE LAW

Justice Leach referred to the original threshold decision of *Meyer v. Bright*, [1993] O.J. No. 2466 (C.A.), where the Court of Appeal found that a plaintiff must prove that he or she falls within the threshold exceptions. The appellate court held that the proper approach to a threshold determination was to answer the following questions:

1. Has the injured person sustained a permanent impairment of a bodily function by continuing injury which is physical in nature?
2. If yes, is the bodily function which is permanently impaired, an important one?

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

Section 4.2(1) of *O.Reg.491/96* lists further criteria that must be met in order for the plaintiff to suffer a permanent, serious impairment of an important physical, mental or psychological function.

In his decision, Justice Leach dissected the words 'serious', importance' and 'permanent'. He outlined further requirements noted in prior case law necessary to satisfy threshold:

- **Serious** – a serious impairment includes a substantial interference with the ability of the injured person to perform usual daily activities or continue regular employment; pain symptoms that go beyond tolerable and significantly impair a person's enjoyment of life; or a change in job function or efficiency.
- **Importance** - not every function that is impaired is important. The relevant bodily function on the plaintiff's way of life must be considered in the broadest possible sense.
- **Permanent** - relates to "lasting or intending to last or function indefinitely as opposed to temporarily" or "lasting or meant to last only for a limited time". The permanence of an injury exists where a limitation in function is unlikely to improve in the indefinite future. Whether an impairment is permanent should be determined on the basis of objective medical evidence.

Justice Leach noted that in order for the threshold exceptions to apply, the plaintiff must establish both the existence and the extent of an alleged injury and the associated impairment. It is then that a plaintiff will be found to satisfy the statutory threshold. While objective findings make this process easier, they are not necessary. Some diagnoses can be made based on a plaintiff's subjective complaints. Further, credibility is often used in making threshold determinations.

Finally, a plaintiff must show causation in order to establish satisfaction of threshold. Threshold exceptions do not apply unless the specified impairments exist or occur as a result of the use or operation of the automobile.

### **JURY VERDICT VERSUS THE THRESHOLD MOTION**

Justice Leach also commented on the overlap between a judge's ruling on a threshold motion and a jury's verdict. The overlap exists between both the judge and jury's consideration of matters such as the existence and extent of bodily injuries and associated disabilities, whether the injuries were caused by the accident and whether the plaintiff did have bodily injuries and impairments which arose directly or indirectly as a result or use of the operation of a motor vehicle.

Justice Leach noted that a judge and the jury may view matters differently and arrive at different conclusions. This is an unavoidable result of the civil jury system. A trial judge is not bound by the findings of a jury. In *Mayer*, Justice Leach and the jury had different perceptions of the case. The jury awarded the plaintiff very little by way of damages: \$5,800 for non-pecuniary

damages, \$15,500 for past income loss, \$45,000 for loss of future income, \$15,000 for future housekeeping care costs, \$56,000 for other future care costs and zero for pecuniary loss of an interdependent relationship. Justice Leach did not find the jury's verdict unreasonable even in light of his finding that the plaintiff met the threshold. He found that a jury is entitled to its own independent assessments of credibility and causation based on its own view of evidence.

## **CONCLUSION**

*Mayer* provides us with a summary of the requirements necessary for a plaintiff's injuries to breach the statutory threshold. This case demonstrates the overlap between the decisions of judges and juries and is a succinct summary of the law and its application to threshold injuries.