

NEUTRAL CASE CITATION NO. 7516

Court File No. 68539/10

SUPERIOR COURT OF JUSTICE

MARIE GIORDANO

Plaintiff

- and -

CHENG LI AND FANG ZHI LI

Defendants

BEFORE THE HONOURABLE JUSTICE SHAUGHNESSY,
AT THE COURTHOUSE, 150 BOND ST. E., OSHAWA, ONTARIO,
ON THURSDAY, DECEMBER 11, 2014.

RULING ON THRESHOLD MOTION

APPEARANCES:

T. Charney Counsel for the Plaintiff.
A. Eckart

T. McCarthy Counsel for the Defendant.

Giordano v. Li
Ruling on Threshold Issue - Shaughnessy J.

1 THURSDAY, DECEMBER 11, 2014

2 NEUTRAL CASE CITATION NO. 7516

3 RULING ON THRESHHOLD MOTION

4
5 SHAUGHNESSY J. (Orally)

6 While the jury is deliberating in the course of a
7 four-week trial, I have heard the submissions of
8 counsel in relation to what is typically referred
9 to as the threshold motion. Accordingly, I am
10 delivering my decision before the jury has
11 returned its verdict.

12
13 The defendant brings this motion on the basis
14 provided by s. 267.5(15) of the *Insurance Act*,
15 R.S.O. 1990, which, in part, reads as follows:

16 *...the trial judge shall determine for the*
17 *purpose of subsections (3) and (5) whether, as*
18 *a result of the use or operation of the*
19 *automobile, the injured person has...*
20 *sustained...*

21 *(b) Permanent serious impairment of an*
22 *important physical, mental or psychological*
23 *function.*

24
25 Now there are decisions going both ways as to
26 when the trial judge should deliver his or her
27 decision. The Court of Appeal in *Kasap and MacCallum*
28 [2001] O.J. No. 1719 stated that the jury's
29 verdict is a factor but only one factor that a
30 trial judge may consider.

31
32 However, in exercising my discretion, I am of the

December 11, 2014

Giordano v. Li
Ruling on Threshold Issue - Shaughnessy J.

1 view that the statutory considerations and the
2 tests under s. 267.5(15) of the *Insurance Act* and
3 the regulations is a discreet consideration
4 separate and apart from the jury's review and
5 consideration of the evidence. Therefore, as
6 stated, I am delivering my decision without
7 considering the jury's verdict.

8
9 Counsel for the respondent has provided me with a
10 recent decision in *Mayer v. 1474479 Ontario Inc.*, [2013]
11 O.J. No. 4945 wherein the trial judge well and
12 correctly details the law and legislative history
13 relating to the relevant provisions of the
14 *Insurance Act*. I do not propose to review the
15 history.

16
17 As outlined in the *Mayer* case at paragraph 15, the
18 underlying criteria of the threshold provisions
19 received further definition and clarification in
20 s. 4(2) of the Ontario Regulations. These
21 regulations define that a person suffers from
22 permanent serious impairment of an important
23 physical, mental or psychological function if all
24 the delineated criteria are met. There are then
25 three criteria defined under the regulations that
26 must be met and as defined.

27
28 Using the benefit of the *Mayer* case, I read from
29 paragraph 15. Section 4.2(1) of the Regulations
30 reads as follows:

31
32 4.2 (1) A person suffers from permanent

Giordano v. Li
Ruling on Threshold Issue - Shaughnessy J.

1 *serious impairment of an important physical,*
2 *mental or psychological function if all of the*
3 *following criteria are met:*

4 1. *The impairment must,*

5 i. *substantially interfere with the person's*
6 *ability to continue his or her regular or*
7 *usual employment, despite reasonable*
8 *efforts to accommodate the person's*
9 *impairment and the person's reasonable*
10 *efforts to use the accommodation to allow*
11 *the person to continue employment,*

12
13 ii. *substantially interfere with the person's*
14 *ability to continue training for a career*
15 *in a field in which the person was being*
16 *trained before the incident, despite*
17 *reasonable efforts to accommodate the*
18 *person's impairment and the person's*
19 *reasonable efforts to use the*
20 *accommodation to allow the person to*
21 *continue his or her career training, or*

22
23 iii. *substantially interfere with most of the*
24 *usual activities of daily living,*
25 *considering the person's age.*

26
27 2. *For the function that is impaired to be an*
28 *important function of the impaired person, the*
29 *function must,*

30
31 i. *be necessary to perform the activities*
32 *that are essential tasks of the person's*

Ruling on Threshold Issue - Shaughnessy J.

1 *regular or usual employment, taking into*
2 *account reasonable efforts to use the*
3 *accommodation to allow the person to*
4 *continue employment,*

5
6 *ii. be necessary to perform the activities*
7 *that are essential tasks of the person's*
8 *training for a career in a field in which*
9 *the person was being trained before the*
10 *incident, taking into account reasonable*
11 *efforts to accommodate the person's*
12 *impairment and the person's reasonable*
13 *efforts to use the accommodation to allow*
14 *the person to continue his or her career*
15 *training,*

16
17 *iii. be necessary for the person to provide*
18 *for his or her own care or well-being, or*

19
20 *iv. be important to the usual activities of*
21 *daily living, considering the person's*
22 *age.*

23
24 3. *For the impairment to be permanent, the*
25 *impairment must,*

26 *i. have been continuous since the incident*
27 *and must, based on medical evidence and*
28 *subject to the person reasonably*
29 *participating in the recommended*
30 *treatment of the impairment, be expected*
31 *not to substantially improve,*
32

Giordano v. Li
Ruling on Threshold Issue - Shaughnessy J.

1 *ii. continue to meet the criteria in*
2 *paragraph 1, and*

3
4 *iii. be of a nature that is expected to*
5 *continue without substantial improvement*
6 *when sustained by persons in similar*
7 *circumstances.*

8
9 Accordingly, all criteria set out in the
10 regulations must be met.

11
12 Again, referencing the *Mayer* case at paragraphs 18
13 through 21, there is again an excellent summary
14 of the case law which I have considered and I am
15 going to read the principles outlined but I am
16 going to omit the citations to the case law
17 referred to in the actual decision. I will begin
18 at paragraph 17.

19
20 [17] *The three criteria also have been the*
21 *subject of repeated judicial comment and*
22 *exposition.*

23
24 [18] *For example, in relation to the first of*
25 *these three criteria, (substantial*
26 *interference):*

27
28 *a. Generally speaking, a serious*
29 *impairment is one which causes*
30 *substantial interference with the*
31 *ability of the injured person in*
32 *question, (and not some other*

Ruling on Threshold Issue - Shaughnessy J.

1 *objectively discernible "reasonable*
2 *person"), to perform his or her usual*
3 *daily activities or to continue his or*
4 *her regular employment.*

5
6 *b. A claimant must do more than simply*
7 *experience ongoing pain or discomfort*
8 *to bring himself or herself within the*
9 *statutory exceptions permitting*
10 *litigation. It is apparent that the*
11 *Legislature intended injured persons to*
12 *bear some interference with their*
13 *enjoyment of life without being able to*
14 *sue for it, and only a "serious"*
15 *impairment will qualify. Tolerable*
16 *symptoms that still permit a claimant*
17 *to function well do not bring a*
18 *claimant within the statutory*
19 *exceptions. However, symptoms that go*
20 *beyond the tolerable and significantly*
21 *impair a plaintiff's enjoyment of life*
22 *will be sufficiently serious. A court*
23 *must look at the totality of evidence,*
24 *whether medical or lay, to assess and*
25 *determine whether the interference with*
26 *the plaintiff's life is substantial. A*
27 *person who can carry on daily*
28 *activities, but is subject to permanent*
29 *symptoms that have a significant effect*
30 *on his or her enjoyment of life, (e.g.,*
31 *because of sleep disorder, headaches,*
32 *dizziness and nausea), must be*

Giordano v. Li
Ruling on Threshold Issue - Shaughnessy J.

1 *considered as having sustained a*
2 *serious impairment, in the sense*
3 *required.*

4

5 Of particular note to the present case is
6 paragraph c:

7

8 *c. A change in job function or efficiency*
9 *is sufficient to constitute a*
10 *substantial interference with the*
11 *ability of an injured person to*
12 *continue his or her*
13 *employment. Similarly, frustration of*
14 *an injured person's chosen career path*
15 *generally should be considered a*
16 *serious matter.*

17

18 I say that criteria is met in the present case,
19 as I will detail later.

20

21 *d. Activities of "daily living" to be*
22 *considered in this context are wide-*
23 *ranging, and include not only*
24 *employment activities and household*
25 *responsibilities, but also the ability*
26 *to socialize with others, have intimate*
27 *relations enjoy one's children, and*
28 *engage in recreational pursuits.*

29

30 [19] In relation to the second of the three
31 criteria, (importance of function):

32

a. Not every function that is impaired is

Giordano v. Li
Ruling on Threshold Issue - Shaughnessy J.

1 *important. The Court must consider*
2 *whether the bodily function is*
3 *important to the injured person in*
4 *question.*

5
6 *b. The court must consider the effect the*
7 *relevant bodily function has upon the*
8 *plaintiff's way of life in the broadest*
9 *possible sense.*

10
11 *[20] In relation to the third of the three*
12 *criteria, (permanence):*

13 *a. The term "permanent" does not*
14 *necessarily mean strictly forever until*
15 *death. Rather, it means "lasting or*
16 *intending to last or function*
17 *indefinitely as opposed to temporarily",*
18 *or "lasting or meant to last only for a*
19 *limited time". It therefore "bears the*
20 *sense of a weakened condition lasting*
21 *into the indefinite future without any*
22 *end limit, as opposed to one predicted*
23 *to have some defined end".*

24
25 *b. Permanence of injury also is*
26 *established where a limitation in*
27 *function is unlikely to improve for the*
28 *indefinite future.*

29
30 *c. Although there may be situations where*
31 *the permanent nature of the impairment*
32 *is readily apparent, (e.g., complete*

1 *loss of a limb or eye), other cases*
2 *demand appropriate evidence that a*
3 *condition will continue into the*
4 *indefinite future. Mere passage of*
5 *time, without evidentiary criteria to*
6 *gauge or assess its significance, (e.g.,*
7 *a medical perspective regarding the*
8 *injuries sustained and expectations of*
9 *recovery in the normal course of*
10 *events), is insufficient to establish a*
11 *substantial possibility that the*
12 *impairments are permanent. The question*
13 *of whether or not an impairment is*
14 *permanent should be determined on the*
15 *basis of objective medical evidence.*

16
17 [21] *Although not expressly included or*
18 *defined as part of these enumerated*
19 *criteria, the relevant provisions of the*
20 *Insurance Act, supra, also effectively make*
21 *existence of injury and impairment, and*
22 *causation of such injury by the relevant*
23 *accident, additional pre-conditions of*
24 *meeting the statutory threshold for*
25 *litigation.*

26
27 [22] *In relation to the existence and extent of*
28 *injury and impairment:*

29 *a. As indicated in the primary legislative*
30 *provisions set forth above, the*
31 *threshold exceptions for litigation*
32 *created by s. 267(3) and s. 267.5(5) of*

1 the *Insurance Act*, *supra*, are entirely
2 dependent on the existence of an injury
3 and associated impairment, the
4 qualities and impact of which then are
5 examined to determine whether or not
6 the threshold has been met. Both the
7 existence and extent of an alleged
8 injury and associated impairment
9 therefore necessarily form a
10 fundamental component of what a
11 plaintiff must establish to demonstrate
12 satisfaction of the litigation
13 threshold.

14
15 b. The presence of "objective findings"
16 may make it easier to establish injury
17 and impairment in the sense required,
18 but the existence of such findings is
19 not necessary. The reality is that
20 some injuries can be diagnosed based on
21 objective findings, while others must
22 be based on a patient's subjective
23 complaints. The "threshold" legislation
24 does not change the process by which
25 courts traditionally have weighed and
26 assessed evidence to make
27 determinations about the existence,
28 nature and extent of injury.

29
30 This next paragraph is of particular importance
31 to the present case:

32 c. The Supreme Court of Canada has

1 *recognized the reality of chronic pain*
2 *and related medical conditions, but*
3 *simultaneously has acknowledged that,*
4 *by definition, the existence of chronic*
5 *pain is not supported by objective*
6 *findings at the site of an injury, (at*
7 *least under current medical techniques),*
8 *such that those suffering from chronic*
9 *pain often are subjected to persistent*
10 *suspensions of malingering; ... In the*
11 *context of "threshold" determinations,*
12 *where the existence and extent of*
13 *injury and associated impairment are*
14 *therefore highly dependent on*
15 *subjective reports of chronic pain, (on*
16 *which treating physicians and others*
17 *rely), credibility of the claimant*
18 *often assumes paramount importance.*

19
20 Applying, therefore, the principles of law as
21 they relate to s. 267(15) of the *Insurance Act*
22 and the regulations relevant to the section, I am
23 satisfied on the evidence I heard during this
24 trial that the plaintiff, Marie Giordano,
25 sustained a permanent serious impairment of an
26 important physical, mental or psychological
27 function arising out of the motor vehicle
28 accident on June 7, 2009. The evidence that I
29 have relied on in arriving at this conclusion is
30 as follows.

31
32 Dr. Barrettara testified that based on his

1 examination of the plaintiff over the course of
2 four to five years, he was able to form a
3 professional opinion to a probability as to what
4 injuries she currently experiences as a direct
5 result of the accident of June 7, 2009.

6 • He diagnosed chronic cervical pain, which is
7 neck strain and "chronic", he stated,
8 meaning it has gone on beyond and above the
9 normal recovery and it is continuing and
10 ongoing.

11
12 • Second, he diagnosed a chronic lumbosacral
13 strain. In that regard, he also diagnosed
14 bilateral leg pains, which is pain felt
15 radiating from the back down to both legs.

16
17 • He also diagnosed left shoulder girdle strain
18 with adhesive capsulitis.

19
20 • Dr. Barrettara also diagnosed post-traumatic
21 stress disorder with major depression, panic
22 attacks and ongoing anxiety. He also
23 testified that the stress disorders and
24 major depression has been a serious injury
25 and she has now gone on to develop
26 psychological symptoms such as panic attacks,
27 nightmares, disruptive sleep, mood changes
28 and anxiety, disrupting her lifestyle and
29 activities, social and work-related matters.
30 He indicated that chronic pain is an element
31 of post-traumatic stress disorder.

Giordano v. Li
Ruling on Threshold Issue - Shaughnessy J.

1 Dr. Barrettara's professional opinion and
2 prognosis, based on his experience and following
3 the plaintiff for several years, as to a
4 probability the permanency of her physical
5 injuries, including her cervical strain, the left
6 shoulder girdle strain, the low back strain, is
7 that they have reached a maximum medical recovery
8 and are permanent.

9
10 Dr. Barrettara also opined on the major
11 depressive episodes wherein the plaintiff has
12 crying spells, feels depressed, withdrawn from
13 her usual activities and feeling more secluded
14 and sad.

15
16 On the issue of causation, Dr. Barrettara
17 testified the plaintiff had been involved in a
18 motor vehicle accident on October 2, 2007.
19 However, with regard to her chronic problems and
20 psychological problems, he states that those
21 injuries were suffered in the June 7, 2009
22 accident and are a direct result of the motor
23 vehicle accident of June 7, 2009. He states that
24 the plaintiff was working full time with no
25 significant neck and back problems or
26 psychological or psychiatric problems at the time
27 of the second accident of June 7, 2009.

28
29 Dr. Barrettara provided his opinion to a
30 probability that the plaintiff continues to have
31 restrictions in the use of her neck. Her neck
32 continues to be painful, especially on the left

1 side. There is associated stiffness and limited
2 ability in using her neck. The neck pain
3 continues to radiate down the left shoulder and
4 she has difficulty lifting the arm. She has
5 difficulty turning her neck. She can't sustain
6 neck flexion or extension for prolonged periods
7 of time. She has restrictions in the use of her
8 left shoulder. She is not able to lift the arm
9 above 90 degrees. She needs help with activities
10 involved in lifting. In relation to her low back,
11 he states the plaintiff has ongoing chronic pain
12 in the central area. Any mechanical movements
13 make the pain worse, such as bending, twisting
14 and turning. She has stiffness. She is limited in
15 her movements as far as bending, walking and
16 exercising.

17
18 With respect to restrictions in her neck, her
19 left shoulder and low back, his opinion to a
20 probability is that these restrictions are
21 permanent.

22
23 Dr. Barrettara further opined that in his
24 professional opinion, to a degree of probability,
25 as a direct result of the accident, the
26 plaintiff's injuries have prevented her from
27 returning to her position at ISA in furniture
28 sales. He stated that she is not able to return
29 to that job any longer given the nature of the
30 work that she was doing full time, including
31 multi-tasking and doing all sorts of activities.
32 He states that she can never resume that kind of

Ruling on Threshold Issue - Shaughnessy J.

1 a job situation with high stress. Her
2 restrictions, as detailed previously, affect her
3 ability to do work. Her neck and back are ongoing
4 problems. Her sitting is limited. Her neck
5 turning and extension, neck flexion rotation,
6 turning to the left and turning to the right is
7 affected and limited.

8
9 In relation to the plaintiff's emotional issues,
10 Dr. Barrettara, to a degree of probability,
11 indicated that the plaintiff is currently
12 experiencing emotional restrictions. He stated
13 that she is still having anxiety and panic
14 attacks. She is still having nightmares and
15 disrupted sleep, which makes her tired when she
16 wakes up and tired throughout the day and
17 affecting her concentration and affecting her
18 daily activities.

19
20 Dr. Barrettara opined that the plaintiff's
21 emotional complaints affect her ability to return
22 to work in a furniture sales position. Her
23 depression does not make her mentally able to
24 work at a demanding job. She has problems
25 focusing on tasks and intrusive panic attacks or
26 mood disturbances that would affect her work. She
27 does not perform very well now under stress.
28 Stressful situations flare her emotional
29 well-being or anxiety and her pain. With
30 increased stress, she experiences increased pain
31 and is more anxious, together with a cascade of
32 other related symptoms.

Giordano v. Li
Ruling on Threshold Issue - Shaughnessy J.

1 Also in relation to the ability to work,
2 Dr. Barrettara provided a professional opinion to
3 a degree of probability that she will not be able
4 to return to work full time. He bases his opinion
5 on her chronic pain and the limited movements of
6 her neck, back and shoulder and also her
7 emotional problems with the sleep disturbance,
8 ongoing nightmares, anxiety attacks, feeling
9 fatigued during the day and not being able to
10 concentrate on what she would be doing on a full
11 time basis.

12
13 In relation to household chores, Dr. Barrettara
14 stated that she can do some light duties but
15 doing laundry, bending, lifting, doing her
16 toenails, doing her hair, she needs help with
17 that and vacuuming, washing, heavy washing,
18 washing toilets, she has problems with. He states
19 that in his professional opinion to a degree of
20 probabilities, her injuries and impairments
21 impact her ability to perform housekeeping and
22 certain hygiene aspects now and in the future.

23
24 I also have considered, in coming to my
25 conclusion, the testimony of Dr. Waisman, a
26 psychiatrist. Dr. Waisman testified that he
27 formed a professional opinion to a probability
28 that the plaintiff sustained psychiatric issues
29 as a direct result of the accident on June 7,
30 2009. He stated that she suffers from:

- 31 1. Somatic symptom disorder, which is a form of
32 chronic pain; and

Giordano v. Li
Ruling on Threshold Issue - Shaughnessy J.

1 2. From a major depressive disorder.
2

3 Dr. Waisman testified about the criteria under
4 DSM-5 and he outlined how the plaintiff met these
5 requirements and that the plaintiff will have
6 more somatic symptoms that are distressing; that
7 result in disruption of daily life and excessive
8 thoughts or feelings or behaviours related to the
9 symptoms that are manifested by persistent
10 thoughts about the seriousness of her symptoms,
11 high levels of anxiety about health symptoms and
12 excessive time and energy devoted to these
13 symptoms and to these health concerns. So that is
14 one somatic disorder with predominant pain that
15 he found that Marie Giordano is suffering from
16 and as a result of this condition, Marie Giordano
17 has got involved in a vicious cycle of pain that
18 developed into depression. He testified that this
19 condition feeds itself like a cycle that she
20 can't get out of. The depression leads to more
21 pain. The pain leads to more depression.
22

23 Dr. Waisman opined that Marie Giordano also meets
24 the criteria for a major depressive disorder. He
25 stated that he came to this conclusion based on
26 her presentation, the mental status exam that he
27 conducted and the symptoms she gave him, namely:

- 28 • she has been experiencing depression most
29 of the day;
30 • she has been experiencing the lack of
31 interest in activities that used to give
32 her pleasure before;

Ruling on Threshold Issue - Shaughnessy J.

- 1 • there has been weight changes;
- 2 • there have been problems with her sleep
- 3 • there have been problems with fatigue;
- 4 • there have been problems with diminished
- 5 ability to think or concentrate;
- 6 • she is distracted by her pains.

7

8 She has all of these criteria, which he puts

9 under the label of "Major Depressive Disorder"

10 and he maintains that, in his opinion, she met

11 the criteria under the DSM-5.

12

13 In relation to impairments and restrictions in

14 functional ability, Dr. Waisman testified that

15 because of the two psychiatric disorders, there

16 are impairments in her ability to regulate her

17 emotions. She often feels very sad. It is to the

18 extent that she cannot get out of those feelings

19 of sadness. Nothing cheers her up. He also feels

20 there is a difficulty in her ability to focus on

21 things and concentrate because she gets

22 distracted by the pains that she is experiencing.

23

24 There is an impairment in her sleep and as he

25 explained, sleep is extremely important for

26 overall functioning and for mental health. If you

27 don't sleep, you can't function. He goes on to

28 state there has been an impairment in her ability

29 to deal with frustrating situations and with

30 situations that we all have to deal with,

31 stressful situations. He testified that she had

Ruling on Threshold Issue - Shaughnessy J.

1 reported feeling irritable, which is an
2 impairment.

3
4 Dr. Waisman testified that another significant
5 impairment has been her vulnerability to
6 decompensate in situations of stress because of
7 her pain and because of the depressive symptoms
8 that she has been feeling.

9
10 Another form of impairment is fatigue, both
11 physical and mental fatigue from the constant
12 pain that she is subjected to.

13
14 Dr. Waisman provided the opinion that the
15 plaintiff's chronic pain syndrome or somatic
16 symptom disorder play a great role as to her
17 impairments. Again he described that vicious
18 cycle of pain and depression that she is trapped
19 in.

20
21 In relation to permanency of the plaintiff's
22 condition, Dr. Waisman's opinion to a probability
23 was that her prognosis is poor and he believes
24 that her symptoms have now reached a stage of
25 permanence. Similarly, the impairments in the
26 plaintiff's mental function are impairments and
27 are permanent.

28
29 Dr. Waisman stated that the underlying illness
30 that she is suffering right now, the chronic pain
31 combined with depression, is going to persist at
32 this point despite many treatments. Dr. Waisman

1 also opined that the restrictions in functional
2 ability or impairments that he described are
3 impairments that are important mental functions.
4 He also went on to state as a result of this
5 chronic pain, her career was stopped. He stated
6 that she had a managerial position, a respectable
7 position in a demanding job but it was a job with
8 a trajectory towards moving forward. Now she has
9 had to give up on this career. He states that she
10 wants to move on with her life but she can't move
11 on because of her impairments.

12
13 Dr. Waisman testified that these impairments are
14 serious and are a substantial interference with
15 her ability to perform her usual activities as
16 described above. He states that the accident
17 brought an abrupt stop to her dreams, to her
18 endeavours, to things that she was planning to do
19 prior to the accident.

20
21 Dr. Waisman was asked to provide an opinion
22 whether Marie Giordano's psychiatric impairments
23 impact her ability to return to work at the
24 furniture sales position that she held before the
25 accident. In giving this opinion, Dr. Waisman
26 stated that he had an opportunity to review the
27 reports of Mr. Kumove and he reviewed the opinion
28 of Dr. Barrettara and Dr. Zacharia. He stated
29 that he has an understanding of what the physical
30 and emotional demands were of that position and
31 he states it was kind of a high-level stressful
32 job that requires a lot of administrative work so

Giordano v. Li
Ruling on Threshold Issue - Shaughnessy J.

1 it involved both physical effort and mental
2 effort.

3
4 Dr. Waisman opined to a degree of probability
5 that as a direct result of the accident of June 7,
6 2009, Marie's psychiatric disorders prevent her
7 from returning to her position in furniture sales.
8 He stated that he did not believe that she is
9 capable of returning back to her pre-accident
10 position. The extent of her emotional impairments
11 at this time is such that she would not be able
12 to cope with the stress of that kind of job. She
13 would not be able to deal with day-to-day
14 situations and problems that occur in that type
15 of responsible position. He also believed that
16 she would not be able to consistently attend to
17 work because of her symptoms and he believes that
18 individuals with chronic pain, especially
19 Ms. Giordano, are required to pace themselves;
20 otherwise, they burn out. They can't perform
21 their job adequately and he believes that her
22 pre-accident employment would not allow her to
23 pace herself. It's a high-powered job that
24 requires her to constantly run and do things.

25
26 Dr. Waisman provided the opinion that while Marie
27 is currently working part-time at the LCBO, in
28 his professional opinion to a degree of
29 probability, with respect to her ability to
30 return to full time work in any occupation, he
31 stated he does not believe that she can return to
32 full time work at this time.

Giordano v. Li
Ruling on Threshold Issue - Shaughnessy J.

1 Dr. Waisman also expressed his opinion on the
2 cause of the plaintiff's psychiatric disorders.
3 It was his professional opinion to a probability
4 the cause of her psychiatric disorders and her
5 current symptoms are as a result of the June 7,
6 2009 accident.

7
8 I also considered, in coming to my conclusions,
9 the evidence of Dr. Ogilvie-Harris who opined, on
10 the basis of the history, physical examination
11 and review of medical information. He testified
12 that, to a probability, the injuries the
13 plaintiff sustained in the accident of June 7,
14 2009 are called soft tissue injuries, which he
15 described. After the accident, she developed pain.
16 The pain has persisted and it is still there and
17 his physical examination shows that she has
18 restricted movement that correlates with long-
19 term pain and disability.

20
21 Dr. Ogilvie-Harris' professional opinion is that
22 she has a chronic pain syndrome. He also
23 explained that if you have chronic pain syndrome
24 and you've had it for more than two years, the
25 chance of successfully curing it is very small.

26
27 Dr. Ogilvie-Harris also provided an opinion
28 regarding the limitations Marie Giordano is
29 currently experiencing as a result of her
30 injuries. He stated that the limitations are
31 because of her pain. She has low back pain and
32 that has mechanical limits. She has difficulty in

Giordano v. Li
Ruling on Threshold Issue - Shaughnessy J.

1 prolonged sitting, prolonged standing, bending,
2 lifting, doing anything such as running or
3 jumping. So that is the mechanical issue and the
4 chronic pain itself affects her endurance so at
5 the end of work, she is tired. She can't take on
6 extra work. The pain interferes with her
7 interaction with other persons, being clients or
8 bosses. Dr. Ogilvie-Harris opined that her limits
9 are that she can only do sedentary or light work
10 and she will probably be limited in the duration
11 of her work; in other words, part-time work or
12 shortened periods of times of work.

13
14 Dr. Ogilvie-Harris was also asked to give an
15 opinion to a degree of probability as to whether
16 the plaintiff's injuries from the June 7, 2009
17 accident prevent her from returning to her work
18 as a sales manager at ISA. He opined that in
19 relation to her ability to return to the ISA
20 sales manager position, based on his
21 understanding of her job, her limitations would
22 have prevented her from going back now and in the
23 future.

24
25 Dr. Ogilvie-Harris' opinion, to a degree of
26 probability, is that the injuries, including the
27 chronic pain syndrome, were caused by the motor
28 vehicle accident of June 7, 2009. The pain has
29 been consistent. It has been there all the time.
30 It has been persistent. So in Dr. Ogilvie-Harris'
31 opinion, it is highly probable that the accident
32 triggered or caused the chronic pain syndrome.

Ruling on Threshold Issue - Shaughnessy J.

1 Dr. Ogilvie-Harris opined to a degree of
2 probability that the injuries sustained by
3 Marie Giordano in the motor vehicle accident are
4 permanent. He stated that sort of injury which
5 has been present for more than two years,
6 statistics indicate it is likely to persist. He
7 can say it is highly probable that her pain will
8 persist for the foreseeable future. The
9 impairment to her bodily functions, which she is
10 currently experiencing because of the accident,
11 are to her low back. The back pain affects her
12 sitting, standing, twisting, turning, lifting and
13 carrying, and that is one aspect.

14
15 The second bodily function which is affected is
16 her whole body and that is affected by the
17 chronic pain and that is coming from her brain
18 but there's a secondary effect to the body. He
19 stated when you are in chronic pain, you are not
20 as active. The body stiffens up, muscles become
21 weaker and your whole body function is affected
22 by chronic pain. So that is a second area in
23 which the plaintiff is affected.

24
25 Dr. Ogilvie-Harris' opinion to a degree of
26 probability is that these impairments to her
27 bodily functions are important medically. They
28 are important because when we judge how serious
29 an injury is, there are several aspects medically
30 as it affects the quality of her life judged in
31 several different domains.

Ruling on Threshold Issue - Shaughnessy J.

1 One domain is whether she can do domestic chores.
2 She says she can only do 30 percent of what she
3 did before. Based on the medical documentation he
4 reviewed, he believed that this is reasonable.

5
6 The second domain is the social and recreational
7 activities. He states that she cannot do dancing
8 and swimming, which are things that she did do
9 before and she's not doing now.

10
11 The third domain, which is very important, is
12 whether she can work. He states if you can't work
13 then it's pretty serious. He stated that she is
14 working part-time and that is consistent with
15 what is known about the whole group of patients
16 with chronic pain is that they are restricted in
17 terms of their lifetime employment. He also
18 opined that, to a degree of probability, her
19 injuries are serious from a medical perspective.

20
21 I have also considered the evidence of Dr. Chow,
22 a physiatrist, who diagnosed from a physical
23 perspective that the plaintiff had chronic neck
24 pain, back pain and left shoulder pain which will
25 restrict her in various functional tasks. She has
26 impairment of the neck and back. While she has
27 psychological issues, Dr. Chow deferred any
28 comment to the psychiatric medical experts.

29
30 He states that she is not able to sustain
31 prolonged and repetitive postural activities such
32 as repetitive head and neck movements and trunk

Giordano v. Li
Ruling on Threshold Issue - Shaughnessy J.

1 bending. He testified that she has a substantial
2 inability to perform the essential tasks of her
3 pre-accident job as a sales manager at ISA. He
4 further testified that she will be at a
5 disadvantage in the workplace since she will be
6 less competitive.

7
8 Dr. Chow testified that he had reviewed the many
9 medical records, notes and reports and it was his
10 opinion to a probability that the injuries
11 sustained by the plaintiff are all caused by the
12 motor vehicle accident of June 7, 2009. He stated
13 he reserved his opinion whether the plaintiff was
14 suffering from chronic pain syndrome until she
15 was seen again by him on a follow-up visit on
16 July 23, 2014. He states that in his opinion to a
17 degree of probability, the plaintiff meets the
18 criteria of a chronic pain syndrome.

19
20 Dr. Chow testified that the plaintiff's physical
21 condition and chronic pain syndrome are serious
22 and permanent and affect her function and ability
23 to participate in her pre-accident activities and
24 her pre-accident employment.

25
26 Then, of course, there is the evidence of
27 Marie Giordano. Ms. Giordano also testified to
28 the impairment she had experienced as a result of
29 the injuries sustained in the accident. Her
30 evidence on this point was:

- 31 a) As a result of the accident, she had ongoing
32 and chronic mid and low back left-sided

Ruling on Threshold Issue - Shaughnessy J.

1 shoulder and neck pain which have restricted
2 her movements in her back, left arm and neck.
3 She cannot sit and stand for prolonged
4 periods of time. She has difficulty reaching,
5 bending and lifting things above her
6 shoulder height. She is in constant pain and
7 because of the injuries, she could not
8 return to work at ISA.
9

10 b) She is restricted from pain in participating
11 in her pre-accident activities including
12 dancing, volleyball, skiing, household
13 chores and prolonged driving.
14

15 c) She has also suffered from psychological
16 impairment since the accident. She has
17 suffered from depression, panic attacks and
18 anxiety. She has difficulty sleeping due to
19 her pain, which has contributed to her
20 fatigue, low energy and mood. She finds that
21 she is irritable and has feelings of
22 helplessness, hopelessness and uselessness.
23 She finds it difficult to cope with
24 stressful situations including a high-paced
25 work environment such as her job at ISA,
26 which she has been unable to return to.
27

28 The plaintiff, of course, has the burden of
29 proving that she falls within the legislated
30 threshold exceptions. I previously set out the
31 criteria of the legislation and the regulations.
32

Giordano v. Li
Ruling on Threshold Issue - Shaughnessy J.

1 The first two criteria (substantial interference
2 and importance of function) will be satisfied if
3 any one of the sub-components indicated therein
4 is true in a given case. It is only the third
5 criteria (permanence) that requires the
6 satisfaction of all its indicated sub-components.

7
8 Again, the principles applicable in determining
9 whether the three criteria are met is described
10 in paragraphs 18 to 20 of the *Mayer* case, which I
11 have previously detailed.

12
13 I have also indicated that with respect to
14 chronic pain in particular, paragraph 22 of the
15 *Mayer* case relating to the comments of the Supreme
16 Court of Canada are very relevant. I find that
17 the evidence advanced satisfies the criteria in
18 *Mayer*.

19
20 Therefore, I am satisfied that the plaintiff has
21 met the onus of proof in establishing that
22 Ms. Giordano has sustained permanent injuries as
23 a result of the June 7, 2009 accident. I likewise
24 find that the criteria of substantial
25 interference and importance of function have all
26 been established in the evidence.

27
28 I am satisfied that Ms. Giordano has sustained
29 permanent injuries as a result of the June 7,
30 2009 accident, including soft tissue injuries to
31 her back, neck and shoulder, which have developed
32 into a chronic pain syndrome. These injuries

1 affect her ability to have a full range of
2 movement in her back, neck and shoulders. In
3 addition to her chronic pain syndrome, she is
4 diagnosed and I accept that she has a major
5 depressive disorder which contributes to a
6 constellation of symptoms including irritability,
7 fatigue, low mood and energy levels and feelings
8 of sadness. These injuries and impairments are
9 supported by the evidence which I have outlined.

10
11 In relation to credibility, I find that
12 Ms. Giordano is an honest and forthright witness.
13 All the doctors who assessed her, including the
14 defence medical expert physiatrist, Dr. Soric,
15 found the plaintiff to be genuine in her
16 complaints to them. There was no finding of
17 malingering in any testing done by psychologists
18 and/or psychiatrists who assessed and/or treated
19 her.

20
21 Much was made by the defence in the course of the
22 trial that the plaintiff failed to mention on her
23 Examination for Discovery that she was involved
24 in what was a very minor fender-bender accident
25 in either 2010 or 2011 with minor property damage
26 to her vehicle and no resultant injury or
27 treatment. She did relate this accident to
28 Dr. Chow and another health specialist. I find
29 that the plaintiff was not holding back
30 information or being deceptive on her Discovery.

31
32 Accordingly, this part of her cross-examination

31
Giordano v. Li
Ruling on Threshold Issue - Shaughnessy J.

1 does not, in my opinion, undermine her
2 credibility. Therefore, I find that
3 Marie Giordano's testimony was credible and
4 reliable.

5
6 Further, in relation to the defence medical
7 expert, Dr. Soric, I find that she did
8 acknowledge and agree that the plaintiff suffered
9 from a chronic pain syndrome. Accordingly, to
10 that extent, she agreed with the opinions of
11 Dr. Barrettara, Dr. Waisman, Dr. Zacharia,
12 Dr. Ogilvie-Harris and the plaintiff's
13 physiatrist, Dr. Chow.

14
15 However, the difference in opinion relates to
16 Dr. Soric's view on the pathology of the chronic
17 pain syndrome. She wrote several medical reports.
18 In one of her reports, she opined that the motor
19 vehicle accident of June 7, 2009 was the cause of
20 the plaintiff's injuries. Then, in testimony at
21 this trial, Dr. Soric testified in-chief,
22 adopting the defence strategy and becoming an
23 advocate, that the defendant's chronic pain
24 related to all three accidents or injuries;
25 namely, the motor vehicle accident of October 2,
26 2007, the motor vehicle accident of June 7, 2009
27 and a fall down the stairs on December 27, 2009.
28 She testified that the medical diagnosis in her
29 reports was wrong and she should have stated that
30 all three accidents contributed to the
31 plaintiff's chronic pain syndrome.

Giordano v. Li
Ruling on Threshold Issue - Shaughnessy J.

1 Then Dr. Soric proceeded to testify that the
2 plaintiff injured her back in falling down the
3 stairs on December 27, 2009 and that she
4 sustained bumps and bruises all over her body.
5 When it was put to Dr. Soric in cross-examination
6 that the hospital emergency record of December 27,
7 2009, Exhibit 25, and the family doctor's notes
8 of January 8, 2010 do not include any back injury,
9 bumps or bruises or increases in neck or back
10 pain, Dr. Soric responded that she has a distinct
11 memory of the plaintiff giving her this
12 information on the interview of June 7, 2012. She
13 maintains that she has a distinct recollection
14 despite not putting it into her various medical
15 reports and despite having conducted 100 other
16 medico-legal assessments since June 7, 2012.

17
18 Dr. Soric also stated that the family doctor was
19 in the best position, based on the numerous
20 visits he had with the plaintiff, to judge what,
21 if any, injury or ongoing complaint the plaintiff
22 had.

23
24 I do not find Dr. Soric's testimony to be
25 reliable. She has ignored completely her expert
26 duty under Rule 53 to be fair, impartial and
27 objective. I do not accept her evidence as it
28 relates to causation and her opinion that the
29 plaintiff does not have a serious impairment of
30 an important physical or psychological function.
31 I reject completely her testimony that the
32 plaintiff is fit to return to her former

Giordano v. Li
Ruling on Threshold Issue - Shaughnessy J.

1 employment as a sales manager at ISA.

2
3 While professing not to opine on psychological
4 issues, which she acknowledged the plaintiff
5 genuinely has, she, nevertheless, opines that if
6 the plaintiff goes back to work, she will be
7 happy. The opinion does not stand up to the test
8 of reasoning or common sense. Dr. Soric stated
9 that the plaintiff has a chronic pain syndrome
10 involving psychological issues but she can
11 proceed with physical exercises, enroll in a
12 chronic pain management program and proceed to
13 return to work.

14
15 I heard a great deal of testimony from
16 Dr. Waisman, Dr. Ogilvie-Harris and Dr. Chow
17 indicating that there are studies that after two
18 years of chronic pain, the likelihood of recovery
19 is extremely low to non-existent.

20
21 Therefore, I reject Dr. Soric's opinion. I find
22 that the injuries and impairment sustained as a
23 result of the June 7, 2009 accident have
24 substantially interfered with the plaintiff's
25 pre-accident employment and she is unable to
26 return to work at ISA as a result. They have also
27 interfered with most of her usual activities of
28 daily living, including her social and
29 recreational life and heavier housekeeping tasks.
30 I find that there has been a substantial
31 interference in her life as a result of the loss
32 of function to her.

Ruling on Threshold Issue - Shaughnessy J.

1 Dr. Barrettara, Dr. Ogilvie-Harris, Dr. Waisman
2 and Dr. Chow all opined that the plaintiff will
3 have permanent impairments. I accept their
4 testimony. Dr. Ogilvie-Harris opined that in only
5 five percent of such cases of chronic pain or
6 somatic disorder patients get better with time
7 and treatments. Therefore, I am satisfied that
8 the permanence criteria has been met.

9
10 **CONCLUSION:**

11 Therefore, I am satisfied that the plaintiff has
12 met the onus and I find that the overwhelming
13 evidence in this case establishes that as a
14 result of the motor vehicle accident on June 7,
15 2009, the plaintiff suffered a permanent serious
16 impairment of important physical, mental and
17 psychological functions and has therefore met the
18 threshold provided under the *Insurance Act* and is
19 therefore not barred from compensation for
20 non-pecuniary losses and health care expenses.

FORM 2

Certificate of Transcript

Evidence Act, subsection 5(2)

I, Maxine Newell, certify that this document is a true and accurate transcript of the recordings of Maxine Newell in the Superior Court of Justice held at 150 Bond St. E., Oshawa, Ontario, taken from Recording number 2812-202-20141211-085615-10-SHAUGHB, which has been certified in Form 1.

5 January, 2015

Maxine Newell, C.C.R.

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