

CITATION: Noori v. Liu, 2020 ONSC 3049
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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Shagofa Noori and Maliha Noori, Plaintiffs (Responding parties on the Motion)

AND:

Zhenyu Liu, 1734942 Ontario Inc., carrying on business as Advanced Auto Imports, Hertz Rent-A-Car and J. Lockwood Leasing Limited, Defendants (Moving parties on the Motion)

BEFORE: Coats J.

COUNSEL: James Page, Counsel for the Plaintiffs

Joel Cormier and Hudson Chalmers, student-at-law, Counsel for the Defendants

HEARD: January 21, 2020

ENDORSEMENT

I. Background and Issues:

[1] This motion arises out of a jury trial of a personal injury claim resulting from a motor vehicle accident, which occurred on May 29, 2013. The accident occurred when the Defendant, Zhenyu Liu (one of the moving parties), struck the Plaintiff, Shagofa Noori (one of the responding parties), while making a right turn. Shagofa Noori was a pedestrian and liability was conceded. The trial proceeded on the issue of damages and the jury awarded Ms. Noori \$40,000 for general damages (pain and suffering and loss of enjoyment of life). The jury awarded Ms. Noori zero damages for past income loss, for future income loss and loss of competitive advantage, for future housekeeping, and for future healthcare costs. The jury also did not award Ms. Noori's mother, Maliha Noori,

any damages for loss of her daughter's care, guidance and companionship or for providing housekeeping and home maintenance services to Ms. Noori.

[2] After the jury verdict, the Defendants brought this motion. The only issue on this motion is whether Ms. Noori has suffered a "permanent serious impairment of an important physical, mental or psychological function," as set out in s. 267.5(5)(b) of the *Insurance Act*, R.S.O. 1990 c.1.8 (*Insurance Act*).

[3] In order for Ms. Noori's damages claim for non-pecuniary loss to be considered, she must meet a threshold onus and demonstrate that her injuries fall within one of the statutory exceptions in s. 267.5(5) of the *Insurance Act*. In this case, the only exception at issue is whether the Plaintiff has met her onus under s. 267.5(5)(b) – the test for which is set out in ss. 4.1 and 4.2 of Ontario Regulation 381/03 Schedule B ("O. Reg. 381/03") under the *Insurance Act*.

II. Uncontested Aspects of the Law:

[4] The test under ss. 4.1-4.3 of O. Reg. 381/03 is complex, but the parties agree on the key aspects.

[5] The overall inquiry on this threshold motion can be broken down into two elements: a three-part test set out at paras. 1-3 of s. 4.2(2); and an evidentiary burden that must be met to fulfill this test, which is set out at s. 4.3(1)-(6).

1. *The Three-Part Test:*

[6] Section 4.2(1) sets out a three-part test with both conjunctive and disjunctive elements. Overall, paras. 1, 2, and 3 of s. 4.2(1) work together conjunctively, meaning that a plaintiff must meet the qualifications of each paragraph in order to submit a claim for damages for non-pecuniary loss. The specific inquiries under each paragraph, however, alternate between conjunctive and disjunctive burdens.

[7] Paragraphs 1 and 2 set out the criteria for determining whether the impairment suffered is a “serious impairment” and whether the physical, mental or psychological function that is impaired is “an important” one. The analysis for paras. 1 and 2 are disjunctive, meaning that a Plaintiff need only show that one of the criteria have been met.

[8] With respect to the “seriousness of the impairment,” a plaintiff must show that the impairment:

- i. substantially interfere[s] 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[s] 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[s] with most of the usual activities of daily living, considering the person’s age. [s. 4.2(1) 1, O. Reg. 381/03, emphasis added].

[9] With respect to the “importance of the function” that is impacted, the Plaintiff must show that the function is:

- i. ...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. ...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. ...necessary for the person to provide for his or her own care or well-being, or
- iv. ...important to the usual activities of daily living, considering the person’s age. [s. 4.2(1) 2, O. Reg. 381/03, emphasis added]

[10] In contrast, para. 3 sets out the criteria for determining whether an impairment is “permanent.” The analysis under this para. is conjunctive, meaning that the Plaintiff must meet all criteria in sub-paras. i-iii. To be permanent, the impairment must:

- 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. [s. 4.2(1) 3, O. Reg. 381/03, emphasis added].

2. The Evidentiary Requirements

[11] The evidentiary requirements are more straight-forward, and the analysis is conjunctive. A plaintiff must adduce medical evidence from at least one physician explaining:

- (a) the nature of the impairment;
- (b) the permanence of the impairment;
- (c) the specific function that is impaired; and
- (d) the importance of the specific function to the person. [s. 4.3(2), O. Reg. 381/03, emphasis added]

[12] The physician(s) must also be “trained for and experienced in the assessment or treatment of the type of impairment that is alleged” (s. 4.3(3)(a), O. Reg. 381/03). The evidence given by that/those physician(s) must accord with “generally accepted guidelines or standards of the practice of medicine” and any such evidence must contain a conclusion that the impairment suffered was “directly or indirectly sustained as the result of the use or operation of an automobile” (s. 4.3 (3)(b) and s. 4.3(4), 381/03, O. Reg. 381/03).

[13] Lastly, the Plaintiff must demonstrate that the impairment represents a negative change in her *status quo* relative to her life before the accident. A plaintiff must “adduce

evidence that corroborates the change in the function that is alleged to be a permanent serious impairment of an important physical, mental or psychological function” (s. 4.3(5), O. Reg. 381/03).

3. Relevant Jurisprudence:

[14] Caselaw interpreting this section and its predecessor also provide guidance on how to approach the threshold test.

[15] The motion judge maintains a statutory duty to determine the threshold motion and is not bound by the jury’s implied findings, including those relating to credibility (*Debruge v. Arnold*, 2018 ONSC 2357, at para. 20; *Kasap v. MacCallum*, [2001] O.J. No. 1719 (Ont. C.A.) at paras. 7-8). The moving party submits that, since *Kasap*, there has been an evolution in the caselaw towards a reluctance to rule contrary to implicit findings of fact made by the jury in a threshold motion. I will deal with this below.

[16] As the parties agree, the starting point for this motion is *Meyer v. Bright*, where the Court of Appeal for Ontario set out the ‘order of operations’ for considering the factors in paras. 1-3 of s. 4.2(1) (1993 CarswellOnt 51 (Ont. C.A), also referred to as *Lento v. Castaldo*).

[17] A motions judge must consider the following questions in the following order:

- A. Has the injured person sustained permanent impairment of a bodily function caused by continuing injury which is physical in nature?
- B. If so, is the permanently bodily function an important one?
- C. If so, is the impairment of the important bodily function serious? [*Meyer*, at para. 16]

A. Permanence

[18] The plaintiff need not prove to a certainty that the impairment will last “forever until death” but rather, she must prove that impairment is expected to last indefinitely into the future with an unlikely chance of improvement (*Giordana v. Li*, 2014 ONSC

7516, at para. 11; *Brak v. Walsh*, 2008 ONCA 221, at para. 4). For instance, a plaintiff may have persistent but intermittent symptoms and still satisfy this part of the test (*Frankfurter v. Gibbons*, [2004] O.J. No. 4969 (Ont. S.C. Div. Ct.), 74 O.R. (3d) 39, at para. 16).

[19] The permanence of an impairment may be determined on the basis of findings that are subjective, objective, or some mix of the two. As the Court noted in *Meyer*:

Some injuries which are physical in nature can be diagnosed objectively, some can be diagnosed only upon the basis of a patient's subjective complaints and others are diagnosed on the basis of both objective observations and the patient's subjective complaints. The courts have traditionally weighed and assessed such evidence and will continue to do so when deciding whether an injured person has sustained permanent impairment of a bodily function caused by a continuing injury which is physical in nature. [at para. 18].

B. Important Bodily Function

[20] The importance of a given function is also assessed relative to the specific plaintiff before the court. The Court must consider “the injured person as a whole and the effect which the bodily function involved has upon that person's way of life in the broadest sense of that expression” (*Meyer*, at para. 25).

C. Seriousness

[21] Section 267.5(5), like its predecessor, recognizes that “injured persons are required to bear some interference with their enjoyment of life without being able to sue for it” (*Meyer*, at para. 70). To qualify as a serious impairment, an injury must go beyond what is tolerable, and this determination is made in light of the cumulative effect on the plaintiff's life (*Frankfurter*, at para. 22; *Sasso v. Copeland*, [2005] O.J. No. 5226 (Ont. S.C.), 78 O.R. (3d) 263, at para. 19). An impairment may still qualify as ‘serious’ even where the person is able to carry on the same daily activities as she did before the accident:

[The 'seriousness' requirement] may be satisfied even although plaintiffs, through determination, resume the activities of employment and the responsibilities of household but continue to experience pain. [*Brak*, at para. 7].

[22] While the wording of this regulation largely aligns with its predecessor which was effective prior to 2003, the moving parties submit that the addition of the word "most" into sub-para. iii of s. 4.2(1)1 may imply a somewhat higher bar if the plaintiff relies only on an impairment of "most of the usual activities of daily living" to satisfy the test under para. 1 (*Nissan v. McNamee*, 2008 CanLII 20345 (Ont. S.C.), [2008] O.J. No. 1739, at para. 37). I will deal with this below.

III. Contested Aspects of the Law

1. "Most" of the Usual Activities of Daily Living

[23] The moving party submits that the addition of the word "most" in the updated wording of this regulation suggests "a higher threshold where impairments affect daily living but not working" (Factum of the Defendants at para. 11, citing *Nissan* at para. 37).

[24] There have not been many subsequent cases that have relied on *Nissan* for this proposition. Most subsequent cases cite *Nissan* for the general proposition that cases interpreting the previous wording of the regulation are still instructive. The clearest endorsement of a higher threshold is set out in *Hayden v. Stevenson*, 2009 CanLII 31990, [2009] O.J. No. 2571 (Ont. S.C.), at para. 10.

[25] I am not prepared to find that the addition of the word "most" requires a higher threshold. There is limited judicial support for this proposition and no appellate authority.

2. Weight of Jury's Implicit Findings – Credibility

[26] The moving party submits that the jury's findings about the Plaintiff's credibility is an important factor to consider (Factum of Defendants, at para. 17, citing *Al-Radwan v. Wanless*, 2018 ONSC 5464, at para. 8).

[27] No subsequent cases rely on *Al-Radwan* for this proposition that implicit findings of fact regarding credibility ought to carry more weight on the threshold motion, as a general precept, than other implicit findings. I cannot extrapolate such a principle from this case alone.

3. Weight of Jury's Implicit Findings – In General

[28] The moving parties submit that the caselaw since *Kasap* reflects an evolution towards a reluctance to rule contrary to implicit findings of fact made by the jury in a threshold motion. Moving parties' counsel relied heavily on *Clark v. Zigrossi*, 2010 ONSC 5403, for this proposition in both his written and oral submissions.

[29] In *Clark*, Brown J. (as he then was) outlines how different judges have approached the question of how much weight to place on the jury's findings (*Clark*, at paras. 13-18). In particular, Brown J. warns against "reach[ing] a different conclusion on credibility without taking into account the verdict of the jury [because this] would seem to blur the line as to who really acts as the trier of fact in a jury case" (*Clark*, at para. 15).

[30] Of the cases subsequent to *Clark*, those that support the deferential position taken in that case include:

- a. *Ivens v. Lesperance*, 2012 ONSC 4280, at paras. 10-11, the strongest endorsement of this position.
- b. *Ashburn et al. v. Storrey*, 2019 ONSC 6486, at paras. 33 and 37. This case is somewhat supportive but to a lesser degree than *Ivens*.
- c. *Girao v. Cunningham*, 2017 ONSC 2452, at para. 4, rev'd on other grounds 2020 ONCA 260. The issue is addressed in passing and takes the *Clark* position.

Cases that do not take the position in *Clark* include:

- a. *DeBruge v. Arnold*, 2014 ONSC 7044, at paras. 18-19, rev'd on other grounds 2018 ONSC 2357. This case reaffirms the discretionary nature of the decision.
- b. *O'Brien v. O'Brien*, 2018 ONSC 4665, at paras. 7-8. This case also reaffirms the discretionary nature of the decision.
- c. *Beader v. Evans*, 2012 ONSC 5781, at paras. 6-12. This case reaffirms the discretionary nature of the decision, albeit with more reluctant wording than *DeBruge* or *O'Brien*.

[31] Counsel for the moving parties relied heavily on *Berfi v. Muthusamy*, 2015 ONSC 981, in his oral submissions, to support the proposition that cases subsequent to *Kasap* have shown greater deference to implicit findings of the jury.

[32] I have reviewed the caselaw subsequent to *Kasap*. The leading appellate authority remains *Kasap* and this is the approach I will follow. The Court of Appeal in *Kasap* is clear that the trial judge may or may not consider the jury's findings in making his or her determination:

[7] The Legislature has left it to judges to determine whether the threshold has been met. This will often overlap a jury's considerations; and particularly where the symptoms are subjective.

[8] Nowhere does the legislature say that the judge is bound to consider the jury verdict much less that the judge is bound by any implied finding of credibility of the jury. By the same token the legislation does not suggest that a trial judge cannot, in the exercise of judicial discretion, consider the verdict of the jury. The legislation is clear: the judge must decide the threshold motion, and in doing so, the judge is not bound by the verdict of the jury. The timing of the hearing is in the discretion of the trial judge. Accordingly the appeal fails and is dismissed with costs.

[33] This passage strongly suggests that whether (or the degree to which) the trial judge relies on the jury's verdict implicit findings is discretionary.

[34] Furthermore, the discretionary nature of this ruling was reaffirmed by the Court of Appeal in *Basandra v. Sforza*, 2016 ONCA 251, at para. 19 as follows:

[19] The statutory regime creates a division of labour between the trial judge and the jury. The trial judge has sole responsibility for determining whether the plaintiff's injuries meet the threshold under ss. 267.5(3) and (5) of the *Insurance Act*. The trial judge does this without the intervention of the jury and may dismiss the case even where the jury makes an award of damages to the plaintiff: see *Kasap v. MacCallum*, 2001 CanLII 7964 (ON CA), [2001] O.J. No. 1719; *DeBruge v. Arnol*, 2014 ONSC 7044.

[35] I have reviewed *Berfi*. I do not find that this case represents a shift in the caselaw requiring greater deference to implicit findings of the jury. In my view, it is a discretionary ruling that supported the moving party's position, based on the facts of the case. I specifically refer to paras. 33-37 of *Berfi* as follows; which suggest that the Court took the approach in *Kasap*.

[33] Finally, I note that, despite awarding general damages to the plaintiff arising from his pain and suffering due to the car accident, the jury awarded him nothing for future income loss. That award is consistent with the jury finding that, going forward, the plaintiff is capable of working. As the case law cited above indicates, I am not bound by the jury's determination of this factual issue. I do, however, find it to be a relevant consideration that is consistent with my finding.

[34] The other alleged substantial interference relied upon by the plaintiff is addressed in s. 4.2(1)1.iii. of the Regulation. He asserts that the injuries arising from the car accident substantially interfere with most of his usual activities of daily living. In my view, the evidence does not support this contention, either.

[35] While I acknowledge that the plaintiff is limited in the extent to which he can assist in household chores and engage in various other social and sporting activities, to a large extent those limitations existed before the October 28, 2010 car accident, and arose from his unfortunate, but well-documented history of prior work-related accidents. This leads me to doubt that most of his current problems are attributable to the car accident.

[36] I also have concerns about the credibility and reliability of his evidence regarding the extent of his ongoing limitations - as confirmed by my previous analysis of his evidence concerning his ability to work, including his true intentions regarding re-employment. I further note that the plaintiff continues to drive. That activity, it seems to me, is at odds with the claimed level of substantial interference with most of his usual activities of daily living that the plaintiff must establish to succeed.

[37] On a motion such as this, the plaintiff bears the onus of persuading me that his accident-caused injuries substantially interfere with his ability to work or his usual activities of daily living. In light of the foregoing, I conclude that he has not so persuaded me. He has therefore not met the tests set out in either s. 4.2(1) i. or iii. of the Regulation.

[36] On balance, I will follow the approach in *Kasap*.

IV. Summary of Position of the Defendants, Moving Parties on the Motion

[37] I will now summarize the moving parties' position on the motion.

[38] Ms. Noori was involved in a minor pedestrian motor vehicle accident. In 2015, Ms. Noori described to Dr. Rhyno that she previously had an accident in 2013 after which she suffered from "aches and pains."

[39] For the impairment to be considered permanent, it must be continuous since the accident, based upon the medical evidence and – subject to Ms. Noori's reasonably participating in recommended treatment – the impairment must not be expected to improve.

[40] The moving parties' position is that the impairment was not continuous. The defendants submit that all of Ms. Noori's medical injuries as they relate to the accident have been resolved. Any medical conditions Ms. Noori suffers from are unrelated to the accident. If they are wrong in this regard, they submit that Ms. Noori has not reasonably participated in recommended treatment.

[41] In regard to the submission that all of Ms. Noori's medical injuries related to the accident have resolved, it is the moving parties' position that there is very little medical evidence that her complaints were casually related to the accident.

[42] With respect to Ms. Noori's back injury, it is the moving parties' position that this is unrelated to the accident. The moving parties rely on the following:

1. Dr. Michael Boucher, a witness for the moving parties, examined Ms. Noori on behalf of an insurance company to determine if treatment was appropriate. He testified that, while trauma may cause a bulging disc, it takes substantial trauma with a rotational and forward flexion movement, which is not how the moving parties say the accident occurred. Dr. Boucher also testified that, if Ms. Noori had ruptured a disc as a result of the accident, she would have felt an immediate and painful burst in her lower back. Back pain would not have started weeks later as Ms. Noori testified.
2. When Ms. Noori attended at the hospital immediately after the accident there was no mention of back pain.
3. There is no record of accident related complaints by Ms. Noori to Dr. Shalini Sharma, her family doctor, until December 2014, when Ms. Noori complained of depressive symptoms and back pain. Dr. Sharma gave evidence that she would expect someone who was injured in a motor vehicle accident to come to see her within a couple of days of the accident. Ms. Noor never did this. The OHIP summary for Ms. Noori shows that Ms. Noori saw Dr. Sharma on March 20, 2014 for low back pain; however, there was no evidence that Ms. Noori's complaints on this day were accident-related.
4. Dr. David Berbrayer, an expert called by Ms. Noori, gave evidence that there is a hereditary component to back pain.
5. Dr. Boucher gave evidence that anyone over the age of 20 would have some degenerative changes in their lower back.
6. Dr. Sharma gave evidence that pregnancy, weight changes associated with pregnancy, and child rearing can also have impact on back pain.

[43] With respect to Ms. Noori's neck pain, she did not complain of this when she attended the hospital immediately after the accident. There is no mention of accident

related neck pain in Dr. Sharma's notes until April 23, 2019, almost six years after the accident.

[44] Ms. Noori did not complain of shoulder pain when she attended at the hospital immediately after the accident.

[45] According to the OHIP summary, Ms. Noori saw Dr. Sharma for depressive symptoms for the first time on January 22, 2014, but there is no indication that her complaints were accident-related. This was a stressful time for Ms. Noori; she had just separated from her husband in December of 2013.

[46] Ms. Noori's only contemporaneous complaint from the accident was a left hip contusion, which has now been resolved.

[47] The only objective mechanical injury sustained by Ms. Noori was a possible minor medial meniscus tear. Ms. Noori did not report any knee injury when she attended at the hospital immediately after the accident. The first reference to a possible tear was in a report from Dr. Trinh dated March 20, 2014 to Dr. Sharma. Dr. Boucher's evidence was that this sort of injury could not have been caused by the mechanics of the accident. Ms. Noori's own evidence is that she no longer experiences left knee pain.

[48] The moving parties argue that, even if it is assumed that Ms. Noori did suffer injuries in the accident, those injuries have not been "continuous since the accident." According to the OHIP summary, Ms. Noori did not attend at an OHIP covered treatment or appointment from April 29, 2015 to February 8, 2017. There is a 22-month gap in treatment.

[49] The moving parties acknowledge that chronic pain arising from a motor vehicle injury, which accounts for limitation in function unlikely to improve, will meet the requirement of permanence under the threshold. Dr. Berbrayer diagnosed Ms. Noori with chronic pain syndrome. The moving parties submit that Ms. Noori does not meet the criteria for chronic pain syndrome according to the American Medical Association, as those criteria were laid out in Dr. Boucher's evidence.

[50] Both Dr. Berbrayer and Dr. Boucher have expertise in chronic pain, and were qualified as such. The moving parties' submit that Dr. Boucher's evidence should be favoured over Dr. Berbrayer's because Dr. Boucher was not hired by any of the parties in the litigation. Dr. Boucher was a participant expert. Dr. Berbrayer was a litigation expert, hired for the sole purpose of the litigation. Further, the moving parties' position is that Dr. Boucher's evidence is more consistent with the presentation of Ms. Noori in the surveillance video evidence shown at trial.

[51] Dr. Boucher gave evidence as to the requirements for a person to meet the diagnosis of chronic pain syndrome. There are six criteria for chronic pain syndrome. To be diagnosed a person needs to meet three of the criteria. In this case, the criteria must also relate to the May 29, 2013 accident. The six criteria for chronic pain syndrome are:

1. Use of prescription drugs beyond the recommended duration or dependency;
2. Excessive dependence on healthcare, friends and family;
3. Secondary deconditioning based on disuse or fear avoidance;
4. Withdrawal from social, work or other activities;
5. Failure to restore pre-injury functioning after a period of disability such that their physical capacity is insufficient to pursue work, family and social life; and
6. Development of psycho-social behaviour after the incident including anxiety, depression, fear avoidance, and non-organic illness behaviour.

[52] It is the moving parties' position that Ms. Noori only meets one of the six criteria – criteria 2. She does not meet criteria 1 because she does not take any prescription drugs to treat her pain or psychological condition. She does not meet criteria 3 because she was found to be well conditioned and just over the BMI threshold of overweight and her weight and appearance did not change during the three years between Dr. Boucher's assessments. Ms. Noori does not meet criteria 4. On the surveillance videos Ms. Noori is seen going to the beach with a friend and her child, shopping with her child

and going on a date. It is the moving parties' submission that these activities are inconsistent with social withdrawal. She does not meet criteria 5 because Ms. Noori told Dr. Boucher she is managing everything with pain. Ms. Noori obtained employment post-accident. Ms. Noori does not meet criteria 6 because, although she has depression, her depression is not caused by the prolonged nature of her pain. It is caused by other social-economic stressors. The only criteria Ms. Noori meets is criteria 2. It is the moving parties' position that Ms. Noori's excessive dependence on healthcare is consistent with the medicalization of Ms. Noori for the purposes of this lawsuit.

[53] The moving parties argue that it is not clear that Ms. Noori's psychological issues were ever related to the motor vehicle accident. Dr. Sharma gave evidence that depression and anxiety can have a hereditary component. Ms. Noori's sister and mother have been diagnosed with depression. Further, Dr. Sharma testified that depression is an illness that does not need a cause. Ms. Noori had a history of anxiety and panic attacks before the accident. When Ms. Noori was first referred to the psychiatrist, Dr. Mark Rhyno in 2015, she made no complaints about the motor vehicle accident and how it impacted her psychologically. Dr. Rhyno's report outlines the stressors in Ms. Noori's life at the time of his report – she had separated and was initiating a divorce and her child had eye complications.

[54] Dr. Greg Tippin, a psychologist, testified as an expert for Ms. Noori. He has also provided counselling to Ms. Noori. Dr. Tippin opined that Ms. Noori will not improve with continued psychological treatment. If this evidence is accepted, the moving parties argue that Ms. Noori would still fail to meet the permanence criteria. The impairment must be continuous, and, subject to Ms. Noori reasonably participating in recommended treatment of the impairment, expected not to improve. Ms. Noori has not reasonably participated in recommended treatment of her psychological impairment. She has been prescribed anti-depressant medication, yet has never taken it. Dr. Sharma testified that she would not prescribe something to someone if she did not expect it to improve her symptoms. Dr. Tippin also gave evidence that anti-depressants are generally beneficial.

Ms. Noori has not attempted to use the medication to see if it will be helpful. If Ms. Noori does have an impairment of her psychological functioning that is not expected to improve, it is because of her own failure to participate in recommended treatment.

[55] The requirement that the impairment be of an important function involves a subjective analysis. The Court must determine whether the impaired function is important to the particular person. The impaired function must be necessary for Ms. Noori to perform the essential tasks of her regular employment, be necessary to provide for her care or well-being or be important to her usual activities of daily living. The moving parties' position is that Ms. Noori suffered "aches and pains" as a result of the accident and that these do not impair any of her physical, mental or psychological functions; or alternatively, that these impairments are not "important" because they have not prevented Ms. Noori from performing her usual activities of daily living.

[56] Ms. Noori has been able to continue with her life since the accident. She worked at Century Fitness for a year from January 1, 2014 to January 31, 2015. She worked at Symposium from December 26, 2016 to May 14, 2017, while earning her chef's certificate from St. Charles Place. Ms. Noori claims that she is unable to work in her desired field as a chef because of her accident-related injuries. However, she was unemployed at the time of accident. Since the accident, she has been able to complete vocational training as a chef and was offered employment in her chosen field but declined that offer.

[57] Ms. Noori has been able to maintain her social life. She was able to travel to Vancouver. She went to the beach with her daughter and a friend. She went to the African Lion Safari with her daughter and friend, Roza Ahmed. She has gone with her boyfriend to Canada's Wonderland and the Toronto Zoo and to a restaurant. She is able to live a social and productive life.

[58] It is the moving parties' submission that even if Ms. Noori did experience a permanent impairment, her impairment would not to be considered serious. Generally, a serious impairment is one which causes substantial interference with the ability of the

person to perform her usual daily activities or to continue with her regular employment. The court should look to the totality of the person's circumstances and the cumulative effect on that person's life.

[59] Applying this to Ms. Noori, although she gave evidence as to the seriousness of her impairments, she was not a credible witness. Her complaints were inconsistent with the medical evidence, with the reports and evidence regarding her success in a co-op placement at Tansley Woods, and with the surveillance evidence. Her injuries did not meet the criteria for seriousness.

[60] The objective medical imaging did not show any mechanical injuries except for the possible meniscus tear. Dr. Boucher testified that this was not the result of the accident. The common recovery time for soft tissue injuries such as the injuries Ms. Noori suffered is 16-20 weeks. Ms. Noori claims to still be in pain but takes no medication for the pain.

[61] Ms. Noori testified that she was in pain and unable to do her co-op job at Tansley Woods. This evidence is inconsistent with the notes of her supervisors. One of her supervisors, Ms. Maggie Jakab, testified that she performed her tasks well and that someone with the type of injuries claimed by Ms. Noori would not have been able to do the job. Ms. Noori performed her job so well that she was offered employment to begin after her co-op placement. Ms. Noori declined the employment.

[62] Ms. Noori was not a credible witness in that her description of her injuries and how the injuries limit her activities was inconsistent with the activities seen on the surveillance described above. Further, Ms. Noori did not exhibit significant pain behaviour on the surveillance, while she did exhibit this behaviour in court and to her litigation experts.

[63] The permanent impairment needs to be of an important function and of a serious nature. There is some level of discomfort that a person can experience before they meet the threshold for recovery and some interference with their enjoyment of life. The injured person must establish more than simply a pain experience to meet the

threshold. The onus is on the injured party to prove that the injuries suffered as a result of the accident caused a permanent impairment of an important function of a serious nature. Ms. Noori has failed to do so.

[64] The jury rejected Ms. Noori's theory of the case. The jury awarded Ms. Noori \$0.00 for past income loss, \$0.00 for future income loss, and \$0.00 for future care costs. In making these determinations, the jury rejected the idea that Ms. Noori was unable to work in the past or that Ms. Noor is unable to work in the future as a result of the accident. By awarding no damages for income loss (past or future) or future care costs, the jury accepted the defendants' theory of the case.

[65] The jury heard all of the medical evidence. The jury rejected Ms. Noori's claim that her impairment will cause her income loss and rejected her claim that she required assistance with future housekeeping and future medical treatment. The jury did not accept that Ms. Noori had suffered any significant impact on her current or future functioning. The jury rejected any claim for past income loss and future income loss. The standard of proof for future losses is considerably lower than the standard of proof for past income loss. For future income loss, Ms. Noori only needed to prove that there was a real and substantial risk that she would lose income in the future as a result of her injuries. The jury rejected that there was such a risk.

[66] As the trier of fact, the jury's award indicates that they made these findings of fact. The moving parties' submit that this case is similar to the situation in *Berfi*, wherein Stinson J. stated that the award of nothing for future income loss "is consistent with the jury finding that, going forward, the plaintiff is capable of working" (para. 33).

[67] The jury found that Ms. Noori requires no future assistance with either housekeeping or for healthcare needs. The jury's assessment of damages should be considered on this motion, otherwise there is a risk of inconsistent findings of fact.

[68] The moving parties' request that Ms. Noori's claim for damages for non-pecuniary loss be dismissed pursuant to the provisions of s. 267.5 of the *Insurance Act*.

V. Summary of the Responding Party's Position (Ms. Noori)

[69] Ms. Noori states that she had no physical health problems before the accident. She was healthy, active, fit and ate healthy. She regularly exercised at the gym and sometimes ran to the gym before her workout. She did a range of activities at the gym, she practiced yoga, and enjoyed rollerblading, dancing and other physical activities.

[70] Ms. Noori had a pre-existing history of panic attacks and social anxiety. This started when she was 19 or 20 years old. She overcame these issues. By the time she became engaged to her fiancé in 2011, she was no longer having these symptoms. This was confirmed by the testimony of Ms. Noori's mother and sister. This is consistent with Dr. Sharma's clinical notes. It is also consistent with the OHIP summary related to Ms. Noori.

[71] In the two years before the accident, Ms. Noori worked on and off part-time. She lived at home with her parents. She was not required to work. Her parents supported her and she was responsible for the majority of the housekeeping and home maintenance. She did the cooking, cleaning, laundry, lawn maintenance and snow removal. Ms. Noori's mother helped, to a limited extent, with the indoor work and her father and brother helped, to some extent, with the outdoor work.

[72] Ms. Noori was socially active in this pre-accident period. She spent time with family and friends. She went out and attended weddings and cultural events. She liked to dress up and go dancing.

[73] Ms. Noori was married in March 2012. Shortly after her marriage, there was a period of about five months when she lived in the United States with her husband and his family. She returned to her family home in August of 2012 with her husband. Ms. Noori became pregnant in November or December of 2012. She was very happy to be pregnant and had no complications with her pregnancy before the accident. She did less housekeeping as her pregnancy progressed.

[74] At the time of the accident, Ms. Noori was 27 years old and eight months pregnant. She was a pedestrian on a sidewalk and was struck directly on her left side by a car exiting a parking lot, which was making a right turn. Ms. Noori testified that her upper body landed on the hood of the car. This was confirmed in the clinical notes from the hospital that she attended at immediately after the accident.

[75] Since the accident, Ms. Noori has had ongoing pain in her neck; upper, mid, and lower back; shoulders; hips and left knee. She initially injured her left hip and thigh but the pain later spread to her left knee, back and neck. More recently, the pain has spread to her trapezius muscles, both shoulders and her right hip. Her knee pain is essentially resolved.

[76] Ms. Noori's mother testified she recalled that Ms. Noori suffered from back and leg pain following the accident and before Ms. Noori began working at Century Fitness in January of 2014. Ms. Noori's pain became worse when she worked at Century Fitness. Ms. Noori's mother testified that after the accident, Ms. Noori's mood changed and she became sad and started crying because of her pain.

[77] Dr. Berbrayer, a physiatrist, testified at trial as a litigation expert called by Ms. Noori. He conducted two assessments and diagnosed her with: myofascial pain of her cervical spine; mid-back strain; mechanical back pain superimposed on pre-existing minor degenerative changes; left hip soft tissue contusion with trochanteric bursitis; and a partial torn medial meniscus in her left knee. Dr. Berbrayer was of the opinion that Ms. Noori's injuries evolved into chronic pain syndrome.

[78] During the trial, Dr. Berbrayer explained that the weight of a car, even at low speed, can cause significant destruction to the muscles and fascia. Her neck, mid-back and multiple muscles were stretched beyond their normal capabilities. The mid-back is a rigid structure and can be damaged by force causing a twisting motion or rotational movement. The force causes the muscles to stress because of the rigidity of the structure.

[79] Dr. Berbrayer's diagnoses of Ms. Noori's physical injuries are very similar to the diagnoses of Dr. Boucher, who testified for the Defendants. Dr. Boucher testified that Ms. Noori suffered a myofascial neck strain, lumbosacral myofascial pain, a left hip contusion and a left knee sprain/strain as a result of the accident.

[80] Dr. Berbrayer's diagnoses of Ms. Noori's physical injuries are also consistent with the diagnoses of Dr. Sharma and the diagnoses given by Dr. Trinh, who assessed Ms. Noori on March 20, 2014, as well as the assessment of her physiotherapist on March 25, 2014. On February 23, 2015 Dr. Sharma, like Dr. Berbrayer, diagnosed Ms. Noori with mechanical back pain. Ms. Noori had no issues with her back prior to the accident. On March 20, 2014, Dr. Trinh initially queried a medial meniscal tear and diagnosed Ms. Noori with trochanteric bursitis. Subsequent MRI imaging on April 14, 2014, documented a possible small horizontal tear in the meniscus in Ms. Noori's left knee. Dr. Sharma testified that the radiologist likely could not see the tear clearly because of the swelling.

[81] Mechanical back pain, according to Dr. Berbrayer, is damage to the structure of the spine. It is an umbrella term that also includes myofascial back pain (Dr. Boucher's diagnosis). This diagnosis is consistent with an MRI of Ms. Noori's lower back from February 4, 2015, which documented a bulging disc and minor degenerative changes in her facet joints at L5-S1 and mild but age disproportionate degenerative changes at L4-L5 (i.e. osteoarthritis in her lower spine). The age disproportionate osteoarthritis at L4-L5 was considered by Dr. Berbrayer to be "abnormal." The bulging disc and degenerative changes at L5-S1 were causing mild to moderate narrowing of the neural foramina, which is where the nerve roots exit the lower spinal column. This was important because this narrowing can impact the nerve roots and cause intermittent pain. The combination of the degenerative changes and the bulging disc can produce nerve pain from the back down the leg, which was consistent with the reason why Ms. Noori was having an MRI in the first place.

[82] Dr. Michel Rathbone, a neurologist, also testified at trial. He was a participant expert called by the Plaintiffs. He performed an EMG on Ms. Noori on May 23, 2017.

Ms. Noori was complaining of hip and back pain, left knee pain and neck pain. She had earlier been sent for an MRI of her lower spine because of shooting pain in her left leg. Dr. Rathbone reviewed the MRI as a part of his assessment and he knew she had been involved in an accident. He noted the degenerative changes in her spine. During the EMG, Ms. Noori complained of left leg pain when attempting to contract certain muscles. Dr. Rathbone concluded that the accident was causing her leg pain. He explained that, when patients have pre-existing degenerative changes in their facets – where Ms. Noori has her degenerative changes – trauma can cause pain in the back but also referred pain in the left leg. Dr. Rathbone also explained that trauma to the area of the degenerative changes can cause worsening and prolonged pain.

[83] On July 18, 2019, Ms. Noori was assessed by Dr. Solimon. She was referred to him by her family physician because of her ongoing chronic pain despite various forms of treatment at Ancaster Sports Medicine and Nebo/Mountainview Physiotherapy. Dr. Solimon prescribed her with CBD oil for her ongoing pain along with noting symptoms of anxiety and depression during her assessment.

[84] On August 27, 2019, Ms. Noori was assessed by Dr. Raja Bobba, a rheumatologist. Dr. Bobba testified at trial as a treating physician. Ms. Noori was referred by her family physician because of her ongoing pain complaints. Dr. Bobba asked her a number of questions and performed a number of physical assessments. He ruled out erosive and inflammatory arthritis as the causes of her pain. He found that she was not suffering from any inflammatory conditions. He diagnosed her with chronic myofascial pain of her spine and hips as a result of her accident, which he acknowledged can be a painful condition – consistent with the diagnosis and testimony of Dr. Berbrayer.

[85] Dr. Bobba's assessment, along with Ms. Noori's blood work, confirmed for Dr. Sharma that Ms. Noori was suffering from chronic pain because of the accident. Dr. Sharma had been hesitant to jump to this conclusion without ruling out other potential causes. But at this stage, all other causes had been ruled out. Dr. Sharma testified to this.

[86] Ms. Noori's treating psychologist, Dr. Tippin, (he was not initially treating her but rather assessing her) also gave evidence at trial. Dr. Tippin is both a clinical psychologist and a rehabilitative psychologist.

[87] Prior to trial, Dr. Tippin had spent over 14 hours with Ms. Noori. He conducted three assessments, administered three sets of standardized psychometric tests and had treated her over the course of nine counselling sessions. He also interviewed Ms. Noori's sister, Arezo Noori. Dr. Tippin opined that Ms. Noori suffered from both persistent depression and Somatic Symptom Disorder as a result of the accident, both of which were clinically significant.

[88] Dr. Tippin explained in his testimony that Ms. Noori was diagnosed with Somatic Symptom Disorder because her pain symptoms are significantly interfering with her day to day life. She thinks a lot about having pain and how it interferes with her life. She spends excessive time and energy doing research to understand her symptoms. She avoids activities that she anticipates will hurt. Her depression was a reaction both to her Somatic Symptom Disorder and to her pain. It resulted as her pain persisted; as pain started to "get in the way" of her career and social life and she had fewer opportunities to enjoy pleasurable activities. Her depression has lasted for more than two years and that is why it is persistent depression.

[89] Regarding Dr. Berbrayer's diagnosis of Chronic Pain Syndrome, Dr. Boucher confirmed that soft tissue injuries and specifically myofascial pain, can lead to Chronic Pain Syndrome.

[90] Dr. Boucher testified as to one method of diagnosing Chronic Pain Syndrome using the American Medical Association Guidelines. A patient who meets merely three of the six criteria has the condition. Ms. Noori's position is that she meets five of the six criteria, which is consistent with the diagnosis of Dr. Berbrayer and with the diagnoses of Dr. Tippin – particularly, Dr. Tippin's Somatic Symptom Disorder diagnosis. The development of psycho-social impairments or sequelae as a result of the accident is a central feature of Chronic Pain Syndrome.

[91] It is the Plaintiffs' position that Ms. Noori was a thin-skulled plaintiff and more vulnerable to both her physical and psychological injuries. She has a family history of depression, which makes her more susceptible to developing the condition according to Dr. Sharma. Additionally, she was pregnant at the time of the accident. Dr. Berbrayer explained that her core muscle strength would have been compromised, which made her back more vulnerable to injury. Her posture would have been altered as well, making her neck and back more vulnerable to injury. The pregnancy itself delayed imaging and treatment and then she had her child before the typical healing time of soft tissue injuries.

[92] While it is true that soft tissue injuries typically heal in 16-20 months, those statistics, according to Dr. Berbrayer, do not apply to pregnant women. In any event, soft tissue injuries do not always heal within 16-20 weeks and the very existence of chronic pain as a medical condition (pain that lasts more than the typical healing time) necessarily makes this true. Dr. Boucher acknowledged this during his testimony.

[93] Ms. Noori was also at a higher risk of suffering from Chronic Pain Syndrome because of her pre-existing social anxiety and panic attacks and because she is female. She is a thin-skulled plaintiff in that regard as well. Dr. Berbrayer testified that both pre-existing anxiety and gender are risk factors for this condition.

[94] With regard to the surveillance evidence, the Plaintiff concedes that there is some indication of inconsistent symptomology in the surveillance footage. Ms. Noori maintains, however, that this is completely consistent with the complex nature of her problems. It is consistent with Chronic Pain Syndrome, which Dr. Boucher acknowledged. In particular, Dr. Boucher acknowledged that inconsistent pain symptoms, even during examinations, and inconsistent pain behaviour, including limping, are consistent with the condition.

[95] According to Dr. Berbrayer, inconsistent symptomology is also typical of Ms. Noori's degenerative changes, bulging disc, bursitis, and left knee injury, and with her

depression in light of those physical injuries. Depression can alter posture and even the way someone walks.

[96] Additionally, Ms. Noori testified that she has good days and bad days, which was supported by evidence of her sister, her mother, and her friend, Roza. Ms. Noori explained that stress can increase her pain, as can her level of activity. Treatment provides temporary pain relief but her pain level and her functionality are dependent on what she has been doing physically in a given day or over a given period. It is also dependent on what kind of emotional stressors she is going through, as well as whether or not she is in treatment.

[97] While there may be multiple potential causes for depression – and depression may not have a cause (according to the evidence of Dr. Sharma) – no one has actually diagnosed Ms. Noori with depression as a result of anything other than chronic pain and the accident. That was Dr. Tippin’s diagnosis. Further, the Plaintiff is only required to show that the accident is a part of the cause and not the sole cause on a preponderance of evidence. The Plaintiff submits that she has met this burden, based on the testimony of her friends and family, the medical opinions and as an application of common sense inferences.

[98] The responding party submits that, according to the caselaw, an “important function” is one that is important to the usual activities of daily living, considering the Plaintiff’s age. The Court is required to consider Ms. Noori and her life as a whole and how her injuries have affected her life in the broadest sense of the word. The activities must be important to Ms. Noori, specifically, and that the Court should look at the quality of her pre-accident life.

[99] It is the responding party’s position that a serious impairment is one which causes substantial interference with the ability of the injured person to perform her usual daily activities or to continue his or her regular employment. A serious impairment is one that is merely beyond frustrating and unpleasant. Similar to when assessing the importance of a function, the respondent says I must take a holistic approach to the

analysis – the focus is on the particular plaintiff and her life, as seen through the cumulative effect of the injury. Within this analysis, changes in mood; withdrawal from social, recreational and family activities; poor sleep; and constant pain while continuing to work or engage in typical daily activities, are highly relevant factors to determine the seriousness of the impairment.

[100] According to the responding party, permanent does not mean lasting strictly forever until death. It is a weakened condition lasting into the indefinite future without any specified end date.

[101] While the impairments must be continuous since the accident, the symptoms do not need to be constant and unrelenting. Intermittent symptoms that wax and wane can satisfy the requirement; there is no requirement for an unbroken chain of impairment.

[102] There can be some improvement in the symptoms in the future but they must be unlikely to substantially improve.

[103] Ms. Noori suffered initial injuries to her left hip and thigh. These injuries evolved to her left knee, back and neck and then to her right hip, trapezius muscles and both shoulders. This has been confirmed by the testimony of Ms. Noori, her mother, Dr. Sharma and the clinical notes and records of Dr. Sharma and Ancaster Sports Medicine.

[104] While the intensity of her pain can vary, along with the part of her body that is hurting at a given moment, this does not mean her condition is not continuous. Ms. Noori testified that treatment and stretching has only provided temporary pain relief.

[105] Dr. Berbrayer has diagnosed Ms. Noori with a number of physical injuries and Chronic Pain Syndrome as a result of the accident.

[106] Dr. Tippin diagnosed Ms. Noori with Somatic Symptom Disorder and persistent depression because of her chronic pain and the extent it has interfered with her everyday life.

[107] Depression in and of itself, according to Dr. Tippin, includes difficulties with focus and concentration, difficulties with multitasking, fatigue/decreased energy, difficulties with initiation and motivation, low mood and lack of pleasure in things one used to enjoy. Fatigue can affect the speed at which one does things. These are not symptoms of depression. This is what depression *is*.

[108] Dr. Berbrayer testified that chronic pain can also affect focus, concentration and energy. It can affect sleep. Additionally, Dr. Berbrayer explained that a diagnosis of persistent depression can both intensify the chronic pain and make it last longer.

[109] It was Dr. Berbrayer's evidence that there is no cure for chronic pain. His prognosis was guarded and he expected the condition to be permanent without significant improvement, especially given the length of time she has been in pain. In particular, Dr. Berbrayer testified that he expects Ms. Noori's pain to increase as she ages because of the natural degenerative changes that will occur. He also testified that the accident has accelerated those degenerative changes. It is the responding party's position that her pain is evolving, given that Ms. Noori is now experiencing pain in her right hip and trapezius muscles and shoulders.

[110] Similarly, Dr. Tippin testified that her psychological impairments are permanent. He does not expect Ms. Noori's condition to significantly change, even with anti-depressant medication. There is no guarantee that anti-depressants will be effective, though they can be. Dr. Tippin explained that, because Ms. Noori suffers from both chronic pain and depression, her depression is more challenging to treat and more resistant to therapy. He expects her depression to continue because she has suffered from depression over many years. She has persistent depression and not just Major Depressive Disorder. He relied upon the testimony of Dr. Berbrayer that her chronic pain is expected to be permanent and worsen with time. If her pain continues, then Dr.

Tippin expects her psychological impairments will also continue. He also explained that, because Ms. Noori has suffered from depression before, she is at greater risk of having those symptoms return.

[111] Additionally, it was her chronic pain and the extent to which it was interfering in her daily life that caused her depression in the first place. Even with anti-depressant medication, her chronic pain will still be there. She suffers from chronic pain that significantly interferes with her daily life. This leads to depression, which can intensify and prolong her pain, which in turn feeds back into her depression. It's a cycle.

[112] Ms. Noori has also been diagnosed with Somatic Symptom Disorder and there is no evidence that anti-depressants are effective on that condition. Somatic Symptom Disorder is about how her pain symptoms interfere with her day-to-day life and includes spending excessive time researching symptoms and avoiding activities she anticipates will hurt. The responding party submits that anti-depressants would be another way in which Ms. Noori's pain symptoms would be interfering with her daily life. They would be forcing her to take medication she does not want to take.

[113] Ms. Noori explained that she is in pain all of the time. Her pain is aggravated by prolonged standing, sitting, bending and kneeling. She tries not to exert herself too much. If she has a good day and she does too much, she pays for it later with more pain. Stress increases her pain, and she feels tired all of the time.

[114] She struggles to shave her legs because she is bending in one position for a long time. She stopped going to the gym to work-out because it worsened her pain. Because of her ongoing chronic pain, Ms. Noori cannot be as active with her child, Zuli, as she wants to be.

[115] Ms. Noori struggles to fall asleep because of pain, she wakes up in the night because of pain and she has trouble getting herself out of bed. Ms. Noori testified to this effect and her issues with sleep are also reflected in the records of her family physician.

[116] Housekeeping also aggravates her pain. Ms. Noori's mother took over the majority of the housekeeping tasks to help her daughter recover. Since meeting with Dr. Tippin, Ms. Noori has learned that she must pace herself and breakdown tasks into smaller chunks. She has low energy. Ms. Noori testified that she does what she can and leaves what she cannot, even while pacing herself. Ms. Noori's sister confirmed that Ms. Noori does her housekeeping slowly and must pace herself. Since moving out of her parents' home in March 2018, her sister, Arezo, her cousin, Fatima, and her friend, Roza, all help Ms. Noori with her household duties. Arezo and Roza confirmed that they help her. Ms. Noori's neighbour, Andrew Treco, clears her car of snow in the wintertime. He also testified to this.

[117] Dr. Tippin testified that he advised Ms. Noori to pace herself to avoid pain flares, which happens when she does too much. Dr. Tippin also recognized fatigue prevents Ms. Noori from doing her tasks. He opined that her depression also impacts her ability to take care of her home because issues with motivation and initiation are part of the illness. Dr. Berbrayer explained that housekeeping sets up pain and that her chronic pain affected her ability to do her housekeeping and home maintenance. Along with depression, pain can also affect her energy stores. There is a real risk she will need help in the future because her pain is expected to worsen.

[118] Pain also affects her mood. Ms. Noori testified that, when her pain is higher, her mood is low and she avoids people. She also isolates herself from her friends and family when she thinks they do not understand her pain. She lashes out and loses her "support system." She has had fights with her sister about feeling misunderstood and lashing out. Arezo testified that it is difficult to be around Ms. Noori because all Ms. Noori wants to talk about is her pain. Arezo also testified that her sister can now be quite critical where she used to be kind and loving. Maliha Noori testified that Ms. Noori often talks about pain. Ms. Noori does not want to talk with Maliha when her mood is down and Ms. Noori will make excuses not to socialize or attend family events.

[119] Ms. Noori struggles to get herself out of bed. Because of this, she struggles to get Zuli to school on time, if at all. Arezo Noori testified that she sometimes would call

Ms. Noori in the morning multiple times to get her out of bed. In 2018, Zuli was late for class 24 times and absent 73 times. In 2019, Zuli was late 65 times and absent 27.5 times. Ms. Noori testified that her pain is the primary reason for those late arrivals and absences. The fact that she cannot get her daughter to school on time is a source of embarrassment and makes her feel like a bad mother. Dr. Tippin recognized this as a “touchy” subject for Ms. Noori. He opined that her depression also affects her ability to care for Zuli because of her low motivation and challenges with initiation.

[120] There have been three attempts to work, all of which have been unsuccessful. Her pain was aggravated at Century Fitness, but she forced herself to work, which impacted her energy and made her feel physically, mentally and emotionally drained.

[121] Her pain was also aggravated while working at Symposium and Samir Kabob House. She had problems with focus and concentration at both restaurants. She struggled with multi-tasking. She was exhausted working at Symposium. She was making mistakes at Samir’s because of her lack of concentration. Duties were modified for her at both restaurants. Her pain was at its worst when she started working at Samir’s and she resigned to focus on treatment and getting back her health. Ms. Noori’s mother confirmed Ms. Noori was in pain while at Symposium and Samir’s. Ms. Noori was fatigued and emotional.

[122] According to Dr. Berbrayer, being a chef was difficult for Ms. Noori because of her chronic pain. There is heavy lifting, carrying, pushing and pulling and she is often on her feet. This is consistent with the testimony of Maggie Jakab who explained that you will not be able to work in a kitchen if you are injured. Ms. Jakab was one of Ms. Noori’s supervisors when she did her co-op placement at Tansley Woods.

[123] According to Dr. Berbrayer, even if Ms. Noori has a sedentary job, she will require frequent breaks and an ergonomic office environment, with an understanding employer. Pain affects focus and concentration and energy. Sitting for lengthy periods of time will affect her back and neck. Her productivity will be affected. Again, her pain is expected to increase with age, which is relevant to her work function.

[124] Dr. Tippin testified that Ms. Noori's psychological impairments affect her ability to work to a significant degree. Because of her psychological impairments, she has low mood, a loss of internal pleasure, decreased energy, sleeping problems and lack of concentration, all of which will affect her ability to work.

[125] Maria Ross, an Occupational Therapist and expert in Vocational Assessments and Vocational Rehabilitation, assessed Ms. Noori over two consecutive days in late May 2019. She concluded that Ms. Noori was not competitively employable and that employment as a chef would not be appropriate for her.

[126] According to Ms. Ross, Ms. Noori's psychosocial factors affecting her ability to work include fears and anxiety about pain or getting hurt, mood and fatigue. Ms. Noori has problems with prolonged standing, sitting, crouching, kneeling and repetitive reaching and lifting. Looking down bothers her neck. She has issues with working for long periods. Ms. Noori also has problems with endurance – because of the duration of a task or its repetitive nature. Ms. Ross testified that Ms. Noori does not have the physical tolerances, emotional tolerances, attention skills or stamina for full-time competitive employment, consistent with the testimony of Dr. Berbrayer and Dr. Tippin.

[127] Furthermore, Ms. Ross testified that Ms. Noori needs to be retrained as she is most suited to clerical work. She recommended that Ms. Noori return to school and determined that Ms. Noori will require occupational therapy to help her return to the workforce. Even then, Ms. Ross concluded that Ms. Noori will not be able to sustain full-time competitive employment in a clerical field.

[128] Caring for her daughter and being active with her, taking Zuli to school, housekeeping, sleeping, exercising, socializing, and working are all important functions in Ms. Noori's life. The respondent submits that challenges in each of these spheres are beyond the unpleasant and frustrating.

[129] There are four main areas of responsibility in her daily life: childcare, home maintenance, physical health (exercise and treatment) and employment. Time and

energy spent in any one major area is going to affect Ms. Noori's ability in the other major areas, also affecting her social life and sleep.

[130] The responding party requests that the Court dismiss the Defendant's motion with costs.

VI. Analysis

a) Permanence – Has Ms. Noori sustained permanent impairments?

[131] As I concluded under the Contested Aspects of the Law section above, one factor I may consider is the jury's implied findings of fact, including those concerning Ms. Noori's credibility. I do this understanding that it is my statutory duty to determine the threshold motion and that I am not bound by these implied findings of fact. In the circumstances of this case, the jury's findings of fact are consistent with my findings based on my review of the evidence from the trial and my analysis of same.

[132] I begin by analyzing what those implied findings of fact are. In my view, the implied findings are most clear on the issue of permanence. I have reviewed the jurisprudence on the issue of permanence, as set out in paras. 18 and 19 above. I am mindful that the Plaintiff need not prove to a certainty that the impairment will last until death. I am also aware that the Plaintiff may have persistent but intermittent symptoms and that the permanence of the impairment may be determined on the basis of findings that are subjective, objective or a mix of the two.

[133] Against this backdrop, in my view, it is obvious the jury implicitly found that Ms. Noori's impairments were not permanent. I base this on several aspects of the jury's answers to the Question for the Jury.

[134] Ms. Noori asked for damages for past income loss in the amount of \$37,302 based on past loss of income commencing on January 1, 2015 and continuing until October 7, 2019. The amount requested by Ms. Noori was based on her working part-time for minimum wage. The jury awarded zero dollars for this. The implied finding of

fact is that Ms. Noori could have worked from January 1, 2015 forward and/or that her income-earning capacity was not impaired by the accident. This strongly implies that the jury did not view her impairments as permanent and that, from January 1, 2015 onwards, the jury found she was employable in the same manner as she had been before the accident.

[135] Ms. Noori asked for future loss of income and loss of competitive advantage from October 7, 2019 forward, under various scenarios, with amounts ranging from \$109,529 to \$169,635. The jury awarded zero dollars for this also. Implicit in this determination, is that Ms. Noori was fully employable and/or that her income-earning potential was not impacted on a go forward basis by any impairments related to the accident. Her injuries were not permanent. Her injuries from the accident did not impact her earning potential from January 1, 2015 to trial or from the trial forward.

[136] It could be argued that this is not the only possible implication from the jury's verdict on past or future loss of income. Perhaps the jury found that she did not have significant income before the accident, therefore she had no loss after the accident or that her receipt of social assistance was greater than her past income. Either way, the argument would be that the jury's findings were not a reflection that her injuries were not permanent.

[137] I disagree with this interpretation. Other aspects of the jury's determination of damages support the implied finding that Ms. Noori's impairments were not permanent. For example, the jury was also asked to award damages so that Ms. Noori could hire housekeeping services for larger household tasks on a go forward, future, basis. The jury awarded zero damages. Implicit in this is that her impairments caused by the accident were not permanent or ongoing. Further, the jury was asked by the Plaintiff to award damages for future healthcare – for physiotherapy and psychological counselling. The jury awarded zero. This implies that the jury did not find that her injuries were ongoing at the time of trial, such that she would require further treatment.

[138] The damage awards being zero for these four heads of damages – past income loss, future income loss and loss of competitive advantage, future housekeeping costs and future healthcare costs – reflect the jury’s implied findings of fact that Ms. Noori’s injuries were not permanent. This is supported by the jury’s consideration of claims made by Ms. Noori’s mother, Maliha Noori. Maliha Noori sought damages for loss of Ms. Noori’s care, guidance and companionship. The jury awarded zero dollars. This is indicative of an implied finding of fact that Ms. Noori suffered no permanent impairments. Maliha Noori also sought damages for providing housekeeping and home maintenance services to Ms. Noori as a result of the accident. The jury awarded zero dollars. Again, this implies that Ms. Noori suffered no permanent impairments which would require her mother to assist with housekeeping and home maintenance.

[139] In making this inference, I have considered that the onus of proof for establishing a loss of future income or the need for future care costs (housekeeping and healthcare) is less than a balance of probabilities (*Athey v. Leonati*, [1996] 3. S.C.R. 458, 140 D.L.R. (4th) 235 at pg. 242). As the jury was instructed, Ms. Noori needed only establish that there was a reasonable and substantial risk of loss of income in the future and that there was a real and substantial risk that she would incur future care expenses. Even with the lower onus on Ms. Noori, the jury awarded zero dollars under these heads of damages.

[140] As indicated, I have determined that the jury’s implied findings of fact in regard to whether Ms. Noori sustained permanent impairments accords with my own findings based on the evidence. In this regard, I make the following findings of fact, which individually and collectively lead to the conclusion that Ms. Noori has not suffered permanent impairments, either physical or psychological; as a result of the accident and that her accident related injuries have been resolved:

1. Ms. Noori was taken by ambulance immediately after the accident. The records indicate that she suffered from a left hip contusion. This is the only injury noted as accident related. That injury has been resolved.

2. There are no clinical notes from Dr. Sharma to indicate that Ms. Noori sought any help for accident-related injuries until December 8, 2014 – over a year and a half post-accident. Ms. Noori's OHIP summary shows that she attended on Dr. Sharma for depressive symptoms on January 22, 2014. There is no clinical note in Dr. Sharma's file; however, based on Ms. Noori's own evidence this is around the time she was separating from her husband and had a young baby to care for. Ms. Noori also testified that her young baby had eye problems which required ongoing treatment. The OHIP summary shows that she attended upon Dr. Sharma for back pain on March 20, 2014. There is no corresponding clinical note of Dr. Sharma indicating that this was accident-related.
3. Ms. Noori did see Dr. Trinh in March of 2014. This is 10 months post-accident. Dr. Trinh did not testify at the trial. One report from Dr. Trinh was filed at trial. It is not sufficient to support a conclusion that Ms. Noori's impairments are permanent and/or that they resulted from the accident.
4. Ms. Noori worked at Century Fitness from January, 2014 to January 2015. She worked part-time. This was during a time when she was newly separated (or was separating) from her husband.
5. Dr. Sharma referred to Ms. Noori to the Mood Disorder Clinic at St. Joseph's Healthcare Hamilton in 2015. Dr. Rhyno saw Ms. Noori. In his report of May 29, 2015, he referred to Ms. Noori's past medical history as follows:

Reports that she previously had an accident in 2013 after which she suffered from aches and pains. These were exacerbated during her period of adjustment disorder. She denies any head injury or seizures. No other medical concerns.

This is indicative that, by May 2015, any accident-related impairments had been resolved.

6. This notation in Dr. Rhyno's report is also consistent with Ms. Noori's OHIP summary. From April 29, 2015 to February 8, 2017 Ms. Noori did not attend a single OHIP covered treatment or appointment with any doctor or healthcare provider. This 22-month gap in treatment is inconsistent with her impairments from the accident being permanent. I did not find Ms. Noori's explanation for the absence of any OHIP covered treatment compelling. I note that she did not even attend at her family doctor during this period.
7. From September 2016 to June 2017, Ms. Noori attended at a chef's training program through St. Charles Place. This involved classes and practical sessions. She attended Monday to Friday, 6 - 6½ hours a day. It included a co-op aspect. Ms. Noori successfully completed the program and the co-op. One of her co-op supervisors testified about Ms. Noori's performance during her co-op. She did this training while working part-time at the Symposium restaurant from December 26, 2016 to May 14, 2017.
8. Ms. Noori began receiving social assistance in April of 2015. She did not apply for Ontario Disability Support. From 2015-2017, she told Ontario Works that she was employable. The records indicate that her failure to seek employment was related to child care issues. She signed an agreement with Ontario Works to go to full-time chef training from September 12, 2016 to June 29, 2017. In 2015 Ms. Noori signed an agreement to participate with Ontario Works, which included a condition requiring her to participate in employment activities. At this time, Ms. Noori indicated that there were no restrictions on her active participation. She signed another agreement in 2016, and a further one in 2017. By doing so, she was telling Ontario Works that she was willing and able to participate in employment activities. This is consistent with the conclusion that the injuries from the accident were fully resolved. It was only on May 30, 2018 that Dr. Sharma first completed a Limits to Participation form for Ms. Noori to submit to Ontario Works.

9. Video surveillance was tendered at trial. Portions of these videos are consistent with her injuries being resolved and not being permanent. In particular, I refer to her twirling while at the beach, her carrying her daughter on numerous occasions, and her crawling in behind her daughter in a restaurant booth and, at one point, leaning across the whole table to her boyfriend.
10. There is no evidence that Ms. Noori made any neck complaints to her family doctor until April 23, 2019, just short of six years after the accident.
11. In terms of psychological matters, Ms. Noori did not begin to receive psychological counselling until 2019. This was only after an accident benefit assessment by Dr. Tippin, upon the referral of Ms. Noori's counsel. She was not referred to counselling by her family doctor.

[141] Ms. Noori testified that her impairments (both physical and psychological) were ongoing, continuing and permanent. Implicit in the jury's answers to the questions on damages they did not find that Ms. Noori was a credible witness in this regard. As I have set out above, in paras. 26 and 27, I am of the view that the jury's implicit credibility findings ought to carry no more weight on a threshold motion and that – like all implicit findings – I am not bound by the jury's assessment. It is one factor that I can consider.

[142] In the circumstances of this case, I find that the jury's assessment of Ms. Noori's credibility accords with mine. In considering what is implied about Ms. Noori's credibility from the jury's verdict, I have considered each parties' position on damages and what the jury awarded by comparison. The Plaintiffs' theory of the case was that Ms. Noori had suffered permanent and ongoing impairments, both physical and psychological. Ms. Noori gave lengthy evidence in this regard, which can be found, above, under "Summary of the Responding Party's Position."

[143] Largely on the basis on her evidence, and the medical evidence I will refer to below, Ms. Noori sought general damages and suggested a range of general damages

from \$70,000 to \$100,000. She also sought past loss of income of \$37,302; future loss of income in the amount of \$148,664, future housekeeping costs of \$40,321 (present value, per Exhibit 57); and future healthcare costs as summarized on Exhibit 62, with the present values at Exhibit 57. The jury awarded \$40,000 in general damages and nothing else.

[144] The Defendants' position was that Ms. Noori was not a credible witness. The Defendants submitted to the jury that they award Ms. Noori general damages in the amount of \$20,000 and nothing for any other category of damages. The Defendants' theory of the case was that the accident caused Ms. Noori soft tissue injuries which have fully been resolved. To the extent that Ms. Noori has ongoing complaints, the Defendants' submitted that these complaints are exaggerated, fabricated or unrelated to the accident.

[145] The jury's verdict almost matched the Defendants' position, awarding \$20,000 in general damages more than the Defendants' suggested and zero in all other categories. Implicit in this is that the jury did not find Ms. Noori to be a credible witness in regard to the permanence of her impairments.

[146] My assessment of the evidence leads to the same conclusion that Ms. Noori was not a credible witness in terms of the permanency of her impairments resulting from the accident. I specifically find that there are no clinical notes of her seeking treatment from her family doctor for accident-related injuries until December of 2014. I did not have any in-person evidence from Dr. Trinh, only his March 2014 report. What Ms. Noori reported to Dr. Rhyno (aches and pains) and to Ontario Works (able to work) is inconsistent with her evidence. Her failure to seek OHIP-funded treatment from any doctor for 22 months is inconsistent with permanent impairments. Her delay in seeking psychological counselling and her delayed reporting of neck pain are inconsistent as well. She also worked for a year at Century Fitness (January 2014 to January 2015) and successfully completed a chef training course (September 2016 to June 2017).

[147] I now turn to the medical evidence. Dr. Berbrayer and Dr. Tippin both testified for the Plaintiffs as to the permanency of Ms. Noori's impairment. Dr. Berbrayer testified that he diagnosed Ms. Noori with myofascial pain of her cervical spine, mid-back strain, mechanical back pain, left hip soft tissue contusion and a partial torn medial meniscus tear, all related to the accident. In his opinion, her injuries evolved into Chronic Pain Syndrome.

[148] Dr. Tippin diagnosed Ms. Noori with persistent depression and Somatic Symptom Disorder, both related to the accident.

[149] Dr. Boucher testified on behalf of the Defendants. He had examined Ms. Noori, first in 2015. He had been requested to examine her through a company on behalf of her insurer to offer an opinion as to whether Ms. Noori required further treatment. Dr. Boucher testified that he formed the opinion that no further formal treatment would be helpful for Ms. Noori. His diagnosis of Ms. Noori in 2015 was:

1. A whiplash injury – WAD 1-11, cervical neck strain;
2. A left knee sprain/strain;
3. A left hip contusion; and
4. A lumbosacral myofascial strain – strain in the lower back.

[150] Dr. Boucher's opinion was that there were no signs that these were ongoing to a significant magnitude. He testified that 16-20 weeks is the customary healing time for soft tissue injuries unless there is a major tear.

[151] Dr. Boucher testified that he examined Ms. Noori again in 2018. He found no objective evidence of any change in her condition and, therefore, his opinion did not change. In his opinion, she did not require further physical treatment. Dr. Boucher's opinion was that Ms. Noori's prognosis was excellent given the type of injuries she sustained. What she suffered at the time of the accident and for several weeks after were, in Dr. Boucher's opinion, consistent with the accident, but he would not expect to see complaints lingering on many years after. The injuries were consistent with the

mechanism of the accident but not the severity of the injuries. In Dr. Boucher's opinion, the limitations Ms. Noori described in 2018 were not consistent with her injuries.

[152] Dr. Boucher did a further "paper review" on December 14, 2018, but he did not see Ms. Noori. He was asked to review additional documents and provide an opinion as to whether occupational therapy should be provided to Ms. Noori. His opinion was that there was no requirement for occupational therapy as Ms. Noori's injuries were self-limited and no longer an issue.

[153] In my view, it can be implied from the jury's award of general damages, which is close to the amount proposed by the Defendants, that the jury accepted Dr. Boucher's evidence. Based upon my review of the medical evidence my view is the same.

[154] This is not because of a preference for a participant expert over a litigation expert or for a doctor with one set of qualifications over another. In the circumstances, I prefer the evidence of Dr. Boucher. Dr. Berbrayer and Dr. Tippin relied heavily in their assessments and in reaching their diagnosis on what Ms. Noori told them. They acknowledged this at trial. The testing that Dr. Tippin did relied on responses from Ms. Noori. For the reasons set out above, I have determined that Ms. Noori was not a credible witness in regard to the permanency of her impairments. Dr. Boucher did not rely on what Ms. Noori told him to the same extent. As such, his evidence that her impairments were not permanent is preferred. To the extent that Ms. Noori suffers from psychological impairments, I find that they are not accident-related. When Dr. Rhyno diagnosed Ms. Noori in 2015, none of her psychological issues were identified as accident related. In December of 2014, when Ms. Noori consulted with Dr. Sharma regarding her psychological issues this was at the time of her marriage ending and related stressors.

[155] Similarly, Dr. Rathbone relied on Ms. Noori's complaints of pain. Dr. Bobba relied in part on Ms. Noori's responses to a number of questions in reaching his diagnosis. As a result, again, Dr. Boucher's evidence is preferred.

[156] For all of the above reasons, I conclude that Ms. Noori's impairments resulting from the accident have not been continuous since the accident. They are resolved. They do not continue.

b) Are the bodily functions, which are permanently impaired, important bodily functions?

[157] It is unnecessary for me to answer this question, as I have found that Ms. Noori suffered no permanent impairments as a result of the accident. However, in the event I am wrong on the permanence issue, I conclude that Ms. Noori did not suffer impairments of important bodily functions. For the reasons set out above, I did not find her evidence credible. The first treatment there is a record of her receiving is from Dr. Trinh almost a year after the accident. She told Dr. Rhyno in 2015 that she suffered aches and pains. She went 22 months without OHIP covered treatment. Ms. Noori has been able to continue with her life since the accident. She has worked at Century Fitness for a year. She worked at Symposium while doing her chef training course. She has travelled. She has engaged in social activities – going on a date, going to the beach, going to African Lion Safari, the Toronto Zoo and Canada's Wonderland.

[158] I accept the evidence of Dr. Boucher and his diagnosis of Ms. Noori's impairments as outlined above. These are not important bodily functions. It can also be inferred from the jury's award of general damages, that was close to what the Defendants suggested, that the jury did not consider that the bodily functions impaired were important bodily functions.

c) Are the impairments of the important bodily functions serious?

[159] Again, it is not necessary for me to answer this question, as I have found that Ms. Noori suffered no permanent impairments and no permanent impairments of

important bodily functions. However, if I am wrong on these issues, I conclude that Ms. Noori's impairments are not serious.

[160] Again, as set out above, I did not find Ms. Noori's evidence credible. Ms. Noori gave evidence as to the seriousness of her impairments. Her complaints were inconsistent with Dr. Boucher's evidence, which I accept. Her complaints were also inconsistent with her working for a year at Century Fitness, her completing her chef's training and co-op at Tansley Woods and with aspects of her behaviour on the surveillance video. Again, she told Dr. Rhyno in 2015 that she suffered accident related aches and pains.

[161] This finding is consistent with what can be implied from the jury's determination as I have outlined above.

VII. Conclusion

[162] For the above reasons, the moving party's motion is granted. The Plaintiff, Ms. Noori's claim for damages for non-pecuniary loss is dismissed pursuant to s. 267.5 of the *Insurance Act*.

[163] Counsel shall contact the trial coordinator to arrange a 15-minute telephone conference with me to discuss a process to deal with costs if they are unable to resolve costs.

("Original signed by")

Coats J.

Date: May 14, 2020