



the BEARD WINTER  
**DEFENDER**

February, 2009  
ISSUE 2

The Beard Winter Defender reports on legal issues related to the insurance industry.

The Beard Winter LLP Insurance Litigation Group acts for numerous insurers, ensuring that their claims are resolved promptly and economically, or proceed to trial quickly when necessary.

## Bill 198 Threshold Cases: The First Wave Of Decisions



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*Your comments are appreciated and if there are any accident benefits or tort topics that you would be interested in reading about, please feel free to [email](#) me and I will certainly explore the possibility of writing an article.*

Although Bill 198 became law effective October 1, 2003, it is only now that the effects of that change in the legislation are being considered by the Courts. And, the decisions are being released at a furious pace. The Court is not unanimous with regards to the applicable and relevance of the new legislation. The five Bill 198 threshold decisions released to date provide insight as to what the Court considers to be influential in rendering their decisions, and how they interpreted the substantive effect of Bill 198. By this early tally, it appears that insurers have taken a slim 3-2 edge in terms of threshold motions wins to date.

### THE WINS

#### **Sherman v. Guckelsberger (2008)**

The 32 year old female Plaintiff suffered soft tissue injuries as a result of a March 10, 2004 accident was considered to be likeable by the

Judge. At the time of the accident she had worked as a medical receptionist on a full time basis (four days a week) since 1996. She only missed one week from work post accident and resumed working full time two weeks later. She continued to work on a full time basis until July, 2007 when she reduced her work hours on account of pain from four days to essential three days. No treating doctor suggested that she reduce her hours. However, since June, 2004 she added a second bookkeeping job working out of her home two hours extra a week. Prior to the accident the Plaintiff was engaged in annual camping trips in which they would canoe, hike, and camp in tents. Post accident the Plaintiff continued to participate in these trips, (including the year of the accident), but less vigorously so as she did pre-accident.

The fact that the Plaintiff reduced her full time hours almost 3.5 years post accident without being recommended to do so by her treating physicians was puzzling to the Court. The fact that the Plaintiff assumed an extra job in 2004 resulting in her working more hours for greater the 3 years post accident compared to her employment pre-accident was highly detrimental to the Plaintiff's case. The Judge did not accept that a claimant who functions at such a high level as was demonstrated by her annual camping trips is not capable of maintaining the work that she had done for 3.5 years post accident.

The Judge conducted a detailed review of the new legislation and found that claimant did not meet



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the statutory test set-out. In particular, the Judge found that Plaintiff had not “suffered a substantial interference in her ability to continue her usual employment despite reasonable accommodations efforts” (as set-out in section 4.2(1)) in light of the claimant’s post accident employment.

Most notably, the Judge was not satisfied that the Plaintiff had suffered any appreciable loss of “function” as a result of the accident. Section 4.3 of the regulation requires that a physician explain “the specific function impaired”. There were generalized comments about fatigue, pain, and variable numbness, but nothing that effectively prevented her from doing anything. The Judge accepted that the Plaintiff continued to experience pain and discomfort, but was not convinced of the severity of the disability:

“My uncertainty stems from an aerial view of the rest of her life. She and her husband tell of a continuing, quite active, social life for persons of their age and station... The picture of Ms. Sherman, the individual who could not maintain her four day per week job as a medical receptionist and Ms. Sherman the young camper and wife are not consistent.”

The Judge then assessed the legal test of the “permanency of the impairment”. The majority of the doctors testified that if the Plaintiff did suffer from a thoracic outlet syndrome, (which was never effectively established at trial), that this condition is treatable by way of physiotherapy and Botox. Since the claimant did not engage in the latter two forms of treatment, or even inquire into the existence of same, she failed to prove that her injuries satisfied the “permanency criteria”.

The Court said as follows:

“I do not doubt that Ms. Sherman has residual pain. She is not a fraud. I, in fact, quite liked both she and her husband. I do not accept however, that her problems are significant enough to meet the Bill 198 Threshold. It is my view, that if the

legislators saw fit to amend the legislation yet again – increasing the deductible for claims under \$100,000.00 and making it so much more specific, they did so with a view to tightening it up from the former version.”

### **Nissan v. McNamee (2008)**

Immediately before the motor vehicle accident, Ms. Nissan worked for several months part-time at Avalon cleaning company as a housekeeper and her prior employment including working for several years in a pizza shop. Within five months post accident she performed “volunteer” activities at Al’s Pizzeria in which she allegedly worked without pay the weekend shifts from 5:00 pm until 3:00 am three nights per week. She testified that this physical activity could only be done while consuming large doses of Percocet.

The surveillance videos of Ms Nissan show her kneading, stretching and rolling pizza dough. She is seen reaching up to the shelves, bending down below the counter, checking pizzas in the oven, putting pizzas in boxes, cleaning, mopping, rolling door mats, running across the shop, serving customers, moving her head and body freely, directing employees, and performing all duties that one would expect of a manager of a pizza shop.

Her complaints of whiplash injury as she reported to her various health care professionals were found to be completely inconsistent with the level of function she has shown in the surveillance evidence. She was found to have misled her health care professionals and was not credible. The jury’s verdict found that Ms. Nissan was not entitled to any amount of compensation for general or special damages. The Court found that she had not suffered a threshold injury.

Unlike in *Sherman v. Guckelsberger (2008)*, however, the Court did not believe that the statutory language of Bill 198 altered the law with respect to the threshold. This Judge too conducted

a detailed analysis of the changes in the legislation and found that: “most of the regulation does not appear to support any significant change in the interpretation of the threshold”. The Judge suggests that the effect of the new statutory language is to codify the existing jurisprudence.

### **Ali v. Consalvo (2009)**

The Plaintiff was 55 years old, a homemaker, had 7 children, and was a very religious woman. As part of her activities of daily living she would pray 5 times daily, (in which she would kneel on a prayer mat), was responsible for all the indoor housekeeping responsibilities, played / taught her grandchildren, and socialized in her community. As a result of the soft tissue injuries she sustained in the accident, she was unable to engage in any of these activities.

The central issue of the trial revolved around the Plaintiff’s credibility. She denied having any pre-accident health problems to her medical assessors and testified in Court that her health was “perfect”. Yet the clinical notes and records indicated that pre-accident that she suffered from osteoarthritis, back pain, energy problems, and documented use of a cane. Dr. Ogilvie-Harris was called as a witness on behalf of the Plaintiff and the Judge concluded that: “Dr. Ogilvie-Harris during his testimony was clearly an advocate for Mrs. Ali and seemed unwilling to consider other possible explanations for her complaints of pain, apart from the car accident”.

The Court was troubled by the fact that notwithstanding her assertions at trial that her pain has never improved, that she had not taken any treatment at all since the accident. There was not a single referral to a specialist nor any recommendations for treatment from the family doctor. Due to her failure to provide proper histories to the medical practitioners who assessed her, their diagnoses may be based on incorrect facts.

The Judge concluded that the plaintiff does not satisfy the requirements of section 4.2 which states that the impairment must substantially interfere with most of the activities of daily living.

In coming to this conclusion the Court did not delve into any great detail regarding the effect of the changes in the legislation.

## **THE LOSSES**

### **Campbell v. Boivin (2008)**

The Plaintiff was employed as a housekeeper in a hospital at the time of the accident for one year working approximately 35 hours a week. By all accounts she was a very active individual pre-accident in which she ran marathons, was training for a triathlon, skied, golfed, hiked, swam, and cycled among other activities. She was described by a witness at trial as the “epitome of fitness”.

She had not returned to work post accident; although she did make at least two brief attempts. She had also not returned to participating in her pre-accident physical activities. The claimant suffered from soft tissue injuries to her neck, shoulder, back and hip as a result of the accident. These injuries appeared to have resolved to a great extent. The key injury which continued to bother her, and the focal point of the case, was pain in her abdomen.

The claimant called a gastroenterologist who made an objective finding that the claimant suffered from diastasis recti which was causally connected to the motor vehicle accident. The defence called an orthopaedic surgeon who found no objective basis for the pain complaints and therefore opined that there was no disability. The Court ultimately accepted the evidence of the gastroenterologist over that of the orthopaedic surgeon as the former treats and diagnosis patients with abdomen problems while as the latter does not. The Court found that:

“The fact that the plaintiff’s injuries are not more precisely objectively confirmed does not persuade me that they do not exist.”

The claimant was found to have suffered from a threshold type injury. The Court made virtually no mention of the changes in the legislation.

### **Guerrero v. Fukuda (2008)**

The claimant suffered a whiplash injury as a result of the accident and was described as an “industrious, honest, perhaps understated and naive”. She attempted to engage in vocational retraining such as taking a heavy truck driving course, but at best was only able to work part time at a restaurant.

The Court found that the family doctor presented as a “wonderful, straightforward witness”, (no other medical expert was called on behalf of the Plaintiff), while as the defence psychiatrist’s evidence was rejected outright. The Judge said, “his evidence was a classic example of a highly qualified doctor with a pre-existing bias, appearing as a hired gun to discredit Ms. Montero”.

The Court concluded that she sustained a threshold injury. There was little analysis with respect to the changes to the legislation and whether this had any impact on the decision making.

### **CONCLUSION**

At this early stage there appears to be two schools of thought. In *Sherman v. Guckelsberger (2008)*, the Court undertakes a thorough analysis of the law and concludes that the changes in the legislation regarding the Bill 198 threshold are substantial and important. In that case the Court found the claimant to be credible; but that her injuries did not cross the more onerous statutory requirements contained within the legislation. In *Nissan v. McNamee (2008)* the Court also goes to great length to interpret the legislation

but comes to the opposite result; namely that the changes in the language merely codify the existing law. In that case, the claimant failed to cross the threshold on account of significant reservations regarding her credibility.

None of the *Ali v. Consalvo (2009)*, *Campbell v. Boivin (2008)*, nor *Guerrero v. Fukuda (2008)* decisions go into much detail regarding the relevance of the changes to Bill 198. *Ali v. Consalvo (2009)* represents the classic case in which the claimant is caught misrepresenting her health both to the Court and to her medical assessors. *Campbell v. Boivin (2008)* illustrates the importance of choosing the most appropriate specialist to assess a claimant, and that substantial changes in a claimant’s recreational activities is highly influential to a trier of fact. *Guerrero v. Fukuda (2008)* was decided on the basis that the Court found the claimant to be credible while as the defence medical expert was a “hired gun”.

The first wave of cases interpreting the threshold under Bill 198 has done little to clarify the landscape in which we practice. I suspect that the second wave of cases to be decided will also be heavily dependent on each Judge’s specific vantage point as to relevance of the new statutory language. The Court of Appeal will eventually get hold of this legislation and try to sort-out what it is supposed to mean. Until then, if the defendants continue to win threshold motions at a rate of 60%, no one on the insurer side will be too concerned with the not so glamorous art of statutory interpretation.

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