



A Guide to the Threshold: Relevant tests and factors to consider

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Section 267.5(5) of the Insurance Act (“the Act”) provides that the owner or occupants of an automobile are not liable in an action for non-pecuniary losses unless the injured person sustained a “permanent serious disfigurement” or a “permanent and serious impairment of an important physical, mental or psychological function.”

Determining whether the respective plaintiff has incurred such impairments, and is thus able to be awarded non-pecuniary damages, is commonly referred to as “the threshold.” This paper will outline how courts assess a plaintiff’s injuries to determine whether the threshold test has been met. This paper provides useful takeaways and questions for adjusters and defense counsel to consider when faced with threshold motions.

Defining “Permanent Serious Impairment of an Important Physical, Mental or Psychological Function”

The phrase “permanent serious impairment of an important physical, mental or psychological function” is defined in the amendments to Bill 198, specifically section 4.2(1) of O Reg 461/96. The section defines what is meant by the terms impairment, important, and permanent, and in doing so, stipulates the test for meeting the threshold.

For the impairment to be serious, it must:

- i. substantially interfere with the person’s ability to continue his or her regular or usual employment, despite reasonable efforts to accommodate the person’s impairment and the person’s reasonable efforts to use the accommodation to allow the person to continue employment;
- ii. substantially interfere with the person’s ability to continue training for a career in a field in which the person was being trained before the incident, despite reasonable efforts to accommodate the person’s impairment and the person’s reasonable efforts to use the accommodation to allow the person to continue his or her career training, or
- iii. substantially interfere with most of the usual activities of daily living, considering the person’s age.¹

¹ *Court Proceedings for Automobile Accidents that Occur on or After November 1, 1996*, [O Reg 461/96](#) at section 4.2(1).

For the function that is impaired to be an important function of the impaired person, the function must:

- i. be necessary to perform the activities that are essential tasks of the person's regular or usual employment, taking into account reasonable efforts to accommodate the person's impairment and the person's reasonable efforts to use the accommodation to allow the person to continue employment;
- ii. be necessary to perform the activities that are essential tasks of the person's training for a career in a field in which the person was being trained before the incident, taking into account reasonable efforts to accommodate the person's impairment and the person's reasonable efforts to use the accommodation to allow the person to continue his or her career training;
- iii. be necessary for the person to provide for his or her own care or well-being, or
- iv. be important to the usual activities of daily living, considering the person's age.²

Finally, for the impairment 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.³

When reviewing the terminology used in these sections, it is clear that the subcomponents of the terms "impairment" and "important" are disjunctive. Only one of the subcomponents need to be met. However, the subcomponents for the term "permanent" are conjunctive. In other words, all subcomponents must be satisfied.

Proving you meet the threshold

To meet the test stipulated in section 4.2(1), a Plaintiff shall adduce evidence of one or more physicians to explain:

- i. The nature of the impairment;
- ii. The permanence of the impairment;
- iii. The specific function that is impaired; and
- iv. The importance of the specific function to the person.⁴

The section uses mandatory language, and as such, the respective plaintiff is required to produce said evidence. The physician chosen to assist with this work must be trained for and experienced in the assessment or treatment

2 *Ibid.*

3 *Ibid.*

4 *Ibid* at section 4.3(2).



of the type of impairment that is alleged.⁵

The evidence must also be based on medical evidence, in accordance with generally accepted guidelines or standards of the practice of medicine and include a conclusion that the impairment is directly or indirectly sustained as the result of the use or operation of an automobile.⁶

Non-compliance with section 4.3(2) of O Reg 461/96 could make or break a threshold motion. For example, in *Watt v. Bissonnette*, the Plaintiff was involved in a motor vehicle accident. The plaintiff complained of right shoulder, right neck, and right scapular pain, and suffered from depression and somatoform disorder. The plaintiff's expert conceded that he did not have legible copy of treating physiotherapists CNRs when drafting his expert report. When provided with all the evidence at trial, the plaintiff expert changed his opinion. As such, the plaintiff did not meet threshold for failing to satisfy section 4.3.

Court application of the threshold tests

In assessing whether an impairment meets the statutory requirements, the courts continue to accept and apply the three-prong test established in *Meyer v Bright*:

1. Has the injured person sustained permanent impairment of a physical, mental, or psychological function? The Plaintiff need not prove a certainty that the impairment will last forever, but that it is expected to last indefinitely into the future with an unlikely chance of improvement.
2. If yes, is the function which is permanently impaired an important one? This is assessed as relative to the specific plaintiff.
3. If yes, is the impairment of the important function serious?⁷ An injury must go beyond what is tolerable, and this determination is made in light of the cumulative effect on the plaintiff's life.

Even in cases where a jury returns a verdict in which no damages are awarded, the court must still determine the threshold issue.⁸ However, the Court is not bound by the jury's implied findings, including those relating to credibility.⁹

Below are recent cases applying this test and the factors listed in sections 4.2(1) – 4.3 of O Reg 461/96.

***Ingratta v. McDonald*, 2024 ONSC 371 – Plaintiff with pre-existing injuries found not to meet the threshold**

The plaintiff, Lana Ingratta, was driving her car on February 11, 2018, when it was struck on the passenger side

5 *Ibid* at section 4.3(3); *Rodrigues v Purtill*, [2019 ONCA 740](#).

6 *Ibid* at section 4.3(3) - (4).

7 *Meyer v. Bright*, [1993 CanLII 3389](#) (ON CA).

8 *Mandel v. Fakhim*, [2018 ONSC 7580](#).

9 *Debruge v. Arnold*, [2018 ONSC 2357](#), at para 20; *Kasap v. MacCallum*, [2001 CanLII 7964 \(ON CA\)](#), at paras 7-8; *Noori v. Liu*, [2020 ONSC 3049](#) at para 32.



by the defendant.¹⁰ An issue at trial was whether the plaintiff sustained injuries as a result of the Collision that met the threshold for recovery.

The Court did not find the plaintiff sustained a permanent impairment. The court noted the plaintiff had sustained cervical and lumbar strain as a direct result of the accident resulting in her ongoing chronic pain. However, this pain had existed before the accident, and despite experiencing this pain after the accident the plaintiff was able to return part time to work as a personal care worker.¹¹ In applying the factors listed in section 4.2(1)1 of O.Reg 461/96, the Court noted that the plaintiff did not have regular or usual employment and was not training for a career at the time of the accident.¹² Concurrently, the plaintiff was not consistently participating in the recommended treatment plans.

The Court did find the impairments to be important. The court made clear that one must consider the importance of the bodily function in issue as it relates to the particular individual. Is it one that plays a major role in the health, general well-being, and way of life of the Plaintiff? The analysis is subjective and qualitative. In this case, the injuries impaired the plaintiff's ability to garden and walk, which were important to her life and well-being at the time of the collision.

Finally, the court did not find the impairments were serious. In order to determine whether the impairment is "serious", the court must consider the seriousness of the impairment to the person, as opposed to the injury in isolation. Further, the impairments must go beyond tolerable. Interference may be frustrating, and even unpleasant, but if it does not go beyond tolerable, it is not serious.¹³ The lack of meaningful treatment, overall improvement of the plaintiff's functional abilities marked by her travels to Africa and a return to employment after many years of receiving disability benefits, all supported the fact that the injuries were not serious.¹⁴

As such, the Court found that the plaintiff's injuries did not meet the threshold.

Kolapully v. TTC et al., 2022 ONSC 5473 – Plaintiff met threshold

The Plaintiff was struck by a TTC bus as she was crossing the road.¹⁵ The Plaintiff underwent emergency surgery to repair an open left ankle fracture. The Plaintiff also suffered a mild concussion, a laceration over her left eyebrow and a fracture of the left tibial spine and left and right fibular heads.

The jury ruled that the Plaintiff was 25% at fault but awarded her \$175,000 in general damages. On the threshold motion, the judge determined that the Plaintiff met the Meyer test.

10 *Ingratta v. McDonald*, [2024 ONSC 371](#) at para 1.

11 *Ibid* at para 55.

12 *Ibid* at para 57.

13 *Ibid* at para 62.

14 *Ibid* at para 63.

15 *Kolapully v. TTC et al.*, [2022 ONSC 5473](#) at para 1.



The Plaintiff sustained a permanent impairment of a physical function.¹⁶ Particularly, the Plaintiff sustained a serious injury to her left ankle with continued restricted range of motion amounting to an impairment and altered gait. Further, the Plaintiff's expert identified objective irregularities in the ankle joint and knee that were consistent with post-traumatic osteo-arthritis that was degenerative and could not be corrected by surgery.¹⁷

The Plaintiff's sustained a permanent impairment of an important physical function. Her ability to walk and stand without pain was important to her daily living, which entailed cooking, cleaning, shopping, socializing, and taking care of her grandchild. These activities were fundamental to the Plaintiff's life, which she could no longer do without significant difficulty.¹⁸

Finally, the Plaintiff sustained a permanent and serious impairment of an important physical function. The Plaintiff was now substantially impeded in her activities of daily living because of her physical limitations. Her physical impairments led to diagnoses of chronic pain syndrome and Persistent Somatic Symptom Disorder with Predominant Pain and Major Depressive Disorder. These psychological impairments, along with the fact the Plaintiff's suicide attempt, resulted in the court concluding that the Plaintiff had sustained a permanent and serious impairment of an important physical function and was entitled to the non-pecuniary damages awarded by the jury.

Emmanuel et al. v RBC General, 2022 ONSC 1718 – Plaintiff did not meet threshold

An unidentified truck in the left-hand turning lane of Martin Grove Road struck the Plaintiff as she was crossing the street. As a result of the collision, the Plaintiff suffered a mild concussion, soft tissue injury to the neck, shoulder and back, and depression.¹⁹

The jury attributed 75% liability to Plaintiff, and awarded \$75,000.00 in general damages, and \$10,000 for loss of care, guidance and companionship pursuant to section 61 of the *Family Law Act*. The Defendants brought a threshold motion to argue the Plaintiff did not suffer a serious and permanent impairment of an important physical, mental or psychological function.

While it is clear that the Plaintiff had suffered physical injuries from the accident, the Court was not persuaded that those injuries were permanent. The Plaintiff did not fill prescription refills for pain medication, she did not see her physiotherapist, and had three children post-accident.²⁰ These facts inferred that the Plaintiff did not require medical treatment, and that her symptoms were manageable or had abated.²¹ As such, the Court did not proceed to the second and third step of the *Meyer* test, and the Plaintiff did not meet the threshold.

16 *Ibid* at para 6.

17 *Ibid* at paras 7-9.

18 *Ibid* at para 12.

19 *Emmanuel et al. v RBC General Insurance Co. et al.*, [2022 ONSC 1718](#).

20 *Ibid* at para 8.

21 *Ibid* at para 10.



Important takeaways – Factors to consider

The cases above illustrate that there are factors that will either strengthen or decrease a plaintiff's chance of meeting the threshold. Common factors that may increase the chance of the plaintiff meeting the threshold include:

- A sympathetic and credible Plaintiff;
- Experts agreeing to the nature but not the severity of the injuries;
- Lay witnesses corroborating evidence of impairment;
- Full disclosure of deleterious evidence.

However, factors such as poor credibility, intervening injuries/prior and ongoing health issues, and a lack of disclosure undermining the reliability of Plaintiff expert opinions, are all factors that decrease a plaintiff's chances of meeting the threshold.

In all cases, adjusters and defense counsel alike should ask themselves the following questions:

- Has there been a ruling on whether the injuries stem from a motor vehicle accident? If the ruling says no, then the threshold issue is moot.
- What was the plaintiff's employment pre-accident? Can they still engage in this employment post-accident?
- What was the plaintiff's pre-accident daily activities? How important were these activities to the plaintiff?
- Is the plaintiff fully participating in recommended treatment plans? Are they listening to the recommendations given by their physicians/treating professionals?
- Did the plaintiff have pre-existing injuries, and, if so, how did they affect their bodily functions?
- Did the plaintiff produce any physician reports, and, if so, what are the qualifications of these physicians?
- Is the Plaintiff a credible witness? Is there any surveillance footage contradicting the plaintiff's evidence?



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