

CITATION: Girao v. Cunningham, 2021 ONSC
COURT FILE NO.: 04-CT-005744
DATE: 20211103

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: YOLANDA GIRAO Plaintiff
AND:
LYNN CUNNINGHAM Defendant
BEFORE: Mr. Justice Chalmers
COUNSEL: *Y. Girao*, in person
T. McCarthy, for the Defendant
HEARD: On October 26, 2021 in person

ENDORSEMENT

Overview

[1] This action arises out of a motor vehicle accident that occurred on June 19, 2002. The action was tried with a jury from September 27 to October 26, 2021. At the conclusion of the trial and while the jury was deliberating, the Defendant brought a motion for an order dismissing the Plaintiff's claims for non-pecuniary loss on the basis that she failed to prove that as a result of the accident she sustained a permanent serious impairment of an important physical, mental or psychological function. The Defendant's motion was also for an order dismissing the Plaintiff's claim for future healthcare expenses on the basis that the Plaintiff failed to prove that she sustained a catastrophic impairment.

[2] After argument on the motion and before this endorsement was released, the jury returned a verdict. The jury awarded \$40,000 in non-pecuniary general damages. No damages were awarded for future healthcare expenses. As a result of the jury's verdict with respect to future healthcare expenses, the motion as to whether Ms. Girao sustained a catastrophic impairment is moot.

[3] For the reasons set out below, I find that Ms. Girao did not sustain a permanent serious impairment of an important physical, mental or psychological function as a result of any injuries that arose directly or indirectly from the motor vehicle accident. I dismiss the Plaintiff's claim for non-pecuniary damages.

[4] I incorporate by reference my review of the evidence set out in my charge to the jury.

The Issues

- [5] There are two issues to be determined on this motion:
- a. Has the Plaintiff discharged her burden of proving that her injuries arose directly or indirectly from the motor vehicle accident; and
 - b. If so, has the Plaintiff discharged her burden of proving that the injuries caused by the accident constitute permanent serious impairment of an important physical, mental or psychological function.

Analysis

The Threshold

[6] The accident occurred on June 19, 2002. The automotive insurance regime that applies is Bill 59: *Del Rio v. Lawrence*, 2009 CanLII 6833 (ONSC), at para. 3. The following threshold applies to a claim for non-pecuniary damages:

267.5(5) Despite any other Act and subject to subsections (6), the owner of an automobile, the occupants of an automobile and any person present at the incident are not liable in an action in Ontario for damages for non-pecuniary loss, including damages for non-pecuniary loss under clause 61(2) e) of the *Family Law Act*, from bodily injury or death arising directly or indirectly from the use or operation of the automobile, unless as a result of the use or operation of the automobile the injured person has died or has sustained,

- (a) Permanent serious disfigurement, or
- (b) Permanent serious impairment of an important physical, mental or psychological function.

[7] Although the Defendant is the moving party, Ms. Girao has the onus to prove that her injuries arose directly or indirectly from the use or operation of an automobile, and that as a result of the injuries sustained in the accident, she sustained permanent serious impairment of an important physical, mental or psychological function: *Meyer v. Bright*, 1993 CanLII 3389 (ON CA), 110 D.L.R. (4th) 354 (ON CA), at para. 50.

i) Causation

[8] The legislation provides that the bodily injury must arise directly or indirectly from the use or operation of the automobile. Ms. Girao must establish that there is a causal connection between the motor vehicle accident and the bodily injury.

[9] The test for causation is the “but for” test. Ms. Girao must prove on a balance of probabilities that “but for” the negligent use or operation of an automobile, her injuries would not have occurred. The accident need not be the sole cause of the injury or the most important cause, but it must be a necessary cause: *Clements v. Clements*, 2012 SCC 32, at para. 46.

[10] Ms. Girao complains of three main injuries, which she says were caused by the motor vehicle accident:

- (a) soft tissue injuries to her neck, back and shoulder which led to chronic pain syndrome and fibromyalgia;
- (b) Tempo mandibular joint (TMJ) dysfunction; and,
- (c) Depression, anxiety and post-traumatic stress disorder (PTSD).

[11] The Defendant argues that Ms. Girao's complaints were a result of pre-existing conditions and were not caused by the motor vehicle accident.

a. Soft Tissue Injuries to her neck, back and shoulder

[12] There is reference to pre-accident neck pain in the clinical notes of Ms. Girao's treating doctor; Dr. Malicki. In October 1999, Ms. Girao presented with a one-month history of neck pain. X-rays of the neck were ordered, which were negative. There is also reference to neck, back and elbow pain in Dr. Malicki's clinical note of January 7, 2002. Although Ms. Girao complained of soft tissue pain in her neck, elbow and back she was able to work on a full-time basis.

[13] At the time of the motor vehicle accident, Ms. Girao was wearing her seatbelt. The seatbelt held her in place. There is no evidence that any part of her body hit the inside of the vehicle. The airbags did not deploy. Immediately after the accident, Ms. Girao was not aware of any pain. She got out of the vehicle to attend to her daughter who was in the back seat. She spoke with the driver of the other vehicle. No ambulance was called to the accident scene. Ms. Girao was not taken to the hospital.

[14] There was a walk-in clinic close to the accident scene. Ms. Girao took her daughter to the office where she was seen by Dr. Nessim. Ms. Girao returned to the car and they drove to the self-reporting centre. At the collision centre she began to experience pain in her right shoulder. She returned to Dr. Nessim's office. She complained of pain in her neck and thoracic area. Dr. Nessim diagnosed her with strain to her back. He prescribed Naproxen.

[15] At the time of the accident, Ms. Girao was working at Hallmark as an office cleaner. She worked a day shift and then a second shift in the evening. The accident occurred after she completed her day shift. She did not go to work that evening. She returned to full-time work the next day.

[16] Ms. Girao first saw Dr. Malicki after the accident on July 11, 2002. She complained of neck and upper back pain. He referred her to physiotherapy. Ms. Girao returned to Dr. Malicki on July 16, 2002. He completed the disability certificate. He diagnosed her with whiplash grade II, with decreased range of movement with no neurologic deficit. Dr. Malicki checked the box on the disability certificate that Ms. Girao could do regular work, without qualification.

[17] Ms. Girao returned to Dr. Malicki on July 25, 2002. His note indicates that she reported that she was attending physiotherapy and was feeling better. Dr. Malicki referred Ms. Girao to a chiropractor, Dr. Burns. Ms. Girao saw Dr. Burns on August 14, 2002. He provided a note that she was unable to work between September 30, 2002 and October 31, 2002. Ms. Girao stopped working on September 30, 2002. She has not returned to work in any capacity since that date.

[18] Ms. Girao was diagnosed with whiplash grade II by Dr. Malicki within a few weeks of the accident. Dr. Mathoo, physiatrist, diagnosed Ms. Girao with whiplash grade II. The Defendant's expert physiatrist, Dr. Lipson confirmed the diagnosis of whiplash associated disorder grade II. I am satisfied that Ms. Girao sustained a whiplash grade II injury in the motor vehicle accident that occurred on June 19, 2002.

b. TMJ Dysfunction

[19] There is no report of immediate jaw pain or that Ms. Girao sustained a blow to her jaw in the motor vehicle accident. The first complaint of TMJ pain following the accident was at the time of her attendance with Dr. Malicki on October 11, 2002. She had not made any complaints with respect to her jaw when she saw Dr. Malicki on July 11, July 16, July 25, August 14, September 4, or September 17, 2002.

[20] Ms. Girao's treating oral surgeon, Dr. Kryshalskyj first saw her on May 27, 2009. He was unable to provide a definitive opinion on the issue of causation. He stated that in a motor vehicle accident a person may sustain an injury to the jaw when the body moves back and then forward, which can cause a contusion to the joint. Dr. Kryshalskyj conceded in cross-examination that he is not trained in biomechanics. He also stated that there can be many different causes of TMJ dysfunction including microtrauma such as grinding teeth or clenching the jaw muscles.

[21] The Defendant's expert oral surgeon, Dr. Gryfe, examined Ms. Girao on October 21, 2010. Before the examination, he reviewed the medical records prepared by the treating dentists and oral surgeons. He noted that there was no record of Ms. Girao striking her face or jaw in the accident. She did not report any immediate jaw pain. On the examination, he noted that there was muscle tenderness in her facial muscles, but there was an absence of dental wear. He concluded that Ms. Girao was clenching her jaw. He diagnosed Ms. Girao with degenerative osteoarthritic change in her left TMJ and significant degenerative disease in her right TMJ.

[22] Dr. Gryfe provided the opinion that the motor vehicle accident had little or no causative effect on Ms. Girao's TMJ dysfunction. He noted that the first complaint of TMJ pain was almost four months following the accident. It was his opinion that if the jaw was injured in the motor vehicle accident, the Plaintiff would have had immediate pain.

[23] The Defendant's expert physiatrist, Dr. Lipson also provided the opinion that the TMJ was not related to the accident. He noted that the medical records refer to a shortening of Ms. Girao's mandibular and an overbite of 50%. He also referred to the report of Dr. Freidlich, who noted in his report dated November 17, 2003, that Ms. Girao has an underlying dental deformity. Dr. Lipson stated that the medical records are consistent with his opinion that the TMJ dysfunction is not related to the accident.

[24] I conclude that Ms. Girao failed to establish on a balance of probabilities that the TMJ dysfunction was caused by the motor vehicle accident. There was no evidence of trauma to the jaw. There was a four-month delay in the onset of the symptoms. There is reference in the medical records to unrelated underlying dental deformity. I accept Dr. Gryfe's opinion that the likely cause of the TMJ dysfunction is her parafunctional habit of clenching her jaw.

c. Depression, anxiety, and PTSD

[25] There is evidence of a significant pre-accident history of depression, anxiety and PTSD. Ms. Girao was a victim of a brutal sexual assault in Peru when she was 18 years of age. She testified at trial that the rape traumatized her. She also testified that she was able to recover with help of her faith.

[26] In 2001 Ms. Girao started school at Sheridan College. She testified that after the terror attacks on September 11, 2001, she was subject to harassment at school because she was an immigrant. She testified that this resulted in depression and anxiety symptoms. She saw Dr. Malicki on September 18, 2001. According to his clinical note, she complained of depression of a duration of 3½ months as a result of "an event that happened". At trial, Ms. Girao denied that she had been depressed for 3½ months before seeing Dr. Malicki and maintained her position that the depression started after September 11, 2001. Dr. Malicki prescribed Paxil and referred her to Dr. Sanchez, psychiatrist.

[27] Ms. Girao was seen by Dr. Sanchez on October 11, 2001. Dr. Sanchez noted that at the time of the examination, Ms. Girao was taking Paxil. He stated that there was no report of hallucinations or suicidal ideation. Dr. Sanchez diagnosed Ms. Girao with anxiety and depression with psychotic features, in partial remission.

[28] Ms. Girao reported depression when she was seen by Dr. Malicki on January 7 and May 7, 2002. The last visit with Dr. Malicki before the motor vehicle accident was on June 6, 2002. In his notes he wrote that she had "less depression". There is no reference to depression in Dr. Malicki's notes on July 25, August 14, September 4, or September 17, 2002. The first complaint of depression in Dr. Malicki's clinical notes following the motor vehicle accident is on October 11, 2002.

[29] In October 2004, Ms. Girao was referred the Trillium Health Centre for severe depression. She was treated on an out-patient basis. The Trillium note dated January 5, 2005 provides that Ms. Girao had flashbacks about a rape that occurred 30 years before. There is no reference to the motor vehicle accident in the note.

[30] Ms. Girao's treating psychiatrist was Dr. Manohar. She treated Ms. Girao from November 2005 to June 2012. She diagnosed Ms. Girao with major depression. She also provided the opinion that the depression was caused by the motor vehicle accident. She stated that one of the reasons for this conclusion was an absence of major depression before the accident. At the time she prepared her report she was not aware that Ms. Girao had complained of depression for a duration of 3½ months when she saw Dr. Malicki on September 18, 2001. She was also not aware that Ms. Girao had been seen by Dr. Sanchez in October 2001 and that he had diagnosed her with major

depression with psychotic symptoms in partial remission. She was not aware of the Trillium Hospital record on January 5, 2005 which refers to the flashbacks about the rape.

[31] Dr. Manohar's final diagnosis in June 2012 was major depression with psychotic symptoms in partial remission. This is the same diagnosis as provided by Dr. Sanchez in October 2001. When Dr. Manohar made this diagnosis, she did not have the complete medical history. She testified that without the complete history, it may be difficult to provide an opinion on causation.

[32] Ms. Girao's treating psychologist was Dr. Pilowsky. She was not aware that Ms. Girao had been prescribed Paxil in 2001 or that there was a report of depression for a duration of 3½ months in September 2001. She was not aware of the referral to Dr. Sanchez and did not know that he had diagnosed Ms. Girao with major depression with psychotic symptoms in partial remission in October 2001. She did not have the January 5, 2005 Trillium Hospital record that refers to the flashback about the rape.

[33] Ms. Girao was examined by Dr. Rosenblat, psychiatrist on October 27, 2006. He diagnosed her with major depressive disorder. He did not find any evidence of psychotic symptoms. He was of the opinion that she did not meet the diagnostic criteria of PTSD. She was not suicidal. Dr. Rosenblat noted that the first report of depression was several months following the accident. He was not aware of the report of depression of a duration of 3½ months made to Dr. Malicki in September 18, 2001. He did not see the report of Dr. Sanchez dated October 12, 2001 in which he diagnosed major depressive disorder with psychotic symptoms in partial remission.

[34] The Defendant called Dr. Finkel, psychiatrist. At the time he prepared his opinion, Dr. Finkel had all of the pre-accident notes and records including Dr. Sanchez's report. He was also aware of the Trillium Health record of January 5, 2005 that refers to Ms. Girao's flashback of the rape. Dr. Finkel provided the opinion that the pre-accident depression may have been briefly exacerbated following the motor vehicle accident for a matter of months. It was his opinion that the motor vehicle accident would not give rise to the prolonged depression she demonstrated. He noted that the first complaint of depression following the accident was on October 11, 2002. He stated that if the major depression complaints were related to the accident, he would have expected the symptoms would have started sooner.

[35] It is my view that the opinions with respect to the causation of Ms. Girao's anxiety, depression and PTSD provided by the Plaintiff's witnesses are of limited assistance. None of the doctors called by the Plaintiff had the complete pre-accident records. Most importantly they did not have the report of Dr. Sanchez dated October 12, 2001 in which he diagnosed Ms. Girao with major depression with psychotic symptoms in partial remission. Dr. Manohar stated that one of the reasons she came to the conclusion that the motor vehicle accident caused the depression, was because Ms. Girao did not have depression pre-accident. In fact, Ms. Girao had serious psychiatric symptoms which were present in the year before the accident. Dr. Finkel, on the other hand, had a complete set of the pre-accident records. I find his opinion to be more persuasive.

[36] I conclude that the Plaintiff failed to establish on a balance of probabilities that her complaints of depression, anxiety and PTSD were caused by the motor vehicle accident.

ii) ***Permanent Serious Impairment of an Important Physical, Mental or Psychological Function***

[37] I find that the whiplash associated disorder grade II was caused by the motor vehicle accident. Ms. Girao must establish that this injury resulted in a permanent, serious impairment of an important physical, mental or psychological function.

[38] Ms. Girao testified that she has continues to experience pain in her neck and back. However, there was very little evidence at trial with respect to these complaints. Ms. Girao's most significant complaints following the accident were with respect to TMJ dysfunction and depression.

[39] Ms. Girao was examined by Dr Mathoo, physiatrist on October 4, 2006. He diagnosed Ms. Girao with whiplash disorder grade II, and mechanical low back pain. On physical examination, Ms. Girao had stiffness and loss of range of movement of her neck on rotation and side bending. There was no tenderness or spasm along the spine. The neurologic examination was essentially normal. He found Ms. Girao was independent in her activities of daily living, medication use and housework.

[40] The Defendants' physiatrist, Dr. Lipson examined Ms. Girao on September 20, 2010. He diagnosed her with whiplash associated disorder grade II. She also had soft tissue injury to her thoracic spine and a contusion to the right shoulder. He found that she had minor impairment of her cervical spine. It was his opinion that the minor impairment would not reasonably be expected to interfere with her ability to work or with her normal activities or housekeeping.

[41] Ms. Girao was treated by Dr. Finestone, physiatrist. The initial consultation was on August 2, 2016. She complained of tenderness to her neck, thoracic area and low back. He noted that the range of motion was "quite good" in all directions with some limitation at the end of the range.

[42] I am satisfied that Ms. Girao sustained a soft tissue injury to her neck in the accident. The injury has resulted in a minor loss of movement of her neck on rotation and side bending. The complaints have persisted for close to twenty years. I am satisfied that there is little likelihood of improvement. I find that the impairment to her neck is permanent.

[43] Although I find that Ms. Girao has a permanent impairment with respect to her neck function, I am not satisfied that the impairment is serious. To be serious the impairment must substantially interfere with most of her usual activities of daily living, considering her age: *Jugmohan v. Royle et al*, 2015 ONSC 1497, at para. 27.

[44] With respect to the requirement that the impairment be serious, the Court of Appeal in *Meyer v. Bright* stated as follows:

It is simply not possible to provide an absolute formula which will guide the court in all cases in determining what is "serious". This issue will have to be resolved on a case-to-case basis. However, generally speaking, a serious impairment is one which causes substantial interference with the ability of the injured person to

perform his or her usual daily activities or to continue his or her regular employment.

[...]

Because it is only a serious impairment which will qualify as an exception under s. 266(1)(b) [now s. 267.5(5)], it is apparent that the Legislature intended that injured persons are required to bear some interference with their enjoyment of life without being able to sue for it.

[45] Ms. Girao testified that as a result of the injuries she sustained in the motor vehicle accident, she has been unable to work or perform her usual activities of daily living. I am not satisfied that any inability to work or perform her usual activities is related to the soft tissue injuries to her neck and back. Ms. Girao's most significant medical issue was with respect her depression and anxiety. Dr. Malicki testified that Ms. Girao's depression was dominating her whole life and causing severe impairment. She could not work or perform her activities of daily living. Dr. Manohar testified that the depression affects Ms. Girao's relationships and ability to work. Dr. Pilowsky stated that as a result of the depression Ms. Girao has low mood and a lack of energy which results in an inability to work or interact socially. Dr. Rosenblat provided the opinion that Ms. Girao was unable to work because of the levels of depression.

[46] Although the evidence supports a finding of a serious impairment arising out of her depression, the same cannot be said about the whiplash associated disorder. In the disability certificate completed about one month after the accident, Dr. Malicki diagnosed Ms. Girao with a whiplash grade II, and stated that she can do her regular work. Dr. Mathoo noted that on examination Ms. Girao had stiffness and a loss of movement of her neck on rotation and side bending, but the impairment did not affect her activities of daily living. Dr. Lipson provided the opinion that the impairment of her neck movements would not reasonably be expected to interfere with her ability to work or perform her normal activities including housekeeping.

[47] The totality of the evidence does not support the conclusion that the soft tissue injuries caused by the motor vehicle accident had a significant effect on Ms. Girao's ability to work or perform her usual activities: *Jugmohan v. Royle et al*, at para. 34. I conclude that Ms. Girao failed to prove on a balance of probabilities that the soft tissue injuries to her neck and back resulted in a serious impairment of an important bodily function. Although Ms. Girao may have a permanent restriction in the movement of her neck, I find that the restriction does not prevent her from working or carrying out her usual activities. It is my view that any inability to work or perform her activities of daily living is related to Ms. Girao's depression which I find was not caused by the motor vehicle accident.

Disposition

[48] I conclude that Ms. Girao does not fall within the statutory exception set out in subsection 267.5(5) of the *Insurance Act*, and as a result, the Defendant is not liable for any damages for non-pecuniary loss. I grant the Defendant's threshold motion and dismiss Ms. Girao's claim for non-pecuniary general damages.

[49] There are two remaining issues:

- a. The deductibility of Statutory Accident Benefits; and,
- b. Costs

[50] If the parties are unable to come to an agreement, they may make their oral submissions with respect to the remaining issues, on November 18, 2021 at 2 pm. by videoconference.



C. CHALMER, J.

DATE: November 3, 2021