

**UPDATE ON THE THRESHOLD –
HAS ANYTHING REALLY CHANGED?**

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What is the Threshold?

The term “threshold” in a motor vehicle case has been around now for nearly two decades. It is a legislative term that limits the right to sue in motor vehicle cases and was implemented in an attempt to keep a balance between the rights of injured persons to sue and the costs of premiums for insurance. It only applies in the tort or negligence side of auto cases.

Essentially, the threshold precludes persons who are injured directly or indirectly through the use or operation of an automobile from suing protected defendants for non-pecuniary general damages unless the injured person has sustained a permanent and serious impairment of an important physical, mental or psychological function or has sustained a permanent serious disfigurement.

What the threshold essentially does is prevent most accident victims that suffer minor soft tissue claims from bringing a claim in tort. However, if there are substantiated pecuniary losses as a result of the injuries, these persons can still claim for these losses. For example, past and future loss of income.

We are now in our fourth insurance regime known as Bill 198 which took effect on October 1, 2003. It is no secret that insurers pushed for this latest amendment to the

Insurance Act in an attempt to tighten the threshold so that fewer motor vehicle claims would succeed. However, to determine how the threshold now affects motor vehicle cases that have occurred since October 1, 2003, it is helpful to look back to the inception of the threshold to see how it has evolved in the common law.

History of the Threshold

This threshold has been evolving in insurance law since the creation of the OMPP in June 1990, when auto cases were plucked from the pure tort system and a dual system of tort and accident benefits was introduced. The first threshold definition in OMPP was interpreted in the Court of Appeal trilogy of cases known as *Meyer v. Bright*¹. In these cases, the Court of Appeal held that persons that had a permanent interference with their career path and had substantial interference with one's daily activities would surpass the threshold and therefore had the right to sue. The OMPP was restrictive in that persons with purely psychological impairments could not sue. If a person did not meet the threshold under OMPP, they could not sue for any damages, including economic losses.

Bill 164 replaced OMPP in 1994. Bill 164 is known for the elimination of the right to sue for any economic losses. This NDP legislation greatly expanded the 1st party accident benefits but in tort, claims were limited to general damages. The threshold definition was expanded to include both physical and psychological injuries. Most of these cases

¹ 1993 CarswellOnt 51 (C.A.)

are now out of the system. What followed was a complicated statutory accident benefits system which was largely litigated before the Financial Services Commission of Ontario.

In 1996, Bill 59 replaced the restrictive Bill 164 and granted injured persons the right to sue for loss of income and other pecuniary damages. The threshold continued to apply to non-pecuniary damages. Care costs could only be recovered in a catastrophic case.

The defining terms of the threshold that has been in place for OMPP, Bill 164 and Bill 59 were not found in the legislation but rather the essential elements were set out in the case law and most notably in the *Meyer* trilogy.

Meyer v. Bright was decided under the OMPP, has been applied to cases under Bill 59 and is the leading case in applying the threshold. The Court of Appeal in *Meyer* prescribed the following approach for determining the threshold:

1. Has the injured person sustained permanent impairment of a bodily function caused by continuing injury which is physical in nature? (As *Meyer* was decided under OMPP it was restricted to physical injuries but this has now been extended to psychological and mental functions.)
2. If the answer to question 1 is yes, is the bodily function, which is permanently impaired, an important one?

3. If the answer to question 2 is yes, is the impairment of the important bodily function serious?²

The courts have been integral in the shaping of the meaning of the threshold since *Meyer v. Bright*. However, the question is whether the courts will continue to apply the threshold in the same manner in Bill 198 cases or whether the courts will find that Bill 198 has tightened the threshold making it more difficult for injured persons to claim for non-pecuniary losses.

The Current Regime - Bill 198

Bill 198 came into force on October 1, 2003. In Bill 198, the wording of the threshold test did not change. Instead, the key terms “serious”, “important” and “permanent” became defined in the regulation³. This regulation also sets out the evidence that must be adduced to meet the threshold. Another notable change with Bill 198 is the ability to recover health care costs in tort regardless if the Plaintiff is catastrophically injured or not.

In Bill 198, the threshold applies to claims for general damages and health care costs and does not apply to damages for economic or pecuniary losses.

² *IBID* at para 16

³ The text of the applicable section of the regulation is attached at Appendix “A” at the end of the paper.

When Bill 198 came into effect, there was much uncertainty as to what this codification of the threshold actually meant. Would there be a change in the interpretation of the threshold and would it be more difficult for injured persons to advance a successful claim in tort for non-pecuniary damages?

It has been 6 years since the “new” threshold for motor vehicle cases came into effect and we are finally seeing the courts interpretation of the revised wording. Although the important terms such as “permanent”, “important” and “serious” have now been defined in the regulation, the meanings of these terms have not changed much since the initial judicial interpretation by the Court of Appeal in the *Meyer* trilogy in 1993.

The first Bill 198 decision was *Nissan v. McNamee*⁴. In this seminal case on the new threshold, Madam Justice Morissette put to rest many of the fears that Plaintiff lawyers had about how the threshold would now be interpreted. She provided balanced and fair reasons relying heavily on the OMPP trilogy in *Meyer v. Bright*.

Essentially, Madam Justice Morissette found that the threshold in Bill 198 was simply a codification of the existing case law and that there was really no significant change in the interpretation of the threshold. Although she found that the Plaintiff did not meet the threshold, this result was mainly because the Plaintiff’s evidence was not accepted. Madam Justice Morissette noted the distinctions between the definition of “serious” in

⁴ 2008 CarswellOnt 2520 (S.C.J.)

the regulation and the definition in *Meyer v. Bright* but held that the distinctions could be reconciled with the Bill 59 case law. The most significant change was the addition of the word “most” to modify “daily activities” and she found that this change was to clarify the law that it is not enough for a Plaintiff to demonstrate that only some of their daily activities have been impacted by their injuries.

Bill 198 Cases

Since the decision in *Nissan v. McNamee*, the Bill 198 case law that has followed has been somewhat mixed. A number of the earlier Bill 198 cases after *Nissan*, seemed to follow Justice Morissette’s reasoning without much analysis⁵. Although each case is fact specific, there appears to be a more recent trend in the case law to tighten up the threshold and make it more difficult for car accident victims to sue.

The first case to move away from the reasoning in *Nissan* was the case of *Sherman v. Guckelsberger*⁶ that was decided by Madam Justice Milanetti in December 2008. In finding that the Plaintiff did not meet the threshold, Justice Milanetti also held that the legislature had intended to “tighten up” the threshold with the introduction of the regulation. She emphasizes in her reasons that she disagrees with Justice Morissette’s view in the *Nissan* decision that Bill 198 did little to change the existing threshold found

⁵ *Guerrero v. Fukuda*, 2008 CarswellOnt 5706 (S.C.J.); *Barkley (Litigation Guardian of) v. Vogel*, 2008 CarswellOnt 8774 (S.C.J.); *Campbell v. Boivin*, 2008 CarswellOnt 7875 (S.C.J.); *Saiklay v. Buck*, 2008 CarswellOnt 9103 (S.C.J.)

⁶ 2008 CarswellOnt 7969 (S.C.J.)

in Bill 59 and held that making the regulation more specific was done with a “view to tightening up the former version.”

A second case, decided in April 2009, followed the *Sherman* reasoning – *Sabourin v. Dominion of Canada*.⁷ In this decision, Justice Valin also concluded that the legislature’s intention with the enactment of Bill 198 was to reduce the number of persons that are able to sue as a result of injuries in a motor vehicle accident. The focus in this case was whether the Plaintiff’s pain substantially interfered with *most* of her activities of daily living and Justice Valin found that it did not. Justice Valin concludes that the word “most” that was inserted into the definition of “serious” in the context of daily living activities was intended to tighten up the threshold by reducing the number of persons able to sue. He found that the meaning of “most” in the Oxford Dictionary was “greatest in amount or degree, the majority of, nearly all of.”

Since *Sherman* and *Sabourin*, there has been a shift back to the reasoning in *Nissan* in that Bill 198 is simply a codification of the principles set out in *Meyer v. Bright*. This occurred in the most recent Bill 198 threshold case of *Hayden v. Stevenson*⁸ where Madam Justice Ferguson adopts the reasoning of Justice Morissette in *Nissan*. Justice Ferguson states at paragraphs 7-13:

⁷ 2009 CarswellOnt 1880 (S.C.J.)

⁸ 2009 CarswellOnt 3578 (S.C.J.)

“The initial issue to determine is whether the defining regulation is a codification of the principles set out by the Court of Appeal in *Lento v. Castaldo*, (1993), 15 O.R. (3d) 129 or whether the legislator’s intent was to substantially reduce the number of personal injury claims as a result of motor vehicle accidents.

I am persuaded by Morissette J.’s view of the new amendment which she dealt with in *Nissan v. McNamee* (2008) 62 C.C.L.I. (4th) 135. In reviewing the changes which were made to the threshold wording, Morissette J. stated the following:

The ultimate question at this stage is whether the defining regulation was implemented to codify the interpretation made by the Ontario Court of Appeal in *Meyer*, or whether the legislator’s intent was to substantially reduce the number of personal injury claims coming before the Courts as a result of motor vehicle accidents.

Morissette J. found that O.Reg 381/03 did not change anything already found in O.Reg 461/96 but rather added definitions. She found that the subject regulation is a codification of existing case law.

Morissette J. found that most of the regulation does not represent a significant departure from the prior interpretation of the threshold. She stated the following:

In summary, most of the regulation does not appear to support any significant change in the interpretation of the threshold. In general terms, it suggests at best some clarification of the law regarding accommodation. The one exception is the addition of the word “most” which suggests a higher threshold where impairments affect daily living but not working.

I would also note that I do not accept the defendant’s contention that the express requirements for proof suggest a higher standard as to the threshold itself. It seems to me that the requirements of s. 4.3 of O.Reg 381/03 are for evidence that would be necessary to prove that the threshold is met in any case. The focus is on that evidence coming from a physician, and the source of the evidence should not change the standard on the threshold question.”

It will be interesting to watch if the momentum of these Bill 198 decisions continues along the path of *Nissan* or whether the pendulum will swing back to the tighter threshold described in the *Sherman* and *Sabourin* cases.

The Threshold in Practice

As one prepares a motor vehicle case, you must be mindful of the evidence that must be marshalled at trial to withstand the Defendant's threshold motion.

In day to day practice, it is often difficult to advise potential clients as to whether their injuries will likely surpass the threshold. Often this is because potential clients contact you shortly after the accident and although they may initially have significant pain and restrictions, they recover from these injuries over time and therefore will not likely meet the "permanent" prong of the threshold test. It can be risky for Plaintiff lawyers to take on borderline threshold cases, as it is difficult to predict with any certainty how the person's injuries will affect their day to day functioning years down the road. This is especially so when we often hear that it can take up to two years for a person to reach maximum recovery. This means that as lawyers, we (and the clients and treating professionals) may not have a solid grasp on whether the injuries will be permanent and whether they will continue to impair the person's functioning.

Plaintiff lawyers must build the case from the first client interview. Although much of the focus will be on what the medical records and reports reveal, there is an equal need to obtain information and evidence about your client's day to day life. Obtain statements from lay witnesses as to what was observed about the client's activities prior to the accident versus what they observed in the days, weeks and years after the

accident. Meet with the client's employer and co-workers to get a sense of how the accident has impacted their ability to do their regular job. Although the injured Plaintiff will be your main witness, don't put all your eggs in one basket. The Plaintiff could have a bad day in court! Having other corroborating witnesses for your client will help bolster their evidence, especially when you are dealing with subjective injuries such as soft tissue injuries or chronic pain where credibility is crucial.

As the main focus in the threshold motion is whether there has been a "substantial interference" with the person's ability to work and enjoy life, it is crucial that evidence has been adduced at trial that demonstrates this interference on the Plaintiff's ability to work or on their usual daily activities. This does not mean that there must be a loss of income but rather there can simply be a loss of earning capacity. Loss of earning capacity is much broader than the loss of a job or of a position as there are many ways that a person's ability to earn income can be adversely affected by their injuries from the motor vehicle accident.

Where the Plaintiff has returned to work, counsel should focus on the degree to which the Plaintiff is able to perform their usual job duties and the extent that accommodation to the Plaintiff is required. Again, it may not be an actual loss of income, but the how the Plaintiff has become marginalized, vulnerable and has suffered a loss of competitive advantage. What was the Plaintiff's career path prior to the accident and has that now changed? A simple calculation of loss of income will not provide the necessary insight

to whether the Plaintiff has sustained economic losses as a result of the accident. The threshold is not a bar to economic losses and these losses should be pursued and well presented. In fact, you will want to do your best to present an economic loss as part of your damage claim. If you lose on the threshold, this could save you from absolute disaster.

Further, many Plaintiffs who have returned to work do so out of financial necessity. Often these Plaintiffs find that they have difficulty doing most of their daily activities as they are in significant pain after having to work. Will these Plaintiffs who have returned to work meet the threshold? In the unreported decision of *Pedisic v. Ambrogio* (March 30, 2009), Madam Justice Morissette held that the Plaintiff's ability to continue working was not determinative of the threshold issue. She went on to state that the Plaintiff's persistence in continuing to work despite pain has caused the Plaintiff to limit her other household and recreational activities. Justice Morissette goes on to state "it seems dishonest and counterproductive to discourage that type of perseverance in injured persons." This will be an extremely helpful decision to support the proposition that loss of income is not a requirement to be successful on a threshold motion.

Evidence to Be Adduced to Prove Threshold

One must be mindful that the new regulation at s.4.3 now requires certain evidence to be adduced to support the claim that the Plaintiff has sustained permanent and serious impairment of an important physical, mental or psychological function. Most of this

evidence must be medical in nature and be provided by one or more physicians. In addition, the Plaintiff also needs to provide corroborating evidence that there has been a change in function as a result of the accident. Again, as credibility is often at issue in these threshold cases, ensure that the corroborating evidence supports the Plaintiff's credibility.

The regulation specifically sets out this evidence required in s. 4.3:

4.3 (1) A person shall, in addition to any other evidence, adduce the evidence set out in this section to support the person's claim that he or she has sustained permanent serious impairment of an important physical, mental or psychological function for the purposes of section 267.5 of the Act. O. Reg. 381/03, s. 1.

(2) The person shall adduce evidence of one or more physicians, in accordance with this section, that explains,

- (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. O. Reg. 381/03, s. 1.

(3) The evidence of the physician,

- (a) shall be adduced by a physician who is trained for and experienced in the assessment or treatment of the type of impairment that is alleged; and
- (b) shall be based on medical evidence, in accordance with generally accepted guidelines or standards of the practice of medicine. O. Reg. 381/03, s. 1.

(4) The evidence of the physician shall include a conclusion that the impairment is directly or indirectly sustained as the result of the use or operation of an automobile. O. Reg. 381/03, s. 1.

(5) In addition to the evidence of the physician, the person shall 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. O. Reg. 381/03, s. 1.

(6) This section applies with respect to any incident that occurs on or after October 1, 2003. O. Reg. 381/03, s. 1.

Threshold Motion

If the Defendant is going to make a threshold argument, that is, the Defendant wants the court to find that the Plaintiff has not sustained a permanent and serious impairment of an important physical, mental or psychological function, the Defendant will do so after the conclusion of the trial and when the jury (if there is one) leaves to deliberate. This is known as the "threshold motion".

If you know that a threshold motion will be made, prepare for it in advance by having a factum and brief of authorities ready for the court. It is wise to have a basic threshold factum on hand that can be updated and applied to the facts of your case as this will save you valuable time after conducting the trial.

The judge will make the determination as to whether the Plaintiff meets the threshold. The onus of proof is on the Plaintiff to establish on a balance of probabilities that they come within the exception of s. 267.5 of the *Insurance Act*, in that they have sustained a permanent and serious impairment of an important physical, mental or psychological function.

One question has arisen as to when the judge should make his or her ruling on the threshold motion. That is, should the judge make the ruling on the threshold motion before or after the jury returns with a verdict on damages. There have been cases that have occurred in both situations. However, there is an interesting issue as to whether a

judge would be swayed on the threshold motion if he or she hears the verdict of the jury first. That is, if a jury makes a substantial award of general damages, should the judge take that into consideration as to whether the Plaintiff surpasses the threshold. Conversely, if the jury returns a verdict of no damages, does that mean that the judge should decide that the threshold was not met. As it is not codified in the regulation as to when a decision on the threshold motion should be rendered, it remains in the discretion of the trial judge.

The Future of the Threshold

What does the future hold for the threshold? The insurance industry lobbied for the threshold to be codified in the *Insurance Act* in an attempt to try and tighten the threshold and make it more difficult for accident victims to sue for their injuries. The insurers hoped that this codification would change the interpretation of the threshold, however, this has not really occurred. The common law interpretation of the threshold continues to prevail. What we need to watch is whether the courts continue to follow the status quo reasoning in *Nissan* or whether the more stringent threshold test found in *Sherman* will prevail.

There has been talk about further amendments to the *Insurance Act*. Will this impact the application of the threshold? Will the Regulation be revoked? Until the changes are revealed, we must continue to assess and pursue claims with the common law interpretation of the threshold in mind. This has been the approach over the last two

decades since the introduction of the threshold and will likely remain the way these cases are assessed. As each case is fact driven and a Plaintiff's success in defeating the threshold motion is highly contingent on credibility, it is best left to the judiciary to continue to interpret the threshold as it has done since the *Meyer* trilogy.

Appendix "A"

Insurance Act ONTARIO REGULATION 461/96

COURT PROCEEDINGS FOR AUTOMOBILE ACCIDENTS THAT OCCUR ON OR AFTER NOVEMBER 1, 1996

DEFINITION OF PERMANENT SERIOUS IMPAIRMENT OF AN IMPORTANT PHYSICAL, MENTAL OR PSYCHOLOGICAL FUNCTION

4.1 For the purposes of section 267.5 of the Act,

“permanent serious impairment of an important physical, mental or psychological function” means impairment of a person that meets the criteria set out in section 4.2. O. Reg. 381/03, s. 1.

4.2 (1) A person suffers from permanent serious impairment of an important physical, mental or psychological function if all of the following criteria are met:

1. The impairment 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.
2. 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.
3. 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. O. Reg. 381/03, s. 1.

(2) This section applies with respect to any incident that occurs on or after October 1, 2003. O. Reg. 381/03, s. 1.

EVIDENCE ADDUCED TO PROVE PERMANENT SERIOUS IMPAIRMENT OF AN IMPORTANT PHYSICAL, MENTAL OR PSYCHOLOGICAL FUNCTION

4.3 (1) A person shall, in addition to any other evidence, adduce the evidence set out in this section to support the person's claim that he or she has sustained permanent serious impairment of an important physical, mental or psychological function for the purposes of section 267.5 of the Act. O. Reg. 381/03, s. 1.

- (2) The person shall adduce evidence of one or more physicians, in accordance with this section, that explains,
 - (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. O. Reg. 381/03, s. 1.
- (3) The evidence of the physician,
 - (a) shall be adduced by a physician who is trained for and experienced in the assessment or treatment of the type of impairment that is alleged; and
 - (b) shall be based on medical evidence, in accordance with generally accepted guidelines or standards of the practice of medicine. O. Reg. 381/03, s. 1.
- (4) The evidence of the physician shall include a conclusion that the impairment is directly or indirectly sustained as the result of the use or operation of an automobile. O. Reg. 381/03, s. 1.
- (5) In addition to the evidence of the physician, the person shall 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. O. Reg. 381/03, s. 1.
- (6) This section applies with respect to any incident that occurs on or after October 1, 2003. O. Reg. 381/03, s. 1.