

**CITATION:** Iannarella v. Corbett et al., 2012 ONSC 2253  
**COURT FILE NO.:** 09 CV 372221  
**DATE:** 2012/04/11

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** ANDREA IANNARELLA and GIUSEPPINA IANNARELLA

Plaintiff

**AND:**

STEPHEN CORBETT and ST. LAWRENCE CEMENT INC.

Defendants

**BEFORE:** JUSTICE MOORE

**COUNSEL:** Joseph Villeneuve, for the Plaintiffs

Martin Forget and Sarah Merredew, for the Defendants

**HEARD:** April 11, 2012

**ENDORSEMENT**

[1] One major problem with this case is that the plaintiff rushed it to trial before he had experienced maximum medical recovery from the injuries that he asserts were caused by the motor vehicle accident at issue in this matter. Conspicuous by its absence during trial was evidence from which I can conclude that Mr Iannarella has suffered serious permanent impairments of important physical, mental or psychological function, as those terms are used in the *Insurance Act*, R.S.O. 1990 c.18 (Bill 198).

[2] Mr Iannarella was involved in a motor vehicle accident on 19 February 2008. He brings this action for damages arising from that accident and asserts that his ongoing limitations constitute permanent serious impairments of important physical, mental or psychological functions.

[3] Following the accident, Mr Iannarella developed neck pain and over time he complained of left shoulder pain and restricted mobility of his left arm and shoulder. The neck injury has settled and it is not asserted that it has produced serious or permanent impairment. There is some evidence from which I might conclude that the left shoulder complaints have morphed into chronic pain and that a chronic pain syndrome diagnosis could be made. It is the combination of left shoulder and chronic pain syndrome produced limitations that the plaintiff points to in insisting that the defendant's threshold motion should be denied.

[4] This action proceeded to trial before a jury on 19 March 2012 and continued through 14 days, a time frame occurring over 4 years after the accident. Importantly, however, this trial

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began only 7 ½ months after surgical intervention aimed at improving Mr Iannarella's left shoulder pain complaints. As will be seen later in these reasons, recovery from that surgery is ongoing and a prognosis for the future and the eventual medical outcome cannot yet be made.

[5] As for the alleged chronic pain syndrome, even if one accepts the diagnosis, a variety of treatment alternatives exist and the evidence falls far short of establishing that Mr Iannarella will ultimately be left with serious permanent impairments arising from any diagnosed chronic pain syndrome.

[6] The jury has been charged that damages may be awarded for proven losses in the future and charged that the burden of proof in that regard rests with the plaintiffs to establish upon a realistic possibility basis. Were that the level of proof required on this motion, the plaintiff could succeed, for there is evidence that suggests that limitations in function could continue despite the recent shoulder surgery and despite treatment for chronic pain complaints.

[7] On this motion, however, the duration, nature and severity of ongoing limitations must be established upon a balance of probabilities for the verbal threshold in the legislation to be overcome.

[8] Following the closings and jury charge, while the jury was deliberating, defence counsel brought this motion to establish whether the plaintiff's claims are barred by the applicable threshold established under section 267.5 of the *Insurance Act*. My task is to answer questions that were not specifically asked of the jury. I will assess the plaintiff's entitlement to non pecuniary damages despite rather than because of what I might suspect may motivate the jury in answering its jury questions.

### *Background*

[9] Mr Iannarella had been living and working in Canada for over 30 years before being involved in the accident of 19 February 2008. Most recently he worked at Fenco Company, a car parts manufacturer, where he supervised several workers and drove a fork lift vehicle in the plant.

[10] His pre-accident health history was combed through at length during the trial. He was under regular care from his family doctors for a variety of ailments and his job function was modified to suit his degenerative low back limitations but he worked full time and pursued some leisure and social activities with his family and friends.

[11] The extent of his pre-accident functioning was debated at trial. Confusion arose because Mr Iannarella is, at a minimum, challenged to explain himself in English. He was educated in Italian and has had no instruction in the English language. He testified that he can speak and understand very little in English and cannot function in reading or writing in English.

[12] Whatever his activities were before the accident, clearly they eventually differed afterwards. From his perspective, Mr Iannarella was completely disabled from his modified factory job immediately following the accident of 19 February 2008 and effectively from any job after the accident and he insists he still is.

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[13] The defence position is that he has long since recovered from any injuries brought about by the accident. The left shoulder operations were reasonable and necessary interventions but the defence insists that they were not accident caused and, in any event, they were successful and Mr Iannarella is capable of returning to his pre-accident activities.

*Medical Evidence*

[14] Mr Iannarella was fortunate to have come under the care of family doctors over the years between the time of his injury at work in 1992 and until his last attendance upon Dr Adenwala early in 2012. His team of family doctors was competent, caring and attentive to his needs and complaints.

[15] Drs Cantarutti, Romanescu and Adenwala testified at trial and they each were impressive witnesses both in terms of their obvious expertise and professionalism in their medical management of Mr Iannarella's many medical conditions and concerns over the years but also in their description of their attention to the detail required for the creation of their clinical notes and records. In the result, their evidence was refreshed by reference to detailed medical recording of Mr Iannarella's complaints, their respective examinations, testing, assessments and plans for each of his patient visits.

[16] From their evidence, it is clear that they recorded pertinent complaints and if their notes record no complaints of pain and/or limitations of movement, that is because no such complaints were made.

[17] From the evidence of the family doctors I am persuaded that Mr Iannarella made no complaints of pain or limited functioning of his left shoulder before the time of the accident in question. I am also persuaded that he made no immediate complaints of pain after the accident relating to the left shoulder other than that he experienced pain in the left side of his neck and left trapezius that radiated down toward his left shoulder. He did not complain of pain originating in his left shoulder from or shortly following upon the accident and he did not complain consistently to his family doctors of significant pain or limitation of movement of the left shoulder at all.

[18] Dr. Soon-Shiong examined Mr. Iannarella in July 2008, about five months after his motor vehicle accident on 19 February 2008. In the interval between the accident and this examination, Mr. Iannarella said that there was absolutely no change in terms of his pain. He complained of pain symptoms extending from his neck into his left shoulder and arm. He described the pain as severe in intensity, occurring daily and being sharp in nature. He said the pain would occasionally run down from the shoulder toward the elbow. His dominant area of pain was in his neck.

[19] No impingement was shown on testing. He found no objective signs of significant physical disability. In terms of work, Dr. Soon-Shiong felt that Mr. Iannarella was not substantially disabled from performing the essential tasks of his employment and he was safe to return to work on a full-time basis and to his normal activities of daily living.

[20] After his initial assessment and report had been completed, Dr. Soon-Shiong became aware of the results of an MRI done around the end of November. His information from that

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diagnostic test was that Mr. Iannarella appeared to have a partial tear, one that he described as a mild inter-substance tear of the rotator cuff together with degenerative signs in the AC joint of pre-existing pathology that could predispose him to a partial tear.

[21] I accept the evidence of Dr Bhargava. He saw Mr. Iannarella on a referral from Dr. Romanescu to determine the nature of shoulder complaints and specifically if shoulder surgery would help him. He saw Mr. Iannarella on 24 November 2009, the only visit. Mr. Iannarella complained of pain predominantly over the trapezius. Dr. Bhargava employed his finger-pointing test; he asked Mr. Iannarella to point with one finger to the place where he experienced pain and Mr. Iannarella pointed to the trapezius on the left side.

[22] On physical examination, he found that there was a nearly full range of motion in the neck with tenderness over the left trapezius on palpation. He was not sure whether he had the MRI report or the MRI film but whatever he had showed him a partial tear, no definite full thickness or complete tear however.

[23] Dr. Bhargava believed that Mr. Iannarella's pain involved soft tissue strain around the neck and left trapezius. He did not believe that shoulder surgery would be of any assistance with his pain management because the pain was predominantly over the trapezius. Dr. Bhargava testified that he was very certain that he saw no rotator cuff injury at the time of his examination. He therefore recommended nonsurgical exercise, pain control and other therapies.

[24] In my view, Dr Bhargava's opinion fits with those of the other orthopedic surgeons who testified in this trial. Dr Langer had seen Mr Iannarella in August of 2008. Dr. Langer did not order any specific investigations or treatment but he did suggest that an MRI be done on the left shoulder because of the plaintiff's complaints and his findings on physical examination of limited range of motion. He felt that Mr. Iannarella likely had a damaged rotator cuff on the left side.

[25] Upon the whole of the medical evidence that I accept, I find that Mr Iannarella had a pre-existing but asymptomatic degenerative condition of the left shoulder. That condition deteriorated over time following the accident. Dr Langer's prediction proved prescient and the condition actually grew to eventually involve shoulder impingement problems by the time that Dr Seligman became involved and performed arthroscopic surgeries.

[26] Mr Iannarella attended upon Dr Seligman in May of 2010. By that time, his left shoulder complaints were significant and evidence on MRI showed partial tearing in the shoulder ligaments. Dr Seligman also found evidence of impingement on physical examination. He injected the shoulder with Cortisone. That led to temporary relief only so he undertook an arthroscopic intervention to decompress the area.

[27] Dr Seligman followed Mr Iannarella's progress through visits in 2010. Pain levels improved and range of motion improved as well. He described the surgery as successful. He did not clear Mr Iannarella for return to work, however.

[28] By January 2011, shoulder movement was near normal but pain complaints continued. Dr Seligman then undertook a second operation, this one aimed at improving the pain situation. This surgery was performed on 1 September 2011 and Dr Seligman referred to it as having been successful too.

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[29] Dr Seligman saw his patient again on 16 October 2011 and testified that Mr. Iannarella demonstrated good range of motion. The doctor noted that "pain is resolving." He described this as "a pretty good sign". Mr. Iannarella was still not at maximum medical recovery. On this visit he was discharged from Dr. Seligman's care. He understood that if pain problems persisted he could come back. He did not return.

[30] Dr. Seligman believes that surgery did obtain the objective of pain relief and the first surgery obtained the objective of increased range of motion. Therefore improvement was made toward both objectives for surgery.

[31] Dr. Axelrod expects that there will be ongoing improvement in Mr. Iannarella's response to his surgeries extending into 2013 perhaps. He noted that we are now only seven months post surgery. Looking into the long future he expected some difficulties with overhead work to continue. He said people tend to improve over 18 months or two years and then "that's what you'll have", he said. His prognosis was "pretty good" given his condition at the 2 1/2 month mark, when Dr Axelrod saw him after the second surgery.

[32] In recent months, Mr Iannarella has been seeing his family doctor. He complains of pain in the shoulder and of being unable to use the left arm and shoulder as normal but no doctor is recommending therapy or treatment or medications for the shoulder. On medical examinations and vocational assessment testing, good function and mobility has been demonstrated. There is evidence of surveillance demonstrating very normal, albeit brief, episodes of normal arm and shoulder use.

[33] Mr Iannarella has had medical management before and after the accident for high blood pressure and high cholesterol issues. After the accident he was found to have cardiac issues and those too have brought him to his GP and on referral to a cardiologist. He has had a problem with his right hand and that required surgical intervention last year. He has also developed painful elbows this year and they have been diagnosed as resulting from degenerative arthritis in each elbow. He has also been diagnosed with osteoarthritis in the cervical spine.

[34] Drs Luftspring and Berman have applied a chronic pain diagnosis in connection with the left shoulder problems of pain and limited movement as reported to them by Mr Iannarella.

[35] Dr. Luftspring agreed that that primary source of information in his assessment is that taken from the patient. If the patient is not accurate about his symptoms and history, there can be an increased likelihood of mis-diagnosis and inappropriate treatment.

[36] Dr Berman agreed that to the extent that information provided is inaccurate, that increases the risk of misdiagnosing and treating the patient. She added that psychologists do look for inconsistencies and are perhaps more attuned than lay people but they assume that people will be honest and put in genuine efforts on psychological testing. She added that some tests build in validity testing to catch under and over reporting of symptoms. The relationship is, however, one of trust; if the psychologist has doubts about the accuracy of the information provided, that casts doubt on the relationship.

[37] They based their diagnoses of chronic pain upon the history Mr Iannarella gave them of pain from almost the time of the accident running consistently and at sharp, intense pain levels

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throughout the years; indeed Mr. Iannarella gave like evidence at trial. They concluded that his pain was chronic and that it interfered with his activities and quality of life. Their diagnoses are no better than the accuracy of the information they were given by Mr Iannarella but the accuracy and completeness of his self description of his pain experience, his abilities, his limitations and his activities after the accident and up until trial has been inconsistent over time. He has contradicted himself. He has been contradicted by the evidence of experts and by surveillance evidence. I am driven to conclude that the chronic pain diagnosis is mis-applied to Mr Iannarella in this case and I reject it.

[38] In any event, I do accept the evidence of both Dr Luftspring and Dr Berman that people with chronic pain can be assisted with appropriate treatment. Even if the diagnosis of chronic pain syndrome can apply, the issue of permanence and severity of limitations remains and they did not profess to opine to such matters.

#### *Analysis*

[39] Mr Iannarella did not make an impressive, credible witness on his own behalf during this trial, quite the contrary. In addition to the difficulties he created for himself by giving inconsistent testimony, he tended to overstate his limitations and understate his abilities. He was often not responsive during cross examination and when he feared being tied down to a proposition he did not like, he resisted answering at all or claimed that he did not understand the question or the concept it addressed.

[40] It appeared to me that he enjoyed much more facility with the English language than he cared to admit to. His understatement of that ability also hurt his credibility. In the result, I cannot accept that the plaintiff's self description of subjective complaints and limitations is fair or accurate. He has not met the burden upon him for he has not favored the court with credible, cogent, consistent evidence.

[41] While it is true that Mr Iannarella was gainfully employed at the time of the accident, his job was about to be ended by a lay off that occurred within a few months of the accident, in October 2008. He claimed not to have been aware that his employer had decided in 2006 to close the plant and move manufacturing operations to Mexico but his supervisor, Mr Arumugan, contradicted that. He also described Mr Iannarella's actual functioning at work as involving a supervisory/product inspection role and carrying a clipboard with only part of his time spent operating a fork lift. Whenever Mr Iannarella actually learned of his impending layoff, he took no steps to secure alternate employment before he was laid off.

[42] After the accident, he did send out a resume but got no job or interview offers. The resume made no reference to pre or post accident injuries or work relevant limitations. The jury may find that Mr Iannarella would have secured a job after and but for the accident but I would have great difficulty in finding that a man of his age, education and work experience who was not able to work other than modified, light duties and who went on to acquire unrelated challenges including an osteoarthritic neck and elbows in addition to his pre-existing degenerative arthritis in his low back and who also has cholesterol and high blood pressure and cardiac issues and who has had hand surgery recently, would be a likely candidate to get and keep employment through to his hoped for retirement age of 65.

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[43] So, to the extent that the seriousness of any permanent impairment arising from the shoulder injury is measured by its impact on his ability to work, the evidence in this case does not assist Mr Iannarella.

[44] Another important question here is whether or to what extent Mr Iannarella's complaints and limitations have been caused or contributed to by the accident in question. Mr Iannarella bears the onus of establishing that the impairments he alleges exist and are permanent impairments. Clearly the causal connection, if it exists, cannot be demonstrated by the opinion of the plaintiff himself, no matter how firmly held that opinion may be.

[45] The experts in this case have accepted that Mr Iannarella's shoulder injury and the surgical repairs to the shoulder have resulted from the accident of 19 February 2008. They were not closely focused on that issue when they prepared their reports upon which their evidence at trial was based. Dr Bhargava saw and examined Mr Iannarella in November 2009. He concluded that there was no evidence of shoulder impingement present then. Dr Axelrod testified that a partial tear could be caused by trauma and trauma could act upon a pre-existing thinness that was asymptomatic, causing aggravation or flare-up. He said that is not uncommon. He agreed that an impingement can progress to become a partial rotator cuff tear.

[46] In his report to counsel, written on 3 March 2011, Dr. Seligman described the motor vehicle accident as the cause of the shoulder injury because there was no information to suggest that there was pain before the accident. He suggested that a shoulder harness can be a potential source of trauma when worn over the left shoulder in a vehicle accident.

[47] While the etiology of the shoulder problem is somewhat uncertain, on balance, I accept the conclusions of Dr Seligman that the accident produced an aggravation of an asymptomatic condition of thinning of the tendons in Mr Iannarella's left shoulder and osteoarthritis in the AC joint that went on to produce symptoms of pain and limited movement requiring Dr Seligman's operative treatments. For purposes of this motion, I am satisfied that the necessary causal connection between the accident and the diagnoses and treatment rendered by Dr Seligman has been made out.

### *The Law*

[48] The issue before this court is whether the plaintiff has sustained impaired functioning as a result of his accident so as to overcome the prohibition against suing the driver and owner under Bill 198. Bill 198 was applicable to motor vehicle accidents which occurred in Ontario after October 1, 2003 and at the time of the accident in question, in February 2008.

[49] It is trite to say that every case turns upon its own particular facts but this case appears to be unique in that it involves an injury that progressed from an insult to an asymptomatic left shoulder condition that progressed to a state of maturity over a span of years and that lead to a surgeon's exercise of medical judgment in favour of surgical intervention and post surgical recovery that remains in progress at the time of trial

[50] The statutory bar in effect at the time of the subject motor vehicle accident provided an immunity of the "at fault" party from liability unless the plaintiff could satisfy the court on a

balance of probabilities that he has sustained permanent serious impairment of an important physical, mental or psychological function.

[51] The leading authority on the interpretation of the "threshold" is *Meyer v. Bright* 1993 CanLII 3389 (ON C.A.), (1993), 15 O. R. (3d) 129 (C.A.). There, the court articulated the three questions which must be posed when considering whether a plaintiff has fallen within the ambit of one of the statutory section relevant to this action. Those questions are:

- a. Has the injured person sustained a permanent impairment of a physical, mental or psychological function?
- b. If yes, is the function one which is permanently impaired an important one?
- c. If yes, is the impairment of the important function serious?

[52] The law relating to threshold interpretation has developed over time and with reference to the specific requirements of the particular version of the threshold definition in place at the time of the accident in question in any given case. The approach called for in the Meyer case has remained the litmus test and has been largely incorporated into the language of Bill 198.

[53] This said, however, Ontario Regulation 381/03 to Bill 198 has added definitions for the terms serious, important and permanent and criteria for the determination of each.

[54] Section 4.2(1)1 sets out alternatives to consider with respect to permanent serious impairments including the matter of whether the impairment substantially interferes 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.

[55] This alternative does not apply in Mr. Iannarella's case because his regular or usual employment ended in October of 2008 at a time well before his left shoulder problems developed into the concerns that Dr. Seligman diagnosed and treated. As well, no efforts were made on Mr. Iannarella's behalf to seek out accommodation in respect of any shoulder concerns prior to the time that he was laid off.

[56] In any event, Dr Adenwala and Dr Axelrod have both testified that Mr Iannarella is capable of returning to work as a fork lift operator. Dr Seligman did not clear Mr Iannarella for work requiring manual labour before the time of his second surgery. He has not said however that he could not now or at some point following maximum medical recovery being achieved return to the modified duties Mr Iannarella performed at Fenco at the time of the accident.

[57] An alternative also exists with respect to a person's ability to continue training for a career in a field in which the person was being trained before the incident but that also does not apply in Mr. Iannarella's case because he was not involved in training of any kind.

[58] A third alternative with respect to the definition of the word serious involves consideration of whether the impairments substantially interfere with most of the usual activities of daily living, considering the persons age. Here, the evidence of the nature and extent of pre-



accident abilities and limitations as compared with the post accident situation is so unclear as to prevent any useful analysis.

[59] Mr. Iannarella gave evidence at trial and to his healthcare providers suggesting that he enjoyed relative good health before the accident and that he was very active in all aspects of social, household, recreational and family activities. Given the nature and number of his health issues and functional limitations before the accident, I do not accept that evidence.

[60] Mr. Iannarella and members of his family testified that his level of activity and interaction with family and friends diminished immediately and considerably after the accident and that that situation has continued consistently through to the time of trial. Upon the whole of the evidence I cannot accept that as being a fair and accurate statement of his activity level following the accident.

[61] I prefer the evidence of the expert witnesses as to Mr. Iannarella's functional ability and the surveillance evidence<sup>1</sup> and the evidence developed through cross examination as to his actual functioning after the accident. The surveillance evidence cannot be considered as consistent with Mr Iannarella's self description of his abilities and limitations and it demonstrates a significant level of accomplishment in the nature and extent of his usual activities of daily living, considering his age. The surveillance evidence also impacts negatively upon the credibility of the family, each of whom supported Mr Iannarella's descriptions of his functional limitations but the video showed him capable of more. The investigators testified that on the day before this trial began, Mr Iannarella drove on 400 series highways in excess of the speed limit and passed cars in the process. He was accompanied by his wife; yet both gave evidence that he rarely drove other than short distances and that he did not drive on those highways.

[62] I cannot find that Mr. Iannarella has demonstrated a serious impairment of functioning following upon and because of the left shoulder injury that he developed.

[63] The legislation establishes criteria to measure whether an impairment is an important one. Here, reference is made in section 4.2(1)2 to the impaired function being 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 meant and the person's reasonable efforts to use the accommodation to allow the person to continue employment. As described above, this criterion does not apply to Mr. Iannarella's situation.

[64] An impaired function is important where it is 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. For the reasons described above, I find that this criterion does not apply.

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<sup>1</sup> *Rajic v. Atkin*, [2011] O.J. No. 650 (S.C.J.) at paras 31

[65] An impairment can be deemed important where it is necessary for the person to provide for his or her own care or well-being. There is no suggestion in the evidence that I accept that Mr. Iannarella is unable to attend to his self-care or for his own well-being.

[66] An impairment will determined to be important where it is important to the usual activities of daily living, considering the person's age. As described above, I am unable to find that Mr. Iannarella's usual activities, considering his age, have been impaired by reason of the shoulder injury that he acquired after the accident in question.

[67] Section 4.2(1)3 establishes that an impairment will be permanent where it has been experienced continuously since the incident and it 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.

[68] The medical evidence that I accept and credit in this case does not establish that Mr Iannarella has, on the basis of a balance of probabilities, suffered any permanent impairment of a physical function. The alleged chronicity of certain complaints notwithstanding, I accept the evidence of Drs Seligman and Axelrod and find that Mr Iannarella has long since recovered from his cervical soft tissue injuries and that he is much improved following the left shoulder surgeries and that he is still recovering.

[69] The plaintiff has not established a permanent impairment of a physical or psychological function. Whatever psychological issues Dr Luftspring or Dr Berman suggested may affect Mr Iannarella have not been appropriately diagnosed given the inadequacies of the evidentiary foundation of patient history upon which they were built. Further, these doctors have determined that Mr Iannarella's chronic pain complaints and psychological situation is likely treatable and, as such, the available evidence does not establish that the condition is permanent.

[70] The medical evidence establishes that there is a very real possibility that Mr. Iannarella's outcome will be positive. Put another way, the evidence does not establish that his outcome is expected not to substantially improve in his case or by reference to persons in similar circumstances. Nor does the evidence establish that his left shoulder related impairments have been continuous since the accident in question.

[71] Section 4.3(5) mandates that a plaintiff must, in addition to establishing the requirements for medical evidence, also 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. The plaintiff has failed to adduce such evidence. The evidence of family members focused on some general activities that Mr Iannarella used to do but that evidence simply did not address with appropriate specificity the change in function involved and when any such change occurred. As well, I am deeply concerned that the family tried too hard to help Mr Iannarella and overlooked in so doing the many and serious limitations in functioning in all aspects of his activities of daily living that pre-dated the accident and those that arose afterwards and that were

simply not accident related. There was no other corroborating evidence and on this basis too, the plaintiff has failed to surmount the threshold.<sup>2</sup>

[72] Therefore, the defendants' motion succeeds. The plaintiff's claims for non-pecuniary damages must be dismissed.

  
Moore J.

**DATE:** 11 April 2012

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<sup>2</sup> *Gyorffy v. Drury*, [2010] ONSC 2709, at para 66