2007 CarswellOnt 7637
Ontario Superior Court of Justice

Goodridge (Litigation Guardian of) v. King

2007 CarswellOnt 7637, 161 A.C.W.S. (3d) 984

STACEY GOODRIDGE a minor under the age of 18 years by her Litigation Guardian NANCY GOODRIDGE and NANCY GOODRIDGE personally (Plaintiffs) and DAVID MICHAEL KING and ROBERT D. KING (Defendants)

T.A. Platana J.

Heard: May 25-29, 2007
Judgment: October 30, 2007
Docket: Kenora CV-05-042-00TT

Counsel: Neestor E. Kostyniuk for Plaintiffs
Alex W. Demeo for Defendants

Subject: Insurance; Torts; Civil Practice and Procedure; Family

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Insurance

XII Automobile insurance
XII.6 Catastrophic impairment
XII.6.b Extent of impairment
XII.6.b.ii Miscellaneous

Remedies

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I.5 Damages in tort
I.5.a Personal injury
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I.5.a.ii.B Motor vehicle accidents
I.5.a.ii.B.6 Miscellaneous

Remedies

I Damages
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I.5.a.iii.C Pain and suffering
I.5.a.iii.C.1 Physical injury

Remedies

I Damages
I.5 Damages in tort

I.5.a Personal injury
I.5.a.iii Principles relating to non-pecuniary loss
I.5.a.iii.F Multiple factors considered

Headnote

Insurance --- Automobile insurance — Threshold issues — Extent of impairment

Remedies --- Damages — Damages in tort — Personal injury — Principles relating to awards of general damages — Motor vehicle accidents — Miscellaneous

Remedies --- Damages — Damages in tort — Personal injury — Principles relating to non-pecuniary loss — Pain and suffering — Physical injury

Remedies --- Damages — Damages in tort — Personal injury — Principles relating to non-pecuniary loss — Multiple factors considered

Table of Authorities

Cases considered by *T.A. Platana J.*:

Ahmed v. Challenger (2000), 2000 CarswellOnt 3985 (Ont. S.C.J.) — considered

Briggs v. Maybee (2001), 29 C.C.L.I. (3d) 104, 2001 CarswellOnt 794 (Ont. S.C.J.) — referred to

Carreiro v. Ontario (Superintendent of Insurance) (1997), 34 M.V.R. (3d) 219, 36 O.R. (3d) 257, 1997 CarswellOnt 4648 (Ont. C.A.) — considered

Dennie v. Hamilton (2006), 2006 CarswellOnt 6505, 44 C.C.L.I. (4th) 243 (Ont. S.C.J.) — considered

Kallias v. Kargacin (1995), 1995 CarswellOnt 1162, 16 M.V.R. (3d) 236 (Ont. Gen. Div.) — considered

Lento v. Castaldo (1993), (sub nom. *Meyer v. Bright*) 17 C.C.L.I. (2d) 1, (sub nom. *Meyer v. Bright*) 15 O.R. (3d) 129, (sub nom. *Meyer v. Bright*) 48 M.V.R. (2d) 1, (sub nom. *Meyer v. Bright*) 67 O.A.C. 134, (sub nom. *Meyer v. Bright*) 110 D.L.R. (4th) 354, 1993 CarswellOnt 51 (Ont. C.A.) — followed

Morrison v. Gravina (2001), 29 C.C.L.I. (3d) 129, 2001 CarswellOnt 1870 (Ont. S.C.J.) — referred to

Page v. Primeau (2005), 2005 CarswellOnt 5919 (Ont. S.C.J.) — considered

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Vandenberg v. Montgomery (1999), 46 M.V.R. (3d) 217, 1999 CarswellOnt 2298 (Ont. S.C.J.) — referred to

Statutes considered:

Family Law Act, R.S.O. 1990, c. F.3
Generally — referred to

Insurance Act, R.S.O. 1990, c. I.8
Generally — referred to

s. 267.5 [en. 1996, c. 21, s. 29] — referred to

s. 267.5(5) [en. 1996, c. 21, s. 29] — considered

***T.A. Platana J.*:**

Overview

1 On July 30, 2000 the Plaintiff, Stacey Goodridge, was a passenger in a vehicle driven by the Defendant, David King, with the permission of his father, Robert King. David and a passenger, Shawn Green, picked up Stacey in order to go to a camp. Stacey sat behind the driver's seat. Her evidence is that when she got into the vehicle she looked for a seatbelt but could not find one. In examination she acknowledged that it was wise to use a seatbelt, and had she found one she would have used it, but that she did not ask the driver because she "didn't think it was a big deal." They later picked up an additional female passenger who also sat in the rear seat. As they were proceeding around a curve on a dirt road, the vehicle started fishtailing. Stacey indicates that she does not remember anything after that but has been told that she was thrown from the vehicle. She has no particular memory until she woke up and saw the other female passenger and her mother, and later saw her own mother and the doctor at the hospital.

2 The facts of the accident, and the liability of the Defendants, are not in issue. What is in issue is whether the injuries suffered by the plaintiff constitute a permanent serious disfigurement or a permanent serious impairment of an important physical, mental or psychological function within the meaning of s. 267.5(5) of the *Insurance Act*, R.S.O. 1990, c. I.8, which states that:

> Despite any other Act and subject to subsection (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.

If Stacey's injuries do satisfy this section, then the issue will focus on whether there should be any reduction of damages by virtue of the fact that the plaintiff was not wearing a seatbelt.

3 At the commencement of these proceedings counsel filed a joint document book consisting of medical, school, tax, and employment records.

The Injuries

4 Following the accident, Stacey was taken to the hospital. Her evidence is that she had received a blow to the head and also sustained a cut on her right shoulder which resulted in a scar some 3.5 to 4 inches in size. That has not changed over a period of 7 years.

5 She also suffered cuts and scratches on the right side of her face from some glass and debris. In her evidence, Stacey explained that for the first couple of years pieces of glass and gravel would come out of her face resulting in sores. She received comments that her "face was dirty" and as a result she would use her hair and makeup to cover her face.

6 She also stated that subsequent to the accident she has experienced memory problems and she has difficulty travelling in small vehicles unless she is the driver. She states that she asks to drive the vehicle which allows her to stay in control and that, if a passenger, she always asks the driver to be more careful and to slow down.

7 She also gave evidence that she has lost her sense of smell. She first noted this on a trip to Winnipeg with some friends when she could not smell perfumes. Her evidence is that she still cannot smell anything and that last year she burned an exercise ball because she missed the smell of smoke. She also testifies that she misses the smell of her mother's cookies and that she cannot smell Christmas dinners. She is concerned that she may not notice her own personal odour as a result of using too much perfume. She worries about what will happen later in life when she has children with the normal odours that children bring.

8 She also testifies that after the accident she lost her sense of taste. Some of that sense has now returned, but not completely.

9 She also described an injury to her left wrist that required her to be placed in a cast for approximately two months. She attended physiotherapy for straightening and strengthening. Her evidence is that the wrist, which is her non-dominant hand, is not as strong as she would like it to be. She is careful when working as a bartender as she knows she cannot carry a heavy tray of drinks. She was very involved in athletics prior to the accident but does not swim as much as she used to. She also states that she no longer wears her hair long as it too painful to brush her hair and she worries that she won't be able to brush her children's hair in the future.

10 With respect to her career aspirations, she is now in university and indicates that her career plans are to become an elementary teacher. She has been working in the summer at various jobs since the accident, including one employment at a youth group home where she showed them how to cook.

11 Her evidence is that she is unable to do daily chores such as dusting and vacuuming.

12 In sum, she states that the injuries are serious to her because people live through their senses. She is further worried about whether she will be able to follow her chosen career path as a result of the injury to her wrist.

13 In cross-examination she does acknowledge that she has been working steadily in the summers since the accident. In 2006 she earned approximately $11,000 working part time at two or more jobs and in 2005 earned over $10,000. Included in her employment is a job cleaning and painting a summer cruise boat.

14 She agreed that she attended physiotherapy with the final report being received on March 15, 2001, at which time it was noted that her hand was feeling like the right, that there were no functional restrictions, that she had full range of movement and that she was pain free.

15 Following her discharge from physiotherapy Stacey received treatment from Dr. Harland, her family physician. In reviewing the records provided she agrees that she did not refer to any further pain in her wrist until 2005. She agrees that she saw him on a number of occasions between 2001 and 2005 and that she would have told him if the wrist had been bothering her.

16 She acknowledges that in March 2001 she saw Dr. Dominique, a neurologist, at which time she told him that she suffered a fractured left wrist, cuts on the right side of the face, cuts on her right shoulder, and multiple bruises as a result of the accident. His report then notes that, apart from her symptoms related to taste and smell, she presented no other symptoms.

17 With respect to her injuries she agrees that after she was finished physiotherapy she continued with school and part-time employment. She took guitar lessons in 2001. She states that she is not afraid to wear her hair pulled back and says that she has been a bridesmaid since the accident at which time she had her hair pulled back and wore an off the shoulder dress. She agrees that she does date and in fact registered herself on the computer program Facebook, including pictures of herself which she posted.

18 She has never sought referral to a plastic surgeon.

19 She further acknowledges that she has been a passenger in vehicles since the accident and that she just recently spoke to her family doctor about this fear.

The FLA Claim

20 Nancy Goodridge is Stacey's mother. On the day of the accident Mrs. Goodridge states that she was returning from Fort Frances. Stacey was not home and there was no note indicating where she was. Mrs. Goodridge received a phone call from the hospital stating that her daughter was in an accident and at the hospital. When she arrived at the hospital she found Stacey conscious on a bed with her hair and face all messed up, her clothes ripped, grass on her head and acting hysterical.

21 Mrs. Goodridge testified that she knew that Stacey smoked before the accident, but it had not affected her sense of smell. Stacey liked to bake and often helped with household chores such as laundry and vacuuming. She has suffered two previous wrist fractures neither of which posed any complications.

22 With respect to the facial injuries Mrs. Goodridge states that "any disfigurement is going to hurt." She stated that Stacey often wears her hair to the side of her head. Stacey is not afraid to expose the scars on her shoulder and is "quite content with where she is."

23 She testified that Stacey does use post-it notes to remember certain things.

24 As to the injuries in the left wrist, Mrs. Goodridge testified that Stacey has not done any sporting activities, and no longer fishes with her father and she does not have enough strength for some kitchen tasks, for example, draining spaghetti.

25 She explained that when Stacey was a child she did have some cold and sinus problems, but that did not seem to affect her sense of smell or taste. After the accident she would tell Stacey from time to time that she was wearing too much perfume. Mrs. Goodridge is still troubled by Stacey's inability to smell; Stacey's parents have made sure that she has a fire detector where she currently lives.

26 Mrs. Goodridge explained a change in the relationship between her and Stacey. Stacey used to do garden and yard work with Mrs. Goodridge. She suffered emotionally while Stacey was in the hospital and when Stacey returned home, Mrs. Goodridge felt like she was a "private nurse" for the first week.

27 Mrs. Goodridge feels that teaching would be an excellent profession for Stacey but worries that there might be some limitations if she becomes an elementary teacher in the process of doing up boots and zippers for young children. She acknowledges that she is not a teacher herself and has no real idea of a teacher's function on a daily basis and that this concern is solely based on her experience as a teacher's aide.

28 On cross-examination, Mrs. Goodridge stated that she was very concerned when Stacey lost her sense of smell and took her to see specialists. She cannot remember if either doctor attributed the loss of smell to the accident. She was referred to letters (filed at Tabs 4N and 4P in Exhibit #1) which she wrote to the family doctor expressing her desire to get a second opinion in order medically verify that Stacey had lost her sense of smell.

Defendants' Seat Belt Evidence

29 Robert King testified that he had owned the Bronco for 3 years. The vehicle had seatbelts which he always insisted be used. The rear belts were a lap type. There was a solid plastic receiver which did not go into the seat and the other part of the belt was retractable. The belt, he said, could not be hidden unless covered with something.

30 David King knew there were lap type seatbelts installed in the rear seat. He can't remember specifically what was said but does recall saying something about using the belts when the other passengers got into the vehicle on the day of the accident. He does not think he was aware that it was his responsibility as driver to ensure that passengers under 16 years of age had their seatbelts fastened.

31 His evidence is that after the vehicle fishtailed and he lost control, the vehicle rolled over. Stacey was found outside the vehicle crying. He testified she was clearly hurt, had some cuts and appeared to need some stitches.

32 Shawn Green testified on behalf of the Defendants. He states that he had ridden in the Bronco several times before and that he was aware that there were retractable seatbelts in the rear seat. His evidence is that the Defendant, Robert King, always made people wear seatbelts when they were in the vehicle. His evidence is that he and David picked up Stacey first. After they picked up the other female passenger, both girls were asked if they had their seatbelts on. There was no complaint with respect to not being able to find the seat belts.

The Medical Evidence

33 Since the motor vehicle accident, Stacey has visited numerous doctors, specialists, and also received physiotherapy. The evidence from each is outlined in this section.

Dr. Harland, Family Physician

34 A series of medical reports from Dr. Harland, Stacey's family physician were filed. On August 28, 2000, Dr. Harland's notes indicate that since the accident Stacey had experienced a loss of smell and that her left wrist was still tender.

35 On September 22, 2000, he notes that she has the same loss of smell, the cast is off, and her wrist is well healed.

36 On January 10, 2001, he notes that she is still missing smell, small pieces of gravel were noted in the temple region, and she still has weakness and sharp pain in her left wrist.

37 On August 13, 2003, the medical records note the presence of anosmia (a loss of smell). It was noted that she had quit smoking for awhile and then restarted that summer. Arrangements had been made for a re-assessment.

38 On September 25, 2003, he noted no symptoms apparently related to anything from the motor vehicle accident.

39 There are a series of attendances from April 2003 through to November 2003 where Dr. Harland's notes indicate references to Dr. Gall, an otolaryngology (ear, nose and throat) specialist, and Dr. Dominique, a neurologist. There is further a notation of a neurology appointment regarding the anosmia.

40 In January 2005, Dr. Harland's notes make reference to scarring on the right shoulder, right temple, a small cut lateral to the right eye, weakness in her left wrist, and that her senses of smell and taste appear to be decreasing.

41 In May of 2007, Stacey expressed a concern with respect to ongoing pain in her left wrist. It is further noted that Stacey gets stressed out when driving and when going around corners.

42 On November 11, 2005, Dr. Harland, the family doctor, summarized the extent of Stacey's injuries as follows:

> 1. Scar right shoulder — 8 cm long with a 3-4 cm scar. Scar is well healed and she can move right shoulder well. This scar is permanent and will not improve with time.
>
> 2. Right temple — 8-9 small punctuate or scrape scares with blue brown discoloration. These scars are flat ie not raised. These scars are permanent and will not improve with time.
>
> 3. There is a small nodule right temple which is just lateral to right eye and likely represents a small fragment of grit or gravel. This is tender to touch and may extrude on its own eventually. These scars are permanent and will not improve with time.
>
> 4. Left wrist — had a fracture left distal radius at the junction of diaphysis and metaphysic with slight angulation at the fracture site. Was treated in a cast. Now 5 years later left wrist is a little thinner and a little weaker when compared to the right. The weakness is mainly in flexion rather than extension and affects her ability to carry trays, if heavy, during bar tending. After 5 years the weakness on the left wrist is likely long-term or permanent. Her left wrist may cause some discomfort with prolonged brushing of her long hair.
>
> 5. Sense of smell is diminished (see neurology report).
>
> 6. Sense of taste — she feels that her taste is reduced for regular Canadian style foods but that she is able to taste spicy foods.

43 Dr. Harland's final report, dated May 16, 2007, concurs with the opinion of Dr. Lloyd that there is chronic ongoing pain and discomfort in the left wrist. In particular, since the pain and discomfort has continued for the past 6-7 years he would conclude that this will likely be persistent and chronic and may have an impact on her future activities. He concludes that this will likely impact on her work as a kindergarten teacher or even as a waitress or bartender.

Dr. Gall, Otolaryngology Specialist

44 Dr. Richard Gall first reported on October 27, 2000. At that time he indicated the impression that Stacey's loss of taste was related to her loss of sense of smell. His impression was that the hyposmia (weakened sense of smell) may be related to the previous motor vehicle accident.

45 Dr. Gall's final report, dated August 25, 2003, notes that Stacey continues to complain of anosmia but that she is unsure whether she has completely lost her sense of smell. At times she thinks that she may have some sense of smell but she questions whether she is simply experiencing the memory of what things used to smell like. The physical examination was unremarkable and Dr. Gall concludes that it is impossible to say whether she is in fact suffering from anosmia.

Dr. Dominique, Neurologist

46 Dr. Gall referred Stacey to Dr. Dominique, a neurologist, who noted in a report to Dr. Gall, dated March 27, 2001, that he "cannot find any significant neurological defect." He noted that "It is possible that her loss of sense of smell may have been related to the accident. However, the interval of one month, following the accident, would be quite unusual." Stacey further noted that since she quit smoking her sense of smell had improved. In particular, Dr. Dominique reported that:

> Stacey is very ambivalent about her sense of smell and the amount she can smell. On holding a bottle of perfume under her nose, she showed external evidence that she had perceived the smell — when the bottle was first held under her nose, she breathed in, registered an express of dislike for the odour by twisting up her face and then withdrawing. She then stated that she couldn't smell it. From her reaction, I would suspect that she did perceive the odour but I cannot state to what degree.

> It is possible as stated that hyposmia and hypogesia could be related to the accident. However, the interval of one month is somewhat unusual. She has been a heavy smoker for three to four years. She has noted improvement when she tried to reduce smoking. I would suspect that it would be impossible to determine whether her loss of these functions sense of smell and taste would be due to the accident one month later or more likely due to the cigarette smoking.
>
> I don't think there is any way to determine which is the underlying cause.

Dr. Gomori, Neurologist

47 In July 2004, Dr. Harland referred Stacey to Dr. Andrew Gomori, a neurologist who provided a follow-up report to Plaintiff's counsel, dated July 26, 2004. The report noted that in a previous examination Dr. Dominique documented that Stacey complained of a loss of smell and taste, but that there was no documentation of the neurological examination as it applies to the testing of taste and smell. In a letter to Dr. Harland (Exhibit 4S), Dr. Gomori wrote that:

> It is an extensive letter, as I wanted to document clearly why I did not feel that there was an organic anosmia in this patient. Simply put, if the patient has true anosmia, she will still have gustatory nerve endings intact and therefore they would be able to appreciate irritating substances presented to the nose when asked to sniff or inhale through the nose.

48 Dr. Gomori expressed his opinion that:

> Based on all of the above information, it is difficult to conclude that this patient has an organic anosmia. If this were the case, the findings would have been different as described above. For this reason it is my opinion that this patient does not suffer from true anosmia. If she did have temporary anosmia at an earlier time, it would be reasonable to conclude that it was due to the head injury. Such injuries can cause damage to the olfactory nerves, but in those situations, recovery is highly unlikely. The most common cause of loss of smell is indeed the common cold. Smokers may have slight decrease in their sense of smell, but I would not go as far as stating that they lose smell completely.
>
> In answer to your third question, there is no evidence of any other neurologic problem as a result of the motor vehicle accident.
>
> I believe that the prognosis for complete recovery of symptoms in this patient is excellent and she will need to be reassured that there is no longer any evidence of an organic smell deficit.

Dr. Lloyd, Orthopedic Surgeon

49 With respect to the left wrist injury, Stacey was referred to Dr. Geoffrey Lloyd, an orthopedic surgeon. His report, dated November 3, 2005, notes three concerns. Firstly, he notes continuing symptoms from the wrist which she feels is generally weaker than she would have anticipated. Secondly, he notes that there is a possibility of a malalignment affecting the joint and that she should have a bone scan and an x-ray. Finally, he notes that "The overall sense one has is that there is a continuing deformity and a probable legitimacy to her complaints." He concludes that:

> By way of summary, there is need to investigate this patient's left wrist further in order to determine whether or not she is going to have a permanent serious impairment of an important physical function.
>
> Generally speaking, a reduction in the sense of smell and taste would be viewed as constituting a permanent serious impairment of an important function.

50 A follow-up report from Dr. Lloyd on February 12, 2006, notes:

I would continue to have a clinical suspicion that this patient does have an abnormality to the region of the inferior radio-ulnar joint.

It now becomes a quality of life judgement as to whether or not she is having sufficient in the way of symptoms to justify further investigations....

On clinical grounds, one continues to have the opinion that there probably is legitimacy to her continuing complaints that flow from the region of her left wrist.

51 His final report, dated April 4, 2007, notes that with respect to the wrist there is legitimacy to her complaints and:

I believe one can say that this lady does have an impairment, and that there is going to be permanence.

Given her chosen lifestyle in the future as a kindergarten teacher, and given the necessity to assist little children with issues relating to personal care on a repetitive basis, I believe that she could reasonably take the position that the injury to her left wrist has serious consequences in the long-term.

52 A bone scan dated January 23, 2006, showed "no scintigraphic evidence that could explain the patient's symptoms in the left wrist."

53 Dr. Lloyd also comments on the anosmia and concludes:

The real dilemma with the diagnosis of anosmia and altered taste is that the subtle changes relay on the patient's subjective commentary and the reliability of that subjective commentary. Certainly, given the mechanism of injury, which would suggest that she did have a blow to the front of her head and that she did have indictors of any injury to the central nervous system, there is a change that her anosmia is as a consequence of the accident that is of concern to you.

54 With regard to the scarring, Dr. Lloyd reported Stacey had superficial evidence of healed abrasions.

Physiotherapy

55 The Plaintiff first presented to physiotherapy on January 11, 2001. At that time she was noted to have severe atrophy around the left wrist, a significant reduction in strength for the wrist, fingers and elbow on the left; reduced range of motion for ulnar and radial deviation; reduced palmer glides; and ligament dislaxity. She was experiencing certain functional restrictions. The case summary, prognosis and recommendations section of the Reporting Form at that time noted:

Stacey presents six months post fracture with significant weakness and atrophy around the left wrist. Functionally she has adapted to using her right hand whenever possible but still have difficulties with some of the tasks at her part time job at McDonald's. She experiences sharp shooting pain with certain tasks. As Stacey attends high school full time we will see her 2-3 times per week for a period of 6-8 weeks to improve on strength and function. We will re-evaluate at 4 weeks. I will also test unilateral lift and carry above shoulder reach and hand circumference measurements at a subsequent visit.

56 On February 13, 2001, the ongoing report form notes that the atrophy persists but has improved; strength has improved for most wrist movements and full range of motion. The case summary at that time notes:

Stacey reports that the sharp pain is gone and she feels stronger with all her work tasks. She still favours her right hand for most unilateral tasks but when forced to use her left she can manage with certain tasks. She has not changed on the one round block testing that most elicits her functional weakness pertaining to her wrist. I will be increasing her weight training for this type of task over the next 4 weeks. Her grip strength has improved for her left wrist from

> 17 kg. to 22 kg. tested on the same prong but is significantly weaker than her right hand. We will continue with the strengthening and report back in 4 weeks time.

57 The final report from the physiotherapist, dated March 15, 2001, noted that some atrophy remained but has improved overall: "strength is gr. 5 for all wrist movements except for wrist extension remains at gr. 4 +/ 5." With respect to the functional restrictions section of the report it notes at that time no functional limitations reported or observed. The case summary prognosis and recommendations section of the report notes:

> Stacey reports that she has no pain anymore and she feels her left is as good as her right. She is not having any functional problems at work/home or school. Her round block testing showed improvement from 72 to 83 over the last 4 weeks. I feel she has reached all her goals and will be discharged from further physiotherapy with a home exercises program.

58 In an Ongoing Functional Abilities Evaluation Reporting Form dated January 11, 2001, prepared by Physiotherapist Helen Janzen Ezekiel, Stacey's primary problems were summarized as follows:

> (a) severe atrophy around the left wrist;
>
> (b) significant reduction in strength for the wrist, fingers and elbow on the left;
>
> (c) reduced range of motion for ulnar and radial deviation;
>
> (d) reduced palmar glides; and
>
> (e) ligamentous laxity.
>
> The above-noted problems presented Stacey with functional restrictions with her employment, which include:
>
> (f) difficulty lifting money holder at the cash register;
>
> (g) lifting with the left hand;
>
> (h) unilateral carrying and lifting with the left hand;
>
> (i) difficulty pushing cash register buttons; and
>
> (j) pouring sauce out of a container.

Dr. Kayler, Orthopedic Surgeon

59 Dr. Kayler is an orthopedic surgeon who conducted an independent medical examination on behalf of the defence on April 25, 2006. He noted that the facial lacerations were outside his area of expertise and did not address those. With regard to the loss of consciousness and the loss of smell, he again noted that those topics were out of his area and were well documented but both neurology consultants did not feel they could confirm a truly objective organic traumatic cause of anosmia.

60 Dr. Kayler was interested in her left wrist fracture and noted:

> The summary diagnosis of the distal radial fracture is that it healed, although not in anatomic position, with minimal relative dorsal angulation resulting in a slight reduction in left wrist flexion as compared to extension. The prognosis is for no significant change from the time forward.

61 He went on to state:

> She does have a very mild measurable loss of flexion, a mild objective loss of volume of the left wrist, and ongoing functional complaints of weakness during heavier activities such as bartending. There are no pre-accident measures available to determine whether any of the limitations in the wrist, either in range of motion, alignment, or circumference, are related to the July 2000 motor vehicle accident or an earlier injury. That having been said, though, the history of a good recovery following the earlier forearm injuries, and the usual good prognosis after such childhood injuries, it is likely that the current situation is related to the July 2000 motor vehicle accident.

62 The report also notes that the wrist impairment is essentially of a physical nature and while it is not a guarantee that she will not get into late arthritic problems, it is supportive of the prognosis that long term deterioration in this wrist, related to this particular injury, is relatively unlikely.

63 Dr. Kayler's report concludes that:

> While the impairment seems moderately serious to Ms. Goodridge, the objective evidence of abnormality, objectively documented, is relatively mild.
>
> The impairment is likely permanent.

64 Finally, Dr. Kayler reports that Stacey's injury is consistent with a motor vehicle accident and comments that this type of injury is typically the result of falling on an outstretched hand and that the particular injury pattern is not likely to occur in a seatbelt-restrained situation.

Positon of the Plaintiffs

65 Plaintiff's counsel submits that in determining whether a Plaintiff falls within one or more of the statutory exceptions to the immunity for general damages, the Courts have applied the three part approach established by the Court of Appeal in *Lento v. Castaldo* [hereinafter Meyer v. Bright] [1] This test was later modified by the decision of *Ahmed v. Challenger*, [2] to reflect the wording of the "Bill 59" regime. The three part approach consists of asking the following questions in sequence:

> i) Has the injured person sustained permanent impairment of a physical, mental or psychological function?
>
> ii) If the answer to question number 1 is yes, is the function which is permanently impaired an important one?
>
> iii) If the answer to question number 2 is yes, is the impairment of the important function serious?

66 Counsel submits that the test in *Meyer* does not establish a general threshold that injured persons must pass before they are entitled to sue for their injuries. Rather, the test requires that a determination be made in each case whether the injured person falls within one or more of the statutory exceptions to the general immunity provided by the Act.

67 In reviewing the evidence regarding the permanence of Stacey's injuries, counsel refers to Dr. Kayler's report, dated May 18, 2006, which concluded that the injury to Stacey's left wrist is consistent with a motor vehicle accident, and that the impairment to Stacey's left wrist is likely permanent.

68 Counsel notes that Dr. Lloyd also concluded that Stacey's wrist impairment is permanent, and that her wrist injury has serious long-term consequences given her chosen future career as a kindergarten teacher.

69 A report prepared by Dr. Harland, dated November 11, 2005, provides a record of all of Stacey's scars and injuries from the accident wherein he concluded that the scars and injuries are permanent and will not likely improve over time.

70 Dealing with the second question, whether the impairment is an important one, counsel submits that this requires a subjective analysis. The court must consider the importance of the bodily function in issue as it relates to the particular

individual who is affected by the impairment. As such, one must consider the injured person as a whole and the effects of the impairment on the individual's way of life. Each case will essentially be one of fact. If the bodily function is important to the particular injured person, then the impairment is an important one. Typically, the court will consider all aspects of the injured person's life and the degree to which previous activities have been compromised by the injuries in issue. [3]

71 In making this argument, Plaintiff's counsel refers to Dr. Lloyd's report, dated April 4, 2007, which states that in the short term Stacey's wrist injury will have an impact on her vocationally and restrict her endurance as it relates to working as a bartender. Dr. Lloyd posits that this is a serious consequence given her need to generate an income in order to complete her studies.

72 Counsel further relies on the report prepared by Dr. Harland, dated May 16, 2007, which states that Stacey continues to have chronic ongoing pain and discomfort in the dorsom of her left wrist (almost 7 years after the accident). In the same report, Dr. Harland concluded that this pain will likely be persistent and chronic and may impact Stacey's future activities, specifically her future work as a kindergarten teacher and her work as a waitress or bartender.

73 Dealing with the issue of loss of smell, counsel refers to the report prepared by Dr. Dominique dated March 27, 2001, wherein he indicates that there is a possibility that the loss of smell is related to the subject accident.

74 Counsel also relies on a report prepared by Dr. Lloyd, dated November 3, 2005, which identifies certain behaviours during the first 24 hours after the accident that would indicate an injury to Stacey's central nervous system from which anosmia can occur as a consequence. Dr. Lloyd goes on to state that certainly given the mechanism of injury, which would suggest that Stacey did have a blow to the front of the head and that she did have indicators of an injury to the central nervous system, there is a chance that her anosmia is a consequence of the subject accident. Dr. Lloyd concluded in his report that this reduction in Stacey's sense of smell and taste would be viewed as constituting a permanent serious impairment of an important function.

75 In answering the third question, whether the impairment of the important function is serious, counsel submits that the assessment must focus on the individual's impairment and not the nature of the injury. He cites *Meyer v. Bright*, where the Court of Appeal provided guidance on that issue with these comments:

> While obviously an impairment which was significantly serious or almost catastrophically serious would be a serious impairment, there is no necessity for the impairment to be that serious in order to qualify as being a serious one. In order to qualify as serious an impairment must be serious-no more no less.
>
> It is simply not possible to provide an absolute formula which will guide the Court in all cases in determining what is "serious." The issue will have to be resolved on a case-by-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. [4]

76 Counsel then references the evidence dealing with "seriousness." He notes that on arrival at the hospital, Stacey was coherent, and approximately 3 hours later, she became rather confused and disoriented. Her confusion and disorientation disappeared around 3 to 4 hours later. In the Discharge Summary Report, dated July 31, 2000, Stacey was diagnosed with superficial head and body injuries and a left colles fracture.

77 Counsel references the evidence that Dr. Gall referred Stacey to Dr. Dominique for further assessment. Dr. Dominique's report, dated March 27, 2001, states that Stacey's friends and teachers have noted that she is "mentally slow," and that her attention "tends to wander." These symptoms were noted apparently one month after the subject accident.

78 Counsel submits that the court should decide the issue based upon a review of the activities of the Plaintiff's daily living prior to the motor vehicle accident and determine which of those activities are impaired and to what extent. [5]

79 Counsel argues that the courts have found that an injury which interferes with or restricts some of the following activities, or prevents the injured person from performing some of the following activities, constitutes a serious injury, listing employment, fishing, a lack of energy which prevents full time work and the ability to engage in "normal activities of daily living", household cleaning and repairs as examples. Moreover, for such Plaintiffs, if their injuries have further marginalized their existence and have had a serious physical and psychological impact on the future enjoyment of his or her life, then the impairment is serious. [6]

80 He argues that Stacey's injuries to her wrist interfere with, and prevent her from, performing some of the following mundane activities that are particular to her: Stacey has cut her hair short as a result of being unable to handle and/or manage her previously long hair; she is unable to carry or lift anything involving her left wrist with respect to her bartending job; swimming; baking; cooking; Stacey has lost 130 pounds since the subject motor vehicle accident; and Stacey avoids exercising where such exercise would involve her left wrist.

81 With respect to the serious permanent disability aspect, he relies upon the report of Dr. Lloyd specifically as it relates to her left wrist. He notes that there was a fracture which has resulted in ongoing problems. His position is that Dr. Lloyd's report establishes that there is an impairment which is permanent and has serious consequences to her life. In summary of the wrist injury, counsel for the Plaintiff argues that I can objectively conclude that it is subjectively serious to this Plaintiff.

82 With regard to the issue of the loss of the sense of smell and taste, counsel for the Plaintiff submits that the question here is the accuracy of the timeline. It is clear that the loss of smell only occurred after a period of one month and counsel points that reliance on the medical reports suggests, on a balance of probabilities, that this is a result of the accident.

83 He further relies on the Plaintiff's loss of memory as being a permanent impairment which has serious consequences. In that regard he points to her evidence that she must use post-it notes.

84 Counsel for the Plaintiff further argues that the threshold issue pursuant to s. 267.5 of the *Insurance Act* has been met in that there has been serious permanent disfigurement. He argues that I must look objectively at the Plaintiff and consider how it affects her and if the position she has taken is reasonable. He refers specifically to the aspect of the injuries she suffered to her face as a result of the glass and debris implanted and the fact that she is left with what she describes as a "dirty face." He further argues that I must consider that she is a young woman who is left with a significant scar on her left shoulder.

85 In sum, counsel for the Plaintiff argues that the injuries to her face have resulted in a serious permanent disfigurement and that the injuries to her left wrist and her lost of sense of smell and taste have resulted in a serious permanent impairment which has serious consequences on her life.

86 With regard to the issue of damages, counsel points to the fact that Stacey aspires to become a teacher. With respect to the issue of general damages, counsel argues that for the wrist fracture, the loss of smell and taste, and scarring damages should be assessed in the range of $75,000 to $100,000.

87 With respect to the loss of future earning capacity, it is submitted that there is a significant possibility that Stacey will suffer a loss of income. Counsel argues that an appropriate range in this case is between $25,000 and $50,000.

88 With respect to the *Family Law Act* claim counsel argues that the evidence shows that Stacey had a close relationship with her mother and that Mrs. Goodridge was significantly involved in Stacey's care during her hospitalization and immediately afterwards. Counsel argues that the mother-daughter relationship has suffered a diminution because Stacey no longer engages in some general household activities that she once enjoyed with the mother. For this, counsel submits that an appropriate range of the *Family Law Act* claim is $10,000.

89 With respect to the seatbelt issue, it is argued that the onus is on the defence. His submission is that there is no evidence from anyone, other than David and Robert King, that seatbelts were installed in the vehicle. He relies upon the fact that there is an obligation on the owner and driver to require the passengers to use them. He further argues that there is no evidence as to what injuries would have been suffered if in fact the seatbelts had been used and submits that the Plaintiff could still have had other injuries.

90 Finally, counsel acknowledges that caselaw permits a reduction for not using seatbelts and, if I am satisfied that the Defendants have met their onus, I may consider a reduction in the range of 5 to 10% of damages attributed to the Plaintiff.

Position of the Defendants

91 Counsel for the Defendants begins by pointing out that liability is clearly admitted. He frames the issues as revolving around whether the threshold has been met and whether the Plaintiff has suffered a permanent serious impairment of important physical function; the issue surrounding contributory negligence with respect to failing to use a seatbelt; an issue around the loss of earning capacity where he submits that there is simply no evidence of any such loss.

92 Counsel submits that the injuries in this case were most likely suffered as a result of ejection from the vehicle caused by not using a seatbelt. He points to the fact that none of the other passengers were injured. He submits that in the event that I am satisfied that the threshold is met and that the Plaintiff is entitled to recover damages, there should be a reduction of 25% for the Plaintiff's failure to use a seatbelt.

93 Counsel references *Dennie v. Hamilton*[7] where Whalen J. noted:

> The questions to be asked are:
>
> 1. Has the injured person sustained permanent impairment of a bodily function caused by continuing injury that is physical in nature?
>
> 2. If so, is the bodily function an important one?
>
> 3. If it is an important bodily function, is it serious?
>
> The plaintiff bears the burden of establishing on a balance of probabilities that she is entitled to the exception [citation omitted] The permanent impairment of bodily function must of course have been caused by the accident, and the plaintiff must also have proven this on a balance of probabilities.[8]

94 Counsel for the Defendants submits that the test in this case could be phrased as follows: Has the Plaintiff proved, on a balance of probabilities that, as a result of the accident, she has sustained a permanent, serious impairment of her sense of smell, a permanent, serious impairment of an important function of her left wrist, or a permanent, serious disfigurement to her right shoulder and in the area of her right temple? In approaching the answer to these questions I must consider the subjective test as it effects the Plaintiff and also the objective test in terms of looking at all of the evidence.

95 In connection with the injuries suffered, counsel submits that on the basis of the above test the Plaintiff has not established any connection by way of causation from the accident as to her loss of smell. In particular, he points out that the medical reports of Dr. Gall and Dr. Dominique suggest that it is unlikely that this injury would arise following in the course of one month after the accident occurred. He further argues that, based on Dr. Gomori's report, that the cause may be the result of cigarette smoking and other factors rather than the accident.

96 With respect to the issues, counsel for the Defendants refers to the oft quoted and well known trilogy decisions. He references *Meyer v. Bright* where the court notes:

> 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. [9]

97 The court goes on to note:

> Once it is found that there is impairment of an important bodily function the court must then decide whether the impairment is a serious one to the particular person. ... In performing that task the question will always be the detrimental effect which the impairment has upon the life of the particular injured person. [10]

98 Dealing with the issue of the injury to the wrist, counsel suggests that the question to be answered is whether there is a functional impairment that is serious? He references the fact that Stacey held a number of different jobs over the summers and Dr. Lloyd's report which notes:

> Whilst the fracture to the distal end of her radius was extra-articular, it was not extra-articular in the context of the overall wrist joint. I believe then there is legitimacy to her complaints.

99 Counsel also directs the Court to the section of Dr. Lloyd's report, dated April 4, 2007, which states:

> Given her chosen lifestyle and the future as a kindergarten teacher, and given the necessity to assist little children with issues relating to personal care on a repetitive basis, I believe that she could reasonably take the position that the injury to her left wrist has serious consequences in the long term.
>
> In the short term, it will have an impact on her vocationally and restrict her endurance as it relates to working as a bartender. This again is a serious consequence to her, given the need to generate an income in order to complete her studies.

100 With reference to Dr. Lloyd's report (found at Tab 8C, page 2), counsel notes that the doctor does not say that there is a serious impairment and also does not say that the impairment is important. All that he says is that this is a serious consequence to her. Counsel argues that the medical report of Dr. Kayler does not provide any evidence of there being an impairment of an important wrist function. He points to the evidence of the Plaintiff herself, Dr. Harland and the physiotherapy reports. He queries that, although Stacey says her injury is serious, I must look at how the evidence shows she has presented to her treating caregivers since the accident, what complaints have been made and what treatments sought. In particular, he points to the physiotherapy records which note that as of March 15, 2001, she has no functional limitations, was not expressing any aspect of pain, that the left wrist was as good as the right, and described no functional problems. He further notes that Stacey's evidence states that she was functioning well at school, and that she took guitar lessons subsequent to the accident.

101 Counsel for the Defendants notes that for a period of four years following the accident and following Stacey's discharge from therapy, despite numerous visits to Dr. Harland there is no mention of any wrist pain or any disfigurement. Counsel for the Defendant argues that she has had numerous visits to the doctor as disclosed by the records to suggest that if she has complaints she goes to the doctor but notes that there have been no visits for wrist problems. His position overall is that the subjective presentation as given by the Plaintiff is not supported in any way by the objective evidence. His position is that the evidence discloses that any impairment to function which she has suffered is neither important nor serious.

102 Focusing on the analysis to be carried out as was conducted by Whalen J. in *Dennie v. Hamilton*, counsel argues that, based on the medical reports of Dr. Lloyd, the injury to the wrist must be considered insignificant. Although the Plaintiff has suffered pain in her wrist, she has continued to engage in the normal activities of life for a person of her

age and has continued her schooling toward her future career. He cites *Smith v. Sabzali* [11] where Howden J. found that the Plaintiff continued to suffer some pain which affected her enjoyment of life to varying degrees, however, she had not brought herself within the exception to s. 267.5(5).

103 Counsel argues that one aspect of this case must be what my view is with respect to her evidence as to having a "dirty face." Dealing with the issue of disfigurement, he argues that the evidence shows that the scarring is not evident. Stacey's own evidence shows that the effect on her life, employment and career has been insignificant. She has been socially active, has friends, dates, and has obtained employment. His argument is that, in essence, Stacey lives a normal life of an attractive young woman. Specifically, there is no medical evidence that she has sought plastic surgery. He cites the decision in *Carreiro v. Ontario (Superintendent of Insurance)*, [12] where the Plaintiff was left with a 4-inch scar over the bend in her elbow following an accident. The trial judge determined that the Plaintiff's scar, which was clearly visible and detracted from her appearance, constituted a permanent serious disfigurement given the nature of her work in an industry where beauty and perfection were vital. On appeal, the Court on an endorsement noted:

> While another judge may have decided differently, we cannot conclude that the trial judge made any overriding and palpable error in the circumstances of this case in determining that the injury of the plaintiff constituted a permanent and serious disfigurement. [13]

104 He further cites *Kallias v. Kargacin*, [14] where Cumming J. noted:

> Ms. Kallias was 21 at the time of the accident and she is now 24. Any young woman or man (and many other persons) would be upset and have real regrets about having any facial scar. The scar did cause Ms. Kallias some particular embarrassment in the year or so following the accident while she was attending college when the recently formed scar would be more noticeable. However, there is no real evidence of rejection by peers based upon the scar.
>
> While Ms. Kallias understandably is saddened by, and uncomfortable with, the blemish to her appearance caused by the scar, it does not have any significant continuing detrimental effect upon her life. There has been minimal disruption to her normal activities. There is no evidence, medical or otherwise, of any mental or emotional problems caused by her concerns about the appearance of the scar. [15]

105 Counsel submits that, based on all of the evidence, the Plaintiff has not come within the exception to the *Insurance Act* because the injury to her wrist is neither important nor serious, the scarring is not serious in light of her testimony, there is no evidence with respect to any loss of earning capacity, and the evidence does not establish, on a balance of probabilities, that her loss of smell or taste was caused by the accident.

106 He cites the decision in *Page v. Primeau* [16] where Sedgwick J. notes:

> The onus of proof rests on the plaintiff to satisfy the court that it is more probable than not that the statutory exception set out in subsection 267.5(5)(b) applies to her. As to what will happen in the future, she "can satisfy the onus by showing upon expert or cogent evidence that there is a substantial possibility that a particular event or condition may occur", [citation omitted]. The defendant is not obliged to lead contrary evidence that the plaintiff has not brought herself within the statutory exception, [citation omitted]. Inadequate medical evidence led by the plaintiff as to the severity of her injuries or the absence of a diagnosis or prognosis of them is a sufficient basis for a finding that the plaintiff has not brought herself within the statutory exception, [citation omitted]. [17]

107 He asks that the case be dismissed.

108 In the event that I am not in agreement, counsel for the Defendants argues that the wrist fracture, the shoulder scar, and the abrasions to her face are the only aspects which may be attributable to the accident, that damages should be found to be approximately $25,000.

109 He submits that the *Family Law Act* claim of Mrs. Goodridge is negligible.

Discussion

110 It is agreed that the test to be applied in a matter under s. 267.5(5) of the *Insurance Act* first posed in *Meyer v. Bright* which requires that the Plaintiff meet a three-fold test in order to meet the threshold and be able to sue for non-pecuniary damages:

> (1) Has the injured person sustained permanent impairment of a physical, mental or psychological function?
>
> (2) If yes, is the function which is permanently impaired an important one?
>
> (3) If yes, is the impairment of the important function serious?

111 The onus is on the Plaintiff to prove on the balance of probabilities that she fits within one of the exceptions to the general prohibition on recovering non-pecuniary general damages.

112 As noted in *Dennie v. Hamilton* [18] the permanent impairment of bodily function must be caused by the accident, and the Plaintiff must also have proven this on a balance of probabilities.

113 There is a significant issue in this case focusing on the aspect of causation as it applies to the Plaintiff's evidence of loss of smell and taste. Her evidence is that she first began to experience this loss approximately one month after the accident. She testified that she was unable to smell anything and that this was causing her particular difficulties in her everyday life. Counsel for the Plaintiff argued that the evidence would establish that there is a probability that she suffered a head injury at the time of the accident and that the injury to the head is now the cause of the loss of smell.

114 In reviewing the objective evidence, Dr. Gall's initial impression is that her hyposmia "may" be related to the previous motor accident. In a subsequent report in August of 2003 he states that it is impossible to say whether she is in fact suffering from anosmia. Dr. Gall referred the Plaintiff to Dr. Dominique who noted that he could not find any significant neurological defect. In particular, Dr. Dominique noted that she showed external evidence that she had in fact perceived a smell when being tested. From her reaction, he suspects that she did perceive the odour but he could not state to what degree. While it is possible that the loss of smell and taste could be related to the accident, the interval is somewhat unusual. He concludes that it is impossible to determine whether her loss of these functions would be due to the accident or more likely due to cigarette smoking. His conclusion is that he did not think that there was any way to determine the underlying cause.

115 The evidence of Dr. Gomori is that, based upon all of the information he reviewed, it is difficult to conclude that she had an organic anosmia. In his opinion Stacey does not suffer from true anosmia.

116 In reviewing the subjective evidence of the Plaintiff and the objective evidence of the medical specialists I find that there is not sufficient evidence to establish, on a balance of probabilities, that the Plaintiff's loss of smell and taste are specifically related to the motor vehicle accident.

117 That leaves the questions relating to the wrist injury and the disfigurement of the face and shoulder. Without reviewing all of the evidence in detail, the reports of Dr. Harland and Dr. Lloyd satisfy me that the Plaintiff has sustained a permanent impairment to the left wrist.

118 In *Meyer v. Bright* the court explained the meaning of important as being:

> The use of the word important is intended to differentiate between those bodily functions which are important to the injured person and those which are not.... What must be considered is the person as a whole and the affect which the bodily function involved has upon that person's way of life in the broadest sense of that expression. If the bodily

> function is important to the particular injured person, then, the bodily function in question is an important one within the meaning of that expression in s. 266(1)(b) [now s. 267.5(5)(b)]. [19]

119 The question then, is whether the impairment to her wrist is an important one? The Plaintiff's evidence is that the most significant affect to her subjectively is that the wrist feels weaker and that she was unable to fully perform her previous employment as a bartender carrying a tray of drinks. She further notes that she has a concern that it will seriously affect her ability in her career aspirations as a teacher. Furthermore she expresses a concern that it will seriously affect her ability in the future as a mother for carrying for children, in particular brushing her children's hair.

120 Objectively the medical reports of Dr. Lloyd do not state that the Plaintiff has a permanent serious impairment of an important function. He does refer to the fact that there is legitimacy to her continuing complaints about the wrist and he states in his report that "She could take the position" that the wrist will have serious consequences in the long term.

121 I have also reviewed physiotherapy records which conclude on discharge that she has no pain anymore and feels that her left wrist is as good as her right. It notes that she is not having any functional problems at work/home or school. I have noted that the test scores do not suggest that the left wrist is as strong as the right but I do note that there is no functional problem indicated at the conclusion of physiotherapy.

122 I note also that, on numerous attendances to her family Dr. Harland for other reasons, there is no notation in any of his notes for a period of some four years following the accident of any left wrist problems. I have also considered that this may be due to a determination of her part to simply proceed with life in whatever fashion she could.

123 I have considered the Plaintiff's evidence with respect to her concerns about the effect the wrist injury may have on her career as a teacher, and her future position as a mother. I find that there is no objective evidence to support those concerns.

124 I note the evidence that the Plaintiff has been able to obtain and maintain employment in the summer months; that she has been able to continue on with school to the point where she is currently in university; and in fact that she was able to take guitar lessons. The evidence of the Plaintiff and her mother demonstrates that it has been more difficult for her to carry trays as a waitress working at a bar, that she is no longer able to work in the garden as she used to with her mother, and that she is no longer able to swim as she used to. Although I am satisfied that there is no long-term importance to Stacey's wrist function, at the time she suffered the injury it affected her employment and other aspects and must be considered to have been important.

125 With respect to the issue of the disfigurement, again without reviewing the particular medical evidence I am satisfied that the scar on the shoulder and also the marks on the Plaintiff's face are permanent. I am also satisfied that subjectively the issue of the scarring, particularly on the area of the right temple which gives her what she describes as having the appearance of a dirty face, are important to this Plaintiff. I further take into account the fact that these injuries occurred at a time when she was 15 years of age.

126 The third question focuses on whether the impairment of the important bodily function is "serious." The issue is not whether the injury is serious but whether the impairment is serious. As courts have previously noted there is no absolute formula courts can rely upon to make such a determination. Each case must be decided on an individual basis. What comes out of the various cases is that 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 her employment. In focusing on this question I consider the position and condition of the Plaintiff subsequent to the accident. The impairment to the left wrist has not prevented her from proceeding in her schooling, from obtaining employment, or indeed from leading anything other than what appears to be normal day-to-day life. The evidence does not establish that she can no longer do things such as gardening, lift trays for employment, or swim, but that she experiences some degree of discomfort in doing so. In my view, the answer to the question as to whether the injury to the wrist can be considered serious is "no."

127 The issue then arises whether the scarring can be considered to be serious within the meaning of the section and the caselaw. As previously noted, the word serious relates to impairment and not to the injury. A serious impairment is one which causes substantial interference with the ability of the injured person to perform her usual daily activities or to continue her regular employment. Legislation and case law does recognize that while an impairment may be permanent and important, courts still must focus on the totality of the Plaintiff's circumstances and the cumulative affect of the injury on her life.

128 While I accept that there has been an embarrassing affect on this Plaintiff, particularly in view of the markings on the right side of her temple, it does not appear to have interfered with her normal, everyday life in any way. Again as I noted, she has continued to maintain employment, to maintain her schooling, and to engage in her everyday life activities. Her evidence is that she socializes, dates, and has even gone to the extent of providing her picture on the computer program Facebook. The evidence further discloses that she has acted as a bridesmaid in a wedding and worn an off the shoulder gown.

129 I further comment that in court she presented herself as a well spoken, attractive young woman, confident in herself and her abilities.

130 I am not satisfied that the Plaintiff has met the burden of discharging her onus that the injuries as a result of the scarring can be considered "serious."

131 Having reviewed the particulars of the injuries complained of I answer the three questions as follows:

(1) The injury to the wrist and the scarring to the left shoulder and the area of the right temple must be considered a permanent impairment.

(2) The permanent impairment to the left wrist and the scarring to the shoulder and the marks in the area of the right temple must be considered an important function.

(3) Neither the injury to the wrist, nor the injuries to the shoulder or the area of the right temple can be considered a serious impairment of an important bodily function.

132 Notwithstanding that I have dismissed the Plaintiff's claim in the event that I am in error on my interpretation of the law that the Plaintiff's claim does not come within the exception of s. 267.5(5), I nonetheless assess damages. I have previously commented that I do not consider that the loss of smell or taste can be attributable to this accident and I therefore assess damages on the basis of the injuries to the wrist and the scar on the shoulder and the markings on the right temple.

133 I assess those general damages in the amount of $55,000.

134 With respect to the Plaintiff's claim for damages for loss of future earning capacity, I am not satisfied that the evidence establishes there will be any such loss. The evidence only goes so far as to suggest that if she becomes a teacher it may be more inconvenient and more difficult for her to deal with the students but it does not establish in any way that there would be any economic consequence on her earning capacity. That claim is dismissed.

135 With respect to the *Family Law Act* claim, the evidence of Mrs. Goodridge is clearly her initial shock at seeing her daughter in the hospital. She subsequently describes that the first week following the accident while Stacey was at home she felt like a private nurse. There is also her evidence that Stacey is no longer able to participate in the same fashion as she did before in cooking or gardening with Mrs. Goodridge. I would assess her *Family Law* claim at $7,500.

136 Costs, if requested, may be addressed in writing. The Defendant may have 45 days to submit costs and the Plaintiff shall have 30 days to reply.

Footnotes

1 (1993), 15 O.R. (3d) 129 (Ont. C.A.).

2 [2000] O.J. No. 4188 (Ont. S.C.J.).

3 *Vandenberg v. Montgomery*, [1999] O.J. No. 2789 (Ont. S.C.J.); *Meyer v. Bright*, *supra* note 1 at p. 139-140.

4 *Supra* note 1 at p. 141-142.

5 *Snider v. Salerno* (2001), 58 O.R. (3d) 209 (Ont. S.C.J.); *Morrison v. Gravina*, [2001] O.J. No. 2060 (Ont. S.C.J.).

6 *Briggs v. Maybee*, [2001] O.J. No. 941 (Ont. S.C.J.) at para. 29.

7 (2006), 44 C.C.L.I. (4th) 243 (Ont. S.C.J.).

8 *Ibid.* at para. 23-24.

9 *Supra* note 1 at p. 142.

10 *Ibid.*

11 [2005] O.J. No. 2014 (Ont. S.C.J.).

12 (1997), 36 O.R. (3d) 257 (Ont. C.A.).

13 *Ibid.* at para. 1.

14 (1995), 16 M.V.R. (3d) 236 (Ont. Gen. Div.).

15 *Ibid.* at para. 11-12.

16 [2005] O.J. No. 4693 (Ont. S.C.J.).

17 *Ibid.* at para. 11.

18 *Supra* note 7.

19 *Supra* note 1 at p. 139-140.

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