

SUPREME COURT OF NOVA SCOTIA
Citation: Gillis v. MacKeigan, 2010 NSSC 109

Date: 20100406
Docket: Syd No. 262862
Registry: Sydney

Between:

John Lloyd Gillis

Plaintiff

v.

David MacKeigan Jr.

Defendant

ADDENDUM

to Decision dated January 25, 2010 (2010 NSSC 22)

Judge: The Honourable Justice Frank Edwards

Heard: January 12, 2010

**Final Written
Submissions:** February 22, 2010

Counsel: Derrick J. Kimball and Nash T. Brogan, for the plaintiff
No one appearing for the defendant

By the Court:

[1] This is an addendum to a decision made by me on January 25, 2010.

[2] The matter had come before me as an assessment of damages following a default judgment. The Defendant was not represented. I proceeded to do the assessment of damages in his absence. I awarded the Plaintiff \$75,000.00 in general damages plus prejudgment interest of \$8,437.50.

[3] Prior to signing the final order, it occurred to me that the matter may be subject to the \$2,500.00 cap under the regulations pursuant to Section 113B(4) of the *Insurance Act*.

[4] I contacted Counsel and made him aware of my concern. I invited Counsel to submit a post-hearing brief on the issue which he did on February 22, 2010.

[5] Normally, this matter would have been dealt with by way of pre-trial motion under Section 113B(6). Under Section 113B(8), Counsel agrees that I can now make the determination of whether or not the Plaintiff has suffered a “minor injury” and therefore whether or not the cap applies.

[6] The relevant provisions of the *Insurance Act and Regulations* are as follows:

The Insurance Act

Limitation on liability

113B (1) In this Section,

(a) "*minor injury*" means a personal injury that

(i) does not result in a permanent serious disfigurement,

(ii) does not result in a permanent serious impairment of an important bodily function caused by a continuing injury which is physical in nature, and

(iii) resolves within twelve months following the accident;

(b) "serious impairment" means an impairment that causes substantial interference with a person's ability to perform their usual daily activities or their regular employment.

* * *

(4) Notwithstanding any enactment or any rule of law, but subject to subsection (6), the owner, operator or occupants of an automobile, any person present at the incident and any person who is or may be vicariously liable with respect to any of them, are only liable in an action in the Province for damages for any award for pain and suffering or any other non-monetary loss from bodily injury or death arising directly or indirectly from the use or operation of the automobile for a minor injury to the amount prescribed in the regulations.

* * *

(6) In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, a judge shall, on motion made before trial with the consent of the parties or in accordance with an order of a judge who conducts a pre-trial conference, determine, for the purpose of subsection (4), whether, as a result of the use or operation of the automobile, the injured person has suffered a minor injury.

(7) The determination of a judge on a motion under subsection (6) is binding on the parties at the trial.

(8) Where no motion is made under subsection (6), the judge shall determine for the purpose of this Section whether, as a result of the use or operation of the automobile, the injured person has suffered a minor injury.

The Automobile Insurance Tort Recovery Limitation Regulations

Definitions for purposes of Section 113B of ***Insurance Act***

2 (1) For the purposes of Section 113B of the Insurance Act and these regulations,

(d) ***"personal injury" does not include***

(I) a coma resulting in a continuing serious impairment of an important bodily function,

(ii) ***chronic pain that***

(A) is diagnosed and established as chronic pain by a medical specialist appropriately trained in the diagnosis and management of pain disorders,

(B) is a direct result of a physical injury sustained in the motor vehicle accident with respect to which the claim is brought,

(C) results in a continuous serious-impairment of an important bodily function, and

(D) is moderately severe or severe pain, as classified in the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th edition,

(iii) a burn resulting in serious disfigurement,

(iv) an amputation of a major limb;

* * *

(f) "resolves" means

(I) does not cause or ceases to cause a serious impairment of an important bodily function which results from a continuing injury of a physical nature to produce substantial interference with the person's ability to perform their usual daily activities or their regular employment, or

(ii) causes a serious impairment which results from a continuing injury of a physical nature to produce substantial interference with a person's ability to perform their usual daily activities or their regular employment where the person has not sought and complied with all reasonable treatment recommendations of a medical practitioner trained and experienced in the assessment and treatment of the personal injury;

(g) "substantial interference" means, with respect to a person's ability to perform their regular employment, that the person is unable to perform, after reasonable accommodation by the person or the person's employer for the personal injury and reasonable efforts by the injured person to adjust to the

accommodation, the essential elements of the activities required by the person's pre-accident employment;

(h) "usual daily activities" means the essential elements of the activities that are necessary for the person's provision of their own care and are important to people who are similarly situated considering, among other things, the injured person's age.

* * *

Total amount recoverable for non-monetary losses

3 For the purpose of subsection 113B(4) of the *Insurance Act*, ***the total amount recoverable as damages for non-monetary losses of a plaintiff for all minor injuries suffered by the plaintiff as a result of an incident must not exceed \$2,500.***

* * *

Onus to prove injury not minor injury

5 On a determination of whether an injury is a minor injury under subsection 113B(6) or (8) of the Act, ***the onus is on the injured party to prove***, based upon the evidence of one or more medical practitioners trained and experienced in the assessment and treatment of the personal injury, ***that the injury is not a minor injury.***

(8) Where no motion is made under subsection (6), the judge shall determine for the purpose of this Section whether, as a result of the use or operation of the automobile, the injured person has suffered a minor injury. (Emphasis mine)

[7] *Analysis:* Clearly, the Plaintiff is required to prove that the *personal injury* he has suffered is not a “minor injury” as defined by the *Act*. The Plaintiff must therefore first prove that he has suffered a “personal injury” which has not been excluded by the legislation.

[8] Counsel agrees that the Plaintiff suffers from chronic pain that “may well fit within the definition of chronic pain as described in the regulation”. However, he goes on to say that “... no attempt was made to prove chronic pain in the manner required in that subsection ...”. In the result (he argues), Mr. Gillis’ injuries would be considered to be “personal injuries within the meaning of the *Act*”. I respectfully do not agree.

[9] It is not relevant that no attempt was made at the January 12, 2010 hearing “to prove chronic pain in the manner required in that subsection”. The onus is now on the Plaintiff to prove that his chronic pain is not excluded by Section 2(1)(d) of the regulations. The Plaintiff has failed to do that.

[10] Accordingly, and with regret, I am obliged to reduce the award for general damages to \$2,500.00 with prejudgment interest (for 4.5 years at 2.5 percent) of

\$281.25. My previous awards for care costs and valuable services remain unchanged. I am reducing the costs by one half to \$3,000.00.

[11] Revised Summary:

General Damages		\$ 2,500.00
PJI		281.25
Care Costs:	past	1,604.43
	Future	7,207.98
Valuable Services:	past	13,650.00
	Future	<u>27,039.40</u>
	Subtotal	52,283.06
Costs + Disbursements		<u>7,910.81</u>
	Total	\$60,193.87

Order accordingly.

J.