

## THE BILL 198 THRESHOLD – THE FIRST CLUES

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By Richard Horak

In the recently released decision in *Nissan v. McNamee*, a decision long-awaited by the insurance industry and the profession, Madam Justice Morissette has provided us with the first clues as to how the Bill 198 threshold (Ontario Regulation 381/03) is to be interpreted. In her view, not much has changed since Bill 59; until some direction is given by the Court of Appeal, we will have to wait and see if other trial judges follow the lead taken by Justice Morissette.

From the perspective of Justice Morissette, the "ultimate question" is whether the defining Regulation was intended by the legislature to substantially reduce the number of personal injury claims or whether it was simply an attempt to codify the existing case law, more specifically the seminal decision of the Court of Appeal in *Meyer v. Bright* (1993) 15 O.R. (3d) 129.

After noting this, she engaged in a lengthy analysis as to principles of statutory interpretation. After considering the submissions made by counsel on statutory interpretation, Justice Morissette concluded that the presumption against implicit alteration of law was applicable, noting that the new Regulation did not change anything previously found in the existing Regulation or the *Insurance Act*, but rather added definitions. She felt that "efforts to reframe the broad approaches that have been applied since *Meyer*, should be resisted".

Justice Morissette adopted statements from the Court of Appeal decision in *Meyer*, indicating that "it is impossible to lay down any general guidelines" and that "each case will essentially be one of fact". She noted that the defining regulation did not analyze the situation as the court did in *Meyer*; in *Meyer* the last question was whether the impairment was

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## Noteworthy

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serious, but in the new regulation, this was the first question.

Against this background of statutory interpretation, Justice Morissette then went on to consider the three aspects of the new Regulation ("serious, important and permanent").

### Serious

After indicating that the word "serious" is not expressly defined, Justice Morissette noted that the effect of Section 4.2(1)1 is to do just that. The three subsections consider how the impairment affects employment, training and daily living.

With respect to employment and training, Justice Morissette noted the reference to "accommodation" and "reasonable efforts". She equated accommodation with mitigation, but acknowledged that the addition in the Regulation of references to accommodation "suggest a slight change. It raises the threshold for Plaintiffs, but in my opinion, only does so modestly ...". She found that the provision added a positive obligation on Plaintiffs to make reasonable efforts to use accommodation measures. She rejected the argument put forward by defence counsel that the introduction of reason-

ableness suggested a more objective standard; in her view, the wording required the Plaintiff to adduce some evidence to show what "reasonable efforts" had been made by the Plaintiff with respect to the accommodations provided, if any.

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

In considering the "daily living" aspect of the test, Justice Morissette concluded that the specific reference to age did not amount to any actual change, as case law suggested

that age had been considered previously. In her view the most significant change was the addition of the word "most" to modify "daily activities". This suggested a quantitative analysis. It is not enough that an impairment substantially interfere with "some" activities of daily living, but rather there must be a "full consideration of the import of the activities that have been interfered with".

### Important

Section 4.2(1)2 provides a more explicit definition of "important". Justice Morissette felt the definition was largely consistent with the ruling in *Meyer v. Bright*, in that the importance of a bodily function must be considered in terms of its importance to the individual Plaintiff. It was agreed by the Defendant that "the court must consider the effect the relevant bodily function has upon the Plaintiff's way of life in the broadest sense". The comments she had made earlier regarding "accommodation, reasonable and age" remained applicable.

### Permanent

Section 4.2(1)3 provides a definition of permanent. All three criteria in the Section must be satisfied. In consid-

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ering whether there is a "continuous" impairment, Justice Morissette noted that this may not necessarily be the same as an "unbroken chain" of impairment. She felt that the affect of the Section was to require that the impairment remain serious permanently and concluded that "intermittence should speak to severity, rather than to permanence". She accepted the submission of counsel for the Plaintiff that subsection 3(i) is a codification of the existing case law.

Justice Morissette then went on to consider subsection 3 (iii) and in particular the phrase "persons in similar circumstances". She felt that this suggested a mixed subjective-objective approach. She accepted the submission of counsel for the Plaintiff that chronic pain sufferers may only be compared with other individuals who have developed chronic pain, rather than to individuals who have recovered from an injury without developing chronic symptoms.

#### Conclusion of Justice Morissette

Justice Morissette indicated that most of the Regulation did not appear to support any significant change, but at best suggested some clarification of the law regarding accommodation. The only exception to

this was the addition of the word "most" in the subsection dealing with daily living.

She also rejected the Defendant's contention that the express requirements for proof suggest a higher standard as to the threshold itself; in her view, the focus was on the source of the evidence (a physician), rather than the standard.

"Efforts to reframe the broad approaches that have been applied since *Meyer* should be resisted."

#### Application of the Threshold to the Plaintiff

Interestingly, Justice Morissette concluded that the Plaintiff failed to meet the threshold. Surveillance evidence introduced at trial called into question the Plaintiff's credibility and Justice Morissette found that the Plaintiff had misled her health care professionals. She accepted the medical evidence led by the Defendant to the effect that the Plaintiff's complaints did not prevent her from returning to employment and there was no impairment that "substantially interfered with

most of her usual activities of daily living". Accordingly as the Plaintiff had failed to satisfy any of the subsections of Section 4.2(1)1, it was not necessary to engage in any analysis under Section 4.2(1)2 or 3.

#### Our Analysis

While Justice Morissette found that the Plaintiff failed to surpass the threshold (interestingly, the jury awarded nothing to the Plaintiff for general or special damages) the analysis put forward by Justice Morissette will be disappointing for those who hoped that the courts would conclude that the legislative amendments would result in a much "stricter" interpretation of the threshold, which would result in more Plaintiffs failing to surpass the threshold. We will now have to wait and see if other trial judges take a similar approach to that taken by Justice Morissette.

More clues to follow shortly.

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