CITATION: Bruff-Murphy v. Gunawardena, 2016 ONSC 7
COURT FILE NO.: 10-CV-49613
DATE: 2016/01/05

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
CALLUM BRUFF-MURPHY and HOPE BRUFF-MCARTHUR by their Litigation Guardian LIESE BRUFF-MCARTHUR, LIESE BRUFF-MCARTHUR personally, and RICHARD MCARTHUR	)	Brenda Hollingsworth and Bianca Bielecki, for the Plaintiffs
Plaintiffs	)	
– and –	)	
NELONI GUNAWARDENA	)	Daniel Reisler and Teresa-Anne Martin, for the Defendant
Defendant	)	
	)	**HEARD:** December 9, 2015 (at Ottawa)

DECISION ON DEFENCE THRESHOLD MOTION

KANE J.

[1] The defendant brought this threshold motion following final instructions to the jury for an order striking the claim of Ms. Bruff-McArthur for general damages on the basis she has failed to prove she suffered permanent serious impairment of an important physical, mental or psychological function pursuant to s. 267.5(5) of the *Insurance Act*, R.S.O. 1990 Chapter I.8, as amended, including Ontario Regulation 381/03 thereunder.

MVA

[2] It is agreed that on October 14, 2008, the defendant while driving her motor vehicle drove into the rear of the plaintiff's motor vehicle which was momentarily stopped and being driven by the plaintiff (the "MVA").

[3] The defendant in this trial acknowledges responsibility for causing the MVA collision.

Position of The Parties

[4] The plaintiff now in her mid-thirties, alleges injury in the MVA consisting of:

(a) Myofascial (soft tissue) injuries to her neck, right shoulder and back;

(b) Radiating pain into her hip and right leg as well as headaches around her right ear and right eye;

(c) Musculoskeletal impairments since 2008;

(d) Major depressive disorder that is currently "moderate";

(e) Post-traumatic stress disorder ("PTSD"); and

(f) A pain disorder (somatic symptom disorder).

[5] The plaintiff testified that the above injuries were caused by and have existed since the MVA and that such injuries have caused her continuous severe pain requiring medication, anxiety, depression, limited her physical capacity, limited her range of motion which impairs her ability in the home, with her husband, children and friends and has prevented her to continue her former employment or other employment.

[6] The plaintiff alleges her current level of injury and impairment is permanent.

[7] The defendant acknowledges that the plaintiff in the MVA suffered uncomplicated muscle strain injuries to the neck, the right shoulder area, mid back and lower back regions. The defendant submits the plaintiff has fully recovered from such MVA injuries.

[8] The defendant submits the plaintiff's alleged complaints as to her injuries and impairment from the MVA are the same conditions she reported over many years before October 2008 and are not caused by the MVA.

Plaintiff's Prior Medical History

[9] The plaintiff then in her mid to late thirties had numerous issues and events in her life prior to this MVA. They included several injuries, a number of personal issues, some 7 miscarriages and severe vomiting during her last pregnancy.

[10] The plaintiff's son was born in 1998 and is now 17. That was followed by an acrimonious separation with her first husband. The plaintiff then started a new relationship with her current husband. Numerous miscarriages then occurred.

[11] The plaintiff was 7 months pregnant with her daughter at the time of the MVA. Her daughter was born in December 2008 shortly after the MVA and is now 7 years old.

[12] The plaintiff's family doctor since she was 15 years of age in 1991, is Dr. Tobin. His clinical notes contain his observations and treatment of the plaintiff before and after the MVA.

[13] The defendant's psychiatric expert, Dr. Bail quotes extensively from the pre-MVA clinical notations of Dr. Tobin to evidence alleged contradictions between what the plaintiff allegedly told Dr. Bail during his IME about her medical history versus these clinical notations to support his report conclusion that she is not credible and suffered no permanent, serious impairment of an important physical, mental or psychological function as a result of the MVA.

MVA Accident

[14] The evidence about the MVA indicates:

(a) The plaintiff was stopped in her car at an intersection. The defendant's car while travelling at 40 km/hour, drove into the rear of the plaintiff's SUV.

(b) The plaintiff complained immediately of back pain and fear as to the impact and health of her fetus.

(c) The plaintiff was removed from her vehicle on a stretcher via her back door by attendants and taken via ambulance to the hospital, released later that day and advised that evening that blood tests indicated no placental tearing of the placenta.

(d) The cost to repair the rear of the plaintiff's SUV was approximately $2,900. The defendant's vehicle due to the damage to it was written off. The reporting police officer as to the severity of the collision described it as moderate.

Severity Of Injuries From MVA

[15] The plaintiff alleges that the MVA caused her soft tissue injuries to her neck, right shoulder and back, radiating pain into her hip and right leg, headaches, musculoskeletal impairments, major depressive disorder currently moderate, PTSD and pain disorder which has debilitated her since the MVA and will continue in the future.

[16] The defendant, while accepting responsibility for the accident and some resulting injury to the plaintiff, argued that the collision only caused uncomplicated muscle strain injuries to the neck, the right shoulder area, mid back and lower back regions and alleges the plaintiff has fully recovered from those injuries.

[17] The defendant alleged that the plaintiff has failed to mitigate her damages as she has failed to return to her former employment, failed to seek alternative employment and failed to follow the advice of her doctors since the MVA.

[18] In 2010, the plaintiff returned to her job at Rogers but was unable to complete a 2-week retraining program due to her reported level of pain, inability to focus on her responsibilities and inability to attend work throughout each day.

[19] The plaintiff then obtained seasonal employment at Fairweather where she worked a short time as a floor sales agent. Her girlfriend hired her for this position, hoped it would lead to a full time position and then terminated the plaintiff because she was unable to perform the tasks of a floor sales representative.

[20] The defendant submitted to the jury and in argument of this motion that the plaintiff is a malingerer, is falsely reporting her injuries and limitations in relation to the MVA and lacks credibility.

[21] In argument of this motion, the defence states this case comes down to a determination whether the plaintiff is telling the truth and submits she is not. Her reporting of her conditions since the MVA is untrue and is motivated for financial gain it is submitted.

[22] The defence is correct that the testimony of the plaintiff raises questions as to the level of her MVA injuries and impairment in relation to her prior medical history, if that evaluation is done in isolation of the other evidence. The plaintiff's pre-MVA medical records indicate frequent but not continuous complaints of back pain, neck pain and anxiety by someone who saw her family doctor frequently between 1991 and 2008 before this MVA. The additional difficulty with this defence argument is the increased severity, continuous duration and the level and nature of limitations reported and diagnosed since the MVA.

[23] The evaluation of the merits of this claim cannot be restricted to an evaluation of the plaintiff's testimony and her pre-MVA reporting of symptoms to health care professionals. That evaluation must include the medical evidence presented by each party.

Medical Evidence As To Extent Of Injuries And Level Of Impairment

[24] The parties presented conflicting medical evidence as to the nature, extent and duration of the injuries suffered in this MVA.

[25] To determine that the plaintiff's reporting of her condition since the MVA, her ongoing limitations and that she is not credible, requires a determination that the evidence of the many health care specialists who have examined and/or treated her since the MVA, and the testimony of her husband and friends as to what she was like before and since the MVA, must be rejected.

[26] I find the medical evidence presented by the plaintiff more relevant, accurate and credible compared to the two medical witnesses presented by the defendant. The plaintiff's medical evidence is corroborated by the evidence of her spouse and two friends.

[27] The defendant did not testify. The defence had two independent medical examinations ("IME") conducted and called the two doctors who performed them.

Plaintiff's Medical Evidence

[28] Dr. Finestone testified as the treating and expert physiatrist for the plaintiff and stated:

(a) He first saw the plaintiff in March 2009, did an examination of her and based on that, recommended she needed treatment including homemaking support, occupational therapy and physiotherapy. She was not then doing well.

(b) He saw her one year later in March 2010. He concluded there was a continuation of myofascial pain in her neck, shoulder and ligaments. Social factors existed which may be delaying recovery which she needed to discuss with a psychologist.

He recommended a physical trainer. He then felt that her problem was physical, not psychological.

(c) He testified that 80% of back pain has no objective findings. He was of the opinion that her case history was not going well and treatments were not resolving the pain which lead him to question whether other factors like stress were retarding her recovery. His primary diagnosis that day was muscle ligament strain (pulled) of her neck and buttock and she met the criteria for fibromyalgia.

(d) He examined the plaintiff again in February and May 2011 as well as February of 2012.

(e) He performed an examination of the plaintiff in December 2013 at the request of her legal counsel. He diagnosed her as having whiplash associated disorder at Level 2, fibromyalgia, PTSD, depression, and pain in her back side including her back, neck and shoulder.

(f) His opinion in 2013 and 2015 is that the plaintiff had post-traumatic myofascial pain after the MVA, pain in her muscles around the neck, the shoulder blade and next to her spine in her back. Her headaches are post traumatic neck derived headaches.

(g) She has PTSD mood and stress disorder. She meets the criteria of fibromyalgia including diffuse pain with fatigue and fuzzy thinking. He stated that but for this MVA, it is unlikely she would be experiencing these symptoms.

[29] Dr. Finestone testified that his diagnosis is not based on the plaintiff's description of pain. Look/Feel/Move and palpation are important parts of the examination he conducted.

[30] His opinion is that:

(a) The plaintiff's prognosis is not good. Her psychological treatment and her exercise trainer will be required for years. Medication may also be required for mood, sleep and pain.

(b) She has physical limitations as to repetitive bending, twisting, lifting, pushing and long standing and walking. Those restrictions impair her duties re housekeeping. He doubts she can do much.

[31] Dr. Finestone testified that the plaintiff's past history with miscarriages and being 7 months pregnant at the time of the MVA, combined with a difficult past, made her fragile and thereby impaired her ability to recover. These elements made her more susceptible to injury in this MVA.

[32] Dr. Finestone:

(a) Agreed the plaintiff had some similar symptoms before the MVA;

(b) Stated her condition post MVA was dramatically worse;

(c) Does not consider fibromyalgia as the primary or major element of his diagnosis;

(d) Stated the plaintiff now suffers from PTSD and myofascial pain, not just pain;

(e) Stated that most people with her condition in time recover, however some do not.

[33] The psychiatrist, Dr. Booth did an IME of the plaintiff in 2011 for an insurer over 1.5 hours during which he conducted six tests. He diagnosed the plaintiff:

- With a major depression disorder, affecting her sleep, a focus on negative future possible events, having low energy, low motivation, poor focus, varying speed of thought and with suicidal thoughts.
- Possible PTSD following what the patient considered do to be a traumatic event, including her subsequently re-experiencing that event; and social withdrawal with the "fight or flight" symptom.
- On the MINS TEST he conducted to consider possible malingering or possible overstatement, faking bad or making up problems, her test results indicated that she was presenting in a forthright manner.
- The clinical evaluations do not support this person as complaining for secondary gain.
- The test results indicated she was presenting in a forthcoming manner and the clinical evaluations do not substantiate the position that the plaintiff is complaining to gain.
- His 2011 conclusions were a snap shot of her experience and condition up to 2011, as he had a lot of past information about her.

[34] Dr. Quan testified as the psychiatric expert for the plaintiff. His evidence is to be compared to the psychiatrist Dr. Bail called by the defence.

[35] Dr. Quan met the plaintiff twice in March 2014 for 2.5 to 3 hours and then again once in 2015. He stated that during his interview with the plaintiff she was restless sitting and standing. She could recall a 7 digit number with difficulty, so her level of concentration was mildly affected.

[36] In 2014, he conducted a mental health examination of the plaintiff which included several tests and his evaluation. He testified that in his opinion:

(a) The plaintiff has clear evidence of PTSD, symptoms of pain disorder and depression.

(b) The Hamilton Depression Scale indicated she was above the severe level and therefore had severe depression, and this was with medication.

(c) The PCL-C test used to detect PTSD showed she continued to be severely affected by PTSD disorder.

(d) She had passive suicidal thoughts.

(e) The disability assessment by the World Health Test indicated she was high to moderately disable.

(f) Her comportment with him matched her test results.

(g) The plaintiff's predisposition to depression was the MVA which created fear for her child and the then accompanying stomach pains and fear which consumed her. The MVA caused her current conditions.

[37] Dr. Quan saw the plaintiff again in May 2015 and had additional medical records from her GP, psychiatrist, psychologist and occupational therapist. That extensive level of treatment then being provided in his opinion was appropriate.

[38] Dr. Quan testified that his 2015 opinion was that:

(a) The plaintiff showed moderate improvement since 2014.

(b) She was moderately depressed.

(c) Her PTSD condition had improved only slightly.

(d) There was some moderate improvement in her level of disability.

(e) She was then unable to return to work and the future possibility of that is very doubtful given the length of time since the MVA and the slow level of improvement.

(f) The 2008 accident commenced this whole series of conditions in the plaintiff.

[39] The qualifications of Dr. Quan, including his peer review publications, as an associated professor in a medical faculty and his teaching role in a teaching hospital all exceed that of the psychiatrist, Dr. Bail, called by the defence. The court had no concern as to Dr. Quan regarding his objectivity and fairness in his testimony, as required under R. 4.1.01. The reverse is true as to Dr. Bail's testimony.

[40] Dr. Seatter is a psychologist and testified as an expert on the subjects of depression and PTSD. He had performed an IMA for an insurance company as to what level of care if any the plaintiff required in relation to the MVA.

[41] Dr. Seatter met the plaintiff once for 2 hours during which he conducted testing and his assessment. The plaintiff sat during this time and shifted while sitting.

[42] A number of tests he conducted included embedded questions to test for possible overstatement of her condition.

[43] Dr. Seatter's opinion in 2010 was that the plaintiff suffered from:

(a) PTSD from which some people recover in 3 to 4 months while others do not recover;

(b) Pain disorder associated with psychological factors and medical condition;

(c) PTSD related depressive disorder symptoms as disclosed in the interview and on testing from trauma, living on alert and regular reminders;

(d) Vehicle related anxiety symptoms;

(e) No diagnosis of a personality disorder. She had some dependency and some histrionic features. People in pain however do not present in their best behaviour. Dependency can be elevated perhaps if you need a lot of medical care. She was not histrionic;

(f) His 2010 prognosis for recovery was fair, given the severity of the symptoms and the lengthy period since the MVA;

(g) In his 2010 report to the insurance company, he stated the plaintiff did not require attendant care as a result of the MVA, no attendant care for assistance around the home because she had 4 health care providers around her, did not require care to protect herself, her children and could be left alone with the children; and

(h) She in 2010 did not suffer a substantial care giving ability as compared to that ability before the MVA as to the care of her older son.

[44] Dr. Seatter testified that:

(a) The intensity of the trauma incident is an important factor but that must be considered in light of the surrounding circumstances. A serious trauma can occur even with a sprained thumb, if that occurred in an elevator when you are being attacked.

(b) Based on the ambulance and hospital records as to the nature of this collision and the plaintiff's recorded condition following it, he disagreed that this collision could not lead to the plaintiff suffering from PTSD for years.

(c) Understanding mental conditions, internal pain and thinking are not matters which can be seen but they exist.

(d) He administered the SIMS test, a specific test to gauge for possible malingering by the plaintiff. He said he and others have stopped using the SIMS test because it showed too many false positives. The plaintiff was above the cut off on this test, namely positive, but that did not impact his conclusions because of the other tests which included embedded questions to test her veracity. He concluded that she appeared to be telling the truth about her symptoms and fit within standard norms.

[45] The above evidence is corroborated by the testimony and testing done by Dr. Arora as the treating psychiatrist, Dr. Duong as treating psychologist and Dr. Morrison and L. Daly occupational therapists. In summary, their evidence as to the plaintiff indicated that:

(a) Due to the MVA, she suffered and continues to suffer from myofascial pain in her muscles around the neck, the shoulder blade and next to her spine in her back as well as post traumatic neck derived headaches.

(b) Her predisposition to injury was the MVA which created fear for her as to her 7th month old fetus, accompanying stomach pains and that fear consumed her.

(c) She is disabled. Her level of disability has shown moderate improvement.

(d) She has physical limitations as to repetitive bending, twisting, lifting, pushing and long standing and walking which impair her duties at home.

(e) She had and has PTSD mood and stress disorder, meets the criteria of fibromyalgia including diffuse pain with fatigue and fuzzy thinking. She tested as having severe depression. He states she is moderately depressed. But for this MVA, it is unlikely she would be experiencing these symptoms.

(f) Her test results correspond to her information and indicate she has serious symptoms or serious impairment in social and occupational function. Her PTSD condition has improved only slightly. Her psychological status has shown moderate improvement.

(g) The 2008 MVA commenced this whole series of conditions in the plaintiff.

(h) Her prognosis is not good. Psychological treatment, exercise trainer, as well as medication for mood, sleep and pain may be required for years.

(i) It is doubted she is capable of doing much.

(j) Her future possibility of returning to work is very doubtful given the length of time since the MVA and her slow level of improvement.

[46] Considered in isolation, the above medical evidence presented by the plaintiff lends credibility to the plaintiff's testimony as to her injuries and level of impairment as a result of this MVA, namely that she has suffered permanent, serious impairment of her mental and psychological capabilities. That evidence is corroborated by the testimony of the plaintiff's husband and two friends as to her condition since the MVA.

[47] Such evidence however must be considered in light of the contradictory medical evidence presented by the defendant.

Defendant's Medical Evidence

[48] In response to the above evidence presented by the plaintiff, the defence called two doctors who conducted a defence examination of the plaintiff, were qualified as experts and gave opinion evidence. They are:

(a) Dr. Maistrelli, orthopedic surgeon; and

(b) Dr. Bail, psychiatrist.

Dr. Maistrelli

[49] Dr. Maistrelli is an orthopedic surgeon. He conducted a medical examination of the plaintiff in that capacity and testified for the defendant that:

(a) He always reviews the clinical records of the person before conducting an IME, as that helps in conducting the assessment;

(b) There was no musculoskeletal or pathological finding to indicate physical impairment of the plaintiff;

(c) There must be a medical reason to explain pain;

(d) Pain is a perception of the person and is not evidence based medicine;

(e) The plaintiff's reporting to him that she felt pain when he lightly touched her skin, has no scientific basis;

(f) In 2015, chronic pain is not accepted in the medical community except by those who have vested interest in that area of medicine;

(g) Soft tissue injury to the neck or back causes pain but recovery from that should be within weeks. Some people however do not recover from soft tissue injury and the reason for that is unexplainable. Bio-medical evidence cannot explain it. There may be other reasons for such instances of continuing pain, but he cannot explain it;

(h) He does not complete disability questionnaires and there is no medical validation of such questionnaires; and

(i) He is not suggesting that the plaintiff is faking. He will leave that up to the psychologists.

[50] The plaintiff and her medical witnesses did not allege she suffered an injury to her bones, joints, ligaments or a full or partial tear to her muscles. With respect to Dr. Maistrelli, his evidence was not relevant to the nature of the injuries suffered by this plaintiff.

[51] Medical and legal thinking as reflected in jurisprudence, has moved beyond a belief that "unless you can see or feel an injury, there is no injury". Such outdated hypothesis however may

be one of the reasons for the current popularity by defendants as in this case to select trial by jury in the hope the jury might accept this outdated argument.

[52] Given the above admissions in subparagraphs (g) and (i) above by Dr. Maistrelli, his testimony was not relevant.

Dr. M. Bail

Qualifications As Expert Witness

[53] Unlike Dr. Maistrelli and numerous medical doctors and experts called by the plaintiff, Dr. Bail is of the belief that the plaintiff is faking and is not credible in her description of her injuries and incapacity as a result of the MVA.

[54] The plaintiff during the trial sought to prevent Dr. Bail from testifying as an expert on the basis of bias as evidenced in his expert's report and several reported decisions which held that Dr. Bail had:

(a) Become an advocate for the party calling him as a witness which is not the role of an expert: *Morrison v. Greig*, 2007 CarswellOnt 343; [2007] O.J. No. 225 (ONSC) paras. 47-48.

(b) Appropriated the role of advocate of the insurer rather than an impartial witness. His partisan approach and focus on inconsistencies are troubling, seriously weaken his credibility and weight of his testimony which should be disregarded: *Gabremichael v. Zurich Insurance Co.*, [1999] O.F.S.C.I.D. No. 198, paras. 31-33.

(c) Presented as a notably partisan witness: *Sohi v. ING Insurance Co. of Canada*, [2004] O.F.S.C.D. No. 106, para. 38.

[55] On the authority of *R. v. Karaibrahimovic*, 2002 ABCA 102 paras. 7-8; *R. v. Ghorvei* (1999), 46 O.R. (3d) 63 (ONCA), para. 31 and *Desbiens v. Mordini*, [2004] O.J. No. 4735, paras. 273-274, I ruled Dr. Bail could not be cross-examined as to these prior court determinations rejecting his testimony and role as an expert witness in those cases.

Dr. Bail's Expert Report

[56] During argument of the plaintiff's objection to Dr. Bail testifying as an expert, I expressed concern upon reading Dr. Bail's report as to what appeared to be an adversarial format and some of the content of the report. My concern was whether Dr. Bail's testimony would be fair, objective, non-adversarial and be limited to his capacity as a psychiatrist.

[57] The plaintiff chose to argue this objection on the basis of Dr. Bail's report and case law. She waived the need of Dr. Bail testifying in a *voir dire*.

[58] Notwithstanding the concern as to Dr. Bail's report, this court felt restricted and compelled to accept this witness as an expert to give opinion evidence, subject to deletion of

portions of his report which the court refused to allow him to express in the terms written, because:

(a) Dr. Bail had not yet testified in any form; and

(b) The very high threshold before a court may exclude expert testimony for bias established by the Supreme Court in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182, paras. 48-49.

Analysis of Dr. Bail's Testimony

[59] Dr. Bail testified that since 1989, he had conducted some 5,500 IME, charging approximately $5,000 or more per assessment. All but a few dozen of those were conducted for defendants. He currently does on average 7 to 14 IMEs per month. IMEs, primarily for defendants or their insurance companies are a large part of Dr. Bail's practice.

[60] Dr. Bail in his report and testimony concluded that:

(a) The plaintiff did not develop any psychiatric disorders or limitations as a result of the MVA;

(b) She required no psychotherapy or psychotropic medication in relation to the MVA;

(c) Her pre-MVA psychiatric profile was not exacerbated or made worse by the MVA;

(d) Her psychiatric diagnosis is as good as it would have been had the MVA not occurred; and

(e) Psychiatrically, she does not require housekeeping or attendant care.

[61] Dr. Bail's testimony and role in this case fell far short of his obligation to be fair, objective and non-partisan as required under R. 4.1.01, requirements he undertook in writing to meet.

[62] Dr. Bail interviewed the plaintiff once in August 2013 for 1 hour and 15 minutes. That was some five years after the MVA. He testified he interviewed her without first reading any of her medical reports which he had received one month before the interview. That is unlike the practice of Dr. Maistrelli for the defence who testified he reviewed the medical files before meeting with the person.

[63] Dr. Bail testified that after this single interview of the plaintiff, he then spent 10 to 12 hours reviewing the plaintiff's medical files sent to him one month before.

[64] Dr. Bail testified in conducting an IME, he does not accept what the person being assessed says due to their possibility of seeking secondary gain. He at the same time has a financial incentive in repeatedly being engaged to conduct IMEs by defendants.

[65] He testified that his job is to determine whether the person's description of their condition is accurate and he makes a diagnosis based on that. He stated that he explores and follows up leads to see if what they are telling him is truthful. He stated his responsibility is to critically assess and determine whether their claims are *bona fide*. A private investigator hired by the defendant might similarly describe their mandate.

[66] In his report, Dr. Bail quotes the plaintiff allegedly telling him that before the MVA:

(a) She never had any significant aching or pain in her neck, back, arms, legs or joints, just regular pain;

(b) She never had headaches or dizziness;

(c) Beyond normal grief following her many miscarriages, she never experienced depression, anxiety attacks or sleep difficulties other than sleep difficulties during her last pregnancy in 2008;

(d) She had never received antidepressants, antianxiety or sleep medication; and

(e) "For years, I was fine before the accident".

[67] The plaintiff's pre-MVA clinical records over six years contain numerous notations with words including anxiety, depression, neck pain, chronic back pain, sleeping difficulty, and dizziness. Prior to meeting Dr. Bail, the plaintiff had attended several prior IMEs, including psychiatrists, for insurers or benefit providers which had largely validated her reported impairment claims.

[68] Ten of the twenty pages of Dr. Bail's report are excerpts of words or phrases from the clinical notes of the plaintiff's family doctor made during six years before the MVA. Dr. Bail cites these excerpts for 10 pages in his report as contradicting his allegation that the plaintiff told him she had no pre-MVA symptoms similar to her described conditions since the MVA. The vast portion of his testimony in chief consisted of Dr. Bail telling the jury about these prior medical notations and how they contradict what the plaintiff allegedly told him in his interview.

[69] The only semi-psychiatric element of Dr. Bail's report is entitled "Mental Status Examination" which consumes one half a page of the 20 page report.

[70] Had Dr. Bail read any of the plaintiff's medical records before interviewing her, he would have known her medical records during the six years before the MVA contained numerous periodic notations of anxiety, neck and back pain and prescriptions in relation to the same. In order to be fair and objective, someone like Dr. Bail would have asked the plaintiff why her verbal reporting of her prior medical condition was so vastly different from her prior medical records. Dr. Bail could not do that because his alleged "methodology" in conducting IMEs is to not read such medical records before the interview. When asked why, unlike other physicians, he does not read the medical records before the IME interview, Dr. Bail responded that some people scheduled for IMEs do not attend.

[71] After reading the plaintiff's medical records after her interview and noting the apparent discrepancies as to her pre-MVA condition reporting, Dr. Bail then chose to not contact the plaintiff and obtain her response in relation thereto. Finding and reporting the alleged discrepancies in the mind of Dr. Bail, completed his retainer by the defendant. I disagree that concludes the obligation of an expert witness in the face of his obligations under R. 4.01.1.

[72] The above alleged statements by the plaintiff that she had told Dr. Bail she had no prior similar symptoms and had been fine for years before this MVA were not put to her directly in cross-examination.

[73] Dr. Bail testified that he discarded any notes he may have made during his interview of the plaintiff as to what the plaintiff allegedly told him. His only record of her comments is contained in his report dictated after he interviewed the plaintiff and after his subsequent lengthy review of her medical records.

[74] The above quoting for 10 pages by Dr. Bail of excerpts from prior medical records and comparing that to what the plaintiff told him, resembles work legal defence counsel might do in identifying potential discrepancies between the plaintiff's transcript from discovery and her medical records. The difference in this analogy however is the existence of a discovery transcript to evaluate the reported discrepancies.

[75] A psychiatrist brings no particular knowledge or expertise to this 10 page portion of his report.

[76] Dr. Bail in testimony stated he told the plaintiff that she could not audio record his assessment. Without notes or a recording of what was said in the assessment, the expert becomes a witness as to what the plaintiff said to the expert which then becomes an issue as to the expert's alleged discrepancies as to what the plaintiff told him.

[77] Dr. Bail in the engagement letter from counsel was retained in 2013 "to provide his opinion as to the nature of injuries suffered by the plaintiff in the MVA, her current condition and his prognosis for the future."

[78] Subsequent to its ruling, the court noted that Dr. Bail's report cites terms of engagement different than those communicated to him by legal counsel. Dr. Bail's report states he was engaged "to provide his psychiatric opinion in relation to the issue of damages." Damages are normally a focus of legal counsel, not a psychiatrist.

[79] Dr. Bail did not have the authority to re-write his terms of engagement. He testified he has conducted 5,500 IME during his career. Dr. Bail was very experienced in IME engagements.

[80] This alteration of the terms of engagement directly impacts the expert's obligation in R. 53.03 (2.1), to include in his report the instructions provided to him or her, the nature of the opinion sought and each issue in the proceeding to which the opinion relates.

[81] In the conclusions of his report, Dr. Bail states that the plaintiff:

(a) Was not forthright with him as to her accident related claims, her prior medical and psychological history;

(b) Her reported medical history since the MVA cannot be relied upon;

(c) Has serious credibility issues as to her MVA claim; and

(d) Lacks reliability, credibility and validity.

[82] The above credibility conclusions are not part of the terms of engagement from defence counsel, nor in Dr. Bail's misstatement of his terms of engagement. These conclusions reflect points made in submissions made by defence counsel to the jury. They are issues for determination by the jury. The court on the motion to exclude him for bias, ordered that Dr. Bail could not express these conclusion opinions directly.

[83] The plaintiff by 2013 as stated had successfully undergone several IME by doctors retained by third party insurers or benefit providers. Several weeks before, she attended a defence IME with Dr. Maistrelli. She was aware in speaking to Dr. Bail that he would have access to her medical records which included her frequent attendances with her family doctor over many years regarding her past accidents, multiple miscarriages, her acrimonious prior separation etc. Despite her past IME experience and her knowledge of her many years of frequent pre-MVA consultations with and prescriptions from her family doctor, Dr. Bail testified the plaintiff denied virtually all of her pre-MVA history of periodic anxiety, symptoms of depression, periods of sleeping difficulty and any medication related thereto during this interview.

[84] The credibility of Dr. Bail's version of what the plaintiff told him regarding her pre-MVA history is impaired in several ways by his other conduct, reporting and testimony in this case.

[85] Dr. Bail states the plaintiff told him that immediately following the MVA, "she had no immediate pain. The only pain she had shortly afterwards was in her right hip area." This reporting by Dr. Bail is not credible.

[86] The plaintiff's trial testimony is that upon impact, she felt pain in her back, her right hip and soreness in her neck. The defendant on discovery stated she immediately after the MVA, spoke to the plaintiff who complained of back pain as a result of which the defendant massaged the plaintiff's back as they awaited arrival of the ambulance. Dr. Bail did not at the time of his assessment have this information from the defendant.

[87] Dr. Bail's report states the plaintiff was over reporting her injuries and symptoms in relation to the MVA. If that is true, why would she therefore tell him she felt no pain following the MVA?

[88] Dr. Maistrelli assessed the plaintiff two weeks before the IME by Dr. Bail. Dr. Maistrelli in his report states the plaintiff told him that while she waited for the ambulance to arrive at the scene of the accident and while still in her vehicle, "She was complaining of pain in the entire right hemi-body and was unable to exit the vehicle due to pain. She also experienced neck pain

and headaches. ... She required assistance to exit the vehicle and was placed on a spinal board with a collar and brought via ambulance to hospital."

[89] The above version to Dr. Maistrelli as to what the plaintiff felt immediately after the MVA is similar to her reports of immediate pain to other medical service providers at the time of the MVA.

[90] It is not credible that the plaintiff in two defence IMEs conducted within 2 weeks, reported multiple areas of pain and inability to move to Dr. Maistrelli and then reported feeling no immediate neck or back pain to Dr. Bail, who concludes she is exaggerating her post-MVA condition. One obvious explanation for this discrepancy is that Dr. Bail is not accurately reporting what the plaintiff said to him.

[91] Dr. Bail had the medical records of the Ottawa Hospital which record the plaintiff upon arrival at the hospital reporting "pain in the back and abdomen" and the notation "tender mid lumbar". Dr. Bail chose to exclude from his report such evidence confirming pain at the time of the MVA and instead reports the plaintiff telling him she experienced no pain other than her right hip next to the seat belt immediately following the MVA.

[92] Dr. Bail's psychiatric assessment of the plaintiff in August 2013 for 1.5 hours was some five years after the October 2008 MVA which accident was two months after the December 2008 birth of her daughter.

[93] Dr. Bail's report as stated contains excerpts of words and phrases from the plaintiff's pre-MVA clinical records as to the issues such as repeated miscarriages, matrimonial separation, anxiety, low mood, depression, extreme vomiting and exhaustion related to her final pre-MVA high risk pregnancy of her daughter and other not uncommon personal stressors in her life.

[94] Subsequent to the MVA in October 2008 and before her assessment by Dr. Bail in 2013, several important things had improved in the plaintiff's life. Those included:

(a) Her final successful birth of a second child in December 2008 after trying unsuccessfully for several years;

(b) Her decision after the birth of her daughter to have no more children. There would therefore be no further miscarriages;

(c) The lapse of time since her 2004 to 2006 acrimonious separation from her first husband; and

(d) Her remarriage in 2006;

all prior issues repeatedly documented in the pre-MVA clinical notes of Dr. Tobin which normally would cause any woman some level of anxiety.

[95] The resulting absence, or at least reduction of normal anxiety and pressure to have children given her advancing age, her reoccurring grief related to her many prior miscarriages, her new marriage and distance since her 2004-2006 former acrimonious separation are not

reflected in Dr. Bail's report or testimony as past stressor then absent in 2013 or 2015. This seems like an obvious consideration in comparing her pre-MVA psychiatric condition versus her post-MVA psychiatric condition and recorded level of impairment since the accident. Such consideration and comment would not however be favorable to the defence and do not receive comparative comment by Dr. Bail in his report or testimony in chief.

[96] Unlike almost every doctor and expert called by the plaintiff, including those who conducted IME of the plaintiff for insurers over the years; Dr. Bail and Dr. Maistrelli each testified the plaintiff while sitting in their respective offices for 1 to 2 hours, did not move to adjust her position or show symptoms of pain while sitting. Such stillness by the plaintiff is not conduct of someone faking injury and pain. The absence of such movement by her however is reported critically against her.

[97] In his report, Dr. Bail states that the plaintiff "sat comfortably throughout the entire interview, without any sign of pain related behaviour ..." "her mood appeared normal, even laughing and smiling at times. At no time was any anxiety or depression noted." The suggestion is that she felt perfectly relaxed and at ease during the assessment.

[98] In cross-examination however Dr. Bail testified:

(a) People undergoing an IME are normally nervous or anxious;

(b) His statement in chief as to her appearing normal did not mean that he was saying she was not anxious during the IME;

(c) In response to the assertion that the plaintiff had asked him if she could use the cushion or pad from his chair during the interview, Dr. Bail testified he could not recall. This lack of memory is to be compared to his alleged recollection as referred to below;

(d) Whether the plaintiff smiled or laughed during the interview as stated in his report, is not relevant criteria as to a diagnosis of depression which he had been engaged to provide an opinion about.

[99] There is no evidence whether Dr. Tobin in speaking to the plaintiff, ever used the clinical terms that appear in his clinical notes or whether he told the plaintiff the pharmacological purpose of the medications he prescribed was for depression, anxiety or muscle relaxant. It was not suggested during cross-examination that Dr. Tobin had communicated such terms to the plaintiff. Dr. Bail however relies on these clinical noted terms to evidence inconsistencies in answers provided by a lay person.

[100] Unlike the plaintiff's psychiatrists, Dr. Quan and Dr. Booth; Dr. Bail conducted no psychiatric tests of the plaintiff during his assessment.

[101] Dr. Bail after some introductory discussion in the IME told the plaintiff he would then conduct a mental examination of her which forms the one half page of his report entitled Mental Status Examination. Within this adversarial environment, that statement normally might increase one's anxiety level.

[102] Dr. Bail testified he asked the plaintiff a number of questions requiring her to use her short term memory. He concluded thereon that the plaintiff was being inconsistent in answering those questions and that "something was going on".

[103] The series of questions he allegedly asked and the answers allegedly given were:

(a) To consecutively count backwards by 7 from 100, which he stated anyone can do unless they are severely depressed, so cognitively incapacitated that they could not drive a car or had never learned math. Her first subtraction was correct. He cited two subsequent incorrect subtraction answers, namely 81 and 17, while other subtractions she did correctly. He concluded this showed inconsistency by the plaintiff.

(b) To recite the months of the year backwards which she did quickly and correctly. He testified this correct performance showed an inconsistency with her above incorrect answers in subtracting from 100 by 7s.

(c) The plaintiff correctly answered how many 15 cent oranges she could buy for one dollar, but incorrectly answered how many $1.50 cent magazines she could buy with $10. Dr. Bail stated this demonstrated the plaintiff was being inconsistent with him.

(d) He showed the plaintiff a piece of paper with 15 symbols. He took the paper back after 15 seconds, talked about something else and then had her tell him what symbols were on the paper. He testified anyone in kindergarten can do this test correctly. The plaintiff recalled one of the symbols incorrectly.

(e) Dr. Bail had the plaintiff repeat numbers he read to her. He testified that she correctly repeated 3 and 4 digit numbers, but gave wrong answers repeating 6 digit numbers. He stated this indicated the plaintiff was being inconsistent. By comparison, Dr. Quan noted the plaintiff's difficulty repeating 7 digit numbers which he stated indicated her level of concentration was mildly affected.

[104] Dr. Bail testified these question results demonstrated internal inconsistencies which caused him doubt as to what she was reporting and why he concluded there was something going on with the plaintiff. This constitutes the quasi-psychiatric extent of Dr. Bail's analysis in this IME.

[105] Dr. Bail has no record of the above questions asked, or answers given, except as recorded in his report. His testimony that the plaintiff correctly subtracted by 7s to 93, but incorrectly subtracted 7 in her answers of 81 and 17, are not facts recorded in his report as required under R. 53.03(5). It is not credible that Dr. Bail in 2015 recalled these specific correct and incorrect details two years after this IME in 2013 given the number of IMEs he subsequently conducted.

[106] His alleged request that the plaintiff state the months in reverse and her quick ability to do so, is not contained in his report. There is no logical reason Dr. Bail would remember the plaintiff's correct answer to this question versus her incorrect answer to other questions.

[107] Dr. Bail's testimony as to asking questions about oranges for $1 and magazines for $10, and the plaintiff correctly answering the former and incorrectly answering the latter, are not contained in his report. His ability to recall such detail without notes after two years is not credible.

[108] Dr. Bail was making up evidence as he testified to support his conclusions adverse to the plaintiff.

[109] Unlike the psychiatrists Dr. Quan and Dr. Booth, and the several psychologists who testified for the plaintiff, Dr. Bail beyond the above alleged questions conducted no testing of the plaintiff. Dr. Bail acknowledged knowing such testing had been done by others as referred to in their reports given to him. He did not ask for or review their test results. He stated testing done by psychologists, even those with imbedded questions to test for consistency or overstating, are not relevant for a psychiatrist. Consideration of those other test results, including ones done by psychiatrists that largely favored the plaintiff, would then require Dr. Bail to explain his opposite conclusion.

[110] Dr. Bail testified that having a support person reside with the plaintiff couple after the birth of their newborn daughter in December 2008 for 5 months, was not unusual and was not in his opinion evidence of the plaintiff's then limited capacity following the MVA two months earlier.

[111] Dr. Bail in cross-examination admitted that family doctors might interpret and clinically note bereavement following a miscarriage, as depression and prescribe medication accordingly. Several minutes later after realizing what he had just said, Dr. Bail then stated he had misspoken and that he presumed a general physicians prescribing medication for depression following one or more miscarriages must have diagnosed the patient with clinical depression.

[112] Dr. Bail was shown pre-MVA pictures of the plaintiff tobogganing, participating in paint ball competitions and on rides at amusement parks as some evidence of her pre-MVA alleged level of activity. Dr. Bail replied such pictures proved nothing as to her pre-MVA level of activity.

[113] Dr. Bail admitted he asked the plaintiff about the degree of damage to her car in the MVA but did not ask about the damage to the defendant's car which resulted in it being written off due to its level of damage.

[114] Dr. Bail agreed that the prior seven miscarriages was a traumatic event for the plaintiff.

[115] Dr. Bail admitted the plaintiff said she had nightmares but did not ask her about them as he did not consider them relevant. The plaintiff told several other doctors about her reoccurring nightmares since this MVA of her children being with her in a motor vehicle accident.

[116] Dr. Bail admitted the plaintiff told him she avoided the MVA location, at times felt numbness and that her post-MVA clinical notes report her feeling guilt for becoming a diminished partner and mother due to her limitations and feeling isolated. Dr. Bail however faulted the plaintiff because when he asked her about her mood, she replied "irritable" and denied depression. Despite that, he admitted her reports to other physicians after the MVA, of

sleep disturbance, thoughts of suicide, low energy and reduced libido, are all symptoms of depression which he would have read upon reviewing her medical records. His report however merely states he asked if she suffered from depression before the MVA and she said no.

[117] Dr. Bail testified that Dr. Tobin's note dated April 21, 2005 indicated she was diagnosed with "anxious depression" but the plaintiff had denied pre-MVA depression to him. He admitted in cross-examination however that the depression as noted is not a clinical diagnosis of depression. He then admitted that the next entry by the family doctor states the plaintiff was not in depression. Such distinction and diagnosis that she was not suffering from depression are not contained in Dr. Bail's report or his testimony in chief.

[118] The same clinical notes are quoted from for the period May to July 2007 to contradict the plaintiff's alleged statement to Dr. Bail that before the MVA she had not taken anti-anxiety medication. At the time, six years before this 2013 assessment, the plaintiff was pregnant with twins. She was told at the hospital she was going to miscarriage. She had an ultra sound showing an empty sac. She had an incomplete abortion with resulting surgical intervention. She complained at the time she felt like a wreck, can't sleep or eat, avoiding others and her friends are pregnant. Her doctor prescribed an anti-anxiety medication in June 2007. These background facts, present in her medical records, are not referred to by Dr. Bail in his report or testimony in chief.

[119] The plaintiff subsequently had more miscarriages but eventually she had the difficult but successful pregnancy and birth of her daughter in 2008. Dr. Bail faults the plaintiff for not telling him in 2013 about the anti-anxiety medication in June 2007 and cites this as proof of her failure to divulge prior use of anti-anxiety medication, regarding a 2008 MVA and injuries about which she is being assessed in 2013. Dr. Bail's legal obligation was to be fair and objective.

[120] Dr. Bail includes reference in his report to the plaintiff reporting back pain in July 2008, as showing she had the same prior complaint and not admitting that to him in regards to this MVA. He admitted in cross-examination that this reference omits her doctor's then notation that it was "diagnosis of pregnancy related back pain", which is obviously different from post-MVA, non-pregnancy related back pain.

[121] Dr. Bail in his report refers to a clinical notation on July 12, 2008 of "complains of intermittent back pain." He admitted in cross-examination that the plaintiff at that time was in labor. That added detail is not mentioned in his report.

[122] Dr. Bail was not a credible witness. He failed to honor his obligation and written undertaking to be fair, objective and non-partisan pursuant to R. 4.1.01. He did not meet the requirements under R. 53.03. The vast majority of his report and testimony in chief is not of a psychiatric nature but was presented under the guise of expert medical testimony and the common initial presumption that a member of the medical profession will be objective and tell the truth.

[123] The vast majority of Dr. Bail's testimony to the jury amounted to nothing other than the following:

(a) The plaintiff did not tell me the truth in my interview;

(b) Here are all the instances I found in my 10 to 12 hour review of her medical records which prove that she did not tell me the truth;

(c) If I as a psychiatrist cannot believe her; how can you?

[124] The primary purpose of R. 4.1.01 is to prohibit and prevent such testimony in the guise of an expert. Dr. Bail undertook and thereby promised to not do what he did in front of this jury.

[125] I will not qualify witnesses as experts in the future whose reports present an approach similar to that of Dr. Bail in this case.

Conclusion As To Evidence

[126] The medical evidence presented by the plaintiff withstood cross-examination and was credible. That medical evidence educated and largely removed my initial doubts as to the plaintiff's credibility regarding the seriousness of her injuries. Her medical evidence corroborated the testimony and credibility of the plaintiff.

[127] The medical evidence presented by the defendant was not relevant in the case of Dr. Maistrelli and was not credible in the case of Dr. Bail. There were no other witnesses for the defence.

***Insurance Act* s. 257 (7) and Regulation 381/03**

[128] The only relevant and reliable evidence on this motion therefore is that presented by the plaintiff and the cross-examination thereon. That evidence including the cross-examination thereon, in light of the case law argued by the plaintiff establishes that the plaintiff's general damage claim involves permanent serious impairment of an important mental or psychological function.

Serious Impairment

[129] The evidence presented by the plaintiff establishes that:

(a) She has pain in her lower back almost daily, in the back of her neck up to the back of her head, her right hip and radiating to the top of her right thigh and constant headaches since the MVA;

(b) Her neck pain is constant, varying between moderate to severe and occurring daily;

(c) She must lie down when the pain is severe;

(d) She has low energy; and

(e) She is receiving extensive medical treatment to overcome her injuries and symptoms.

[130] The diagnoses of the plaintiff's doctors as stated above establish that the plaintiff has suffered serious impairment.

Permanent

[131] The recorded injuries and level of impairment to the plaintiff since the MVA have existed now for seven years with only slight improvement despite receiving substantial medical treatment.

[132] Her health care providers testified she cannot go back to work now and may never be able to as a result of her continuing injuries and impairments.

[133] The plaintiff was twice unsuccessful in 2010 to return to her employment and perform the tasks of a retail store sales clerk in the second case.

[134] Dr. Finestone testified her prognosis was poor. Dr. Quan said he was hopeful but guarded given the length of time and level of treatment since the MVA.

[135] Dr. Seatter stated his opinion in 2010 was the plaintiff's symptoms had then become entrenched.

[136] The diagnoses of the plaintiff's doctors as stated above establish that the plaintiff's injuries and impairment appear to be permanent.

Important Function

[137] The diagnoses of the plaintiff's doctors as stated above establish that the plaintiff's level of impairments are serious restrictions and include physical limitations as to sitting, bending, twisting, walking, pushing, pulling and lifting. Dr. Finestone testified that the plaintiff's memory and concentration are poor which prevents her resuming pre-MVA activities including employment.

Regular Employment

[138] The plaintiff's past employment involved sitting, standing, concentration, repetitive social interaction and the handling of services and merchandise mentally and physically.

Necessity To Perform Essential Employment Activities

[139] The plaintiff's evidence is that she has tried but has been and continues to be unable to work beyond several days which thereby exhausts her, inflames her symptoms with resulting in time off. Her medical evidence corroborates this position.

[140] None of the plaintiff's doctors state she has been able to or is now able to resume her former employment level.

Substantial Interference With Usual Daily Activities

[141] There is substantial evidence from the plaintiff, her husband, two friends and testing of occupational therapists as to the plaintiff's many limitations in daily living and the necessary accommodations the plaintiff and others must make as a result.

[142] Daily limitations exist in the areas of the plaintiff's interaction with her husband, children, friends, level of energy, irritability and emotions as well as her daily duties as a parent, homemaker and personal care.

[143] These are all matters of importance to the plaintiff.

Credibility

[144] The evidence of the plaintiff as to her injuries, level of symptoms and limitations are corroborated by her health care providers including some of their testing for veracity. Such evidence is further corroborated by her husband and her friends. In such ways, the plaintiff's credibility is strongly supported.

Jury Verdict

[145] I reach the above conclusions notwithstanding the decisions made by the jury in this trial.

[146] The jury awarded nominal general damages to the plaintiff of $23,500 and dismissed all of the other claims.

[147] I cannot speculate on what basis the jury reached their decisions. The jury's assessment of the testimony of Dr. Bail and Dr. Maistrelli is and will remain unknown.

Conclusion

[148] For the above reasons, I conclude the plaintiff's claim for general damages met these requirements under the *Insurance Act*. The defendant's threshold motion is therefore dismissed.

Kane J.

Released: January 5, 2016

CITATION: Bruff-Murphy v. Gunawardena, 2016 ONSC 7

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CALLUM BRUFF-MURPHY and HOPE BRUFF-MCARTHUR by their Litigation Guardian LIESE BRUFF-MCARTHUR, LIESE BRUFF-MCARTHUR personally, and RICHARD MCARTHUR

Plaintiffs

– and –

NELONI GUNAWARDENA

Defendant

DECISION ON DEFENCE THRESHOLD MOTION

Kane J.

Released: January 5, 2016