CITATION: Liu v. 1226071 Ontario Inc. (Canadian Zhorong Trading Ltd.), 2009 ONCA 571
DATE: 20090717
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COURT OF APPEAL FOR ONTARIO

Doherty, MacPherson and MacFarland JJ.A.

BETWEEN

Ruofeng Liu and Shun-Hua Zhao

Plaintiffs (Appellants)

and

1226071 Ontario Inc. operating as Canadian Zhorong Trading Ltd., and/or Flying Dragon Car Rental, 1319291 Ontario Ltd. operating as Flying Dragon Car Rental, Halton Auto Lease Inc., Jin Kim and Stanley Tang

Defendants (Respondents)

Chris G. Palaire, for the appellants

James L. Vigmond and Brian M. Cameron, intervener, Ontario Trial Lawyers Association

Mark L. J. Edwards and Aaron S. Murray, for the respondents

Heard: March 20, 2009

On appeal from the ruling of Justice Blenus Wright of the Superior Court of Justice dated April 10, 2007.

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MacFarland J.A.:

[1] Automobile legislation in this province over the past three decades might best be described as patchwork. Compensation for motor vehicle accident victims very much depends on when they sustained their injury.

[2] The issue raised in this appeal is the interpretation of s. 267.5(3) of the *Insurance Act*, ("the Act") R.S.O. 1990, c. I.8 and O. Reg. 461/96 passed pursuant to the Act.

OVERVIEW

[3] The plaintiff suffered injuries as the result of being struck by a motor vehicle on April 9, 1999. A trial of his damage action resulted in a jury verdict on March 30, 2007. At the conclusion of the trial, the trial judge heard a motion to determine whether or not the appellant had suffered a catastrophic impairment within the meaning of s. 267.5 of the Act.

[4] The trial judge in brief reasons concluded that the appellant did not suffer a catastrophic impairment. As such he was not entitled to receive a damage award for future medical, rehabilitation or attendant care expenses.

[5] The appellant appeals the trial judge's ruling and requests an order setting that ruling aside. The appellant seeks an order from this court declaring that the appellant is

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catastrophically impaired within the meaning of O. Reg. 461/96 s. 5(1)(e)(i) and is entitled to the future healthcare benefits awarded to him by the jury at trial.

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[6] For the reasons that follow, I would allow the appeal and set aside the order of Wright J. dated April 3, 2007, and declare that the plaintiff meets the statutory definition of catastrophically impaired.

THE FACTS

[7] Ruofeng Liu immigrated to Canada from Beijing, China in 1991, holds a bachelor degree in mechanical engineering from Quinghua University, China, and graduated with honours from a LAN Design and Administration program at Humber College.

[8] On April 9, 1999, the appellant sustained serious head injuries in a pedestrian/motor vehicle accident. As the result of the collision the appellant struck the windshield of the respondents' vehicle, was thrown over the top of the car and crashed onto the road.

[9] The accident happened at approximately 8:15 p.m. When the ambulance paramedics arrived at 8:31 p.m. the appellant was unconscious. His initial Glasgow Coma Score (GCS) was 3 out of 15. It is not disputed that the ambulance attendants were persons trained for the purpose of taking GCSs.

[10] The trial judge found the following timeline applied with respect to the GCSs:

	Time	GCS
Accident	20:15	--
Emergency call	20:23	--
Ambulance call	20:31	3/15
	20:43	8/15
	20:55	12/15
Arrival at hospital	20:57	14/15

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[11] The evidence disclosed that although the appellant regained consciousness on route to hospital his consciousness level remained impaired in the days following the accident. In addition Mr. Lui suffered a long period of post-traumatic amnesia following the accident.

[12] The medical evidence led at trial was largely unchallenged and established beyond question that the appellant had, as the result of the accident, suffered a brain impairment.

[13] A Catastrophic DAC assessment of the appellant completed soon after the accident by Drs. Becker (Physician), Oshidari (Physiatry) and Salmon (Neuropsychology) concluded that, for the purpose of entitlement to statutory accident

benefits under O. Reg. 403/96, the appellant was catastrophically impaired. It is to be noted that the definition for catastrophic impairment was the same for statutory accident benefits under O. Reg. 403/96 as it was for third party tort claims under O. Reg. 461/96.

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[14] Those assessors as well as Dr. Kaplan[1] all concluded that Mr. Lui met the statutory definition for catastrophic impairment. Dr. Kaplan further opined:

> My own opinion is that the various medical, psychological, and structural markers reflect a serious trauma to the brain and evidence a permanent disruption of brain function. On the balance of probabilities such a patient will have persisting neurocognitive, neurobehavioural, and neuroemotional changes and their day-to-day function will be affected. The actual severity of deficits must be determined through serial assessment, observation, evaluation of ability to reintegrate into daily activities, and through ability to benefit from rehabilitation.

[15] Dr. Kaplan diagnosed a need for lifetime future care. His findings were endorsed and corroborated by the evidence of Drs. Ouchterlony, Levitan and Cancelliere. There was no medical evidence to the contrary.

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[1] Dr. Kaplan's uncontested medical report was admitted at trial. As stated in para. 20 of the appellant's factum: "Dr. Kaplan also reviewed and considered the GCS scores taken by the ambulance attendants, and the timing thereof, as well as numerous medical reports. He noted that the DAC team had deemed Lui to have a catastrophic impairment for the purposes of statutory accident benefits. He concluded:

> Based on the GCS scores a CAT DAC deemed him to have a catastrophic impairment based on SABs E(I). This is in my view as a CAT DAC assessor and owner the correct conclusion and consistent with the FSCO Arbitration Appeal ruling in *Young*.

ANALYSIS

[16] Sections 267.5(11) and (14) of the Act describe the process for determining the catastrophic impairment issue in tort proceedings and provide:

> (11) 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 in accordance with an order of a judge who conducts a pre-trial conference, determine for the purpose of subsection (4) whether the injured person has sustained a catastrophic impairment arising directly or indirectly from the use or operation of the automobile.
>
> (14) If no motion is made under subsection (11), the trial judge shall determine for the purpose of subsection (4) whether the injured person has sustained a catastrophic impairment arising directly or indirectly from the use or operation of the automobile.

[17] In this case, as no motion was made before trial, it fell to the trial judge to determine whether the appellant met the statutory definition of catastrophically impaired. Under the then existing legislation and on the pleadings, only if the appellant met the definition would he be entitled to recover damages for health care expenses which the jury assessed at $865,000.

[18] The analysis must begin with the language of the legislation. Section 267.5 subsections (3) and (4) of the *Insurance Act* provides:

> (3) Despite any other Act and subject to subsection (4) and (6), the owner of an automobile, the occupants of an

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> automobile and any person present at the incident are not liable in an action in Ontario for damages for expenses that have been incurred or will be incurred for healthcare resulting from bodily injury arising directly or indirectly from the use or operation of the automobile.
>
> (4) Subsection (3) does not apply if the injured person has sustained a catastrophic impairment, as defined in the regulations, arising directly or indirectly from the use or operation of the automobile.

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[19] The meaning of catastrophic impairment is found in O. Reg. 461/96, s. 5(1):

> "catastrophic impairment" means, …
>
> (e) brain impairment that, as a result of the incident, results in,
>
> (i) a score of 9 or less on the Glasgow Coma Scale, … according to a test administered within a reasonable period of time after the incident by a person trained for that purpose….

[20] The appellant's position is succinctly stated in paragraphs 48 and 49 of his factum:

> 48. On a plain reading of the relevant section of the Regulation, so long as the plaintiff can prove that the accident caused him or her to sustain a brain impairment that resulted in at least one GSC score of 9 or less, taken within a reasonable time post-accident, then the injured person is deemed to be catastrophically impaired. The fact that subsequent GCS scores are 10 or greater is irrelevant to the statutory analysis. The focus is on the injured person having sustained a period of unconsciousness that is causally related to the accident.

> 49. In the present case, the evidence is that Lui's initial GCS scores were administered within a reasonable time after the incident by persons trained for that purpose, and were less than 9. There were no confounding factors. There is no evidence to the contrary, and the trial judge so found. Therefore, Liu patently meets the test for a finding of catastrophic impairment. The trial judge erred in law when he found otherwise. There are no other factors relevant to this statutory test.

[21] In a nutshell, the medical evidence proves the appellant sustained a brain impairment and had at least one GCS of 9 or less, taken within a reasonable time post-accident and therefore meets the statutory definition.

[22] The respondents' position as stated in paragraph 51 of their factum is:

> … the Appellant should not be considered catastrophically impaired as his GCS readings rose to 12/15 within 33 minutes of the collision and continued to rise thereafter. This period of time is well within what would be considered reasonable in all the circumstances of this case. Given that the GCS scores continued to rise following the reading of 12, the appellant should not be considered catastrophically impaired on the basis of the GCS readings.

[23] The trial judge concluded that the appellant had a GCS of 9 or less within a reasonable time after the accident. The only other necessary conclusion for the trial judge was whether the appellant suffered a brain impairment. In paragraph 11 of his reasons he very clearly concluded that he did: "[t]here is no doubt that the plaintiff received a brain injury as a result of the accident."

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[24] In my view having made those findings the appellant met the statutory definition of catastrophic impairment and the trial judge's ruling to the contrary is in error and cannot stand.

[25] The language of the statute is clear – catastrophic impairment means brain impairment – and it is not disputed here that the appellant suffered a brain impairment as the result of the accident – that results in a score of 9 or less on the GCS according to a test administered within a reasonable period of time after the accident by a person trained for that purpose. There is no issue that the tests were administered by persons trained for that purpose.

[26] The respondents' objection is solely based on the fact that there were GCSs following the accident, which they submit were also "administered within a reasonable period of time after the accident", which were greater than 9.

[27] In my view the answer to the respondents' objection is the plain language of the legislation. Provided there is a brain impairment, all that is required is one GCS score of 9 or less within a reasonable time following the accident. It is a legal definition to be met by a claimant and not a medical test.

[28] I agree with the appellant's submission that the fact that there may have been other higher scores also within a reasonable time after the accident is irrelevant.

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[29] In my view the trial judge fell into error in equating the statutory test to a medical one. It is not.

[30] Any notion of catastrophic injury, other than the specific meaning ascribed to that term by the legislation must be discarded when considering whether a claimant meets the statutory test. The statutory scheme creates a bright line rule which is relatively easy to apply. This enhances the ability of those looking to the definition to know what injuries will and will not be considered catastrophic. Having the same definition for both no fault and third party liability claims avoids inconsistency. The ease with which the rule can be applied adds an element of predictability which will facilitate the settlement of claims.

[31] It matters not that there is some evidence - albeit disputed evidence - that the appellant is capable of managing his property, clothing, hygiene, shelter, safety and taking two trips to China. Nor does it matter that his head injury was described as "moderate to severe" or "moderately severe".

[32] All that is required is a brain impairment and a GCS reading of 9 or below within a reasonable period of time after the accident. The appellant met both criteria on the trial judge's findings and is entitled to recover damages for health care costs in accordance with the verdict of the jury.

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[33] I would add however that simply meeting the statutory definition does not automatically mean entitlement. It will still remain for claimants to prove their damages as the appellant did at trial.

[34] I would allow the appeal, set aside the order of the trial judge dated April 3, 2007 and amend the judgment dated March 30, 2007 to include a paragraph which entitles the plaintiff to recover damages for future care costs in accordance with the verdict of the jury.

[35] In view of the result it is unnecessary to deal with the cross-appeal.

[36] If counsel are unable to agree on costs they may make brief written submissions to the court.

Signed: "J. MacFarland J.A."

"I agree Doherty J.A."

"I agree J. C. MacPherson J.A."

RELEASED: "DD" July 17, 2009

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