

CITATION: Nadarajah v. Aviva Canada Inc., 2017 ONSC 7522
COURT FILE NO.: CV-12-00448309-0000
DATE: 20171218

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
SELVARAJAH NADARAJAH) *Andrew Suboch and Dale Stuckless, for the*
) *Plaintiff*
Plaintiff)
)
– and –)
)
AVIVA CANADA INC.) *William Jesseau, Troy Asselin and Simon*
) *Cox, for the Defendant*
Defendant)
)
) **HEARD:** December 13, 2017
)

2017 ONSC 7522 (CanLII)

REASONS FOR JUDGMENT

P. J. MONAHAN J.

[1] The plaintiff, Selvarajah Nadarajah, brought a claim for damages, on the basis of the unidentified motorist coverage in his automobile insurance policy, against his insurer, Aviva Canada Inc. (Aviva), arising out of a motor vehicle collision on March 24, 2010 (the “Collision”). After a two week jury trial, the jury found that Mr. Nadarajah has sustained a “minor soft tissue strain”,¹ and awarded him \$15,000 for general damages. They awarded him nothing for past income loss or for future income loss. The plaintiff had claimed damages for future housekeeping expenses and for future medical costs, but these were abandoned during the course of the trial.

¹ This finding was in response to Jury Question Two, asking the Jury to list the injuries the plaintiff sustained in the Collision.

[2] Pursuant to s. 267.5(15) of the *Insurance Act*,² I am required to determine whether an injured person has sustained “permanent serious impairment of an important physical, mental, or psychological function”.³ Only persons who have sustained such a permanent, serious and important impairment may recover for non-pecuniary losses sustained in a motor vehicle collision.⁴ For the reasons that follow, I find that Mr. Nadarajah did not suffer any such impairment as a result of the Collision and, accordingly, his claim for general damages is barred by s. 267.5(5) of the *Act*.

Background Facts

[3] On March 24, 2010, Mr. Nadarajah, who was then 47 years old, was stopped at a traffic light on Lawrence Avenue East in Toronto when he was struck from behind by another vehicle. He was wearing a seatbelt at the time. He described the impact as “strong” and said that he had both hands on the steering wheel of his car at the time of the impact. No airbags were deployed and the collision did not cause him to strike or hit any part of his vehicle. He spoke briefly with the driver of the following car but she left.

[4] After calling a friend as well as his wife, he called 911. Both police and ambulance attended at the scene. The ambulance report indicates that Mr. Nadarajah reported that for the first 30 minutes following the accident he did not experience any pain and was able to exit the vehicle and walk around. However, by the time the ambulance attended on the scene he reported pain to his lower back and left flank to the paramedics. The ambulance report also noted “very mild damage [to] rear bumper” of Mr. Nadarajah’s vehicle, an assessment that was confirmed by the photographs of the vehicle tendered as exhibits at trial.

[5] He was transported to hospital via ambulance. The hospital report indicates that he complained of pain to his flank and to his chest. He had an X-ray taken of his chest and lower back, both of which were normal. He was prescribed pain medication and discharged from the hospital.

[6] Mr. Nadarajah testified that in the weeks and months following the accident he experienced significant pain in his left shoulder and lower back. He began treatment through physio and saw his family doctor, Dr. Linda Ingber, on a number of occasions, beginning on March 31, 2010. Mr. Nadarajah testified that during these visits he complained to Dr. Ingber of

² R.S.O. 1990, c. I-8 (the “Act”).

³ Neither party argued that the determination of this issue had become moot in light of the fact that the jury’s award of general damages was less than the statutory deductible provided for in s.267.5(7). The issue was fully argued and the parties requested that I make the determination that, in any event, is mandated by s.267.5(15). Moreover, a determination on the statutory threshold could become relevant in the context of an appeal.

⁴ *Act*, s. 267.5(5)(b). Note that there are other exceptions to the bar against recovery of non-pecuniary damages in s.267.5(5), but none of these other exceptions is relevant here and will not be discussed.

shoulder pain and back pain. The clinical notes and records of Dr. Ingber from this period indicate that Mr. Nadarajah was complaining regularly of lower back and left shoulder pain.

[7] In May of 2010, Dr. Ingber referred Mr. Nadarajah to Dr. Ed Urovitz, an orthopaedic surgeon, because of his complaints of left shoulder pain. After taking x-rays and an ultrasound, Dr. Urovitz concluded that the pain being experienced by Mr. Nadarajah was originating in the muscles between the spine and the left shoulder blade, rather than in the shoulder itself.

[8] Because Mr. Nadarajah's complaints of left shoulder pain continued, in March of 2011, Dr. Ingber referred Mr. Nadarajah to Dr. Robin Richards, who is an orthopaedic surgeon specializing in the upper extremities. After examining Mr. Nadarajah and performing various diagnostic tests, Dr. Richards concluded that he was experiencing pain as a result of an injury to the soft tissues near the left shoulder blade.

[9] Prior to the accident, Mr. Nadarajah has been employed as a general labourer. He would be placed with different employers on a temporary basis through an employment agency. Immediately prior to the accident, he was working on an assignment at a manufacturing plant that had commenced on January 20, 2010 at a pay rate of \$11.50 per hour.

[10] Mr. Nadarajah testified that he was off work for approximately two years following the Collision. He returned to work on a part-time basis, and with limited duties, sometime in 2012. In the fall of 2013, he secured full-time employment as an "assembler" at Merrithew Health and Fitness ("Merrithew") at a pay rate of \$11.75 per hour.

[11] In January of 2015, Mr. Nadarajah suffered an injury to his left shoulder at work, while he was lifting a heavy object weighing approximately 25 lbs. He was off work for a couple of weeks as a result of this injury. He also broke his ankle on January 20, 2015, in an accident unrelated to the Collision, and was off work for a number of months recuperating from the ankle injury.

[12] Mr. Nadarajah continues to be employed full-time at Merrithew. He describes his current duties as a 'labeller' of health care products, although he also indicates that he does some assembly of products. In the fall of 2017 he secured a higher paying job at Merrithew, but it required him to regularly pull upholstery toward him. He found that this repetitive task caused pain to his left shoulder and he returned to his job as an labeller/assembler.

Applicable Law

[13] As noted above, pursuant to s. 267.5(5)(b) of the *Act*, persons injured in motor vehicle accidents in Ontario may not sue for non-pecuniary damages unless they have suffered a "permanent serious impairment of an important bodily function." I note, as did Firestone J. in his

comprehensive analysis of the relevant legislative scheme in *Valentine v. Rodriguez-Elizalde*,⁵ that it is the impairment to the bodily function that must be the focus of the analysis, as opposed to the injury itself. The bodily function that is impaired must be “important”, and the impairment to that important bodily function must be “permanent” and “serious”, in order for the injured person to succeed in a claim for non-pecuniary damages.

[14] Limitations on the right to recover non-pecuniary damages were inserted into the *Act* in 1990 and have been amended or further defined on a number of occasions over the years. In particular, the regulation *Court Proceedings for Automobile Accidents that Occur on or after November 1, 1996*,⁶ (the “Court Proceedings Regulation”) clarifies the meaning of the terms “serious”, “permanent” and “important” for purposes of s.267.5 of the *Act*. At the same time, the jurisprudence prior to the enactment of the *Court Proceedings Regulation*, particularly the seminal Court of Appeal decision in *Meyer v. Bright*,⁷ remains relevant and applicable.

[15] It is settled law that the appropriate framework for analysis in relation to s.267.5(5) involves the following three questions:⁸

1. Has the injured person sustained permanent impairment of a bodily function?
2. If the answer to question one is “yes”, is the bodily function which is permanently impaired an important one?
3. If the answer to question number 2 is “yes”, is the impairment of the bodily function serious?

[16] In *Meyer v. Bright*, the Court of Appeal found that the legislative intent underlying the relevant provisions was to limit claims for non-pecuniary damages to cases where the bodily function in question is important to that particular injured person. What must be considered is “the injured person as a whole and the effect which the bodily function involved has upon that person’s way of life in the broadest sense of that expression.”⁹

[17] At the same time, it was clear that not every bodily function could meet the statutory test, otherwise the legislation would not achieve its intended purpose, which was “to reduce substantially the number of personal injury claims coming before the courts as a result of motor vehicle accidents.” Thus, for a bodily function to be “important” it must “play a major role in the health and general well-being of the injured plaintiff”, while an impairment is “serious” if it is

⁵ 2016 ONSC 3540 (“*Valentine*”) at para. 36. See also Archibald J.’s helpful analysis in *Nguyen v. Szot*, 2017 ONSC 3705 (S.C.J.) at paras. 5-13.

⁶ O.Reg. 461/96, as amended by O.Reg. 381/03, ss. 4.1, 4.2 and 4.3, which apply to incidents occurring after October 1, 2003.

⁷ [1993] O.J. No. 2466, 15 O.R. (3d) 129 (Ont. C.A.) (“*Meyer v. Bright*”), at para. 16.

⁸ *Meyer v. Bright*, para. 16.

⁹ *Meyer v. Bright*, at para. 25.

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.”¹⁰

[18] This approach is broadly consistent with the provisions of the *Court Proceedings Regulation*. For example, s. 4.2(1).2 of the Court Proceedings Regulation states that an “important bodily function” must be a function “necessary to perform the activities that are essential tasks of the person’s regular or usual employment”, functions that are “necessary for the person to provide for his or her own care or well-being”, or are “important to the usual activities of daily living, considering the person’s age.”¹¹

[19] Similarly, s.4.2(1).1 provides that for an impairment of a bodily function to be “serious”, the impairment must “substantially interfere with the person’s ability to continue his or her regular or usual employment”, taking into account reasonable efforts at accommodation, or must “substantially interfere with most of the usual activities of daily living, considering the person’s age.”

[20] It is clear that impairments to bodily functions resulting from chronic pain can satisfy the statutory definition. As the Supreme Court of Canada noted in *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*,¹² there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real. In the words of Firestone J. in *Valentine*, “the effects of chronic pain are just as real and just as likely to meet or not meet the threshold as any other type of injury or impairment. It all depends on the manner in which the plaintiff has been impacted.”¹³

Relevant Evidence

[21] The *Court Proceedings Regulation* specifically requires that the injured person adduce evidence, from a physician with relevant training and expertise, as to the nature and permanence of the impairment, the specific function that is impaired, and the importance of the specific function to the person. Accordingly I begin with the medical evidence that was tendered on these issues.

[22] Dr. Robin Richards, who had seen Mr. Nadarajah on the basis of Dr. Ingber’s referral in 2011, examined him again on September 12, 2016 at the request of the plaintiff for purposes of preparing a medical/legal report for use in this proceeding. Dr. Richards was qualified as an orthopaedic surgeon with expertise in the treatment of the upper extremities, particularly the

¹⁰ *Meyer v. Bright*, paras. 23-39.

¹¹ Note that the *Court Proceedings Regulation* also makes reference to bodily functions that are essential to training for a career, but these portions of the *Regulation* are not relevant to this proceeding and will not be referenced further.

¹² [2003] 2 S.C.R. 203, at para.1.

¹³ *Valentine*, at para. 39.

shoulder. Based on his examination and assessment, he concluded that Mr. Nadarajah's ongoing pain was the result of soft-tissue injuries sustained in the March 24, 2010 accident. Mr. Nadarajah sustained a soft tissue injury to the left shoulder resulting in chronic periscapular myofascial pain superimposed on underlying degenerative conditions. He also has symptoms of myofascial pain affecting the lumbar spine. He noted that there was evidence of certain pre-existing degenerative conditions in his left shoulder and lower spine, but that these pre-existing conditions were not causing him pain or functional limitations prior to the accident. Therefore, in Dr. Richards' opinion, his current pain and limitations are a result of the accident, rather than the pre-existing conditions.

[23] Dr. Richards concluded that Mr. Nadarajah has a significant permanent disability consisting of "pain, weakness, loss of terminal range of motion, lack of endurance, and an inability to return to his pre-injury level of activity." He found that his permanent limitations relate to "impact activity, heavy lifting, overhead activity, climbing and any repetitive or forceful use of the upper left extremity against resistance."

[24] Dr. Richards believes that these limitations have affected his normal activities of daily living, employment activities and recreational activities. Dr. Richards also was of the view that his chronic pain and physical limitations are likely to be permanent, given the length of time since the accident.

[25] Dr. Rajka Soric, a physiatrist whose expertise is in the diagnosis and treatment of acute and chronic pain, testified on behalf of the Defendant Aviva. She examined Mr. Nadarajah on June 4, 2015. She agreed that it was likely that Mr. Nadarajah suffered a soft tissue injury in the March 24, 2010 accident. However she was of the view that any such soft tissue injury would likely have resolved within a relatively short period of time. She found that he has anatomically complete range of motion of both shoulder joints. She was of the view that the pain he is now experiencing is primarily caused by the injury he suffered in his workplace on January 7, 2015, and may also be attributable to pre-existing degenerative conditions in his left shoulder and lower back.

[26] Dr. Terry Axelrod, an orthopaedic surgeon with a specialization in the upper extremities, also testified for the defendant Aviva. He examined Mr. Nadarajah on January 18, 2017. Based on his review and assessment, he concluded that Mr. Nadarajah sustained a minor soft tissue strain in the accident on March 24, 2010. He noted that, because Mr. Nadarajah subsequently returned to work involving the lifting of heavy objects in late 2013, his injury must have substantially resolved by this time. He acknowledged, based on clinical notes of Dr. Ingber, that Mr. Nadarajah continued to complain of left shoulder pain in September 2014 and that the workplace accident in January 2015 likely aggravated the injury he had sustained in the motor vehicle accident.

[27] In contrast to Dr. Richards, Dr. Axelrod did not consider the injuries sustained by Mr. Nadarajah in the 2010 accident to have caused a major impairment. Dr. Axelrod noted that there was very little difference in the range of motion of Mr. Nadarajah's left shoulder as compared to

his right. He noted that Mr. Nadarajah had extremely weak grip strength bilaterally which, in Dr. Axelrod's opinion, indicated suboptimal effort. He also found that strength testing revealed voluntary giving way with some discomfort on the left shoulder. In Dr. Axelrod's opinion, Mr. Nadarajah's predominant injury is a simple soft tissue strain to the shoulder girdle, a muscle injury that would normally resolve within several weeks to several months. In his opinion, Mr. Nadarajah's current symptoms are likely a combination of the March 2010 motor vehicle accident and the January 2015 workplace accident. He believes that his prognosis is excellent but that Mr. Nadarajah is likely to continue to experience shoulder pain on a long-term basis.

[28] Turning to the evidence of Mr. Nadarajah, in addition to the summary provided above under "Background Facts", I would note the following:

- Mr. Nadarajah indicated that he experiences pain from lifting objects above his head, pulling objects towards him against resistance, and holding items away from his body for extended periods of time;
- The pain varies and is not constant. It tends to increase if he does heavy lifting, stands for long periods of time, or at the end of a workday. However when he is not working the pain diminishes or goes away;
- Prior to the accident, Mr. Nadarajah was employed as a general labourer on a casual or temporary basis. While he was off work for an extended period of time following the accident, when he began work with Merrithew in 2013 on a temporary or casual basis they were happy with his performance and offered him full-time employment. This represented his first full-time employment in seven years. He has been employed at Merrithew on a full-time basis for the past four years as a general labourer, with duties broadly similar to those associated with his pre-accident employment. His employer has not been required to provide any accommodation in light of any impairment he may have suffered in or as a result of the Collision;
- Prior to the accident, he used to do cooking on the weekend and did most of the grocery shopping. He does less cooking and grocery shopping now;
- Prior to the accident he would do yardwork such as cutting the grass and shovelling snow. He continues to do this work now but on a reduced basis. He finds he needs to take breaks and stretch and he sometimes calls upon other family members to complete these tasks;
- Following the accident he finds it difficult to kneel or sit at church. He requires that the family take an aisle seat at church so that he can get up to stretch and alleviate his pain symptoms as needed. He has also reduced his church attendance;

- He participates in fewer social activities such as family gatherings following the accident;
- He does not exercise and has been unable to participate in sporting activities such as volleyball, swimming and cricket to the extent he did prior to the accident. He has tried to play badminton since the accident;
- He is able to perform all routine personal hygiene tasks.

[29] Mr. Nadarajah's wife Vasuki Salvarajah and the couple's daughters Prashika and Thuksa testified at trial. Their testimony tended to corroborate his account of the way in his behaviour and social interactions have changed since the accident. These family members spoke of Mr. Nadarajah as taking a reduced role in household tasks, being less social, no longer participating in sports, and spending much more time alone.

[30] Mr. Nadarajah was also cross-examined with respect to an application for employment insurance he submitted in October 2012, approximately 30 months after the Collision. As part of that application, in response to a question asking whether he had been unable to work for medical reasons anytime in the previous 24 months, he had responded "no". Mr. Nadarajah explained this response on the basis that he did not understand the meaning of the word "unable" in the question.¹⁴ He also indicated that, at the time he was completing the application for employment insurance, he was not thinking about the March 2010 Collision.

Analysis

[31] While there were differences in the expert medical testimony with respect to the impairments currently being experienced by Mr Nadarajah, there was broad agreement on the nature of the injury he sustained in the Collision. All three experts who testified at trial agreed that Mr. Nadarajah had sustained a soft tissue injury to the muscles surrounding the left scapula. As Dr. Axelrod noted in his testimony, while his complaints over lower back pain have varied over the years, there has been remarkable consistency in Mr. Nadarajah's complaints with respect to his left shoulder. This assessment was further confirmed by two other orthopaedic surgeons who examined Mr. Nadarajah as treating physicians in the years following the accident, namely, Dr. Ed Urovitz, who examined him in 2010 and again in 2015, and Dr. Crystal Smith, who examined him in April and September of 2015. The clinical records of Drs. Urovitz and Smith recording their diagnoses were tendered as exhibits. Mr. Nadarajah was referred to these

¹⁴ I note that Mr. Nadarajah testified through a Tamil interpreter and his understanding of the English language is limited. He indicated that he had completed the application with the assistance of one of his daughters, who is fluent in both Tamil and English.

physicians, as well as to Dr. Richards in 2011, because of his complaints of shoulder pain, as opposed to back pain. In my view, the preponderance of the evidence supports the conclusion that Mr. Nadarajah sustained an injury to the soft tissues surrounding the left scapula in the Collision.

[32] At trial, there was dispute between the parties as to whether the soft tissue injury sustained in March 2010 had healed by the time of the January 7, 2015 workplace accident. However, Dr. Ingber's clinical notes and records indicate that as of the September 19, 2014, Mr. Nadarajah was continuing to experience left shoulder pain. Dr. Axelrod also conceded that it was likely that the January 2015 workplace accident had aggravated the soft tissue injury sustained in the Collision. Accordingly, in my view, the January 2015 workplace accident aggravated a soft tissue injury that had partially but not fully healed by that time.

[33] What this means is that as a matter of law the Collision caused the injuries sustained in the January 2015 workplace accident and, accordingly, the injuries and limitations Mr. Nadarajah is currently experiencing have resulted from the Collision.

[34] Where the medical experts diverge is in their assessment of the nature and extent of the impairments or limitations that Mr. Nadarajah is experiencing as a result of the soft tissue injury sustained in the accident. As noted above, Dr. Richards is of the view that the injury sustained in the accident has resulted in a "significant and severe permanent disability". He notes that Mr. Nadarajah is experiencing "pain, weakness, loss of the terminal range of motion, lack of endurance, and inability to return to his pre-accident level of activity." In his opinion, Mr. Nadarajah has limitations for "impact activity, heavy lifting, overhead activity, climbing and any repetitive or forceful use of the upper extremity against resistance."

[35] Drs. Axelrod and Soric, in contrast, were of the view that Mr. Nadarajah has sustained a soft tissue strain to the muscles in the area of the left scapula. Dr. Axelrod agreed that Mr. Nadarajah would likely continue to experience pain in this area on a long term basis, but that clearly this did not amount to an injury that was serious in nature.

[36] To the extent that there is a conflict between any of the medical expert testimony, I prefer the evidence of Dr. Axelrod. He testified in an entirely credible and straightforward fashion and was willing to concede points that favoured the plaintiff's case. For example, he acknowledged that the January 7, 2015 workplace accident likely aggravated the injury that had been sustained in the Collision. He was candid, direct and forthright, and offered his testimony and opinions in a completely independent and impartial manner. I accept his opinion over that of Dr. Richards with respect to the limitations currently being experienced by Mr. Nadarajah.

[37] Turning to the various statutory criteria set out in s.267.5(5)(b), I find that Mr. Nadarajah has experienced permanent impairments to a bodily function as a result of the injuries sustained in the Collision. Both Dr. Richards and Axelrod agreed that the pain he is currently experiencing will likely continue into the indefinite future. The limitations and impairments associated with this pain include some loss of range of motion in the left shoulder, lack of endurance and

weakness, with an associated limitation on impact activity, heavy lifting, and repetitive or forceful use of the left shoulder against resistance.

[38] From the perspective of the injured person, any limitation to a bodily function is both important and serious. Nevertheless, as the Court of Appeal noted in *Meyer v. Bright*, in limiting the right to claim non-pecuniary damages, the legislature must have contemplated that there are some impairments to bodily functions that are not “important” or “serious”, otherwise the words of the statute would be superfluous. It is for this reason that the Court of Appeal in *Meyer* held that, for a bodily function to be ‘important’, it must play a “major role in the health, general well-being and way of life of the particular injured plaintiff.” Courts in later years have noted that the impairment must “go beyond tolerable” in order to be considered “serious”.¹⁵

[39] Turning to the definitions of the statutory terms set out in the *Court Proceedings Regulation*, I note that Mr. Nadarajah is currently able to continue the same kind of employment he was engaged in prior to the Collision. In fact, he is currently employed on a full-time basis rather than a temporary or casual basis, which is an enhancement to the kinds of positions he had been able to secure prior to the Collision. He has not requested or received any accommodation from his employer as a result of his injuries. This tends to indicate both that Mr. Nadarajah is able to perform the “activities that are essential tasks of [his] regular or usual employment”¹⁶ and that any impairment he is experiencing does not “substantially interfere with [his] ability to continue his regular or usual employment.”¹⁷ Mr. Nadarajah testified that he had recently attempted to take on a position with enhanced responsibilities but had been unable to continue in that enhanced position due to his shoulder injury. I would note, however, that *Meyer*,¹⁸ as well as the *Court Proceedings Regulation*, require the plaintiff to point to an impact on the person’s employment as it existed at the time of the accident, as opposed to impacts on enhanced employment opportunities that may arise post-accident, in order to satisfy the statutory criteria.¹⁹

[40] I would further observe that the plaintiff did not make it entirely clear how the changes in his family, social and other activities in recent years have been caused by the injuries he sustained in the Collision. For example, Mr. Nadarajah testified that he no longer plays cricket post-accident. However this appears to be as a result of the degeneration of his right shoulder, which was not injured in the accident. Further, Mr. Nadarajah did not explain how the limitations resulting from his accident-related injuries have limited his ability to cook, to do groceries, or to attend social gatherings, none of which would necessarily involve heavy lifting, overhead activity or repetitive or forceful use of the left upper extremity against resistance.

¹⁵ *Frankfurter v. Gibbons* (2004), 74 O.R. (3d) 39 (Ont. Div. Ct), at paras. 22-24.

¹⁶ *Court Proceedings Regulation*, s. 4.2(1).2(i), which is an indicia for the function to be considered “important”.

¹⁷ *Court Proceedings Regulation*, s. 4.2(1).1(i), which is an indicia for the function to be considered “serious”.

¹⁸ *Meyer* at para. 34.

¹⁹ Of course, impairments of bodily functions that limit a person’s future career opportunities may give rise to a claim for economic loss, but this is a claim separate and distinct from the claim for pain and suffering.

[41] In my view, therefore, I do not believe that the plaintiff has established, on a balance of probabilities, either that the limitations arising from the accident have “substantially interfered with [his] usual activities or daily living”, nor that the functions that have been impaired are “important to the usual activities of daily living”, considering his age. Further, there is no dispute over the fact that he is fully able to provide for his own care and well-being.

[42] I have no doubt that Mr. Nadarajah has experienced soft-tissue pain and will continue to experience such pain into the indefinite future. But for the reasons outlined above, I am unable to find that the plaintiff has met the burden of establishing that the limitations to his bodily functions arising from the Collision meet the statutory test of “important” or “serious”. The impacts are no doubt unpleasant and perhaps frustrating but, in my view, do not rise above the tolerable.

[43] I find that the plaintiff has failed to discharge his onus of proof on a balance of probabilities that the impairments to his bodily functions sustained in the Collision satisfy the criteria set out in s.267.5(5) of the *Act*. Accordingly, his claim for general damages is dismissed.

[44] If the parties cannot agree on costs, I invite Aviva to provide me with written costs submissions of no more than five double-spaced pages, exclusive of bills of costs or offers to settle, by no later than January 12, 2018. The plaintiff’s costs submissions of similar length are due January 26, 2018.

P. J. MONAHAN J.

Released: December 18, 2017

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SUPERIOR COURT OF JUSTICE

SELVARAJAH NADARAJAH

Plaintiff

– and –

AVIVA CANADA INC.

Defendant

REASONS FOR JUDGMENT

P. J. MONAHAN J.

Released: December 18, 2017