Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

Plaintiff

- and -

Defendant

FACTUM OF THE DEFENDANT (MOVING PARTY)
{when brought by motion}

DEFENDANT'S STATEMENT OF LAW
{when brought at trial}

THRESHOLD ISSUE

TO:

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THRESHOLD ISSUE

OVERVIEW

1. Section 267.5(5) of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, provides that there shall be no liability for non-pecuniary loss resulting from a motor vehicle accident unless, as a result of the accident, the injured person has died or has sustained (a) permanent serious disfigurement; or (b) a permanent serious impairment of an important physical, mental, or psychological function. This subsection is commonly referred to as the 'threshold' provision. This is a motion to determine whether this Plaintiff meets the threshold in this action.

THE LAW AND ARGUMENT

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THE CURRENT TEST

2. Bill 198 brought changes to the *Insurance Act* for automobile accidents on or after October 1, 2003 to which this case is subject. The Regulation was amended to include a definition of "permanent serious impairment of an important physical, mental or psychological function" as well as the evidence required to prove same.

> **Sections 4.2 and 4.3 of Ontario Regulation 461/96 as amended by O.Reg 381/03 of the *Insurance Act*, R.S.O. 1990, c.I.8 as amended**

3. Section 4.2 has three parts. The first part defines what is meant by "serious." The second part defines what is meant by "important." The third part defines what is meant by "permanent":

> 1. The impairment must,
>   i. substantially interfere with the person's ability to continue his or her regular or usual employment, despite reasonable efforts to accommodate the person's impairment and the person's reasonable efforts to use the accommodation to allow the person to continue employment.
>   ii. substantially interfere with the person's ability to continue training for a career in a field in which the person was being trained before the incident, despite reasonable efforts to accommodate the person's impairment and the person's reasonable efforts to use the accommodation to allow the person to continue his or her career training, or
>   iii. substantially interfere with most of the usual activities of daily living, considering the person's age.
>
> 2. For the function that is impaired to be an important function of the impaired person, the function must,
>   i. be necessary to perform the activities that are essential tasks of the person's regular or usual employment, taking into account reasonable efforts to accommodate the person's impairment and the person's reasonable efforts to use the accommodation to allow the person to continue employment,

ii. continued…

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