



FSCO A10-002979

BETWEEN:

NITA MUJKU

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

REASONS FOR DECISION

Before: Arbitrator Jeffrey Rogers

Heard: May 7, 8, 9, 10, 14 and 15, 2012, in Hamilton, Ontario.
Written submissions were completed on October 26, 2012.

Appearances: Mr. Daniel Roncari, solicitor for Mrs. Mujku
Mr. Robert Franklin, solicitor for State Farm Mutual Automobile
Insurance Company

Introduction:

The Applicant, Nita Mujku, was injured in a motor vehicle accident on November 10, 2005. She claims that the accident caused her to sustain a marked impairment due to mental or behavioural disorder and she is thus catastrophically impaired, within the meaning of section 2(1.2)(g) of the *Schedule*.¹ On October 29, 2009, she made an application to State Farm for a determination of catastrophic impairment. State Farm arranged for her to be assessed by a team of medical professionals (CAT assessment team). They concluded that Mrs. Mujku did not meet the test. A team that Mrs. Mujku later retained arrived at the opposite conclusion.

¹ *The Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996, Ontario Regulation 403/96, as amended.*

The parties were unable to resolve their dispute through mediation, and Mrs. Mujku applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

The issues in this hearing are:

1. Did Mrs. Mujku sustain a catastrophic impairment, as defined in section 2(1.2)(g) of the *Schedule*, as a result of a motor vehicle accident on November 10, 2005.
2. Is either party required to pay the other's expenses of this hearing?

Result:

1. Mrs. Mujku sustained a catastrophic impairment, as defined in section 2(1.2)(g) of the *Schedule*, as a result of a motor vehicle accident on November 10, 2005.
2. If they are unable to resolve the issue of expenses, either party may make an appointment for me to determine the matter in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

EVIDENCE AND ANALYSIS:

Overview

Mrs. Mujku argues that the accident caused her to sustain a marked impairment due to mental or behavioural disorder. State Farm says that this was a minor accident and any injuries Mrs. Mujku sustained have healed. It argues that the seeds for Mrs. Mujku's mental or behavioural disorder were planted before the accident and nurtured by post-accident stressors, unrelated to her injuries. It further argues that, even if the accident caused Mrs. Mujku's mental or behavioural disorder, her impairment is mild, not marked. She therefore does not meet the definition of catastrophic impairment.

In its decision in *Pastore v. Aviva Canada Inc.*², the Court of Appeal neatly summarized the three-stage process required for deciding the issue of catastrophic impairment due to mental or behavioural disorder as follows:

An assessment under s. 2(1.1)(g) is carried out by reference to the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (the *Guides*). Chapter 14 of the *Guides* sets out a three-stage process for evaluating catastrophic impairment based on mental disorder using four categories of functional limitation and five levels of dysfunction. The first stage is diagnosis of any mental disorders, followed by the second stage where the impact on daily life is identified. The third stage is assessing the severity of limitations by assigning them into the four categories and determining their levels of impairment. The *Guides* direct the assessment in the following "four categories of functional limitation"

Thus, the dispute in this case is resolved by answering the following three questions:

1. Did the accident cause Mrs. Mujku to suffer a mental or behavioural disorder?
2. If it did, what is the impact of mental or behavioural disorders on her daily life?
3. In view of the impact, what is the level of impairment?

Mrs. Mujku has been diagnosed with several mental or behavioural disorders. State farm disputes causation. That is the first question to be resolved. All other questions are moot, if the accident did not cause Mrs. Mujku to suffer a mental or behavioural disorder.

Mrs. Mujku had a pre-accident history of mental health issues. She was diagnosed with, and treated for depression. After the accident, she was further diagnosed with many recognized mental or behavioural disorders, including adjustment disorder with anxiety-chronic, pain disorder with associated psychological factors and a general medical condition, and specific phobia-situational type (driving).

² 2102 ONCA 642, at page 4 (the number of the section is changed because of the date of the accident, but the definition is the same)

State Farm argues that Mrs. Mujku should not be believed when she says that she was fully functional before the accident. It further argues that she should not be believed when she says that post-accident stressors did not severely impact her mood or function.

All of the evidence must be assessed, bearing in mind the well-established “material contribution” test for causation. Mrs. Mujku is not required to prove that the accident was the only cause of her mental or behavioural disorder. She is required to prove that the accident materially contributed to it.³ Further, as the Court of Appeal ruled in its decision in *Pastore*, if pain due to purely physical injuries cannot be factored out, she is not required to show that her impairment is due solely to mental or behavioural disorder. The Court approved the Director’s Delegate’s finding that, in determining whether impairment was “due to” mental or behavioural disorder “there was no statutory requirement to dissect the mental disorder into constituent parts.”⁴

The decision rests on Mrs. Mujku’s credibility and the soundness of the opinions of the medical professionals who treated and assessed her. I have concluded that, although Mrs. Mujku had a significant pre-accident history of mental health issues, which she tended to downplay, the injuries she sustained in the accident exacerbated her existing condition. I have further concluded that, despite unrelated post-accident stressors, Mrs. Mujku’s injuries from the accident materially contributed to her diagnosed mental and behavioural disorders. Finally, I have concluded that Mrs. Mujku’s level of impairment due to her mental or behavioural disorders is marked.

I will first address Mrs. Mujku’s credibility, since the strength of the expert opinions is contingent upon their application of the underlying facts. I will then review the opinions.

Mrs. Mujku’s credibility

Mrs. Mujku testified at the hearing and she was cross-examined at length. I found her to be a co-operative and credible witness. Not surprisingly, she did not have total recall of her medical history, and of what she might have told the numerous health professionals over the course of many years. I saw no pattern of evasiveness or refusal to concede the possibility of error.

³ See *Arunasalam and State Farm Mutual Automobile Insurance Company* (FSCO P09-00025, March 2, 2011)

⁴ *Pastore supra*, at page 27

Not surprisingly, there were differences between the various histories transcribed by the numerous health professionals. Since there was no evidence to confirm the accuracy of transcription, the fair approach is to view the records as a whole. I have viewed Mrs. Mujku's credibility in light of the overall pattern the records establish. I have generally discounted unproven anomalies.

Mrs. Mujku was born in Kosovo on February 25, 1962, making her 50 years old now. She was 42 at the time of the accident. She immigrated to Canada in 1995. She is married, with two sons, Faton and Fadil now aged 30 and 28. Her husband sustained a catastrophic impairment as a result of a motor vehicle accident that occurred in 1999. Her son Fadil was arrested and charged with murder in 2001. He has been in jail since his arrest. His trial was ongoing at the time of the accident. He was convicted of second-degree murder in December 2006. He was sentenced to 13 years in prison. Two years ago, Faton was shot in the leg while sitting in a coffee shop.

Mrs. Mujku was involved in a previous accident in 2002. She testified that the damage to her vehicle was much more serious than in this accident. Her car was written off. She reported no injuries.

Mrs. Mujku was diagnosed as depressed as early as 2001. Dr. Geoffrey Holdway, her family doctor since 1996, confirmed this diagnosis. She was referred for treatment by psychiatrist Dr. Janet Patterson. Prior to the accident Mrs. Mujku had suffered panic attacks and had attended at emergency departments and at Dr. Holdway's office with various complaints of pain.

Mrs. Mujku testified that she was generally healthy before the accident. Despite her panic attacks and depression, she was physically active and socially engaged. She was not taking any medication and was not in pain. Confronted with her history of depression, panic attacks, and complaints of pain, Mrs. Mujku explained that she considered herself healthy because her pre-accident health problems did not significantly impact her function. She remained physically active and socially engaged. She was the primary caregiver for her catastrophically impaired husband and was independent with regard to self-care. She did most of the housekeeping, and she tended a garden.

I accept that Mrs. Mujku tended to downplay the existence of her pre-accident mental health issues. But there is no evidence that any of her pre-accident mental health issues significantly impaired her function. There is also no evidence that any of her pain complaints were chronic.

The testimony of Dr. Holdway and his extensive records⁵ support Mrs. Mujku's view of her pre-accident health. He testified that he knows Mrs. Mujku as well as he knows any patient. As noted above, he has been her family doctor since 1996. He is also her husband's family doctor. His familiarity puts him in a unique position to comment on Mrs. Mujku's health over time. His notes show that he saw Mrs. Mujku on April 26, 2004 at which time he did a complete physical examination. He noted occasional problems with hemorrhoids. He noted that "she has a lot of stress in her family with her son and husband." He found her general health to be excellent.

Dr. Holdway did not see Mrs. Mujku again until about 18 months later, after the accident. She was not out of touch with his office. She did contact his office twice in the interim, for non-medical reasons. There is no evidence that she sought medical attention from anyone else during that period. Dr. Holdway keeps a cumulative chart for his patients on which he notes recurring complaints. Mrs. Mujku's cumulative chart was blank before the accident.⁶ Dr. Holdway agreed that Mrs. Mujku's depression remained unresolved at the time of the accident. But he pointed out that she did not fall into crisis without treatment, and she had no complaints of chronic pain. That happened after the accident.

I find that despite her pre-accident medical history, there were no significant limitations on Mrs. Mujku's function before the accident. Mrs. Mujku's failure to acknowledge the impact of her pre-accident health issues on her post-accident decline is of no consequence. All of the health professionals who later gave opinions on causation were aware of the important aspects of her history and took them into account in forming their opinions.

I now turn to the accident and Mrs. Mujku's post-accident health. The accident itself was unremarkable. Mrs. Mujku was a passenger in a vehicle driven by her son Faton. He stopped because the vehicle in front of him stopped. His vehicle was then hit from behind. The cost of

⁵ Exhibit 11E

⁶ Exhibit 1, page 1

repairs to his vehicle was \$703.34.⁷ Mrs. Mujku testified that the police were called, but the parties involved decided to leave when the police had not arrived for over an hour. She did not attend at a hospital.

Mrs. Mujku did not suffer serious physical injuries. When she attended at Dr. Holdway's office 5 days after the accident, she complained of headaches, and pain and stiffness in the neck and shoulders. Dr. Holdway referred her for chiropractic treatment. He issued a disability certificate in which he made a diagnosis of mild to moderate whiplash, and strained muscles posterior to the shoulders. He anticipated that she would be disabled from her caregiving, and her housekeeping and home maintenance activities, for 5 to 8 weeks.⁸

Mrs. Mujku testified that, after the accident, her pain steadily worsened and her mental health followed the same trajectory. After some initial efforts, she stopped providing care for her husband, needed help with her own care, stopped virtually all housekeeping and home making activities, and she became socially withdrawn. Although she is now physically capable of most self-care, she lacks the motivation to take care of herself. She has never returned to her pre-accident caregiving for her husband, or her housekeeping and home maintenance activities. Those responsibilities fell to her mother, her son Faton, and his girlfriend, who is now his wife. She is no longer physically active. She lost interest in socializing and has lost contact with her friends.

Since the accident Mrs. Mujku has been diagnosed with fibromyalgia, rotator cuff syndrome, severe major depression, a pain disorder, adjustment disorder, anxiety disorder, and specific phobia. She has received chiropractic treatment. She has received psychological counselling and psychiatric treatment. She has been enrolled in an exercise program and a pain management program where she was given steroid injections in her neck and shoulders. She has been prescribed a cocktail of medication for depression, pain, and sleep disturbance, and stomach medication to combat the adverse effects of taking her cocktail.

⁷ Exhibit 7

⁸ Exhibit 11E, At page 16, and Exhibit 11A

Dr. Holdway's chart now shows severe major depression, coping with chronic pain, and fibromyalgia as chronic complaints.⁹ In a note dated February 1, 2008, he described Mrs. Mujku as follows:

This pt was injured in a car accident two years ago; whiplash. She has myofascial pain; pain in the back of her neck across her shoulders, radiating up into her scalp. Describes it as burning pain. Physical activity is extremely painful. She is not able to bend over for more than about 2 minutes; she also is deeply depressed.

Her husband was injured in a motor vehicle accident some 5-10 years ago; had a head injury; and is in a very poor state; no longer works, just stays at home; has a history of depression. She has a son who is in jail for murder. Lots of big stressors.

However, the patient was far more active than she is now and her mood was good and she did not have any chronic pain. This seems to have occurred since the accident although the other issues have certainly not helped...¹⁰

State Farm attacks Mrs. Mujku's reports of pain and lack of function on many fronts. First, State Farm questions the severity of her injuries, since she did not attend at a hospital immediately after the accident and did not see Dr. Holdway until 5 days after the accident. I agree that Mrs. Mujku now recalls the accident as a more horrific incident than it appears to have been. But she does not claim that she sustained serious physical injuries, and no one who treated or assessed her formed an opinion based on a history of serious physical injury.

However, no one who treated or assessed Mrs. Mujku questioned Dr. Holdway's initial diagnosis. As late as September 2006, Dr. Joel Yellin, who assessed Mrs. Mujku at State Farm's request, confirmed that she had suffered a cervical sprain, lumbar sprain and thoracic sprain in the accident, and she had ongoing symptoms. There is no doubt that Mrs. Mujku suffered soft tissue injuries in the accident.¹¹ It is those injuries that are the lynchpin of the opinions of the medical professionals who concluded that the accident caused Mrs. Mujku to suffer a mental or behavioural disorder.

⁹ Exhibit 1

¹⁰ Exhibit 1e, at page 20

¹¹ Exhibit 14b, at page 3

Next, State Farm questions Mrs. Mujku's credibility because several medical professionals who later interviewed her recorded her description of the accident as a much more traumatic event than appears warranted by the damage to her car and her conduct at the scene. At the hearing, she testified that, when the accident occurred, she heard a loud noise. She was never more scared in her life. Her knees started shaking and the shaking did not subside for half an hour after she left the scene. She testified that she told Dr. Holdway about her knees shaking, but the first record of shaking is found in her psychologist's notes of April 5, 2006.¹²

I agree that, given Mrs. Mujku's history of attendances at hospital emergency departments, her post-accident conduct is not consistent with her current recall of the immediate effects of the accident. Had the effects been as severe as she now reports, she would likely have sought immediate medical attention. But subterfuge is not the only explanation.

Dr. Brian Levitt, the psychologist who was a member Mrs. Mujku's CAT assessment team, addressed this issue in his evidence. He testified that depression itself causes patients to report events as horrible. If that is the case, the patient will not recognize that what is being said is exaggeration. All of the evidence must be considered in order to find the right explanation. Here, Mrs. Mujku had nothing to gain from belated exaggeration. She had already reported her injuries from the accident, and she did not later add to those. I therefore reject State Farm's submission that Mrs. Mujku's credibility is generally suspect. I note that, in any event, Mrs. Mujku's later description of the immediate effects of the accident did not play a role in informing the opinions of any medical professionals who treated or assessed her.

I do not accept State Farm's submission that the opinions of Mrs. Mujku's CAT assessment team should be discounted because its members were part of the medical association that provided her psychological treatment. State Farm provided no basis for the alleged conflict between the obligations of a treatment provider, and the obligation to provide objective opinion. Further, none of the assessors actually treated Mrs. Mujku.

¹² Exhibit 13a, at page 3

Next, State Farm challenges Mrs. Mujku's reports of decline in her ability to function, shortly after the accident. State Farm says that her evidence is unreliable when she testified that she was not able to continue to care for her husband. State Farm argues that there is persuasive evidence to the contrary.

At the time of the accident, Mrs. Mujku was being paid \$6,000 per month as the attendant care provider for her catastrophically impaired husband. Those payments continued until her husband's claims were settled. According to Mrs. Mujku, that was one to two years after her accident. She testified that, although the cheques continued to be paid in her name, she did not provide the care to her husband. Faton and her mother took over those duties. Her evidence was that she did not pay them at first, but she started to do so when Faton had to spend so much time taking care of his father that he could not work as much as he did before her accident.

On this issue, State Farm also points to a note in Dr. Holdway's records on March 9, 2009 that states that Mrs. Mujku's husband had an accident 7-10 years ago and "Pt has cared for him all this time"¹³ as evidence that she was still providing care for her husband. However, I find it unlikely that Dr. Holdway's note refers to her current care for her husband. First, that interpretation is not consistent with the numerous notes Dr. Holdway made about her complaints after the accident. And second, Dr. Holdway himself issued two disability certificates after the accident in which he gave the opinion that Mrs. Mujku was disabled from her pre-accident caregiving activities.¹⁴ More likely, the note is an imprecise reference to Mrs. Mujku's pre-accident care for her husband.

Neither Faton nor Mrs. Mujku's mother testified at the hearing. But Juanita Le Roux, the occupational therapist who was part of State Farm's CAT assessment team, interviewed Faton during her assessment. Her report of the interview generally confirms Mrs. Mujku's evidence. He told her that he was unable to hold down a permanent job because he was required to care for both of his parents. He also told her that he was currently able to work more regular hours because his visiting grandmother was able to assist with his parents' care.

¹³ Exhibit 11e, at page 25

¹⁴ Exhibits 11a and 11b

I accept Mrs. Mujku's evidence that she was unable to continue to care for her husband after the accident. I give no weight to the evidence that cheques for his care continued to be paid in her name. In the circumstances of her household, there was no imperative for her to change how the cheques for his care were paid.

State Farm also challenges Mrs. Mujku's evidence of the post-accident decline in her ability to perform her housekeeping and home maintenance tasks, based upon similar anomalies in the records. I reject this submission for the same reason. There are also records confirming Mrs. Mujku's reports. Viewed as a whole, they support her evidence.

State Farm also says that Mrs. Mujku's evidence that she stopped driving one to two months after the accident is unreliable. She testified that she only drove a few times during that period. She did not have that much difficulty while she was actually driving, but that at night she would have "bad thoughts" and nightmares. She testified that, because she had stopped driving, two years after the accident when her licence was due for renewal, she did not renew it. As with her other activities, there are many references in the records that support Mrs. Mujku's evidence.

State Farm points to a note that says she had no daytime fear of driving. But that note is not necessarily inconsistent with her evidence that she did not have difficulty when she actually drove. Her fear came at night.

I doubt the accuracy of further notes State Farm relies on in this regard. Dr. Jonathan Siegel assessed Mrs. Mujku on State Farm's behalf on April 2, 2007. He recorded that she was driving "not that much" and that she was driving two to three times a week to appointments.¹⁵ Dr. Siegel might well have misreported Mrs. Mujku's evidence that she did not have much difficulty when she actually drove, and that she only drove a few times after the accident. He noted that she took a taxi to his assessment. Even if his note is accurate, Dr. Siegel's note also confirms Mrs. Mujku's testimony regarding the nighttime consequences of driving during the day.

¹⁵ Exhibit 17a, at page 6

The hazard of relying on the notes of medical professionals as a verbatim transcript is illustrated by the further note State Farm relies on in this regard. When Dr. Zohar Waisman interviewed Mrs. Mujku on January 7, 2010 for the CAT assessment, he recorded that Mrs. Mujku “has returned to driving.”¹⁶ Ms. Le Roux, who assessed her the day before and 2 days after Dr. Waisman’s interview, recorded that she had not driven for the past 4 months due to pain and feelings of fear.¹⁷ Both cannot be accurate, and given the proximity of the two reports, Mrs. Mujku would likely have been consistent, if subterfuge were intended. Since Mrs. Mujku had let her driver’s licence expire by the time of these assessments, both records of continued driving are likely inaccurate.

In its submissions, State Farm also claimed that Mrs. Mujku did not attend for recommended treatment. State Farm also referred to instances when she did not take medication prescribed for her depression. The submissions said little about how this might impact either her disability or credibility. I find no merit in these submissions. The evidence does not support the claim that Mrs. Mujku did not pursue treatment, and both Dr. Levitt and Dr. Waisman testified that non-compliance with medication is not uncommon in patients with Mrs. Mujku’s condition.

In summary, although Mrs. Mujku’s evidence does not accurately describe the immediate consequences of the accident, and although she lacks a clear appreciation of the impact of her pre-accident mental health issues and post-accident stressors on her post-accident decline, I accept Mrs. Mujku’s evidence regarding her decline in function after the accident.

I turn now to the three-stage analysis set out in *Pastore*. To reiterate, the questions to be answered are:

1. Did the accident cause Mrs. Mujku to suffer a mental or behavioural disorder?
2. If it did, what is the impact of mental or behavioural disorders on her daily life?
3. In view of the impact, what is the level of impairment?

I will answer those questions in order.

¹⁶ Exhibit 17f, at page 31

¹⁷ Exhibit 17f, at page 25

1. *The accident caused a mental or behavioural disorder*

The dispute in this case is not about diagnosis. The dispute is about whether the accident caused Mrs. Mujku to suffer a mental or behavioural disorder. This analysis must be conducted, bearing in mind that Mrs. Mujku is not required to prove that the accident was the only cause of her mental or behavioural disorder. She must prove that the accident materially contributed to it.

With the exception of Dr. Peter Marton, a psychologist who assessed Mrs. Mujku on State Farm's behalf on September 26, 2006¹⁸, experts on both sides of the debate diagnosed Mrs. Mujku with several mental or behavioural disorders. Dr. Marton's opinion was not accepted by any of his colleagues who followed. I reject it for that reason.

On the issue of causation, State Farm apparently relies on the opinion of Dr. Waisman, the psychiatrist who was part of the CAT assessment team. Dr. Waisman testified at the hearing. The issue of causation was raised in his testimony, but he did not retreat from his diagnosis. His diagnosis was: "Pain Disorder Associated with Psychological Factors and a General Medical Condition. The psychological factors being financial difficulties and pre-accident history of depression. Pre-accident history of dysthymia."¹⁹ But the general medical condition is the injuries from the accident. Dr. Waisman agreed that the injuries Mrs. Mujku sustained in the accident contributed to the development of her pain disorder.

Thus, although State Farm argues that Mrs. Mujku's "impairment was pre-existing and/or caused by subsequent, unrelated, events in her life"²⁰, its own CAT assessor diagnosed a mental disorder, caused by the accident. Dr. Waisman found Mrs. Mujku to be mildly impaired, and therefore not within the definition of catastrophic impairment. He did not claim that the pain disorder he diagnosed was not caused by the accident. His evidence was that he took causation into account in assigning the level of impairment. I will address his approach to that determination later in this decision.

¹⁸ Exhibit 14c

¹⁹ Exhibit 17f-at page 33

²⁰ Respondent's written submissions, at page 2

Dr. Siegel made the same diagnosis as Dr. Waisman, about 3 years earlier, after examining Mrs. Mujku on State Farm's behalf, on April 2, 2007.²¹ He stated as follows: "It is my opinion that Ms. Mujku has a Pain Disorder associated with a General Medical Condition and Psychological Factors ... and it is my opinion that there are moderate symptoms of depressive symptomatology. In my opinion, symptoms of depression are likely potentiating pain problems."²² As Dr. Waisman pointed out in his testimony, Dr. Siegel's psychological testing raised questions about symptom magnification. But Dr. Siegel concluded as follows: "It is my clinical impression that there are signs of symptom magnification, based on testing, although this is coexisting with symptoms of depressive symptomatology."²³

Dr. Siegel was aware of Mrs. Mujku's pre-accident mental health issues and unrelated post-accident stressors and he directly addressed the issue of causation as follows: "To emphasise, in my opinion, although there are non-accident-related issues that are impacting on the course of recovery, it is my opinion that Ms. Mujku is legitimately experiencing pain problems, which were not present prior to the subject motor vehicle accident and therefore, counselling can be considered to be reasonable and necessary as a direct result of the subject motor vehicle accident."²⁴

Then, on February 22, 2008, State Farm had Mrs. Mujku assessed by another psychologist. Dr. Joel Goldberg diagnosed adjustment disorder, with depression and anxiety.²⁵

Psychologist Dr. R. C. Bradley added her voice to the consensus, after assessing Mrs. Mujku on State Farm's behalf, on April 4, 2009. She diagnosed the same pain disorder as Drs. Siegel and Waisman.²⁶ After an exhaustive review of Mrs. Mujku's medical and personal history, she made the additional diagnoses of major depressive disorder, severe without psychotic features; adjustment disorder with anxiety-chronic; and specific phobia-situational type (driving). She found all of her diagnoses to be caused by the accident, stating as follows:

²¹ Exhibit 17a

²² Exhibit 17a, at page 10

²³ Exhibit 17a, at page 12

²⁴ Exhibit 17f, at pages 12-13

²⁵ Exhibit 17c, at page 8

²⁶ Exhibit 17d

Regarding etiology of the aforementioned clinical syndromes, all are materially related to Ms. Mujku's November 10, 2005 MVA. It is believed that the subject MVA has had a material contribution to the development of the aforementioned clinical syndromes. Yet it is also believed that there was a significant level of psychological strain prior to the subject MVA, associated with issues related to her husband's catastrophic injuries since his 1999 MVA, and more importantly, her son's incarceration since 2001 and his pending charge for a serious criminal offence.²⁷

As noted above, Dr. Brian Levitt is the psychologist who was part of the CAT assessment team that Mrs. Mujku retained. He assessed her on April 30, 2010 and prepared a report dated June 11, 2010.²⁸ He too diagnosed the same pain disorder as Drs. Waisman and Siegel. He also concurred with Dr. Bradley's diagnosis of major depressive disorder. He made a different diagnosis, on the facts that led to Dr. Bradley's diagnosis of adjustment disorder and specific phobia (driving). Dr. Levitt's diagnosis was anxiety disorder, NOS, [not otherwise specified] with features of PTSD [post traumatic stress disorder] and GAD [general anxiety disorder].²⁹ He agreed that Dr. Bradley's diagnosis was a reasonable alternative, but he thought that his choice better captured Mrs. Mujku's symptom picture.³⁰

Dr. Levitt also echoed Dr. Bradley on the issue of causation. Fully aware of her history, he concluded that "Ms. Mujku's psychological and mental disorders, and pain conditions are caused by the November 3[sic], 2005 MVA, due to injuries sustained and trauma experienced in the accident."³¹

All of these mental or behavioural disorders were diagnosed with awareness that the results of psychological testing raise concerns about symptom magnification. Although their analysis differed, all of the psychologists who administered the tests resolved the concerns in favour of finding that the accident caused the mental or behavioural disorders they diagnosed. There is nevertheless some divergence in diagnoses. Where their diagnoses diverge, I prefer the opinions of Dr. Bradley and Dr. Levitt, to that of Dr. Waisman.

²⁷ Exhibit 17d, at page 26

²⁸ Exhibit 13t

²⁹ Exhibit 13t, at page 12

³⁰ Exhibit 13t, at page 13

³¹ Exhibit 13t, at page 17

Dr. Levitt testified that Mrs. Mujku met all 9 criteria for major depressive disorder, in the DSM-IV-TR.³² Dr. Waisman thought otherwise. He saw no evidence of depressed affect, no evidence of psychomotor agitation or retardation, no evidence of excessive or inappropriate guilt, no evidence of diminished ability to think or concentrate, and no evidence of specific plan for committing suicide. Dr. Levitt specifically disagreed with this conclusion. He pointed out that, although there was no plan for suicide, Mrs. Mujku did wish she were no longer alive.

Dr. Waisman's observations regarding Mrs. Mujku run contrary to those of Dr. Bradley and Dr. Levitt, and to those other health professionals made consistently, throughout the record. Remarkably, Dr. Waisman saw a different Mrs. Mujku than the one that the occupational therapist on State Farm's CAT assessment team saw. As I noted earlier, Ms. Le Roux assessed Mrs. Mujku the day before and 2 days after Dr. Waisman. She saw much the same Mrs. Mujku as many others did. I reject Dr. Waisman's opinion that Mrs. Mujku does not meet the criteria for a diagnosis of major depressive disorder.

There is ample support in the record and in Mrs. Mujku's evidence for Dr. Bradley's and Dr. Levitt's opinions. I find that Mrs. Mujku suffers from major depressive disorder, severe, without psychotic features, as a result of the accident.

Dr. Waisman was also of the opinion that Mrs. Mujku did not meet the diagnosis for specific phobia. Here, he again contradicted a diagnosis that Dr. Bradley had earlier made. He stated that "there is no evidence of marked or persistent fear that is excessive or unreasonable, cued by the presence or anticipation of a specific object or situation."³³ Again, Dr. Levitt specifically disagreed. Dr. Waisman's opinion in this regard was based, to a large extent, on his mistaken belief that Mrs. Mujku was still driving. Dr. Bradley and Dr. Levitt made their diagnoses with a better appreciation of the facts. It is not necessary to choose between their preferred diagnoses in this area. Either diagnosis encompasses the same effects on Mrs. Mujku's function.

In summary, I find that the accident caused the following mental or behavioural disorders:

³² *Diagnostic and Statistical Manual of Mental Disorders*, 4th Ed., Text Revision

³³ Exhibit 17f, at page 33

- Pain Disorder Associated with Psychological Factors and a General Medical Condition;
- Major Depressive Disorder, severe without psychotic features; and
- Either adjustment disorder with anxiety-chronic and specific phobia-situational type (driving), or anxiety disorder, NOS, [not otherwise specified] with features of PTSD [post traumatic stress disorder] and GAD [general anxiety disorder]

2. Impact of Mrs. Mujku's mental or behavioural disorders on her daily life

Having determined that the accident caused mental or behavioural disorders, two steps in the analysis remain. The next step is to determine the impact of Mrs. Mujku's mental or behavioural disorders on her daily life.

The *Guides* direct the assessment in the following four areas of function:

- (1) Activities of daily living (ADL);
- (2) Social functioning;
- (3) Concentration, persistence and pace; and
- (4) Deterioration or decompensation in work or worklike settings.

The best evidence in this regard is the similar findings of the two occupational therapists who were members of the CAT assessment teams. I choose their perspective for three reasons. First, their expertise lies in the area of assessing physical, emotional and cognitive, functional abilities and limitations. Second, their findings are consistent with Mrs. Mujku's evidence that I have accepted, and the medical records as a whole. Third, they independently arrived at similar conclusions.

Ms. Le Roux, the occupational therapist on State Farm's CAT assessment team, conducted her assessment by spending many hours with Mrs. Mujku in her home and community, on January 6 and January 9, 2010. Her assessment included review of medical documentation, a clinical interview, musculoskeletal assessment, ~~manual muscle testing~~, extensive observation of functional tasks, and assessment of physical and functional skills in the community.

Ms. Le Roux summarized her findings is as follows:

Ms. Mujku presented with low volition and flat affect throughout this extended assessment period. She demonstrated lack of interest in her environment. She was unable to initiate basic self care tasks and requires constant prompting for all tasks. She was unable to make basic decisions (even as basic as what to eat or what to wear). She presented with poor functional concentration and memory.

She is physically able to perform some of the requested functional tasks but required prompting for all tasks. She presented with functional range of motion and muscle strength but is not motivated to use these abilities for function. She was not willing to complete tasks on a constant basis and the tasks attempted were partially completed with poor task quality. She does not perform basic hygiene and grooming tasks without prompting. She does not eat proper meals, if not prepared for her. Her appetite is very poor. She has poor sleep hygiene and has difficulty falling asleep and waking up in the mornings. She requires prompting to get dressed and get out of bed on a daily basis. She is unable to follow a daily routine such as waking up at the same time per day, have regular meals at certain times of the day and go to bed with a specific hygiene routine.³⁴

The occupational therapist on Mrs. Mujku's CAT team did her assessment about 5 months later. Ms. Asma Malik testified that she chose to do her assessment in a clinical setting, because she wanted to capture a worklike environment. She otherwise took the same approach as Ms. Le Roux.³⁵

She agreed that her findings were similar to Ms. Le Roux's. She agreed that Mrs. Mujku demonstrated the physical ability to complete some of the tasks. She disagreed with Ms. Le Roux's comment on Mrs. Mujku's lack of motivation since Ms. Le Roux did not include the possibility that lack of motivation may be caused by Mrs. Mujku's mental disorder.

As noted above, all of Mrs. Mujku's mental or behavioural disorders were diagnosed with awareness that the results of psychological testing raise concerns about symptom magnification, and all of the psychologists who administered the tests resolved the concerns in favour of finding that the accident caused the mental or behavioural disorders they diagnosed. But diagnosis does not answer the question of whether magnification is intentional or as a consequence of the disorder. In forming his opinion, Dr. Levitt conducted a thorough review of all of the tests

³⁴ Exhibit 17f, at pages 27-28

³⁵ Report at Exhibit 13q

conducted. He concluded that Mrs. Mujku's "emotional distress is genuine, and that she is neither exaggerating nor malingering."³⁶ I accept Dr. Levitt's opinion. It confirms my findings on Mrs. Mujku's credibility.

Ms. Malik's findings of impairment in the four spheres to be measured reflect their similarity to Ms. Le Roux's findings. They include the following:

Activities of Daily Living

- Inability to participate in personal hygiene and self care routinely;
- Limited with regard to travel, communication, sleep, social and recreational activities;
- Requires cuing, structure and support to initiate even simple self-care activities such as brushing her teeth, taking a shower, and changing her clothes;

Social Functioning

- Stoic facial expression and flat affect throughout;
- Anxiety attack during the functional activities;
- Did not initiate much communication, required prompting;

Concentration, persistence and pace

- lack of ability to sustain focussed attention;
- required significant support, intervention and assurance to initiate and persist in activities;
- limited in physical activities by pain and limited by mental abilities in activities which were cognitively demanding;

Deterioration or decompensation in work or worklike settings

- inability to maintain an active daily routine and complete tasks in a timely manner;
- inability to participate in activities of daily living on a regular basis;
- requires significant cueing and prompting to initiate activities and persist through tasks.

As I noted earlier, Dr. Waisman observed a different Mrs. Mujku, when he assessed her as the psychiatrist on State Farm's CAT assessment team, between the two days that Ms. Le Roux did her assessment. Without explanation, Ms. Le Roux's observations were not integrated into the

³⁶ Exhibit 13t, at page 15

team's findings. Dr. Waisman testified that no attempt was made to do so. In fact, he would have resisted any attempt to reach a consensus. He explained that patients with depression have good days and bad. I suppose that he meant that Mrs. Mujku was having a good day, when he saw her. But Dr. Waisman did not explain how the many other health professionals who saw Mrs. Mujku, invariably saw her on worse days than he did. He did not integrate this divergence into his findings.

Where Dr. Waisman's observations of Mrs. Mujku's functional abilities differs from those of Ms. Le Roux and Ms. Malik, I prefer their views. Dr. Waisman's expertise is not in this area, he saw Mrs. Mujku for a limited time, and his view is contrary to the recognition in the *Guides* that an individual's functioning may vary considerably over time. His approach is contrary to the specific direction in the *Guides* that "[P]roper evaluation of an impairment must take into account variations in the level of functioning with time, in arriving at a determination of severity."³⁷

3. Mrs. Mujku has a marked impairment, due to mental or behavioural disorder

The final step in the analysis is to determine Mrs. Mujku's level of impairment. The *Guides* direct that each of the four categories of function be assessed, based on the following five levels of impairment:

Area or aspect of functioning	Class 1: No impairment	Class 2: Mild impairment	Class 3: Moderate impairment	Class 4: Marked impairment	Class 5: Extreme impairment
Activities of daily living	No impairment is noted	Impairment levels are compatible with <i>most</i> useful functioning	Impairment levels are compatible with <i>some</i> , but not all, useful functioning	Impairment levels <i>significantly impede</i> useful functioning	<i>Impairment levels preclude</i> useful functioning
Social functioning					
Concentration					
Adaption					

³⁷ Paragraph 14.2 of *Guides*

This assessment must be conducted, bearing in mind that the impairment must be as a result of mental or behavioural disorder. The *Guides* recognize that assessing impairment as it relates to pain is difficult. The following guidance is offered:

Establishing that pain is or is not a symptom of a mental impairment may be a difficult and complex task. Pain that presents only as a symptom of a mental disorder is rare. The following guidelines may be useful in determining whether pain is a symptom of a mental impairment. (1) All possible somatic causes of the pain have been eliminated by careful, comprehensive medical examinations. (2) Some significant emotional stressor has occurred in the patient's life that may have acted as a triggering agent, and the stressor and the pain have occurred in a reasonable sequence. (3) Evidence exists of a mental disorder other than a conversion-related one, and the pain may be a symptom of the former; for example, delusional pain may occur in a patient who has subtle paranoid disorder.

Assessing impairment related to pain is difficult, and the process is not as clearly and precisely defined as with some kinds of impairments. Therefore, determinations about difficult and borderline cases in this category should be made through a multidisciplinary, multispecialty approach, in which physicians who are knowledgeable about the different body systems are involved as needed.³⁸

In *Pastore*, the Court of Appeal explained the meaning of the above section of the *Guides* as follows:

This passage states that because it is rare for pain to be a symptom only of a mental disorder, such pain must be carefully assessed. In order to determine whether pain is a symptom of a mental disorder, the assessor needs to remove from consideration, to the extent possible, any physical causes. In difficult and borderline cases, the *Guides* direct that this should be done using a multi-disciplinary approach.³⁹

In *Pastore*, the insured person was diagnosed with the same pain disorder with which Mrs. Mujku is diagnosed. One of the issues before the Court was whether it is necessary to factor out pain from purely physical causes. The Court ruled that it is not. The Court stated:

Because the mental disorder itself involves pain and includes pain associated with a general medical condition, in this case it is certainly reasonable to include pain

³⁸ Chapter 14.5 of the *Guides*

³⁹ Paragraph 63, at page 29

from the general medical condition to the extent that such pain is connected with the diagnosed mental disorder.⁴⁰

In assessing Mrs. Mujku's level of impairment, Dr. Waisman and Dr. Levitt took different approaches. I earlier found Dr. Waisman's reports of Mrs. Mujku's level of function to be unreliable. His opinion on her level of impairment may be rejected for that reason alone. But there are other reasons.

As noted above, Dr. Waisman diagnosed Mrs. Mujku with the same disorder as the insured person in *Pastore*: "Pain Disorder Associated with Psychological Factors and a General Medical Condition." He rated her as having no impairment of concentration, persistence and pace. He rated her as mildly impaired in the other three spheres of function. As noted above, Dr. Waisman saw Mrs. Mujku functioning at a higher level than any other professional who observed her. Most notably, he differed from the contemporaneous observations and testing by Ms. Le Roux. He also mistakenly believed that she was still driving, a fact he considered important to his impairment rating.

Dr. Waisman's perspective was limited. He interviewed Mrs. Mujku for an hour to an hour and a half, and based much of his opinion on what he described as a "mini mental status examination." Neither he nor anyone on his team conducted any psychological testing. He agreed that this would have been a useful tool. He did not have Dr. Holdway's records and he did not have the records of Kaplan and Kaplan, the psychologists who had treated Mrs. Mujku since before the accident.⁴¹ As noted earlier, Dr. Waisman's approach ignored the recognition in the *Guides* that an individual's functioning may vary considerably over time. In this regard, the *Guides* also state that "it is important to obtain evidence over a sufficiently long period before the date of examination. This evidence should include treatment notes, hospital discharge summaries, work evaluations, and rehabilitation progress notes if they are available."⁴²

⁴⁰ Paragraph 68, at page 31

⁴¹ In its written submissions, State Farm claimed that Mrs. Mujku failed to provide these records. Mrs. Mujku replied that she had provided them. Even if State Farm is right, I attach no consequence. State Farm should have raised this issue earlier.

⁴² Paragraph 14.2 of *Guides*

Dr. Waisman testified that he took causation into account in assigning the level of impairment. Presumably he factored out the things he noted in his report: "functional limitations due to physical conditions, chronic pain, or internal or external factors other than strictly psychological dysfunctions."⁴³ In other words, he claims to have factored out pain due purely to a medical condition, and stressors that were unrelated to the accident. But Dr. Waisman does not explain how he was able to do so or what value he attached to matters he considered unrelated. Dr. Waisman does note that Mrs. Mujku "explicitly relates her functional difficulties primarily if not entirely to her physical problems."⁴⁴ While it is true that Mrs. Mujku views her limitations as primarily physical, her perception of pain is what drives that view. Dr. Waisman does not explain how much of Mrs. Mujku's perception of pain he attributed to a purely medical condition. He also does not explain how he could make a diagnosis of pain disorder, which hinges on a finding of pain that is not explained by physical injuries, when he believed that Mrs. Mujku's limitations were primarily or entirely related to physical problems.

In fact, Dr. Waisman's own view of the physical injuries Mrs. Mujku sustained in the accident supports the conclusion that her pain has a large psychological component. He testified that this was truly a minor accident and, in his view, there is a correlation between the severity of impact and the severity of symptoms. He testified that Mrs. Mujku should therefore have long ago recovered from her physical injuries. Since she had not, he looked elsewhere for the cause of ongoing problems. Dr. Waisman's view suggests that one looks to causes that are not purely physical. Instead, Dr. Waisman apparently sought to eliminate the accident as a cause and focussed his scrutiny on causes that were not related to the accident. Whatever his approach, Dr. Waisman did not explain how he took causation into account in arriving at his impairment rating.

In addition to the above, Dr. Waisman appears to have had the wrong definition of marked impairment in mind when he conducted his assessment. Marked impairment is defined as "a level of impairment that significantly impedes useful functioning." In his report, he stated "marked or extreme impairment in turn describe minimal or no independent functioning."⁴⁵ This is closer to the definition of extreme impairment. Extreme impairment is defined as an impairment that "precludes useful functioning." And this is not just a drafting oversight.

⁴³ Exhibit 17f, at page 35

⁴⁴ Exhibit 17f, at page 34

⁴⁵ Exhibit 17f, at page 34-35

In his evidence, Dr. Waisman described patients with marked impairments as completely non-communicative or lying on a slab.

One does not know what Dr. Waisman's impairment rating would have been, if he had an accurate view of Mrs. Mujku's level of function, did not factor out limitations caused by pain, and considered the correct definition. I give no weight to Dr. Waisman's opinion on Mrs. Mujku's level of impairment.

Dr. Levitt rated Mrs. Mujku's as markedly impaired in the spheres of social functioning, and deterioration or decompensation in work or worklike settings. He found a moderate impairment in the two other spheres. Ms. Malik considered Mrs. Mujku to have a marked impairment in the sphere of deterioration or decompensation in work or worklike settings. Her rating in the other three spheres was moderate to marked. Unlike the State Farm team, Mrs. Mujku's team reviewed each other's findings and attempted to reach consensus. The consensus was that Mrs. Mujku has a marked impairment in the sphere of deterioration or decompensation in work or worklike settings.

I reject State Farm's submission that I should disregard Ms. Malik's opinion on level of impairment because it involves making a diagnosis, which an occupational therapist is not authorized to make.⁴⁶ Ms. Malik offered no opinion on diagnosis. An impairment rating is based on function. The expertise of an occupational therapist lies in the area of assessing functional abilities and limitations. Giving an impairment rating is squarely within this competence.

I accept Dr. Levitt's and Ms. Malik's opinion. I conclude that Mrs. Mujku's mental or behavioural disorders significantly impede useful functioning in the sphere of deterioration or decompensation in work or worklike settings.

The *Guides* direct that this sphere refers to repeated failure to adapt to stressful circumstances. The *Guides* also set out possible effects of stress, such as withdrawal, exacerbation of symptoms

⁴⁶ At the hearing, State Farm also argued that Dr. Levitt was not qualified to give an opinion on impairment. This issue was conceded in its written submissions. (Written Submissions of the Respondent, at page 35, paragraph 5)

of mental disorder, and difficulty maintaining activities of daily living and continuing social relationships.⁴⁷

Both Dr. Levitt and Ms. Malik correctly appreciated that impairment in this sphere is not measured in isolation. Mrs. Mujku's impairments in the other measured spheres must be taken into account. It must be appreciated that any level of function that she has achieved has been at the price of a "dramatically reduced daily life in terms of responsibilities and social contact."⁴⁸ Ms. Malik put it as follows:

Ms. Mujku's chronic pain symptoms, headaches, poor functional tolerance, severe depression, difficulty with initiating and persisting through tasks, lack of motivation, reduced energy, reduced cognitive abilities and excessive fatigue would all be barriers in her ability to be productive. The stress of work environment would make her withdraw from the situation and she would experience exacerbation of her mental symptoms.⁴⁹

On the issue of whether Mrs. Mujku's impairment is due to mental or behavioural disorder, I accept Dr. Levitt opinion. I accept his conclusion that Mrs. Mujku's pain and emotional symptoms interact in a vicious cycle. His opinion that "psychological factors play a major role with respect to daily functioning, including a significant impact on exacerbating her pain conditions that further limit her"⁵⁰, is amply supported by the record. The circumstances are identical to those in *Pastore*. As noted above, the Court concluded that, because the mental disorder itself involves pain and includes pain associated with a general medical condition, it is certainly reasonable to include pain from the general medical condition to the extent that such pain is connected with the diagnosed mental disorder.

Finally, I accept Dr. Levitt's opinion that depression and anxiety are major factors in limiting Mrs. Mujku's initiation and useful engagement in activities. I reject the view that she chooses not to try harder.

⁴⁷ Chapter 14.3 of the *Guides*

⁴⁸ Exhibit 13t, at page 17


⁴⁹ Exhibit 13q, at page 13

⁵⁰ Exhibit 13t, at page 23

In summary, I find that the accident caused Mrs. Mujku's mental or behavioural disorders. I further find that she is markedly impaired in the sphere of deterioration or decompensation in work or worklike settings, due to her mental or behavioural disorders. She thus sustained a catastrophic impairment, within the meaning of section 2(1.2)(g) of the *Schedule*.

EXPENSES:

The parties made no submissions on expenses. If they are unable to resolve this issue, either party may make an appointment for me to determine the matter in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.



Jeffrey Rogers
Arbitrator

January 14, 2013

Date



FSCO A10-002979

BETWEEN:

NITA MUJKU

Applicant

and

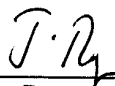
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. Mrs. Mujku sustained a catastrophic impairment, as defined in section 2(1.2)(g) of the *Schedule*, as a result of a motor vehicle accident on November 10, 2005.
2. If they are unable to resolve the issue of expenses, either party may make an appointment for me to determine the matter in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.



Jeffrey Rogers
Arbitrator

January 14, 2013

Date