



Citation: Ratnam v. Primum Insurance Company, 2021 ONLAT 19-006706/AABS

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In the matter of an Application pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

Jeganathan Ratnam

Applicant

and

Primum Insurance Company

Respondent

DECISION AND ORDER

VICE-CHAIR:

D. Gregory Flude

APPEARANCES:

For the Applicant:

Jeganathan Ratnam, Applicant
Sarah A. Naiman and Matthew J. Sutton, Counsel

For the Respondent:

Annette Uetrecht-Bain, Counsel

Court Reporter:

Tala Rida

HEARD by Videoconference: January 18 through 27, 2021

OVERVIEW

- [1] The applicant, Jaganathan Ratnam, was involved in automobile accidents on September 15, 2011 and June 21, 2014. He was found to be catastrophically impaired after the 2011 accident because he was barely conscious at the accident scene. He received benefits from his insurer and has fully and finally settled his benefit entitlement with respect to that accident. He now seeks a determination that he has suffered a catastrophic impairment as a result of the 2014 accident on the grounds that it has had a major impact on his mental health.
- [2] The respondent, Primum Insurance Company (“Primum”), does not accept that Mr. Ratnam’s mental health condition, to the extent that he has a condition that meets the test for catastrophic impairment set out in the June 2014 version of the *Statutory Accident Benefits Schedule – Effective September 1, 2010 O. Reg. 34/10 (“Schedule”)*, that flows from the 2014 accident. Primum’s position is that Mr. Ratnam does not meet the test set out in the *Schedule*, but, if he does, his condition flows from the 2011 accident not the 2014 accident. Primum further asserts that both the 2014 accident and Mr. Ratnam’s injuries flowing from it were minor.
- [3] Prior to 2011, Mr. Ratnam had a family and a steady income from a career in his chosen field and owned a house in the GTA. After 2011, he became involved in a custody dispute that resulted in him being awarded custody of the children, and he still had his career. In 2014, in quick succession he was involved in the 2014 accident and approximately a month later he was let go from his employment. He hasn’t worked since. His personal circumstances have deteriorated, and he now lives in a one-bedroom apartment with his 88-year-old mother and spends much of his time in bed. His psychiatrist has diagnosed him with severe depression.
- [4] There are two issues that I must address. First, does Mr. Ratnam suffer from a psychological condition of such severity that he meets the test for catastrophic impairment? Primum says that, because of serious concerns about the validity of Mr. Ratnam’s responses to the tests their psychologists administered to him, that there can be no reliable psychological diagnosis. Second, if he does meet the catastrophic impairment test, would he be suffering from this condition had it not been for the 2014 accident. This is referred to as the “but for” test. I find that Mr. Ratnam does meet the catastrophic impairment test and that, on a balance of probabilities, he would not have become catastrophically impaired but for the 2014 accident.

ISSUES

- [5] The issues in dispute as set out in the case conference order is: did the applicant sustain a catastrophic impairment as defined under the *Schedule*, denied by the respondent on May 17, 2019?

APPLICABLE DEFINITION OF CATASTROPHIC IMPAIRMENT

- [6] The 2014 version of the *Schedule* sets out 3 monetary and time limits for medical, rehabilitation and attendant care benefits. Section 18 sets the monetary limit for persons who have sustained minor injuries at \$3,500; for those who have sustained more than minor but non-catastrophic injuries it is \$50,000 for medical and rehabilitation benefits and \$36,000 for attendant care benefits. These medical and rehabilitation benefits are subject to a 10-year time limitation and the attendant care benefits are subject to a 104-week time limitation. The 2014 monetary limit for someone who has sustained a catastrophic impairment increases to \$1 million for each of medical/rehabilitation benefits and attendant care benefits. The benefits are available until the monetary limit is exhausted with no time limit. In addition, several benefits, such as housekeeping and home maintenance, become available.
- [7] At the 2011 accident scene, Mr. Ratnam was administered an awareness/responsiveness test called the Glasgow Coma Scale (“GSC”). It measures three areas of response on a scale of 1 – 5, the maximum score of 15 indicating complete awareness and the lowest score of 3 indicating coma. Mr. Ratnam scored 5. According to the *Schedule*, any person scoring under 9 is deemed to be catastrophically impaired, hence the finding that Mr. Ratnam was catastrophically impaired as a result of the 2011 accident.
- [8] A finding of catastrophic impairment is a designation. Its effect is to make higher coverage limits available for treatment where necessary. For instance, a person found to be in a coma at the accident scene may make a speedy recovery with little or no lingering impairment and not need to access the increased funding. Equally the person may suffer severe debilitating impairments and need extensive treatment and care.
- [9] Mr. Ratnam asserts that he suffers from a debilitating psychological disorder as a result of the 2014 accident. He submits that his psychological impairment falls within the definition of catastrophic impairment set out in s. 3(f) of the *Schedule* as follows: “an impairment that, in accordance with the American Medical Association’s *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993 (“Guides”), results in a class 4 impairment (marked impairment) or class 5 impairment (extreme impairment) due to mental or behavioural disorder.”

- [10] The Guides establish various criteria for establishing if someone is catastrophically impaired. There are chapters dealing with different areas of the body and a means of assigning weight to the type of impairment found. Chapter 14 of the Guides addresses mental and behavioural disorders. It identifies four areas or spheres: 1) activities of daily living, 2) social functioning, 3) concentration, persistence and pace, and 4) deterioration or decompensation in work or work-like settings. Each of the four areas is assessed on a scale of Class 1 to Class 5, where Class 1 represents no impairment and Class 5 represents extreme impairment. To be determined to have a catastrophic impairment, Mr. Ratnam must have sustained a Class 4 impairment in at least one of the four spheres. That is, in at least one sphere, Mr. Ratnam suffers from impairment levels that “*significantly impede* useful functioning.”

ANALYSIS

Does Mr. Ratnam suffer from a catastrophic impairment?

- [11] I find that Mr. Ratnam’s condition does meet the definition of catastrophic impairment. In arriving at this conclusion and at the conclusion about causation in the second part of this analysis, Mr. Ratnam’s tailoring of his evidence and his deliberate attempt to frustrate Primmum’s psychological assessors from arriving at a meaningful diagnosis weigh heavily against him. In the end, there is other evidence that tips the scale in Mr. Ratnam’s favour, so I conclude, on a balance of probabilities that Mr. Ratnam’s current psychological condition meets the test for catastrophic impairment, that is, he has at least one Class 4 marked impairment.

Tailoring of Evidence

- [12] As stated above. I find that Mr. Ratnam tailored his evidence to exaggerate his condition. Mr. Ratnam was in an accident in September 2011 where he suffered a brain trauma that rendered him almost comatose. As a result, he was determined to be catastrophically impaired. Of the two accidents, September 2011 and the current accident in June 2014, the former was much more serious, and Mr. Ratnam spent several days in hospital. By comparison, the June 2014 accident was relatively minor. Having settled the first accident claim, it was in Mr. Ratnam’s interest to ascribe the majority of the symptoms he currently suffers to the second accident, and that is what he did.
- [13] In his examination-in-chief Mr. Ratnam testified that, following the 2011 accident he returned to work, earned bonuses and that his work performance did not suffer. Prior to 2011 he had been active in sport and in the community, playing

cricket and soccer, attending church, and being involved in social activities. After the 2011 accident he stopped playing sport but became a spectator. He stated his life did not change much. He had care of his children and although he had home care for a period after 2011, he managed well.

- [14] According to Mr. Ratnam, after his return to work following the 2011 accident, he suffered no performance issues. There may have been occasional absences due to difficulty coordinating his treatment schedule with his work schedule. He does not deny suffering pain as a result of the injuries he sustained, but his pain was managed by medications. It came as a surprise to him when he was the only senior member of his department to be laid off shortly after the June 2014 accident.
- [15] Following the June 2014 accident, he testified that he felt increased pain in his ankles, knees, back, and neck, and suffered from headaches. He felt he was falling apart. He had psychological issues. He was scared. He could not sleep. He had bad dreams and would wake up screaming. A major issue for him, he testified, was an inability to focus, an inability that meant he cannot focus on work, read technical manuals or a book. The June 2014 accident has caused him to suffer from major depression.
- [16] During cross-examination, Primmum pointed out to him that his work record between 2011 and 2014 showed several extensive medical absences that were of concern to his employer. It also pointed out to him that the medical records of his family physician, Dr. Lu, do not record any report of depression arising out of the June 2014 accident, during post-accident visits from 2014 through 2018. Dr. Lu, in 2018 renewed his anti-depression medication at the pre-accident level. On August 29, 2014, Mr. Ratnam was seen by Dr. Utsalo. Dr. Utsalo's notes make no reference to the 2014 accident. There were other instances where medical notes do not recall the accident.
- [17] Mr. Ratnam's response the first time this issue was raised was to say, "Doesn't mean I didn't tell him." Subsequently, as more instances were put to him he took the position that he always talked about the accident and his depression, ultimately stating that it was his general position that where medical notes were silent on his depression symptoms and the accident, they failed to record what he had actually said.
- [18] I find it unlikely that several healthcare providers would not record over multiple years and multiple visits what Mr. Ratnam maintains he told them is a matter of major concern to him, his depression arising from the June 2014. I prefer to rely

on the contemporaneous notes of these healthcare providers rather than the Mr. Ratnam's insistence that the records are deficient.

- [19] In weighing Mr. Ratnam's evidence, I formed an impression that he was enhancing his complaints for effect. His blanket denial of evidence that tended to contradict the impression he was trying to create did nothing to enhance his credibility. Overall, despite my concerns over Mr. Ratnam's evidence, it is clear that he is a shadow of his former self.

Failure to Cooperate with Insurance Examiners

- [20] My concerns over Mr. Ratnam's evidence were not relieved by his performance at independent psychological assessments conducted on behalf of Primmum under s. 44 of the *Schedule*.
- [21] Primmum exercised its rights under s. 44 of the *Schedule* to have Mr. Ratnam undergo a psychological and neurocognitive assessment. The assessor, Dr. Karen Wiseman, testified and was qualified as an expert in clinical psychology, clinical neuropsychology, and traumatic brain injury as they relate to catastrophic impairment under the *Schedule*.
- [22] The results of Dr. Wiseman's December 3 and December 17, 2018 assessment of the applicant are succinctly summed up at pages 22 and 23 of her report included in the Multi-Disciplinary Assessment Report issued on May 7, 2019:

Mr. Ratnam was administered two dedicated performance validity tests and three neuropsychological measures with embedded validity checks during the current assessment. These were all performed unacceptably. His performance on both forced choice measures at or below a chance level of responding. In the context of litigation and with the accident parameters, this actually meets the Slick and Sherman (2013) criteria for Definite Malingered Neuropsychological Dysfunction. Neurocognitive impairment and malingered neurocognitive dysfunction are not mutually exclusive. However, the probability of malingering does preclude accurate quantification of any impairment that may exist, or even confirming the presence of impairment.

The current assessment does not reveal evidence of valid neurocognitive impairment arising from the accident and resulting in a complete inability to engage in any employment for which Mr. Ratnam is reasonably suited by education, training or experience.

- [23] Dr. Wiseman reached similar conclusions with respect to her contemporaneous psychological assessment. She concluded at page 54 of the Multi-Disciplinary Assess Report:

The criteria of relevance to the current assessment are criteria 7 and 8. I am unable to provide a valid rating under criterion 7 using a GAF [Global Assessment of Functioning], due to the validity concerns outlined in the report. Mr. Ratnam's behaviour during the current assessment and concurrent occupational therapy assessments is not verification of Class 4 or Class 5 level of impairment (per criterion 8) in relation to the accident. I am unable to provide further clarification regarding any mental or behavioural impairment that might exist, due to the validity concerns outlined above.

However, given the validity concerns outlined above, it is my opinion that it would be more appropriate not to assign an impairment rating.

- [24] While it is not necessary to go into the detail of each test that brought Dr. Wiseman to the conclusions she reached, a representative sample will illustrate the problem. In the 50 question Visual Form Discrimination Test, even a person guessing the answers would likely choose correctly 50% of the time for a score of 25. Mr. Ratnam scored 14. Dr. Wiseman interpreted this result as a deliberate attempt on the part of Mr. Ratnam to choose the incorrect answer. In the Memory Malinger Test, Dr. Wiseman testified that people with brain injury will score 50, 50 and 50, or 48, 48 and 50. People with advanced dementia may not get much higher than 45, but Mr. Ratnam's score of 14, 14 and 7 is just not credible. In Digit Tests, where a normal cut off would be around 7 or 8, and a person with a lower level of education might get as low as 5, Mr. Ratnam scored 2, yet, inconsistently, he was able to converse for long periods of time.
- [25] One very telling test showing a lack of effort is the Motor Speed Test. It consists of tapping the index finger as often as possible over a timed period. The cut-off point for this test, that is the point where it is clear the patient is not trying, is 63. Mr. Ratnam managed 6 taps. Dr. Wiseman concluded that Mr. Ratnam's were so consistently below chance that he was deliberately presenting below his level of ability. She characterized the behaviour as neuropsychological malingering, defined as exaggeration or feigning for secondary gain. Because all the invalid test results, Dr. Wiseman could not provide a diagnosis.

[26] Dr. Wiseman noted similar results from other IE examinations. In a March 17, 2015 report, neuropsychologist, Dr. Christopher Hope, made very similar findings. In his report he states:

Psychometrically, Mr. Ratnam's testing was considered invalid because of symptom exaggeration and response bias. Thus, although he reports some symptoms of psychological distress, his self-report in this regard is not considered to be valid. It is not reasonable to accept his self-report of his impairments as an accurate reflection of his functioning. This does not rule out the possibility that he is experiencing symptoms of psychological distress, but he has not provided any valid evidence of an accident-related psychological impairment.

[27] In a report dated November 2015, Dr. Hope again concluded that it was impossible to diagnose an accident-related psychological impairment because of lack invalid test data. He states:

Psychometrically, Mr. Ratnam's testing was again considered invalid because of symptom exaggeration and response bias. Thus, although he reports ongoing symptoms of psychological distress, his self-report in this regard is not considered to be valid. It is not reasonable to accept his self-report of his impairments as an accurate reflection of his functioning given this consistent evidence of symptom exaggeration. This does not rule out the possibility that he is experiencing symptoms of psychological distress. However, in consideration of the nature of the accident and consistent evidence of invalid symptom reporting, any connection between a significant psychological impairment and the accident in question is dubious.

[28] There are several reports addressing Mr. Ratnam's physical abilities. In her report at page 49, Dr. Wiseman reviews the finding of Amanda Garnett and notes that Ms. Garnett was unable to assess the performance of the applicant in several areas due to suboptimal effort. I must note, however, that Ms. Garnett did make findings that do not appear to be disputed, particularly safety awareness. She states, "an apparent lack of safety awareness was noted in the kitchen environment when he turned on an electric kettle and positioned it near the edge of the sink when washing dishes." She also noted difficulties scheduling and organizing tasks.

[29] Chiropractor, Dr. Stephen Balsky and Registered Kinesiologist, Dawn Rynberk, concluded the report of their July 17, 2015 assessment by stating: “As Mr. Ratnam put forth a sub maximal effort and declined to perform some tasks, we are unable to comment on his current objective functional limitations.”

[30] Physiatry reports by Physiatrist, Dr. Oshidari, note a similar theme of inconsistency. Dr. Oshidari notes that:

During formal examination, there is significant weakness in the ankle dorsiflexion and plantar flexion. Even in the sitting position when he tried to show me the location of the pain in both knees, he extended both knees to at least 80 degrees straight leg raising and bent forward to show the location of pain in the knee without any difficulty, but in lying position, I was limited to perform straight leg raising to at most 20 degrees. Therefore, this assessment is positive for numerous inconsistencies and nonorganic findings and cannot be explained by any specific neuromusculoskeletal pathology.

[31] Notwithstanding that he noted inconsistencies and a lack of any specific neuromusculoskeletal pathology, in his catastrophic assessment report, Dr. Oshidari concludes that the 2014 accident exacerbated pain symptoms that started with the 2011 accident. He notes:

However, we have to consider, he has had these symptoms for almost four years. I expect if there were any true neurological findings, some of my findings today would be abnormal such as muscle tone, bulk, or reflexes. (The only abnormality I found was mild atrophy of the right quadriceps compared to the left quadriceps, 10 cm above the patella (0.7 cm)).

Therefore, at this stage, I cannot make any specific diagnosis. From the physical perspective, there no physiological abnormality to account for his presentation and limitation of function. It is structural or my opinion that the pain symptoms he was experiencing from his previous accident in 2011 were exacerbated by this motor vehicle accident of 2014.

[32] In short, Dr. Oshidari accepts that Mr. Ratnam suffers from non-organic pain that limits functioning and was contributed to by the 2014 accident. Dr. Oshidari declined to give a diagnosis of chronic pain syndrome in his oral evidence, citing a decision of this Tribunal that held that only a psychologist or a psychiatrist

could diagnose chronic pain syndrome, or somatic symptom disorder with predominant pain as it is referred to in psychological circles.

Dr. Anthony Feinstein and Dr. David Berbrayer

- [33] Mr. Ratnam relies on the opinion of Dr. Anthony Feinstein that he has sustained a Class 4 impairment in one of the 4 spheres set out in the Guides. Dr. Feinstein is a neuropsychiatrist who studies the behavioural impact of neurological disease on behaviour. He has had grants to study the impact of traumatic brain injury (“TBI”) on depression and on psychiatric illness. He testified as an expert on the impact of TBI on mood and behavioural disorders.
- [34] Dr. Feinstein assessed Mr. Ratnam twice to determine whether he was catastrophically impaired, once in September 2014 and again in September 2016. In 2014 he initially diagnosed Mr. Ratnam as not catastrophically impaired but, having reviewed the medical records, he noted Mr. Ratnam had a GCS of 5 at the accident scene and, in keeping with the definition of catastrophic impairment in the *Schedule*, change his opinion, finding that the 2011 accident caused a catastrophic impairment.
- [35] In arriving at his initial conclusion that Mr. Ratnam did not meet the psychological threshold for catastrophic impairment in his 2014 assessment, Dr. Feinstein found:
- In terms of his post-accident functioning, his impairments in relation to activities of daily living; socializing; concentration, persistence and pace; and adaptation fall in the moderate range (Class 3). I am therefore of the opinion that Mr. Ratnam's symptomatology does not meet the threshold for Catastrophic Impairment.
- [36] Dr. Feinstein concluded that Mr. Ratnam's symptoms arising from the 2011 were worsened by the 2014 accident. He lists them, as follows:
- Mr. Ratnam reports the following lifestyle changes that come about following his first accident and which were subsequently affected by the second accident:
1. Difficulty focusing at work with a falloff in work performance. As noted earlier, Mr. Ratnam feels that this left him vulnerable to being laid off.
 2. A significant reduction in socializing.

3. Less ability to manage housekeeping activities. Here Mr. Ratnam reports that following his first accident he had to employ a nanny to look after his children and manage the housekeeping.
4. An inability to manage home maintenance tasks which are now done by a contract worker.
5. Less ability to manage a full grocery shop with Mr. Ratnam reporting that he requires the assistance of his 16-year-old daughter for this.
6. An inability to play soccer or go jogging.
7. Less ability to cook leading to a greater reliance on fast foods.

[37] Two years later, on September 19, 2016, Dr. Feinstein assessed Mr. Ratnam for the second time. He noted a marked deterioration in Mr. Ratnam's condition, attributable, at least in part, to the 2014 accident:

Having now assessed Mr. Ratnam for the second time I have observed a deterioration in his condition. His psychopathology is extensive and wide-ranging and the effects on his level of functioning as it currently pertains to the assessment of catastrophic impairment are as follows:

1. Limitations in activities of daily living: Moderate (Class 3) Impairment
2. Social functioning: Marked (Class 4) Impairment
3. Concentration, persistence and pace: Marked (Class 4) impairment
4. Deterioration or decompensation in work or work-like settings: Marked (Class 4) Impairment.

Given that I have deemed Mr. Ratnam to have a Marked Impairment in three of the four areas used to assess catastrophic impairment, it is my overall conclusion that he is suffering from a Marked Impairment (Class 4) in Accordance with the American Medical Association's Guides to the Evaluation of Permanent Impairment, 4th Edition, 1993.

There is a clear temporal association between Mr. Ratnam's road traffic accident of June 21st, 2014 and the development of his current psychopathology. Mr. Ratnam's second accident has materially contributed to a worsening in his mentation and a more extensive falloff in his level of functioning. The temporal association between the accident of June 21st,

2014 on the one hand and the deterioration in his physical and psychological health on the other, points towards a causal association.

[38] Dr. Feinstein diagnosed Mr. Ratnam with:

Somatic Symptom Disorder with Predominant Pain and an **Adjustment Disorder with Mixed Anxiety and Depressed Mood**. Notwithstanding the deterioration in his mood, symptoms fall short of the diagnosis of Major Depression and as such an Adjustment Disorder diagnosis remains a better fit for his current presentation. Finally, Mr. Ratnam does have enduring symptoms of a Neurocognitive Disorder. Once more emotional factors have intruded, hindering his recovery. His subjective complaints of poor memory and impaired concentration are likely secondary to his prominent pain, impaired mood, heightened anxiety and fatigue. While direct cerebral trauma is now unlikely to be contributing to the clinical picture, it cannot be definitely ruled out. It is for this reason that the diagnosis of **Neurocognitive Disorder** remains. [emphasis in original]

[39] The essential difference between the approach taken by the psychologists who assessed Mr. Ratnam on behalf of Primmum and Dr. Feinstein, is that Dr. Feinstein did not use psychometric validity testing as part of his assessment. He does not believe there is a clear link between the results of validity testing and the lack of symptoms. While the validity tests raised the spectre of malingering, Dr. Feinstein points to Mr. Ratnam's strong work ethic. He returned to work and managed pain after the 2011 accident and tried to return to work after the 2014 accident until he was laid off. In Dr. Feinstein's opinion, his attempts to return to work highlight a strong work ethic that was overwhelmed by his mental health issues.

[40] What Dr. Feinstein did find was consistency of symptoms between his 2014 assessment and his 2016 assessment. He noted deterioration over time from a Class 3 impairment to a Class 4 impairment in three of the four spheres in the absence of the treatment he recommended in 2014. While not addressed in his formal report, Dr. Feinstein expounded on his reasons for finding that the assignment of Class 4 impairment levels in his testimony. He noted that Mr. Ratnam had maladaptive coping, an almost complete cessation of social interactions, a lack of resilience, and a problem focussed approach to life that significantly impeded useful functioning.

- [41] Mr. Ratnam also relied on the opinion of physiatrist, Dr. David Berbrayer, an expert in pain management and physiatry. Dr. Berbrayer assessed Mr. Ratnam in 2015 and found that he could distinguish between the impacts of the 2011 accident and the 2014 accident. He diagnosed the applicant with chronic pain syndrome, not showing Dr. Oshidari's reluctance to do so. In Dr. Berbrayer's opinion, as a physiatrist he is trained to diagnose chronic pain syndrome, and in doing so, he takes into account the psychological diagnoses.

Reconciling the Medical Evidence

- [42] When he embarked on a course of action to deliberately frustrate the efforts of Primmum's assessors, Mr. Ratnam adopted a dangerous course. Had it been argued that the level of his refusal to cooperate rose to effective refusal to attend an insurance examination and he was barred from proceeding by virtue of s. 55(1) 2. of the *Schedule*, this hearing may have had a different outcome. In the absence of submissions on this point from the parties, I decline to consider the impact of s. 55(1) 2. further. Going forward, Mr. Ratnam would be well advised to cooperate fully, or risk being denied access to benefits.
- [43] The inability of Primmum to meaningfully assess Mr. Ratnam has created a tension in the evidence that I must resolve. In ultimately preferring Dr. Feinstein's diagnosis of a Class 4 impairment in three of the four spheres set out in the Guides, I am not unaware of the deliberate attempts to fail the psychological testing. In the end, I think Dr. Feinstein's more practical assessment of Mr. Ratnam as he actually presented in his daily life, and the marked deterioration between 2014 and 2016, is more convincing.
- [44] There is supporting evidence from Mr. Ratnam's long-time friend, Ravichandran Selvanaykyan, about Mr. Selvanaykyan's increasingly futile attempts to entice Mr. Ratnam into greater social activity. There was also objective evidence of Mr. Ratnam's declining personal circumstances, his reduced living arrangements, loss of house, job, and reduced contact with his children. Objectively, Mr. Ratnam is not functioning in any meaningful or useful manner. He spends large parts of his day in bed. There is also evidence of cognitive impairment or poor coping skills leading to possible dangerous conditions in the report of Amanda Garnett.
- [45] Having weighed the evidence, I find that Mr. Ratnam suffers from three Class 4 impairments. Pursuant to s. 3(2)(f) of the *Schedule*, he has sustained a catastrophic impairment. The question remains: are his impairments as a result of the 2014 accident?

Causation

- [46] In the recent case of *Sabadash v. State Farm et al.*, 2019 ONSC 1121 (CanLII) (“*Sabadash*”), the Divisional Court upheld Director’s Delegate Evans decision that applicants in cases under the *Schedule* must show that but for the accident, they would not have sustained the impairments for which they seek benefits. Following *Sabadash*, in the case of *RBC General Insurance Co. and Thiruchelvam*, 2019 CarswellOnt 6221 (“*Thiruchelvam*”) Director’s Delegate Evans set aside an arbitrator’s decision that found a “new normal” at work in *Schedule* cases and, again, failed to apply the “but for” test. It is clear from the case law, a long line of which is cited in *Sabadash* and *Thiruchelvam*, that in order to succeed in a case where causation is in dispute, the applicant must show that he or she would not be in their current condition but for the accident.
- [47] To be sure, the accident need not be the sole cause of the applicant’s condition, but it must be a cause, which, or alone or in combination with other factors, results in the complained of impairment. This multi-factored causation is at the heart of the dispute in this case.
- [48] Primum submits that the medical complaints Mr. Ratnam now advances predate the 2014 accident and, were, in fact, the result of the 2011 accident. Mr. Ratnam does not disagree that the 2011 accident was the more serious accident as a result of which he sustained a TBI and was off work for several months. The contemporaneous medical records support the proposition that many of his complaints stem from the 2011 accident. But, he submits, he was coping. He had fought a custody battle over his children and had continued to work. He no longer played sports, but he took his son to sporting activities and participated as a spectator.
- [49] Primum is not wrong in its submission, but it stops the analysis short of the mark. It ignores the documented decline in Mr. Ratnam’s mental health from 2014 through 2016. It treats Mr. Ratnam’s mental health as an event, not a process. Finally, it ignores the findings of its own assessor, Dr. Oshidari, that the 2014 accident exacerbated pre-existing symptoms and the impact of that exacerbation needed to be considered. Dr. Oshidari considered the injuries to be non-organic, that is, they may be explained by a psychological component. Thus, while Mr. Ratnam was diagnosed with depression following the 2011 accident and before the 2014 accident, that the condition was exacerbated by the 2014 accident and the impact of that accident sent him on the downward spiral noted by Dr. Feinstein. That decline needed to be considered. Dr. Feinstein recommended psychological intervention in 2014 and again in 2016.

[50] One issue raised by Primmum questions why Mr. Ratnam did not seek psychological treatment when he had in excess of \$45,000 left for medical treatment under the coverage limitation for non-minor injuries in the *Schedule*. The answer to that question is found throughout the medical evidence.

[51] Ms. Garnett, in her assessment of the applicant, noted his inability to complete even simple planning or use memory aids. In this regard she stated:

Despite his reported memory issues, he did not make use of any compensatory strategies to aide his memory. In order to ensure his full understanding of the task, I asked that he repeat the instructions back to me before proceeding and he was unable to do so. Prior to repeating the instructions, I asked if there was any strategy, he might helpful [sic] to aide his memory and he was unable to identify any such strategy independently. He required direct cueing to take a written note, which was lacking in detail (e.g. missing full details for the dishwashing task, no specific details noted for the meal planning task, no mention of time limit).

He sat down to complete the meal planning task. When he indicated that he was complete, I noted that he had only listed two meals for Monday through Friday. I asked him to label his meals for easier review and he noted that the meals were for breakfast and lunch.

After completing his meal plan, the examinee remained seated. When asked, he reported that he was done the task. I informed him that there was one thing left remaining for him to do. He was unable to identify the remaining task, despite looking to his written note which read: "wash dishes put in". He was advised that he had been asked to return the washed dishes to the shelving above the sink.

[52] Dr. Feinstein also noted maladaptive coping strategies. He identified avoidance and social isolation. Testifying on his own behalf, Mr. Ratnam stated that he did not seek psychological treatment because it was not offered to him. In fact, Mr. Ratnam's diagnosis of a Class 4 impairment in 3 spheres, that is, significant impediment to useful functioning in social functioning, concentration, persistence and pace, and decompensation in work or work-like settings, explains his lack of initiative in seeking psychological treatment.

ORDER

[53] For the reasons set out above, I find that Mr. Ratnam is catastrophically impaired in accordance with s. 3(2)(f) of the *Schedule*. I further find that but for the 2014 accident Mr. Ratnam would not have sustained a catastrophic impairment.

Date of Issue: September 27, 2021

D. Gregory Flude, Vice-Chair