

Everything You Wanted To Know About Catastrophic Impairment But Were Afraid To Ask

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INTRODUCTION

As time proceeds, there is a widening of the definition of Catastrophic Impairment. The *Statutory Accident Benefits Schedule - Accidents on or After November 1, 1996, O. Reg. 403/96* ('SABS") defines Catastrophic Impairment.

Catastrophic Impairment is defined in s. 2 of the SABS and over time the definition has been interpreted differently than how the drafters wrote this section.

As an illustration, the Whole Body impairment test of 55% as outlined in the SABS is supposed to be measured based on the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993.

The 4th Edition of the *Guides* does not combine physical and mental scores to obtain 55% impairment. This was not how the *Desbiens v. Mordini*, [2004] O.J. No. 4735 (Ontario Superior Court of Justice) decision was determined. For the time being this case has altered how the Whole Body Impairment test is calculated and interpreted.

It should be noted that *Desbiens* and other combining type cases have not yet been judicially determined by the Ontario Court of Appeal or the Supreme Court of Canada.

This paper will outline the definition of catastrophic impairment as defined by the SABS, catastrophic impairment declaration impact on the Accident Benefits that may be received by an insured, and I have summarized the important catastrophic cases that have been judicially determined by the Ontario Courts and the Financial Services Commission of Ontario ("FSCO").

LEGISLATION

STATUTORY ACCIDENT BENEFITS SCHEDULE - ACCIDENTS ON OR AFTER NOVEMBER 1, 1996, O. Reg. 403/96

s.2 (1.1) For the purposes of this Regulation, a catastrophic impairment caused by an accident that occurs before October 1, 2003 is,

- (a) paraplegia or quadriplegia;
- (b) the amputation or other impairment causing the total and permanent loss of use of both arms;
- (c) the amputation or other impairment causing the total and permanent loss of use of both an arm and a leg;
- (d) the total loss of vision in both eyes;
- (e) brain impairment that, in respect of an accident, results in,
 - (i) a score of 9 or less on the Glasgow Coma Scale, as published in Jennett, B. and Teasdale, G., *Management of Head Injuries*, Contemporary Neurology Series, Volume 20, F.A. Davis Company, Philadelphia, 1981, according to a test administered within a reasonable period of time after the accident by a person trained for that purpose, or
 - (ii) a score of 2 (vegetative) or 3 (severe disability) on the Glasgow Outcome Scale, as published in Jennett, B. and Bond, M., *Assessment of Outcome After Severe Brain Damage*, Lancet i:480, 1975, according to a test administered more than six months after the accident by a person trained for that purpose;
- (f) subject to subsections (2) and (3), an impairment or combination of impairments that, in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, results in 55 per cent or more impairment of the whole person; or
- (g) subject to subsections (2) and (3), an impairment that, in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, results in a class 4 impairment (marked impairment) or class 5 impairment (extreme impairment) due to mental or behavioural disorder. O. Reg. 281/03, s. 1 (5); O. Reg. 314/05, s. 1 (1, 2).

(1.2) For the purposes of this Regulation, a catastrophic impairment caused by an accident that occurs after September 30, 2003 is,

- (a) paraplegia or quadriplegia;
- (b) the amputation or other impairment causing the total and permanent loss of use of both arms or both legs;
- (c) the amputation or other impairment causing the total and permanent loss of use of one or both arms and one or both legs;
- (d) the total loss of vision in both eyes;

(e) subject to subsection (1.4), brain impairment that, in respect of an accident, results in,

(i) a score of 9 or less on the Glasgow Coma Scale, as published in Jennett, B. and Teasdale, G., *Management of Head Injuries*, Contemporary Neurology Series, Volume 20, F.A. Davis Company, Philadelphia, 1981, according to a test administered within a reasonable period of time after the accident by a person trained for that purpose, or

(ii) a score of 2 (vegetative) or 3 (severe disability) on the Glasgow Outcome Scale, as published in Jennett, B. and Bond, M., *Assessment of Outcome After Severe Brain Damage*, Lancet i:480, 1975, according to a test administered more than six months after the accident by a person trained for that purpose;

(f) subject to subsections (1.4), (2.1) and (3), an impairment or combination of impairments that, in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, results in 55 per cent or more impairment of the whole person; or

(g) subject to subsections (1.4), (2.1) and (3), an impairment that, in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, results in a class 4 impairment (marked impairment) or class 5 impairment (extreme impairment) due to mental or behavioural disorder. O. Reg. 281/03, s. 1 (5).

(1.3) Subsection (1.4) applies if an insured person is under the age of 16 years at the time of the accident and none of the Glasgow Coma Scale, the Glasgow Outcome Scale or the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, referred to in clause (1.2) (e), (f) or (g) can be applied by reason of the age of the insured person. O. Reg. 281/03, s. 1 (5).

(1.4) For the purposes of clauses (1.2) (e), (f) and (g), an impairment sustained in an accident by an insured person described in subsection (1.3) that can reasonably be believed to be a catastrophic impairment shall be deemed to be the impairment that is most analogous to the impairment referred to in clause (1.2) (e), (f) or (g), after taking into consideration the developmental implications of the impairment. O. Reg. 281/03, s. 1 (5).

(2) Clauses (1.1) (f) and (g) do not apply in respect of an insured person who sustains an impairment as a result of an accident that occurs before October 1, 2003 unless,

(a) the insured person's health practitioner states in writing that the insured person's condition has stabilized and is not likely to improve with treatment; or

(b) three years have elapsed since the accident. O. Reg. 403/96, s. 2 (2); O. Reg. 281/03, s. 1 (6).

(2.1) Clauses (1.2) (f) and (g) do not apply in respect of an insured person who sustains an impairment as a result of an accident that occurs after September 30, 2003 unless,

(a) the insured person's health practitioner states in writing that the insured person's condition is unlikely to cease to be a catastrophic impairment; or

(b) two years have elapsed since the accident. O. Reg. 281/03, s. 1 (7).

(3) For the purpose of clauses (1.1) (f) and (g) and (1.2) (f) and (g), an impairment that is sustained by an insured person but is not listed in the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993 shall be deemed to be the impairment that is listed in that document and that is most analogous to the impairment sustained by the insured person. O. Reg. 403/96, s. 2 (3); O. Reg. 281/03, s. 1 (8).

Determination of Catastrophic Impairment

40. (1) An insured person who sustains an impairment as a result of an accident may apply to the insurer for a determination of whether the impairment is a catastrophic impairment. O. Reg. 403/96, s. 40 (1).

(2) Within 30 days after receiving an application under subsection (1), the insurer shall give the insured person,

(a) a notice stating that the insurer has determined that the impairment is a catastrophic impairment; or

(b) a notice advising the insured person that the insurer requires the insured person to be examined under section 42 to assist the insurer in determining if the impairment is a catastrophic impairment. O. Reg. 546/05, s. 18.

(3) If an application is made under this section not more than 104 weeks after the accident and, immediately before the application was made, the insured person was receiving attendant care benefits,

(a) the insurer shall continue to pay attendant care benefits to the insured person during the period before the insurer makes a determination under this section; and

(b) the amount of the attendant care benefits for the period referred to in clause (a) shall be determined on the assumption that the insured person's impairment is a catastrophic impairment. O. Reg. 546/05, s. 18.

(3.1) Revoked: O. Reg. 546/05, s. 18.

(4) Within five business days after receiving the report of an examination under section 42, the insurer shall give a copy of the report and the insurer's determination of whether the insured person's impairment is a catastrophic impairment to the insured person and to the health practitioner who prepared the application under this section. O. Reg. 546/05, s. 18.

(5) The determination of the insurer shall specify the reasons for the insurer's determination of whether the insured person's impairment is a catastrophic impairment. O. Reg. 546/05, s. 18.

(6) If an insured person fails or refuses to comply with subsection 42 (10), the insurer,

(a) may make a determination that the insured person does not have a catastrophic impairment;

(b) may stop payment of any benefits that are payable only if the insured person has a catastrophic impairment; and

(c) may, in respect of the period after the insured person failed or refused to comply with subsection 42 (10) and before the insured person submits to the examination and provides the material required by subsection 42 (10), refuse to pay a benefit or expense that is payable only if the person has a catastrophic impairment. O. Reg. 546/05, s. 18.

(7) If an insured person subsequently complies with subsection 42 (10), the insurer shall,

(a) reconsider the application and make a determination under this section;

(b) subject to the determination, resume payment of benefits, if benefits were being paid before the examination; and

(c) pay all amounts, if any, that were withheld during the period of non-compliance, if the insurer determines that the insured person sustained a catastrophic impairment and the insured person provides not later than the 10th business day after the failure or refusal to comply, or as soon as practicable after that day, a reasonable explanation for not complying with subsection 42 (10). O. Reg. 546/05, s. 18.

(8) If the insurer fails to provide a copy of the report of the examination under section 42 or its determination in respect of the application by the day determined in the following manner, the insurer shall, for the period commencing on that day and ending on the day the insurer gives the insured person the report or determination, pay all amounts in respect of benefits and goods and services to which the insured person would be entitled if he or she had sustained a catastrophic impairment:

1. If the attendance of the insured person was not required for the examination under section 42, the day is the 15th business day after the day the material required under subsection 42 (10) was provided.

2. If the attendance of the insured person was required for the examination, the day is the 15th business day after the day the examination was completed or was required under paragraph 2 or 3 of subsection 42 (11) to be completed. O. Reg. 546/05, s. 18.

GLASGOW COMA SCALE

The Glasgow Coma Scale (“GCS”) is used to measure the conscious state of a person for an initial as well as a continuing assessment.

The scale was published in 1974 by Graham Teasdale and Bryan J. Jennett, professors of neurosurgery at the University of Glasgow.

The GCS is to be measured by persons trained for the administration of the test and be administered by that person within a reasonable period of time after the accident.

The GCS score is measured on a 3-15 scale.

Where there is a score that is under a 9 on the GCS which is obtained within a reasonable time of the accident it will most likely mean that a person will be declared to have a catastrophic impairment.

The GCS score is an additive function of independent observations made of a patient's graded responses within three behavioral domains: eye movement, motor response and verbal response. It is numerically scored according to the following criteria:

Eye Opening

4. Spontaneous, indicates arousal, not necessarily awareness
3. To speech. When spoken to - not necessarily the command to open eyes
2. To pain. Applied to limbs, not face where grimacing can cause closure.
1. None

Motor Response

6. Obeys commands. Exclude grasp reflex or postural adjustments
5. Localizes. Other limb moves to site of nail-bed pressure
4. Withdraws. Normal flexion of elbow or knee to local painful stimulus
3. Abnormal flexion. Slow withdrawal with pronation of wrist, adduction of shoulder (decorticate posture)
2. Extensor response. Extension of elbow with pronation and adduction. (decerebrate)
1. No movement

Verbal Response

5. Orientated. Knows who, where, when; year, season, month
4. Confused conversation. Attends & responds but answers muddled/wrong.
3. Inappropriate words. Intelligible words but mostly expletives or random.
2. Incomprehensible speech. Moans and groans only - no words.
1. None

IMPACT OF BEING DECLARED CATASTROPHIC

A Catastrophic Impairment designation on first party coverage has the following impact on an individual's accident benefits entitlement:

- ❖ s. 17(1) – Case Management services are covered;
- ❖ s. 16(5) and s. 18(3) – Attendant care is increased from a maximum of \$3,000 per month for 2 years (non-catastrophic claims) to \$6,000 per month for a lifetime up to a maximum of \$1,000,000;
- ❖ s. 18(3) and s. 19(1) – medical and rehabilitation benefit limits are increased from \$100,000 available for 10 years to \$1,000,000 over a lifetime;
- ❖ s. 21(3) – Expenses for visitors are extended past the 104 week mark;
- ❖ s. 22(4) – Housekeeping and home maintenance benefits are extended over a lifetime.

CATASTROPHIC CASES

I have outlined the most important Catastrophic Impairment cases from the Ontario courts and FSCO.

I have divided these cases into categories; however there are some cases which could be in multiple categories.

GCS Score Under 9 But NOT Declared Catastrophic

Unifund Assurance Company v. Michael Fletcher, Private Arbitration, Mr. Bruce Robinson, January 18, 2000.

FACTS

- Michael Fletcher, 14 years old, was injured in an accident on September 30, 1997, while riding his bicycle through an intersection when he was struck by a vehicle.
- The time of the accident was 6:43 p.m., with the first GCS being recorded at 6:57 p.m. being a 6/15.
- At 7:02 p.m. he had a GCS of 8/15 and by 7:03 p.m. he had a GCS of 11/15.
- It should be noted that the GCS did not drop below 10/15, was a 13/15 at 11:30 p.m., and the following day at 12:30 a.m. was recorded at 14/15.

- A CAT DAC was done by Kaplan & Kaplan which stated that catastrophic impairment did exist based on the initial GCS readings that took place at the scene of the accident.
- Dr. Stewart gave evidence with respect to GCS and reasonable timing and stated that a reasonable time for assessing a patient's condition would be a minimum of a six hour period before making any type of prognosis.
- Dr. Stewart further stated that an early GCS score may not correlate at all with a bad outcome.

ISSUE

- Did Michael Fletcher sustain catastrophic impairment as defined by section 2(1)(e)(i) of the SABS in the motor vehicle accident of September 30, 1997?

HELD

- Michael Fletcher did not sustain a catastrophic impairment

COMMENTARY

- With respect to the period of time that should be used, Arbitrator Robinson used the Minister's Committee on the Designated Assessment Centre System Report dated June 1998. It stated as follows:

As you are aware, CAT DACs were initially directed to refrain from exercising any judgment regarding what constituted "**a reasonable period of time after the accident by a person trained for that purpose**". Prior to the release of the manual, the DAC Committee had reconsidered this direction and instructed CAT DACs to apply their judgment to these caveats. No definition of what constitutes "a reasonable period of time after the accident" or "person trained for that purpose" will be provided by the DAC Committee – clinicians' own judgment should prevail and their conclusion should be well explained in the report.

- This would seem to imply that a reasonable period of time will depend upon the medical evidence and what occurred shortly after the accident and the symptoms with respect to GCS readings.
- Arbitrator Robinson when on to state:

To properly determine those people who appropriately fall into the category of catastrophic injury, it is necessary that the critical period of time is not immediately after the accident but in the period that best relates to any loss of consciousness or a lowered

level of brain function to future [outcome] from a neurological or cognitive perspective. I therefore find that “a reasonable period of time” in this case was in a half hour of the accident. This accomplishes the intent of the legislation and within a fairly short period of time still allows for an assessment of whether access to increased benefits is necessary for those people that suffer catastrophic injury. During the acute phase, the injured person will be receiving appropriate care in any event and would not, by such a brief intervening period, be in any way prejudiced.

- It should be noted that Arbitrator Robinson stated that Dr. Kaplan’s approach was too simplistic and did not take into consideration the intent of the legislation which is to deal with access to higher benefits for people with more serious injuries as in the case of catastrophic impairment.
- It can be gleaned here that the arbitrator felt that one or two readings shortly after an accident of a GCS does not necessarily mean that someone is catastrophically impaired

FACTORS AFFECTING A GCS SCORE

Intubation, Sedation Seizures

Young v. Liberty Mutual Insurance Company [2005] O.F.S.C.D. No. 76 (Ontario Financial Services Commission Director’s Delegate D. Evans); [2003] O.F.S.C.D. No. 157 (B. Allen, Arbitrator).

FACTS

- Howard Young was injured in a motor vehicle accident on February 15, 2001 at 7:00 a.m.
- On March 2002, Liberty Mutual terminated medical/rehabilitation and housekeeping benefits and denied the Applicant’s claim for attendant care benefits and a case manager as a result of the findings of a CAT/DAC.
- Young suffered numerous serious injuries, among them head, neck, back, chest, leg, arm and knee injuries.
- When the ambulance attendants arrived at the scene they assessed the Applicant to be unconscious.
- The Applicant’s Glasgow Coma Score (GCS) was evaluated at 7:18 a.m., 7:28 a.m. and 7:38 a.m. The parties dispute whether the Applicant was intubated at 7:16 a.m.
- His GCS was assessed at 3/15 at 7:18 a.m. representing a score of one for each of the three factors – No eye opening, verbal or motor responses.

- The Applicant's score was 4/15 at 7:28 a.m. with a 1 for eye opening, 2 for verbal response because he made incomprehensible sounds and 1 for motor response. His reading at 7:38 a.m. was once again a 3/15.
- While on route to the hospital the Applicant suffered two seizures lasting one minute each.
- In a consultation report Dr. Milkovich evaluated the Applicant's GCS to be a 3/15 upon arrival at the hospital at 7:55 a.m. and queried whether the score was due to a head injury or post-seizure result.
- He was moved to Sunnybrook at about 10:00 a.m. and emergency staff recorded the Applicant at 10:08 a.m. to have a GCS of 3/15. At 12:00 p.m. he again had a score of 3/15. At 1:00 p.m. he had a GCS of 7/15.
- After the accident the Applicant received various types of treatments including occupational speech therapy, the services of a case manager, housekeeping, a personal trainer, and treatment by an osteopath.
- Dr. Sommerville, a neurologist, who assessed the Applicant for catastrophic impairment in a report dated December 13, 2002, stated that the Applicant met the test. Pursuant to subsection 40(2) (c) of the Schedule, Liberty Mutual required the Applicant to be assessed for catastrophic impairment by a DAC.
- On February and March 2002 the Applicant attended a CAT/DAC at MDAC where he underwent neurosurgical, in-home occupational, psychiatric, neuropsychological and orthopaedic evaluations. In its reports dated March 28, 2002, and April 4, 2003 the MDAC assessors expressed a consensus opinion that the Applicant did not meet the criteria for catastrophic impairment. The DAC assessors considered that the combined GCS was only valid if all three sub-scores are "valid and reliable".
- Dr. Stewart, neurologist, provided an expert opinion for Liberty Mutual and stated that the Glasgow Coma readings obtained were not "valid in the presence of confounding factors which included intubation, post accident seizures and sedation."
- Liberty Mutual submitted that although the GCSs were all below 9 they resulted not from brain impairment but from medication, intubation, seizures and the nature of Young's injuries (facial smash, raccoon eyes and bleeding). They were thus confounded and not "valid and reliable". Liberty Mutual submitted that any scores taken within the first six hours or so should have been discounted as not having been administered "within a reasonable period of time after the accident".

ISSUES

- Was Young catastrophic due to the GCS which would have shown brain impairment or was this GCS all below 9 due to medication, intubation and seizures?
- Were the scores taken within a reasonable amount of time after the accident?

HELD

- It was found that Mr. Young was catastrophic due to the GCS test that was conducted shortly after the accident and thus he was deemed catastrophic and these scores were taken within a reasonable amount of time after the accident.

COMMENTARY

- Arbitrator B. Allen found that medication, intubation, seizures and the nature of injuries, in situations of trauma, GCS readings would still be valid despite these factors.
- The arbitrator rejected and this was confirmed upon appeal that the modifiers of “valid and reliable” and “direct and exclusive” should not be read in the legislation to determine if a person should be deemed catastrophic.
- Arbitrator Allen and Director’s Delegate Evans also accepted that a period of one hour was a reasonable time after the accident for an insured to be evaluated with respect to Glasgow Coma Scales being under 9 despite the fact that the scores were taken when the person was intubated and with medication, having seizures. The six hour argument put forth Liberty Mutual was rejected in this case.

Intubation

Tournay v. Dominion of Canada General Insurance Company [2006] O.F.S.C.D. No. 137 (Arbitrator Kominar).

FACTS

- Veronica Tournay was injured in a motor vehicle accident on March 12, 2003.
- She has no recollection of the accident. She was riding with her daughter when the accident occurred and the only thing the daughter remembers is seeing her mother after the crash and trying to wake her by grabbing at her arm and shaking her for approximately ten minutes and her mother was not responding.
- Tournay also suffered an open fracture of her foot and a large laceration on her right thigh, so deep that the bone was visibly exposed.
- GCS was recorded at 14 to 15. As treatment was administered, Ms. Tournay was less responsive.
- She was intubated and a score was then taken which was between a 3 and a 5.
- Dr. Becker testified for the insurer with a CAT DAC report and invalidated the intubated score. Dr. Becker testified and it was stated at paragraph 27, “the fact is that GCSs are invalid once the person is intubated. You can find all sorts of reasons why, but clearly the main reason is because they can’t speak. I mean it’s an obvious situation for those of us who work with GCS.”

- It was challenged on cross examination, with respect to the scores being invalid by pointing out that the emergency room physicians, nurses and paramedic transport people continued the GCS tests and recorded scores even after Ms. Tournay was intubated.

ISSUE

- Can someone have a GCS to qualify them to be catastrophic if they are intubated?

HELD

- It was held that Ms. Tournay was deemed to be catastrophic.

COMMENTARY

- Arbitrator Kominar stated at paragraph 38 with respect to Dr. Becker's assertion with respect to intubation and GCS readings that:

I find that there is no basis in law for any such distinction being made, given the language of the current regulation, and it is that language which governs my decision here. Whether or not it would be appropriate for the government to review this section of the Schedule, given the concerns raised by Dr. Becker about the challenges associated with assigning a GCS score to an intubated patient, the current reality is that just the opposite conclusion which Dr. Becker draws is the most warranted one.

- Arbitrator Kominar stated at paragraph 38 that:

[T]he GCS is a clinical test pure and simple. Thus, if a medically appropriate GCS registers a score of "9 or less" within a reasonable time after the accident, where the brain impairment as a result of the accident is not contested, then, in my view, there must be, that must be taken as satisfying section 2(1.1)(e)(i). of the Schedule. There is simply no further legal filter which the test needs to pass through to validate its results.

Alcohol and Marijuana

Holland v. Pilot Insurance Co. [2004] O.J. No. 2737 (Ontario Superior Court of Justice) (Keenan J.).

FACTS

- William Holland was 15 years old and on April 16, 1999 suffered a traumatic head injury when he was struck by a motor vehicle as a pedestrian.
- At the scene he had a GCS reading of 7.
- Subsequent readings at the hospital were in the range of 7 and 8 and later readings at the Hospital for Sick Children were as low as 3 and 4.
- Holland had consumed alcohol and probably smoked marijuana as the hospital records showed his blood alcohol level was above the legal limit.
- Counsel for Pilot Insurance argued that the GCSs were unreliable because of the alcohol consumption.
- After a DAC report chose to set aside the GCS because of the presence of alcohol, Dr. Rumney of Bloorview MacMillan Centre stated that a GCS of a 4, which he Holland had at the hospital can actually be worse than a GCS of 4 when not intoxicated.
- The issue was whether alcohol and marijuana had an impact on the GCS of Holland.

ISSUE

Can someone be deemed catastrophic and have a valid GCS if they have consumed alcohol and drugs?

HELD

- Holland's expert evidence was accepted and the injuries sustained by Holland constituted that he was catastrophic despite the alcohol and marijuana in his system.

COMMENTARY

- Pilot Insurance Company argued that the GCS was unreliable because of the alcohol consumption and therefore the GCS cannot be followed.
- By way of expert evidence Justice Keenan concluded that the readings of 9 or less on the GCS had not been influenced by alcohol consumption.

- What is key is the obiter located at paragraph 28 which states that, “the definition of ‘catastrophic impairment in the Statutory Accident Benefits Schedule is a creature of the legislature.”
- Therefore, this type of regulation is adopted by the legislature after extensive consultation with interested parties, including insurers. If restrictive meaning is to be assigned to the regulation it should be clearly recited in the regulation itself.
- What can be gleaned out of this decision is that if there are factors within a Glasgow Coma Scale such as marijuana or alcohol that should be taken into consideration, then it should be in the legislation.

Reasonable Period of Time

Liu v. 1226071 Ontario Inc. [2007] O.J. No. 1564 (Ontario Superior Court of Justice) (B.P. Wright J.)

FACTS

- The Plaintiff was struck by a vehicle on April 9, 1999. The accident occurred at 8:15 p.m. An ambulance arrived at 8:31 p.m. and a GCS was found to be a 3. At 8:43 p.m. a GCS of 8/15, at 8:55 a GCS of 12/15 occurred, when he arrived at the hospital at 8:57 p.m. a score of 14/15 was given.
- A CAT/DAC dated June 11, 2001 found that the Plaintiff was catastrophically impaired.
- Psychologist Alina Kaminska examined the Plaintiff in January and February 2003 and stated that the Plaintiff was capable of managing his property, nutrition, health, shelter, clothing, hygiene and safety and was capable of making complex decisions and in fact had travelled to China on two occasions making his own travel arrangements.

ISSUES

- Was the Plaintiff catastrophically impaired?
- Was the GCS found at a reasonable time after the accident?

HELD

- It was held that the Plaintiff was not catastrophically impaired.
- The court found that the GCS was 9 or less in forty minutes after the accident was a reasonable time after the accident.

COMMENTARY

- It appears that Justice Wright relied on the timing of the GCS and it was showed in the scores that less than an hour after the accident, the GCS for the Plaintiff was above a 9/15.
- In this short judgment, Justice Wright seemed to rely on the evidence of a Psychologist report that showed that the Plaintiff was independent and able to make his own decisions with respect to his property, nutrition, healthcare, shelter, clothing, hygiene and safety and was able to travel to China while making his own travel arrangements.
- This case seems to go against other cases where it appears to be a brain injury.
- This case shows that there are cases where an insurer can argue that a loss of consciousness and scores below a 9/15 can have an outcome on a Plaintiff not being deemed catastrophic.
- If there are circumstances found after the accident that point to the Plaintiff not being catastrophic, despite a GCS that would deem someone to be catastrophic, a person can still be found to not have a catastrophic impairment.

Administrators of the GCS Test

Milson v. Aviva [2006] O.F.S.C.D. No. 67 (Arbitrator Rogers).

FACTS

- Kyles Milson was injured in a motor vehicle accident on June 27, 2000.
- Milson was transported from the scene of the accident to the hospital.
- Milson had GCS scores of 7, 7 and 6 within a reasonable period after the accident. The first two scores were done by Mr. Kirkconnell, who is a paramedic. The third score was done by a nurse in the emergency room.
- Aviva conceded at the hearing that all three tests were administered by persons trained for that purpose.
- In its written submissions, Aviva for the first time questioned the training of the Emergency Room nurse because she had not been identified by name.
- Dr. Goodwin, a neurologist who was responsible for the review of the GCS as a member of the DAC team, felt that the GCS should have been a 10 from the paramedic and an 11 from the Emergency Room as the doctor stated that the scores did not accord with the narrative account of Mr. Milson's condition.
- Aviva agreed that Milson suffered a brain impairment and agreed that the GCS were administered in a reasonable time after the accident. Aviva's argument was assessment error.
- It should be noted that Dr. Goodwin did not have formal training with administering a GCS test.

ISSUE

- Were the GCS tests that were administered by the paramedic and nurse assessed correctly despite the evidence of Dr. Goodwin?

HELD

- It was held that Milson was deemed to be catastrophic.

COMMENTARY

- The Arbitrator felt that it was unlikely that two trained experienced technicians and another doctor who examined Milson would have an incorrect approach.
- It should be noted that the arbitrator did not accept that the neurologist in this matter, Dr. Goodwin, had superior training and experience compared with the emergency staff who conduct GCS all the time.
- This case also showed that despite the credentials of a doctor, they will not necessarily be believed or followed over trained and experienced persons who administer GCS tests on a regular basis.

Which AMA Guides should be used

Snushall v. Fulsang [2005] O.J. No. 4069 (Ontario Court of Appeal); [2003] O.J. No. 1493 (Ontario Superior Court of Justice)

FACTS

- On July 28, 1997, the Plaintiff, Carol Snushall was seriously injured in a motor vehicle accident.
- She was awarded general damages of \$175,000.00, damages for loss of income of \$54,633.00, future loss of income of \$540,000.00, damages for future housekeeping and home maintenance of \$92,612.00 and damages for futures healthcare costs of \$75,000.00.
- In order to recover damages for future healthcare costs it was necessary for the Plaintiff to establish that she had sustained a catastrophic impairment under the Bill 59 legislation.
- Snushall, on the date of the accident, was a 30 year old woman who was a front seat passenger in the car driven by the Defendant, Daniel Fulsang. Her injuries were two serious injuries, a burst L3 fracture necessitating a spinal fusion from the second to the fourth lumbar segment and a closed head injury resulting in permanent cognitive impairments in the areas of concentration, information processing and multi-tasking.

- Ms. Snushall returned to modified work approximately 18 months after the accident and currently works four days a week as a patient information coordinator at the Hospital for Sick Children.
- The impairments that were under consideration with respect to whole person impairment were lumbosacral impairment, cerebral impairment, a vestibular impairment, bladder and urethral impairment and Dr. Becker also assessed Ms. Snushall for a sleep disorder and skin disorder due to the scars from the spinal fusion.

ISSUES

- Was Ms. Snushall deemed to be catastrophic?
- What AMA guides should be used?

HELD

- It was held that Ms. Snushall was not catastrophic. Her injuries failed to reach the 55% or more impairment for the whole person threshold.
- Although she suffered significant injuries her functional abilities were reasonably good.
- This matter also confirmed that the AMA Guides, 4th Edition is what should be followed in this matter as that is what the legislation entails, despite the fact that there is a 5th Edition of the Guides.
- The Appeal did not address the Catastrophic issue.

COMMENTARY

- In this matter, paragraph 39, states what needs to be followed when using the Guides:

39 The Guides direct the clinician as the first step to gather thorough and complete historical information on the individual's medical condition(s), to carry out a medical evaluation and to compare the findings with the appropriate Guides tables to estimate the individual's impairment. The second step is to determine the nature and extent of the impairment. The third step is to compare the results of the analysis with the criteria specified in the Guides for the particular body part, system, or function. The Guides state:

This comparison is distinct from the preceding clinical evaluation and need not be performed by the physician who did that evaluation; rather, any knowledgeable person can compare the clinical findings with the Guides criteria and

determine whether or not the impairment estimates reflect those criteria.²⁰

- This case further states that where the Guides provide ranges instead of fixed percentages the assessing clinician brings their clinical knowledge to bear the question and arrives at a precise percentage, it is then the task of the “knowledgeable person” to determine, as the Guides state, “whether or not the impairment estimates reflect the Guides criteria” and to determine how the medical information fits with the other evidence.
- Comments were made by Justice Lax on why we are using Guides that at the time this matter was heard were ten years old however Justice Lax did not go ahead and use the 5th edition of the AMA Guides, the judge followed the legislation which outlines that the 4th edition is to be used.

Arbitrator Discretion

B.P. v. Primmum Insurance Company, November 14-17, 2006, Arbitrator Lawrence Blackman

FACTS

- B.P. was 22 years of age when the motorcycle he was driving collided with a car turning left in front of him.
- B.P.’s right leg was severed after it was caught in the front wheel well of the other vehicle. He did sustain other injuries.
- His right lower leg could not be salvaged and required a revision of his leg stump at the level of the knee. Other medical procedures including nailing his right femur fracture and washing and debriding the open wounds on both of his knees.
- B.P. obtained a prosthesis for his leg.
- In September 2003 he saw Dr. Kara, a plastic surgeon, because his prosthesis fit poorly because of excessive skin and soft tissue.
- B.P. submitted that he sustained a whole person impairment of 71-73% while Primmum says he sustained 44% WPI rating.
- B.P. states that he sustained neck, left wrist and left elbow, lower back, right hip and thigh, left knee, left ankle injuries and a left knee amputation.

ISSUE

- Did B.P. sustain a catastrophic impairment within the meaning of paragraph 2(1)(f) of the schedule as a result of the accident on May 10, 2002?

HELD

- B.P. did sustain a catastrophic impairment within the meaning of paragraph 2(1)(f) as a result of the accident on May 10, 2002.

COMMENTARY

- Arbitrator Blackman stated that he was not persuaded by the Applicant's argument that he had discretion to make a finding of catastrophic impairment where the cost of future treatment exceeded the non-catastrophic limits under the schedule.
- Also, Arbitrator Blackman stated that he had significant doubt, that in the absence of some direction from the Guides, that he could exercise his discretion to make a catastrophic impairment where he thought that impairment did not meet the 55% whole body impairment.
- He was also not persuaded that the Guides are to be treated as a "meat chart hidden under a silk lining called consistency".
- Arbitrator Blackman stated at page 21 the following: "as stated on page 2 of the Guides, an impairment percentage derived by means of the Guides is intended, among other purposes to represent an informed estimate to which an individual's capacity to carry out daily activities has been diminished."
- The arbitrator stated that he was persuaded that each of the areas from the traumatic amputation of his right lower leg, which included mobility issues, loss of his lower leg, neuropathic leg pain, excessive strain on the lower back, the care and maintenance of his stump skin and the mental and behavioural consequences did constitute a distinct impairment.
- The arbitrator stated that he was persuaded that each of the impairments must be separately rated, being careful to avoid any double counting of impairment.
- Page 8 of the Guides states that, "it may be necessary to refer to the criteria and estimates in several chapters if the impairing condition involves several organ systems. In that case each organ system should be expressed as a whole person impairment, then the whole person impairment should be combined by means of the combined values chart..."
- Dr. Becker testified that the CAT DAC's final 44% whole body assessment did not include any rating for mental or behavioural disorder under chapter 14 of the Guides and it was believed that there were psychiatric and emotional issues and that a rating for mental and behavioural impairment should be added to the whole person impairment of a rating of 10-20%.
- Arbitrator Blackman felt that there was a 62% whole person impairment based on 37% for right lower extremity, 20% for the skin, 15% for mental and behavioural, 5% low back, 2% left knee, 2% left wrist and left elbow.

CAT DAC's

Liberty Mutual Insurance Company v. Fernandes [2006] O.J. No. 3514 (Ontario Court of Appeal)

FACTS

- It was found that Fernandes was injured in a car accident on April 7, 1999.
- He was assessed for catastrophic impairment at a CAT DAC where it was determined that he had suffered a catastrophic impairment.
- Liberty Mutual Insurance Company disputed this finding of catastrophic impairment and first initiated mediation in accordance with the *Insurance Act*.
- Mediation subsequently failed and the insurer commenced an action for a declaration that the insured had not suffered a catastrophic impairment.
- The insured a motion under rule 21 to strike the insurer's claim on the basis that the act did not allow the insurer to bring such action.

ISSUE

- The issue is whether the dispute resolution scheme in sections 279 to 283 of the *Insurance Act* for the determination of entitlement to and quantum of statutory accident benefits constitutes the complete code and if so how it operates or whether beyond the express provisions of the act does an insurer have the right to bring an action in the Superior Court to challenge a catastrophic impairment designation.

HELD

- It was held at the Superior Court of Justice and affirmed at the Ontario Court of Appeal that sections 279 to 283 of the *Insurance Act* formed a complete code that did not give the insurer the ability to bring a court proceeding against an insured to challenge a CAT DAC.
- There was no need or basis for the court to read into the act a right for the insurers to initiate court action to find that the language of s.281 of the *Insurance Act* is not sufficient to remove any common law right that an insurer may have had to bring an action.

COMMENTARY

- As you know, the CAT DAC process was eradicated in February 2006.

- This case shows that an insured person does have a right to challenge an unfavorable catastrophic determination both in mediation and arbitration and subsequently in the courts; however an insurer is bound by the determination of a CAT DAC and therefore cannot challenge this according to this matter.

Thomas George v. State Farm Mutual Automobile Insurance Company, Appeal Order P04-00028, Director's Delegate David Evans, December 6, 2005

FACTS

- Thomas George was in a motor vehicle accident on November 30, 1999.
- The most serious injury came to his left thigh causing muscle atrophy and requiring him to use a cane.
- State Farm paid his income replacement but terminated his attendant care and housekeeping benefits at the 104 week mark. An OCF-19 was submitted on July 3, 2002.
- State Farm arranged for an MDAC assessment for January 2003, three years after the accident.
- The MDAC assessors concluded that George was not catastrophically impaired, rating his whole body impairment at 30%.
- As to the mental and behavioural impairment, the report found only mild impairment (compatible with most useful functioning) of activities of daily living and concentration ability. It found a Class 3 moderate impairment of social functioning and adaptation.
- At the arbitration George objected to the MDAC assessment as the assessors did not follow the CAT DAC manual. He argued that MDAC had not included a psychologist in the team assessing his mental and behavioural impairment, had not forwarded Assessor Practice Summaries, and the physiatrist for the WPI assessment, Dr. Ben Meikle, lacked sufficient experience.
- The arbitrator acknowledged the first two objections however it stated that George should have raised these earlier in the process as he did not consider the objection regarding Dr. Meikle and only raised it in his closing submissions at the arbitration.
- The arbitrator found that George had no reliable evidence for the amount of monthly care required and no reliable evidence for the amount of housekeeping services provided by Mrs. George on account of the accident.

ISSUE

- Does George qualify as having catastrophic impairment?
- Was the DAC process invalid?

HELD

- On appeal it was determined that Mr. George was not catastrophic as George provided no substantive grounds to overturn the arbitrator's findings.

COMMENTARY

- It should be noted that this matter was arbitrated prior to *Desbiens*.
- Did not find catastrophic impairment even when including the possible addition of impairment ratings the whole body impairment was still only 40%, 15% short of the statutory definition of catastrophic impairment. The Director's Delegate did ask for additional submissions due to the *Desbiens* decision however the parties agreed that even combining George' MBI with his 30% WPI would not provide him with a 55% whole body impairment.
- Further, the arbitrator and Director's Delegate felt George could have provided a report from a psychologist indicating that he suffers from a higher class of mental and behavioural impairment and this would have changed the outcome of the MBI portion of the DAC.
- The Director's Delegate stated that George essentially applied for an arbitration on the issue of catastrophic impairment without evidence to support his position.

Pre- Accident Impairment and How they Affect a Catastrophic Declaration

Villers v. Pilot Insurance Company [2006] O.F.S.C.D. No. 14 (Director's Delegate N. Makepeace); [2005] O.F.S.C.D. No. 46 (Arbitrator E. Bayefsky)

FACTS

- Lloyd Allison Villers was injured in a motor vehicle accident on June 19, 2000.
- Villers' claim for attendant care benefits from October 11, 2002 onward was denied by Pilot Insurance Company.
- This was rear end accident with \$9,000.00 worth of damage to Villers' truck.
- Villers was diagnosed with having a cervical sprain and x-rays showed he had a loss of disc space, traction spurs and degenerative changes.
- It appears that degenerative changes in Villers' back, due to the report of the family physician, stated that this had been there and was documented in previous x-rays of the neck in 1992.
- Villers was 75 years old. He attended the arbitration in a wheel chair and appeared to be frail. He testified that he suffered neck pain at the time of the accident and it had gradually gotten worse.

- He stated that before the accident nothing stopped him and he would get wood from sheds, build fences and chairs, painted and worked on machines and built box trailers.
- There was also testimony from his wife that he was very active right up until the time of the accident doing various yard work, wood working, loading fire wood into the trailer, and opening both his own trailer and friends trailers at cottage property, walking shopping and driving.
- It should be noted that Villers suffered a stroke in December 1999 and lost sight in his left eye.
- There was testimony from his neighbor stating how active he was and the neighbors also testified to how he quickly deteriorated after the accident.
- A CAT DAC (paper review) in September 2002 was denied as he had had a long history of wide spread cervical spondylosis. It also stated in this CAT DAC that there was no increase in degenerative change due to this accident and did not produce any evidence of acute neurological or orthopaedic abnormality i.e. fracture or dislocation or evidence of a new and significant neurological deficit.

ISSUE

- Can Villers be deemed to be catastrophic despite pre-accident impairments?

HELD

- It was held that Mr. Villers was not deemed to be catastrophic. This was due to the pre-accident level of functioning that Villers had prior to the accident.

COMMENTARY

- Despite the fact that the CAT DAC was not done properly, in that it was confirmed by the doctors that where a person is not catastrophically impaired then almost invariably the person is brought in for an assessment, and this was not done.
- However the arbitrator in this matter E. Bayefsky stated, and it was confirmed on appeal, that the arbitrator has the ultimate decision in determining catastrophic impairment.
- The arbitrator found that Villers suffered a number of ailments in the year prior to the accident including diabetes, right knee pain, degenerative disc disease, chronic obstructive pulmonary disease, gout, Paget's disease, bilateral carpal tunnel syndrome, cerebral vascular disease, stroke, renal calculi, blindness in the left eye and a cataract in his right eye.
- Despite Villers, his wife, step daughter and neighbors attempting to suggest he was very active, the arbitrator did not buy that assertion.

- It appears that the arbitrator decided this case on the credibility of the witnesses and just did not believe the witnesses of the Plaintiff with respect to the pre-accident health of Villers.
- This case shows that ultimately it is up to the arbitrator to determine whether someone is catastrophically impaired and in this one it appears that credibility became an issue and the pre-accident impairment of Mr. Villers.

McMichael v. Belair [2006] O.F.S.C.D. No. 36 (Directors Director N. Makepeace); [2005] O.F.S.C.D. No. 34 (Arbitrator D. Muir)

FACTS

- McMichael got in an accident on June 14, 1998 where he was a rear seat occupant of a taxicab and was thrown from the vehicle.
- He sustained a head injury, evulsion skull fracture, femoral fracture, rib fracture, scapular fracture, pneumothorax fracture of a bone in the left hand, displacement of the TMJ and fracture of the T-9 vertebrae.
- Following the accident he developed a crack cocaine addiction.
- He was unable to reintegrate into the work force. It should be noted that he had a pre-accident history of cocaine use.
- The arbitrator found that he did not meet the DSM-IV criteria for addiction prior to the accident as there was no evidence that this addiction had interfered with his day to day life or affected daily activities.
- After the accident it stated that McMichael failed to go back to work and had social withdrawal. It was accepted that psycho-social problems were materially related to the accident even though a prior history of cocaine use.

ISSUE

- Was Mr. McMichael catastrophically impaired despite the problems he had with respect to drug use and psychological problems that he had?

HELD

- It was held that McMichael was catastrophically impaired and had a Class 4 impairment in three of the four spheres

COMMENTARY

- It should be noted that in the appeal heard by Director's Delegate N. Makepeace paragraph 16 the issue of how many functional Class 4 or 5 impairments are

required for a global Class 4 or 5 catastrophic impairment score based on a mental or behavioral disorder was the question.

- Here it was confirmed that, as was said in *Desbiens*, where it may be enough to have a Class 4 or 5 impairment in only one realm to be deemed catastrophic pursuant to s.2(1.1g) of the SABS.
- It was stated at paragraph 175:

What flows from the level of impairment as determined by the assessment will depend on how the results are intended to be used. To be clear, the protocols in the Guides are not intended to result in a determination of "catastrophic impairment", rather the Legislature has determined that these assessment protocols and the results that obtain from their use should form part of the definition of catastrophic impairment in the Schedule.

- It goes on to state that s.2(1.1f) of the SABS requires the assessors to consider any and all relevant Guide chapters in order to arrive a whole person impairment rating as contained at paragraph 180. This seems to go against what the 4th Edition of the Guides states with respect to combining psychological and physical impairments to get a whole person impairment rating.
- Further, the SABS confirms that only the 4th Edition of the AMA Guides are to be used and until that is changed the 4th Edition of the Guides should be what governs the calculation of physical and mental impairments. This was obviously not done in this case.

55% Whole Body Impairment – The Era of Combining Physical and Mental Impairments

Desbiens v. Mordini, [2004] O.J. No. 4735 (Ontario Superior Court of Justice)

FACTS

- On November 8, 1999, Desbiens while operating a wheelchair on the sidewalk was struck by a motor vehicle driven by Mordini.
- As a result of the collision Desbiens was thrown approximately 10 feet into the roadway.
- He suffered a displaced fracture of the femur and soft tissue injuries to the right side of his body.
- In 1986 at the age of 44, Desbiens was rendered a paraplegic due to an injury to his spinal cord when he fell off the roof in the course of employment.
- The Defendants admitted liability and admitted that the injuries sustained met the threshold requirement under section 267.5(5) of the *Insurance Act* as being

permanent serious impairment of important physical, mental or psychological function.

- It was alleged that prior to the accident despite being a paraplegic Desbiens was functionally independent with a little help from others and was independent in most activities of daily living.
- Desbiens stated that the pain in his back increased after the accident, and many of his hobbies and activities had been affected.
- Desbiens was no longer able to walk the dog, spasms in his wheelchair, he is not driving as much, could not do household activities and needed help doing things he normally would do on his own prior to the accident.
- The Defendant's claim was that Desbiens was exaggerating his problems and had surveillance that was only used for impeachment due to the fact that it had not been served according to the *Rules of Civil Procedure*.
- Desbiens submitted that as a result of the injuries his functioning was similar to that of a quadriplegic.
- The Defence submitted that the evidence was sufficient to establish that Desbiens was suffering significant amounts of pain prior to the accident that were not substantially different from that which he suffered after the accident.

ISSUE

- Did Desbiens suffer a catastrophic impairment due to the injuries that he suffered from the motor vehicle accident despite the fact that he had extensive pre-accident injuries?
- How would this catastrophic impairment be evaluated?

HELD

- Judgment was given to Desbiens in the amount of \$1,019,000.00. The court found that Desbiens was catastrophic.
- Desbiens was found to have a whole body impairment over the 55% catastrophic threshold by combining psychological impairments with physical impairments.

COMMENTARY

- Justice Spiegel found that Desbiens was catastrophic by combining psychological impairments and physical impairments to reach the whole body impairment threshold.
- This was used by Justice Spiegel despite the fact that Chapter 14 of the AMA Guides specifically excludes percentage impairment ratings in respect of mental or behavioral disorders.
- Paragraph 109 stated that:

The stated purpose of the Guides was to achieve a greater degree of objectivity in estimating the degree of permanent impairments by providing a standard framework and method of analysis. There are various definitions of "impairment" in the Guides, including: "an alteration of an individual's health status" and, "a deviation from normal in the body part or organ system and its functioning".

- It should be noted that Desbiens did not sustain a catastrophic impairment as defined in clause (g), which is an impairment considered to be catastrophic if, in accordance to the Guides, results in a Class 4 (marked impairment) or Class 5 (extreme impairment) due to mental or behavioral disorder.
- It should be noted that Dr. Delaney, who assessed the Plaintiff, stated that Desbiens had a whole body impairment of 40% without taking into account the pre-accident paraplegia.
- Dr. Delaney felt that his original full body impairment of 40% when imposed on the Plaintiff's pre-existing problems resulted in a 60% whole body impairment while Dr. Ameis stated that there was a 40% whole body impairment. Dr. Delaney's opinion was accepted in this matter.
- It should be noted that Justice Spiegel commented on using the Guides with respect to the litigation process and financial awards and stated at paragraph 115:

While the editors acknowledge that the Guides may be used in the litigation process, they caution against using the impairment percentages derived, to make direct financial awards.¹⁰ As Lax J. pointed out in *Snushall v. Fulsang*¹¹ the insurance legislation in Ontario appears to require precisely what the Guides themselves discourage. It has also been pointed out that the Guides are not designed to assess treatment or rehabilitation service requirements. Therefore under Bill 59 we have the anomalous situation that the determination of entitlement to recovery of healthcare expenses in a tort action is governed by a set of guidelines that do not address the need for healthcare or the estimated costs thereof.

- With respect to the pre-existing problems it should be noted that it stated at paragraph 186 that, "[T]he Guides are premised on the assumption that one is dealing with a healthy person who sustains impairments as a result of an injurious event."
- The court used discretion in this case and in fact bumped up the whole body impairment of Desbiens in this matter so that he could reach the 55% whole body impairment threshold and in this Justice Spiegel did exercise discretion with respect to this and how the Guides would be used.
- Overall this case stands for the combining of physical and psychological impairments in order to determine catastrophic impairment to meet the 55% whole body impairment test.

G. v. Pilot Insurance [2007] O.F.S.C.D. No. 153 (Director's Delegate N. Makepeace)
[2006] O.F.S.C.D. No. 42 (Arbitrator L. Blackman)

FACTS

- Ms. G. was injured in a motor vehicle accident dated August 20, 1998.
- It was found that she suffered from serious injuries including fractures of her right forearm, right leg and psychological problems.
- She was 22 years old at the time of the accident. She was single, employed and without children. She gave birth to a daughter in 2004.
- She settled out her IRB's in November 2002.
- In late 2001 she applied for a catastrophic designation.
- On August 29, 2001 a report of the comprehensive medical evaluation of Diagnostics Inc., was obtained by her counsel that found that she had a 62% combined whole body impairment based upon impairments of the spine, 37%, right leg, 30% and right arm, 13%.
- The insurer did a CAT DAC and found that she was had a combined 36% whole body impairment. The insurer examination did not find that she had a spinal impairment.
- It was found at the arbitration that the CAT DAC assessors had a conflict of interest. This was overturned on appeal as it was not really the main issue in this matter.

ISSUE

- Is Ms. G. deemed to be of a catastrophic impairment?
- Should psychological and physical impairments be combined to attain the 55% whole body impairment?

HELD

- It was held in the arbitration and appeal that she was deemed to be catastrophic using the combining of physical and mental impairments.

COMMENTARY

- It should be noted in this matter that Arbitrator Blackman in attempting to determine 55% whole body impairment threshold appears to assign scores for right arm scar, dental and dietary issues, mental and emotion scores based on a headache and facial scar that were not given scores for impairment at the CAT DAC.

- Paragraph 163 of the arbitrator's decision stated:

[T]he proper course is for an adjudicative assessment to be made as best one can on the basis of the available evidence. I am strengthened in this decision by a concern in this specific case as to whether the open minded neutrality expected of a CAT DAC may be somewhat clouded by, perhaps subconsciously, a very human impulse to sometimes endeavor to justify one's prior conclusion.

- It appears that the arbitrator simply determined whether Ms. G. was catastrophically impaired rather than focusing on the experts and evidence put forth.
- This point was further shown at paragraph 14:

Hence, the approach of the Schedule is that ultimately this is an adjudicative, not a medical determination. The trier of fact is not simply reduced to choosing between expert medical opinions. The trier of fact, rather, has the responsibility under paragraph 2(1)(f) of the Schedule to endeavor, in accordance with the rules of statutory interpretation, to capture and accurately estimate all of the impairments that an insured person has sustained as a result of the accident.

- This case further shows that psychological impairments should be added to physical impairments for the purpose of whole person impairment scores which confirms Desbiens

CONCLUSION

The interpretation of what entails a Catastrophic Impairment is constantly widening.

Currently, the courts and FSCO have taken a broad and liberal approach to interpretation of the SABS and the AMA Guides and have allowed combining despite the fact the 4th edition of the AMA Guides specifically excludes a percentage rating for behavioral and mental disorders.

The battle between Insurers and Insured's with respect to the combining of physical and mental to reach a 55% Whole Body Impairment or if to follow the AMA Guides as per the SABS and not combine will need to be judicially determined by the Ontario Court of

Appeal. Until this is completed there will be uncertainty with regards to determining catastrophic impairment.