

SHOULD PSYCHOLOGICAL INJURIES BE COMBINED  
WITH PHYSICAL INJURIES TO DETERMINE  
CATASTROPHIC IMPAIRMENT?

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THE IMPACT OF KUSNIERZ V. THE ECONOMICAL MUTUAL  
INSURANCE COMPANY

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*\*\*Please note that the appeal of this decision is scheduled to be heard on November 16, 2011\*\**

On October 19, 2010, the Honourable Justice Lauwers released his decision in the case of *Kusnierz v. The Economical Mutual Insurance Company*, 2010 ONSC 5749, addressing the definition of "catastrophic injury". In particular, the Honourable Justice Lauwers was asked to determine whether it is permissible for a trier of fact to assign a percentage rating in respect of Mr. Kusnierz's psychological impairments and to then combine that percentage with the percentage ratings in respect of his physical impairments for the purposes of determining whether Mr. Kusnierz was "catastrophically impaired". This analysis was required because if it were found that Mr. Kusnierz suffered a catastrophic injury, then under the SABS he would have been entitled to medical and rehabilitation benefits to a maximum of \$1,000,000 and attendant care benefits to a maximum of 1,000,000.

## **BACKGROUND**

The background facts to this case are as follows:

- Mr. Kusnierz was a passenger in an automobile that left the paved portion of the road and rolled a number of times.
- Mr. Kusnierz suffered numerous injuries, the most serious of which required the amputation of his left leg below the knee.
- Mr. Kusnierz suffered an infection which resulted in the tendency of his stump to develop cysts which lead to him having great difficulty in finding a prosthetic leg that fit properly.
- As a result of his ongoing pain, including pain caused by the development of his cysts on his stump, Mr. Kusnierz wore his prosthesis only 50% of the time. He testified that on days that he had cysts and his stump was too big for the socket, he stayed indoors and used the walker – which was approximately 5 days each month.

- Mr. Kusnierz continued to experience difficulty walking with his prosthetic leg and had difficulty walking up or down slopes.
- Since the accident, Mr. Kusnierz continued to suffer a great deal of pain in his shoulders, his low back and his upper back. He also had problems with his hip as it carried the full weight of his body.
- Mr. Kusnierz developed a narcotic dependency in dealing with the pain, but successfully completed a detoxification process.
- Mr. Kusnierz reported withdrawing from others, emotionally and socially, and saw a psychiatrist to assist for depression.
- Mr. Kusnierz was no longer able to perform his job, driving tractor trailers, and was terminated as a result.
- He relied on his family for help on a day-to-day basis.

It was agreed by all parties that Mr. Kusnierz was entitled to SABS benefits from Economical as a result of the accident. The only question left for the Court to determine was the quantum of benefits that he was entitled to receive.

### **DEFINITIONS IN THE SABS**

Section 2(1.1) of the former SABS defines "catastrophic impairment" as

- (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.*

*\*\*Please note that the definition is different for accidents that occur after October 1, 2003 and under the new SABS regulation which came into effect on September 1, 2010.\*\**

In determining whether Mr. Kusnierz had suffered a catastrophic impairment, the Court had the task of determining whether the evidence of Mr. Kusnierz' impairments satisfied the criteria in the SABS for catastrophic impairment on a balance of probabilities.

Justice Lauwers identified the legislature's purpose in incorporating the American Medical Association's *Guides to the Evaluation of Permanent Injury* (the "Guides") into the SABS regulations on the basis of providing objectivity when estimating the degree of long-standing or permanent injury and to help eliminate bias and error. He noted that while sympathy for a patient is to be expected when determining whether an individual is "catastrophically impaired", it is not permitted to influence the assessment as the Guides prescribe a bright line test that will result in individuals who are significantly injured and approach the threshold but fail to overcome the clear demarcation line. Justice Lauwers correctly noted that the legislation does not grant the court the discretion to push the Plaintiff over the demarcation line.

Justice Lauwers undertook a careful examination of the Guides and found that Mr. Kusnierz could not be characterized as suffering from a "catastrophically impairment" as:

1. The Guides do not permit the mental and behavioural disorders to be assessed in percent terms and combined with the percentage values derived from other impairments for the purpose of determining whole person impairment;
2. The current structure of SABS reinforces the bright line demarcation between mental and behavioural disorders from other impairments

*1. The Guides do not permit mental and behavioural disorder to be assessed in percentage terms and combined with values derived from other impairments*

Justice Lauwers found that the Guides deliberately do not provide a mechanism for translating mental and behavioural impairments into percentages that can be used in determining "whole person injury". The Guides do this as "there is no available empiric evidence to support any method for assigning a percentage of psychiatric impairment of the whole person...and cannot be done reliably".

Justice Lauwers found that combining the two sorts of impairments would contradict the express purpose of the Guides - to provide a system for evaluating impairments that is objective and standardized. He further found that the Guides identify as a problem that it is not possible to have standardized assessments for mental and behavioural impairments. He found that it would be inappropriate to combine mental and behavioural impairments with physical impairments as this would introduce the danger of creating an impairment rating system that is not based on consistent objectivity.

*2. The structure of SABS reinforces the demarcation in the Guides*

Justice Lauwers rejected the arguments made by the Plaintiff for the inclusion of psychological injuries when determining whether a person has suffered a "catastrophic impairment" for the following reasons:

1. *The legislators knew the contents of the Guides when drafting the legislation* - The Guides are clear that they should not be combined. As such, it is presumed that the legislators were familiar with this when choosing to use the Guides to define "catastrophic impairment";
2. *Definition of "impairment" contemplates psychological injuries* - Section 2(1) of the SABS defines "impairment" as a loss or abnormality of a psychological, physiological or anatomical structure or function". In analyzing the proper meaning of the term, Justice Lauwers departed from the strict definition as set out in section 2(1) and interpreted the term in a manner to make sense of the definition of "impairment" in the specific provision it is used;
3. *No indication in the SABS for including psychological injuries* - There is no indication in the SABS that impairments due to "mental or behavioural disorder" that are lesser than the two most serious categories were intended to be evaluated for inclusion with impairments under clause 2(1.1)(f);
4. *The legislators intended to narrow the scope of "catastrophic impairment"* - The legislators did not use an open, non-exhaustive of "catastrophic impairment" even though they could have. This is presumed to be intentional and cannot be displaced by the court.
5. *The purpose of the legislation was to restrict the those entitled to exceptional benefits* - The category of "catastrophic impairment" is meant to be exceptional and is only to be awarded to those who suffer exceptional injuries;
6. *No indication that list of catastrophic impairments should be expanded through the exercise of discretion* - The impairments listed in the SABS as "catastrophic" are very limited and would be very rare by their nature and there is no ability for a trier of fact to expand this list through the trier of fact's discretion;
7. *The presence of the word 'or' between the last two clauses* - The use of the word 'or' in the list of catastrophic impairments is a disjunctive use of the word and, therefore, each of these injuries is a separate and distinct road to qualification; and

8. *The legislators could have included psychological injuries but did not* - It would have been very easy for the legislators to clearly state that psychological injuries were to be contemplated when determining whether a person has suffered a "catastrophic impairment".

## **CONCLUSION**

As psychological injuries are not to be assigned a percentage rating in respect of psychological impairments, Justice Lauwers concluded that it is not possible to then combine psychological impairments with the percentage ratings in respect of the physical impairments. As such, Justice Lauwers found that Mr. Kusnierz failed to meet the definition of catastrophic impairment as set out in the SABS and was therefore not entitled to the benefits associated with him being "catastrophically impaired".

## **THE REACTION BY THE PLAINTIFF'S BAR**

The decision in this case is causing consternation in the plaintiffs' bar as it condemns the practice of combining different impairments to reach the 55-per-cent threshold for a finding of catastrophic impairment under the statutory accident benefits schedule. The Plaintiff's Bar believes that an inability to combine mental and behavioural disorders with other impairments would clearly create a kind of gap in eligibility for catastrophic impairment benefits. In particular, the Plaintiff's Bar takes exception with the decision by Justice Lauwers regarding his inability to depart from what he saw as the more natural way to interpret the regulations in the face of a decision which he felt was "unjust".

Members of the Plaintiff's Bar strongly disagree with the decision of Justice Lauwers. Amongst their reasons, some feel that, while the purpose of the legislation is to keep insurance rates at reasonable levels, the central purpose of the SABS is consumer protection and, as such, any ambiguity and uncertainty is to be interpreted in favour of the insured.

In particular, they take exception with Justice Lauwers decision to depart from the as set out in the decision of *Desbiens v. Mordini*, [2004] O.J. No. 4735 ("*Desbiens*"). In *Desbiens*, Justice Spiegel held that the Court was to assigning percentages to psychological impairments and could

combine same with physical impairments in determining whether a person suffers a "catastrophic impairment". In arriving at this determination, Justice Spiegel found that to deprive innocent victims of motor vehicle accidents the right to recover much needed health care expenses because their psychological impairments cannot be combined with their physical impairments in considering their overall WPI is unjust.

The appeal of the Kusnierz decision is scheduled to be heard on November 16, 2011. Both the Plaintiff and Insurance Defence Bar wait patiently for clarification as to how the SABS is to be interpreted and whether psychological injuries are to be combined with physical injuries when determining whether a person injured in a motor vehicle accident has suffered a "catastrophic impairment".