



Piecing the Puzzle Together: Catastrophic Claims, Tort Claims and the New SABS

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How to Detect and Decide Who Fits Into the New SABS Framework as Catastrophic

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CATASTROPHIC IMPAIRMENT DEFINITION

3. (2) For the purposes of this Regulation, a catastrophic impairment caused by an accident is,
- a) paraplegia or quadriplegia;
 - b) the amputation of an arm or leg or another impairment causing the total and permanent loss of use of an arm or a leg;
 - c) the total loss of vision in both eyes;

CATASTROPHIC IMPAIRMENT

DEFINITION

- d) subject to subsection (4), brain impairment that 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;

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- e) subject to subsections (4), (5) and (6), 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

- f) subject to subsection (4), (5) and (6), 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.

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Subsection (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 (2) (d), (e) or (f) can be applied by reason of the age of the insured person.

CATASTROPHIC IMPAIRMENT

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- Change to section 3(2) of the definition of “catastrophic impairment” to include single limb amputees and those with total and permanent loss of use of a single limb:

3(2)(b) the amputation of an arm or leg or another impairment causing the total and permanent loss of use of an arm or leg

- This new change serves to eliminate former subsections (b) and (c) dealing with the loss of use of two limbs and as a result all of the letters associated with the “catastrophic impairment” test have moved up a letter (so clauses (f) and (g) are now (e) and (f))

The Treatment of the *Desbiens* Decision

Desbiens v. Mordini

[2004] O.J. No. 4735 (S.C.J.)

In *Desbiens*, a 2004 Ontario decision, the Plaintiff was injured when his wheelchair was struck by a motor vehicle. One of the key issues for the court to address was determining whether the Plaintiff had suffered a catastrophic impairment as a result of the collision. Under 2(1.1)(g) the court found that the Plaintiff did not suffer a catastrophic impairment, as his psychological injuries were not considered to be at the class 4 or “marked” level of impairment.

However, under 2(1.1)(f) the court found that the Plaintiff did indeed suffer a catastrophic impairment. Importantly, the court recognized that a 2(1.1)(f) analysis should combine the psychological impairments with the physical impairments to determine whether the Plaintiff’s Whole Person Impairment (WPI) exceeds 55%.

Pilot Insurance Company v. Ms. G

[2007] O.F.S.C.D. No. 153.

In *Pilot*, a 2007 appeal of an Arbitrator's FSCO decision, the original decision from the Arbitrator held that ratings for psychological impairment can be combined with ratings for physical impairment to determine a total WPI rating under 2(1.1)(f), as held in *Desbiens*. Importantly, at the appeal, the Office of the Director of Arbitrations referenced the Arbitrator's statement:

“In addition, it is important to be cognizant that the *Guides* are not intended to reduce human beings to a collection of bones, nerves, flesh and sinew. Body parts do not have impairments. People have impairments. I agree with the comments of Dr. J. McCall, orthopaedic surgeon, in his December 3, 2003 report that “[i]n dealing with a case like [that of this Applicant], it is important to deal with the person as a whole and not just focus on the individual injuries.” The challenge for adjudicators is to rise above the trees and to see the forest.”

In dismissing the appeal, the Office of the Director of Arbitrations agreed with the reasoning of the Arbitrator, which was consistent with Justice Spiegel's treatment of this issue in the *Desbiens* decision.

Arts (Litigation Guardian of) v. State Farm

[2008] O.J. No. 2096 (S.C.J.)

In *Arts*, a 2008 decision, Justice MacKinnon followed the *Desbiens* reasoning in combining the physical impairments in clause (f) and mental or behavioral impairments in clause (g), in determining whether the insured has sustained more than 55% or more Whole Person Impairment (WPI) within the meaning of the SABS.

The Insurer's examination determined that the insured suffered 23% whole person impairment from his neuro-musculoskeletal impairments and a 40% value to psychological impairments, which resulted in a combined score of more than 55% WPI and a finding of CAT impairment.

Kusnierz v. Economical Mutual Insurance Co. [2010] O.J. No 4462 (S.C.J.)

In *Kusnierz*, a 2010 decision which stood against the reasoning from *Desbiens* and *Arts* in determining a CAT impairment under s. 2(1.1)(f), the Plaintiff was a passenger in a motor vehicle that had rolled over and he suffered injuries including the amputation of one of his legs below the knee. The plaintiff brought an action against the insurer seeking a designation of CAT impairment based on the reasoning in *Desbiens*, that his physical and psychological impairments combined to reach a score above 55% whole person impairment, under s. 2(1.1)(f).

The court dismissed the Plaintiff's action. The court stated that section 14 of the Guides provided that assignment of percentage values of psychological impairment was not allowed. The court also stated that the Guides did not allow combining physical and mental impairment in the assessment of the Plaintiff's whole person impairment.

The court added that allowing mental and physical impairments to be combined would undermine Bill 59, which was aimed at reducing no fault benefits to all but the catastrophically impaired in order to stabilize insurance premiums. It should be noted that this case is under appeal as of this date.

Jaggernaut v. Economical Mutual Insurance Company

FSCO A08-001413, December 20, 2010.

In *Jaggernaut*, a 2010 decision, Arbitrator Feldman considered the reasoning within the *Kusnierz* decision regarding its treatment of s. 2(1.1)(f) and indicated that the FSCO tribunal was bound by the FSCO appeal decision of *Pilot and Ms. G.* which allowed a combination of mental and behaviour impairments with physical impairments in determining the WPI rating.

The Arbitrator went on to determine the appropriate percentage WPI impairment rating to the Plaintiff's mental or behavioral impairments and then combined that rating with the WPI rating he determined for all other impairments, in line with the *Desbiens* reasoning. The Arbitrator, importantly, stated that the *Pilot* decision continued to govern the approach he must take with respect to this issue (combining mental or behavioral impairments with other WPI ratings).

Liu v. 1226071 Ontario Inc. (c.o.b. Canadian Zhaorong Trading Ltd.)

[2007] 157 A.C.W.S. (3d) 322, (2009) ONCA 571

- This case stands for the proposition that a single GCS reading of 9 or less taken within a reasonable time following an accident will meet the legal test for whether a claimant has suffered a “Catastrophic Impairment”
- Based on *Liu*, insurers cannot challenge a CAT determination because the patient improved quickly and the GCS rose above 9 shortly after the accident

Recommendations of the Catastrophic Impairment Expert Panel to the Superintendent of Insurance

- The Panel has made recommendations which they believe will improve the accuracy, relevance and clarity of the definition, based on scientific evidence and judgment.
- For Spinal Cord injuries the panel recommended that the American Spinal Injury Association (ASIA) classifications be used to assist in the determination of Catastrophic Impairment subsequent to spinal cord injury.
- The Panel recommended the Spinal Cord Independence Measure for assistance with the measurement of Catastrophic Impairment associated with ambulation dysfunction.

- The Panel recommended the Extended Glasgow Outcome Scale (GOS-E) to assist in the assessment of Catastrophic Impairment for traumatic brain injury in adults.
- The Panel recommended the Global Assessment of Function (GAF) criteria to be used to determine catastrophic impairment related to psychiatric disorders.
- The Panel recommended continuation of the 4th Edition of the AMA Guidelines for multi-system physical impairments. (55% WPI)

- The Panel recommended that for the time being, physical and psychiatric impairments should not be combined for the purpose of catastrophic determination until more investigation is done into a clinically comparable combined psycho-physical whole person impairment threshold that corresponds to the current accepted physical threshold.
- The Panel recommended a new designation called “interim catastrophic impairment status” for traumatic brain injury and major physical impairments who meet 55% WPI three months after an accident and who *unequivocally* require intensive and prolonged rehabilitation to maximize their chance of achieving a lower final impairment level (potentially less than catastrophic).