DEFINING CATASTROPHIC IMPAIRMENT: ADVANCED RESEARCH IN SABS

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The implementation of the new Statutory Accident Benefits Schedule ("SABS") on September 1, 2010, had very little effect on the definition and the application process in catastrophic impairment cases. Given the limited changes and the time it takes to reach arbitration before the Financial Services Commission of Ontario (FSCO), there have been no reported decisions on the new changes under the SABS. The definition of catastrophic impairment has, however, been most recently scrutinized by an expert panel that was assembled by FSCO. The review was completed in mid-April 2011 and FSCO has most recently released its report outlining its recommended changes to the definition of catastrophic impairment. The purpose of this paper is to: (1) identify the recent changes related to catastrophic impairment under the most recent SABS; (2) provide a brief analysis of the most relevant case law in the area of catastrophic impairment; and (3) discuss the expert panel’s recommendations for change to the definition of catastrophic impairment.

I. CHANGES TO THE CATASTROPHIC IMPAIRMENT PROVISIONS UNDER THE SABS

As indicated above, the changes to the SABS did not result in a great number of changes to the catastrophic impairment provisions. The following are the only changes noted:

- Pursuant to clause 3(2)(b) of the SABS, catastrophic impairment caused by an accident now includes the amputation of an arm or leg or another impairment causing the total and permanent loss of use of an arm or a leg;

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1 I would like to acknowledge and thank my articling student, Sherilyn Pickering for her research and assistance writing this paper.
• Pursuant to clause 45(2), paragraph 1, only a physician may conduct an assessment or examination in connection with a determination of catastrophic impairment; and
• Pursuant to clause 45(2), paragraph 2, if the impairment is a brain impairment only, the assessment or examination must be conducted by a neuropsychologist or a physician.³

Prior to the recent changes to the SABS, a determination of catastrophic impairment for accidents occurring after September 30, 2003, required the amputation or other impairment causing the total or permanent loss of use of both arms or both legs OR one or both arms and one or both legs.⁴ One can see that the criterion, in this respect, is less onerous as a result of the changes. Furthermore, under the former SABS, a health practitioner, as defined in the Ontario Regulation 403/96, could complete the application and assessment for determination of catastrophic impairment.⁵ The drafters of the new SABS clearly wanted to limit the types of medical professionals who had any bearing on the catastrophic designation. The drafters have, however, allowed for regulated health professionals to assist both physicians and neuropsychologists with their assessment or examination.

II. RELEVANT CATASTROPHIC IMPAIRMENT CASE LAW
This paper will outline some of the most important catastrophic impairment cases decided before the Ontario courts and FSCO arbitrators. The cases are separated under different headings per the definition of catastrophic impairment under clause (3)(2) of the SABS.⁶

1. GLASGOW COMA SCALE (“GCS”) BASED IMPAIRMENTS
A catastrophic impairment is, subject to subsection 4, a brain impairment that results in:

³ Ibid.
⁴ Statutory Accident Benefits Schedule – Effective October 1, 2003, O. Reg. 403/96, as amended by O. Reg. 281/03.
⁵ Ibid.
⁶ Supra note 2.
(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.\(^7\)

(a) What is a GCS?
The origins of the GCS can be traced back to 1974 at the University of Glasgow. It was
published by two professors of neurosurgery, Graham Teasdale and Bryan J. Jennett.
The purpose of the scale is to measure the conscious state of a person for an initial as
well as a continuing assessment. The test must be administered within a reasonable
period of time after the accident by a person who is trained to administer the test. The
score is measured on a scale of 3 to 15; where a score of less than 9 likely results in a
catastrophic impairment designation. Eye movement, motor responses and verbal
responses are the three criteria independently assessed in coming to a score on the
GCS.\(^8\)

(b) Factors Affecting GCS Scores
(i) Intubation
In Tournay v. Dominion of Canada General Insurance Company\(^9\), the insurer sought to
invalidate the GCS score based on the medical expert testimony of Dr. Becker who
testified that a GCS is invalid once a person is intubated, the main reason being that the
person cannot speak. Arbitrator Kominar had to decide whether a person could be
deemed catastrophic by virtue of his or her GCS score while intubated. The issue was
decided in the affirmative and Arbitrator Kominar stated the following in that respect:

The 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, that must be taken as satisfying section

\(^7\) Supra note 2, s. 3(2)(d)(i).
\(^8\) B. Jennet and G. Teasdale, “Management of Head Injuries” (1981) 20 Contemporary Neurology Series,
F.A. Davis Company, USA.
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.\textsuperscript{10}

(ii) Alcohol and Marijuana
The issue before Justice Kennan in \textit{Holland v. Pilot Insurance Co.}\textsuperscript{11} was whether or not alcohol or marijuana consumption, on the part of the insured, had an impact on the GCS score of the insured. The insurer’s position was that the alcohol and marijuana consumption of the insured rendered the GCS score unreliable. The court concluded, based on expert evidence, that the GCS score had not been influenced by alcohol consumption. It is worthy of mention that Justice Kenaan was of the opinion that “[I]f restrictive meaning is to be assigned to the regulation it should be clearly recited in the regulation itself.”\textsuperscript{12}

(iii) Administrators of the GCS Test
In \textit{Milson v. Aviva}\textsuperscript{13}, the insured had GCS scores of 7, 7, and 6 within a reasonable time frame after the collision. The first two scores were completed by a paramedic and the third by an emergency room nurse. The insurer initially conceded that all three tests were administered by persons trained for that purpose, but later questioned the training of the emergency room nurse because she had not been identified. A neurologist, who was responsible for the review of GCS scores as a member of the DAC team, felt that the GCS scores should have been a 10 from the paramedic and an 11 from the emergency room as the scores did not accord with the narrative account of the insured’s condition. The neurologist did not have formal training with administering a GCS test. Arbitrator Rogers held that it was unlikely that two trained experienced technicians and another doctor who had examined the insured would have an incorrect approach. Arbitrator Rogers did not accept that the neurologist had superior training and experience over the emergency staff who conduct GCS tests all the time. Thus despite the credentials of a doctor, their opinion will not necessarily take precedence over trained and experienced persons who administer GCS tests on a regular basis.

\textsuperscript{10} \textit{Ibid.} at page 16.
\textsuperscript{12} \textit{Ibid.} at para. 24.
\textsuperscript{13} [2006] O.F.S.C.D No. 67 (FSCO Arb.).
(iv) Seizures
In *Young v. Liberty Mutual Insurance Company*[^14^], paramedics assessed the insured as having GCS scores of 3, 4, and 3. While on route to the hospital, the insured had two seizures lasting one minute each. Upon arriving at the hospital, a doctor evaluated the insured’s GCS score as 3 but queried whether that was due to the head injury or whether it was a post-seizure result. DAC assessors were unanimous in their opinion that the insured did not meet the criteria for catastrophic impairment. It was their opinion that the combined GCS score was only valid if all three sub-scores were “valid and reliable” and could not designate a catastrophic impairment in the absence of “reliable evidence that GCS scores of 9 or less were the direct and exclusive consequence of a serious traumatic impairment of brain function”[^15^]. A neurologist retained by the insurer provided an expert opinion that the GCS scores were not valid in the presence of confounding factors which included intubation, post accident seizures and sedation. Thus the insurer submitted that the GCS scores resulted not from brain impairment but from medication, intubation, seizures and the nature of Young’s injuries (facial smash, raccoon eyes, and bleeding) and, therefore, were not valid and reliable. Arbitrator B. Allen found the insured to be catastrophically impaired and held that medication, intubation, seizures and the nature of an insured’s injuries in situations of trauma do not affect GCS readings. He further held that modifiers of “valid and reliable” and “direct and exclusive” should not be read into the legislation to determine if a person should be deemed catastrophic[^16^]. On appeal, Director’s Delegate Evans affirmed Arbitrator B. Allen’s decision[^17^].

(v) Improvement of Scores Shortly After Accident
In *Liu v. 1226071 Ontario Inc. (Canadian Zhorong Trading Ltd.)*[^18^], the insured was in a motor vehicle accident at 20:15. GCS scores were 3 at 20:31; 8 at 20:43; 12 at 20:55;

[^17^]: Supra note 14 at para. 100.
and 14 at 20:57. The insured took the position that at least one GCS score was 9 or less taken within a reasonable time after the motor vehicle accident and thus, that he should be deemed to be catastrophically injured. The insurer’s position was that the insured should not be considered catastrophically impaired because his GCS reading rose to 12 within 33 minutes of the collision, which is a reasonable period of time after the motor vehicle accident. The Court of Appeal held that the insured was catastrophically impaired and that the definition of catastrophic impairment is a legal definition to be met and not a medical test. The Court of Appeal further held that it is irrelevant that there may also have been higher scores within a reasonable time after the motor vehicle accident.

2. THE 55% BASED CATEGORY

A catastrophic impairment is:

(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.\(^{19}\)

(i) *Desbiens v. Mordini*

In *Desbiens v. Mordini*\(^{20}\), the insured was operating a wheelchair on a sidewalk when he was struck by a motor vehicle. He suffered a displaced fracture of the femur and soft tissue injuries to the right side of his body. The insured had significant pre-accident injuries as a result of an employment related accident which rendered him a paraplegic. The Court found the insured to be catastrophically injured as he had a Whole Person Impairment over the 55% threshold. Justice Spiegel combined the insured’s psychological and physical impairments, despite that fact that chapter 14 of the AMA’s *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, specifically excludes percentage impairment ratings in respect of mental or behavioural disorders.

\(^{19}\) *Supra* note 2, s. 3(2)(e).

(ii) *G. v. Pilot Insurance*

In *G. v. Pilot Insurance*\(^{21}\), the insured suffered from injuries including fractures of her right forearm, right leg, and was dealing with psychological issues. The insured submitted a comprehensive medical evaluation of Diagnostics Inc. which found that she had a 62% Whole Person Impairment based upon impairments of the spine (at 37%), right leg (at 30%), and right arm (at 13%). The insurer did a CAT DAC and found that she had a 36% percent Whole Person Impairment and that she did not have a spinal impairment. It was held at the arbitration and appeal level that the insured was catastrophically impaired using a combination of physical and mental impairments. Arbitrator Blackman assigned scores for her right arm scar, dental and dietary issues, and mental and emotional scores based on a headache and facial scar which were not given scores for impairment at the CAT DAC.

(iii) *Arts (Litigation Guardian of) v. State Farm Insurance Co.*

In *Arts (Litigation Guardian of) v. State Farm Insurance Co.*\(^{22}\), the insured brought a motion to determine a question of law before trial. The issue was whether, when determining if an insured is catastrophically impaired pursuant to clause 2(1)(f)\(^{23}\) of the SABS, it is permissible to assign percentage ratings in respect of an insured's psychological or psychiatric impairments and combine them with percentage ratings in respect of an insured's physical impairments. IME assessors opined that the insured's neuro-musculoskeletal impairment was 23% and that the insured's mental and behavioural impairment was 40%. The insurer argued that the AMA's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, recommends against the use of mental/behavioural percentages, and that *Desbiens*\(^{24}\) was wrongly decided. MacKinnon, J., found that *Desbiens* was compelling, reasonable and persuasive and that clause 2(1)(f) of the SABS “requires consideration of all impairments, however
caused, and that they be totalled together in arriving at Whole Person Impairment.»

MacKinnon, J., further notes that:

An injured victim may fail short of being found catastrophically impaired under on the basis of any one of the other seven parts to the definition of catastrophic impairment, but when all of his/her impairments are considered, he/she may well have a 55% Whole Person Impairment. To deprive Ontario motor vehicle accident victims in these circumstances the right to recover needed attendant care and medical - rehabilitative benefits is both unreasonable and unjust. That cannot have been the intention of the provincial legislature.

The insurer brought an application for leave to appeal the aforementioned decision to the Divisional Court. J.E. Ferguson, J., dismissed the application for leave to appeal on the basis that there was no reason to doubt the correctness of the trial judge’s decision as it was well reasoned and consistent with existing law.

(iv) Kusnierz v. Economical Mutual Insurance

In Kusnierz v. Economical Mutual Insurance, the insured brought an action for a declaration that he had sustained a catastrophic impairment. The insured had suffered injuries resulting in a left leg amputation below the knee. The insured submitted that his physical and psychological impairment ratings combined to give him more than a 55% impairment rating. P.D. Lauwers, J., dismissed the action because under s. 2(1.1) of the SABS, the AMA’s Guides to the Evaluation of Permanent Impairment, 4th edition, 1993, applied where the SABS were silent. The AMA’s Guides to the Evaluation of Permanent Impairment, 4th edition, 1993, distinguished between physical and mental impairment and did not allow combining the two in impairment assessments. Furthermore, P.D. Lauwers, J., held that allowing physical and psychological impairment ratings to be combined to reach an impairment of more than 55% would

25 Supra note 22 at para. 8.
26 Ibid. at para. 15.
28 Ibid. at para. 10.
30 Now clause 3(2) of the Statutory Accident Benefits Schedule – Effective September 1, 2010, O. Reg. 34/10, as amended by O. Reg. 370/10.
undermine Bill 59, which was aimed at reducing no fault benefits to all but the catastrophically impaired so as to stabilize insurance premiums.

(v) Jaggernauth v. Economical Mutual Insurance Co.

In Jaggernauth v. Economical Mutual Insurance Co., four CAT assessments were conducted, three by the insurer and one by the insured. The insurer’s assessments indicated that the insured suffered a Whole Person Impairment between 33% and 52%, whereas the insured’s assessment indicated that he suffered a Whole Person Impairment of 60-64%. The differences were due to the methodology for rating a spinal injury, the difficulty in assessing fluctuating levels of functioning in chronic pain cases, the effect of medication on the overall impairment ratings, and the ability to combine physical and mental or behavioural impairments to obtain a Whole Person Impairment rating. After analyzing the Injury Model in the AMA’s Guides to the Evaluation of Permanent Impairment, 4th edition, 1993, with regards to a healed spinal injury, Arbitrator Feldman held that “for this type of injury, the impairment rating should be based upon the initial injury unless the Guides specifically provide otherwise”. The assessors found differences in the limited range of motion due to fluctuations in the insured’s pain and mobility levels. Arbitrator Feldman held that assessing an insured on his best day would underestimate the person’s true level of functional impairment and would be prejudicial to those who suffer from chronic pain. Arbitrator Feldman found that an increase in the Whole Person Impairment due to the necessity of being on numerous potent medications indefinitely was appropriate so as to recognize that the medications may contribute to the insured’s overall impairment level in a way that is not otherwise captured. As for combining physical and mental or behavioural impairments, Arbitrator Feldman held that he was bound by G. v. Pilot Insurance which had followed Desbiens and thus was allowed to combine the two. Arbitrator Feldman adopted the methodology identified in the AMA’s Guides to the Evaluation of Permanent Impairment, 4th edition, 1993, in Chapter 4 and on page 301, to assign an impairment rating for

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31 2010 CarswellOnt 10195 (FSCO Arb.).
32 Ibid at para. 130.
33 Supra note 21.
34 Supra note 20.
mental or behavioural impairment. The physical and mental or behavioural impairment ratings combined for a Whole Person Impairment Rating of 53%; however, the AMA’s *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, allow for a Whole Person Impairment Rating to be rounded to the nearest value ending in 0 or 5. Arbitrator Feldman held that it was appropriate to give the benefit of the doubt to the insured so that he might make further claims and try to prove entitlement to those claims. As a result, Arbitrator Feldman rounded up the Whole Person Impairment rating to 55% and found the insured to be catastrophically impaired.

3. **Mental and Behavioural Based Impairments**

A catastrophic impairment is:

(f) subject to subsections (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.\(^\text{35}\)

(a) **Classes of Impairments**

In the AMA’s *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, there are five classes of impairment due to mental or behavioural disorder, which are based upon the four areas of functioning: activities of daily living, social functioning, concentration, and adaption.\(^\text{36}\) The five classes are as follows:

- **Class 1**: No Impairment is assigned when no impairment is noted in activities of daily living, social functioning, concentration, and adaption.
- **Class 2**: Mild Impairment is assigned when impairment levels are compatible with most useful functioning regarding activities of daily living, social functioning, concentration, and adaptation.

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\(^{35}\) *Supra* note 2, s. 3(2)(f).

• **Class 3**: Moderate Impairment is assigned when impairment levels are compatible with some, but not all, useful functioning regarding activities of daily living, social functioning, concentration, and adaptation.

• **Class 4**: Marked Impairment is assigned when impairment levels significantly impede useful functioning regarding activities of daily living, social functioning, concentration, and adaptation.

• **Class 5**: Extreme Impairment is assigned when impairment levels preclude useful functioning regarding activities of daily living, social functioning, concentration, and adaptation.

(i) “A” Single Impairment – Is All That is Required

In *Aviva Canada Inc. v. Pastore*[^37^], the CAT DAC found that the insured had a class 4 impairment in her activities of daily living and an overall rating of class 3. The insurer submitted that the language of clause 2(1.1)(g)[^38^] required an overall rating of 4 or 5.[^39^] Director’s Delegate Blackman held that the use of the word “a” indicated that a single class impairment would be sufficient and that if the legislature intended for there to be an overall impairment rating then it would have indicated so in clear language. To determine otherwise would be contrary to the remedial intention of the SABS and would result in depriving an accident victim of access to much needed benefits. The AMA’s *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, does not state that an overall rating is required. Even if it did, in circumstances of conflict between the AMA’s *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, and the *Insurance Act* and SABS, the later take precedence. The insurer applied for judicial review of this decision before the Divisional Court and OTLA was granted intervener status[^40^]. The decision of the Divisional Court has not yet been released.

[^37^]: 2009 CarswellOnt 821 (FSCO Arb.), aff’d 2009 CarswellOnt 8244 (FSCO App.).
[^38^]: Now clause 3(2)(f) of the *Statutory Accident Benefits Schedule – Effective September 1, 2010*, O. Reg. 34/10, as amended by O. Reg. 370/10.
[^39^]: 2009 CarswellOnt 8244 (FSCO App.), aff’g 2009 CarswellOnt 821 (FSCO Arb.).
[^40^]: 2011 CarswellOnt 211 (Ont Sup. Ct. J. (Div. Ct.)).
III. REVIEW OF CATASTROPHIC IMPAIRMENT DEFINITION

Not surprisingly, the most significant complaint made by the Insurance Bureau of Canada (“IBC”) during the five-year review on auto insurance was that the definition of catastrophic impairment had been eroded by the judiciary, leading to a rise in the number of successful catastrophic designations under the SABS. While it is the position of OTLA that the IBC’s submission lacks a factual basis, an expert panel was nonetheless appointed to review the definition of catastrophic impairment and make recommendations for its change. In its recent report dated April 8, 2011\(^1\), a number of recommendations were outlined, a summary of which are as follows:

- the use of assessment systems such as the American Spinal Injury Association classification, the Extended Glasgow Outcome Scale\(^2\), the Spinal Cord Independence Measure and the Global Assessment Functioning to determine the presence of catastrophic impairment;


- the disallowance of combining physical and psychiatric impairments for the purpose of catastrophic determination; and

- the introduction of a designation of interim catastrophic impairment.

As one can clearly see, the recommendations of the panel eliminate more than a decade of jurisprudence on the interpretation of the catastrophic impairment definition. Given the wide ranging implications of this review, FSCO will conduct consultations among stakeholders (including OTLA) before making submissions to the Ontario government. For all of us who focus our daily efforts on helping motor vehicle accident


\(^2\) The use of the Extended Glasgow Outcome Scale would be an elimination of the use of the Glasgow Coma Scale in the current SABS.
victims who suffer the most serious of injuries, the adoption of any of the above-mentioned recommendations would have detrimental impacts on how we can service our clients. We now have to wait to see what, if any, changes the government implements to the definition of catastrophic impairment.

IV. CONCLUSION
While this paper should not be considered a comprehensive review of all the case law in the area of catastrophic impairment, it is meant to serve as an overview of the most relevant and most referred to jurisprudence on the issue. One can easily conclude from a review of the cases mentioned above that the challenges made on the behalf of insured persons, coupled with some of the recent amendments to the SABS, have expanded the definition of catastrophic impairment in a way that better addresses the needs of motor vehicle accident victims.

With the review of the definition of catastrophic impairment that is underway, the years of advancements made on the behalf of insured persons are in jeopardy. But just as we vigorously fight for our clients during the course of their action, we must use that same vigor to convince the government that any changes to the catastrophic impairment definition, with the exception of an expansion of the definition, would not be in the best interest of Ontario consumers. I would like to applaud the efforts of the OTLA Board of Directors and others who are fighting the good fight.