A Catastrophe In The Making?

An examination of the proposed changes to the definition of "Catastrophic Impairment"

Rehabilitation and Life Care Planning Symposium

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"Obviously, a person who has been gravely and permanently injured can never be put in the position he would have been in if the tort had not been committed….. Money is a barren substitute for health and personal happiness…."

- Justice Brian Dickson in *"Andrews V. Grand & Toy"*

"All the kings horses and all the kings men couldn't put humpty dumpty together again"

- **Mother Goose**

Introduction

At its most basic level, all of us attending this conference work to achieve the same fundamental goal: repairing, insofar as is humanly possible, a life which has been shattered and can never be fully restored. Enabling and empowering the seriously injured to live with dignity to ensure that they receive the services and

monies necessary to sustain or improve their mental and physical health. To provide them with adequate care. And to place them, as nearly as money, medical treatment and care can do, in the place where they would have been had they not suffered their injury.

The importance of this task was stressed by Mr. Justice Dickson of the Supreme Court of Canada in the case of Andrews V. Grand & Toy when he stated:

> **"Money can provide for proper care: this is the reason that I think the paramount concern of the courts when awarding damages for personal injuries should be to assure that there will be adequate future care."**

Fellow Supreme Court Justice Spence echoed the importance of future care damages in the award of damages in Arnold v. Teno:

> **"It should be stressed that in such a case such as the present, and indeed in other personal damage actions to which I have referred above, the prime purpose of the court is to assure that the terribly injured plaintiff should be adequately cared for during the rest of her life. That and having been attained, other elements of damage are of lesser importance."**

In the case of seriously injured victims of motor vehicle collisions, a determination of "Catastrophic Impairment" is an essential condition precedent to your ability to provide the seriously injured with the benefit of your involvement and help. Without it, your hands are completely and utterly tied. And it goes without saying that the expertise and help that you provide serve to enhance the lives of the most seriously injured at their most vulnerable.

Unfortunately, change is afoot that is by in large not positive. In short, the Ontario Government is expected in the reasonably near future to announce a complete overhaul of the definition of "catastrophic impairment" (or CAT) as set forth in the Statutory Accident Benefits schedule.

In the balance of this paper we propose to explore and examine (1) the current definition of CAT; (2) the 16 years of accumulated jurisprudence which have brought life to its real world application, (3) the particulars of its recommended overhaul, and (4) an analysis of the recommended changes and the implications thereof.

(1) The Current Definition of Catastrophic Impairment

Catastrophic Definition under Ontario Regulation 34/10 – after September 1, 2010

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;

(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;

(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 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. O. Reg. 34/10, s. 3 (2).

(3) 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. O. Reg. 34/10, s. 3 (3).

(4) For the purposes of clauses (2) (d), (e) and (f), an impairment sustained in an accident by an insured person described in subsection (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 (2) (d), (e) or (f), after taking into consideration the developmental implications of the impairment. O. Reg. 34/10, s. 3 (4).

(5) Clauses (2) (e) and (f) do not apply in respect of an insured person who sustains an impairment as a result of an accident unless,

(a) a physician or, in the case of an impairment that is only a brain impairment, either a physician or a neuropsychologist 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. 289/10, s. 1 (2).

(6) For the purpose of clauses (2) (e) and (f), 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 is 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. 34/10, s. 3 (6).

(2) FSCO and Judicial Interpretation of the CAT "Tests"

Because the CAT designation is a pre-requisite to accessing over 2 million dollars in accident benefits, the past 16 years have seen the insurance industry adopt a truly "scorched earth" approach to the defense of the vast majority of

applications for catastrophic designation. But fortunately, over the past 16 years we have at least finally achieved some degree of clarity with respect to the interpretation of the tests set forth in the catastrophic designation defining regulation.

Three recent decisions of the Ontario Court of Appeal have provided us with some clarity:

1. Liu v. 1226071 Ontario Inc: the Ontario Court of Appeal determined that the "GCS test is a bright line legal, and not medical catastrophic impairment test; meaning that if a person has a brain impairment resulting in a GCS of 9 or less immediately following the accident that person is undeniably and forever considered to have sustained a catastrophic impairment". The Court of Appeal reasoned that it is a legal definition to be met and not a medical test, and it is irrelevant that there may have been higher scores also within a reasonable time after the collision.
2. Kusnierz v. Economical Mutual Insurance Company – this was an appeal from the ruling of a judge of the Ontario Superior Court of Justice that prevailed the combination of physical and psychological impairments in the 55% WPI test (under the AMAG guides); the lower court judge's ruling contradicting an early ruling by a different judge of the same court. The Ontario Court of Appeal in Kusnierz ruled that you can combine physical and psychological impairments in the 55% WPI test.

3. Pastore v. Aviva Canada Inc. The issue in dispute was whether the claimant was catastrophically impaired due to a single mental or behavioural disorder, under subsection 2(1.1)(g) of the SABS.

   The CAT issue proceeded to arbitration. The arbitrator accepted that the assessment of a Class 4 impairment in one area of function was sufficient to

meet the definition of "catastrophic impairment". This was the only area of function she reviewed in detail. On this basis, she concluded that Pastore had suffered a catastrophic impairment.

On appeal, the Director's Delegate agreed with the Arbitrator that a Class 4 impairment was required in only one of four areas of functioning to establish a CAT impairment.

The Divisional Court disagreed with FSCO and granted the insurer's application for judicial review. The Court found that the Director's Delegate had failed to properly appreciate the effect of the incorporation of the Guides into the SABS. The Guides are incorporated into the SABS and must be treated as part of the legislative scheme. A plain reading of the words in s. 2(1.1.)(g) bearing in mind the context and purpose of the legislation and taking into account the FSCO Guidelines makes it clear that all four areas of function are to be accounted for in an assessment of catastrophic impairment.

The Court of Appeal held that the decision of the delegate, in which he concludes that the use of "a" in the definition of "catastrophic impairment", refers to a single, functional impairment due to mental or behavioural disorder at the marked level, constituting a catastrophic impairment, is a reasonable decision. There was nothing in the Guides which required more than a single finding and there was no requirement that every assessment allot a mental impairment class to each of the four areas of functional limitations before an impairment can be found to qualify. It was also held that, the Guides are not "part of the legislation" and are only guidelines.

(3) The Proposed Overhaul of the Definition of Catastrophic Impairment

The Financial Services Commission of Ontario's mandatory five year review on automobile insurance in Ontario (2009), included a recommendation for the review of the definition of Catastrophic Impairment under the then Statutory Accident Benefit Schedule, O.Reg. 403/96 (SABS). Recommendation #10 of the Five Year Review had stated that:

Further consultation with experts in the field is needed to amend the definition of "catastrophic impairment". **<u>The goal for this review should be to ensure that the most seriously injured accident victims are treated fairly</u>**.

Notably, Recommendation #1 of the Five Year Review stated that:

When determining the merits of any future regulatory changes, consideration should be given to whether the change would increase complexity and regulatory burden. There should be a compelling reason for making a change that would add complexity to the accident benefit system.

We should also note the Superintendent's report to the Minister of Finance although dated December 15, 2011, was not made public until July 2012.

Further thereto, an expert panel was assembled. The panel consisted of eight experts, there of whom had been consultants to the Insurance Bureau of Canada. It issued a report dated April 8, 2011, outlining numerous recommendations for proposed changes to the legal definition of Catastrophic Impairment contained within the SABS. From these recommendations, the Superintendent of Insurance

issued final recommendations to the Minister of Finance, in a report dated December 15, 2011. The report was not made public until June of 2012.

The proposed changes remain a very active legislative issue, and we expect that they will be considered shortly by the resuming Ontario Legislature.

The expert panel's recommendations and the Superintendents response thereto are set forth below in a chart that was prepared by Toronto personal injury lawyer Darcy Merkur. Darcy is a partner in the Thomason, Rogers Law Firm. (Thank you Darcy for allowing the use of this chart!)

(4) Analysis of the Recommended Changes

Stated simply, the overall impact of implementation of the above mentioned changes to the definition of catastrophic impairment will not be positive. We will lose the benefit of 16 years of accumulated jurisprudence. A lack of familiarity with the new testing protocols will inevitably result in their mis – applications. Even more CAT applications will be opposed. And they will undoubtedly take longer to process; the net result being the placement of new stressors on an already seriously overstressed system and far fewer people being declared CAT.

A more detailed and nuanced analysis of and response to the proposed changes to the definition of catastrophic impairment can be found in the attached "Response Of The Ontario Trial Lawyers Association To The Recommendations For Changes To The Definition Of Catastrophic Impairment – Final Report Of The Catastrophic Impairment Panel To The Superintendent" submitted by the Ontario Trial Lawyers Association.

For those of you not aware of OTLA, it is an association of lawyers dedicated to the fair representation of consumers who suffer traumatic injury. I was privileged to serve as OTLA's president in 2006. Founded 20 years ago, OTLA is comprised of lawyers who act on behalf of plaintiffs from Ontario and across Canada. It currently has more than 1,100 members.

OTLA's concerns were essentially fivefold:

1. That the panel's report is based on a preconceived notion and an invalid premise about what a catastrophic impairment ought to be; but this fundamentally undermining the entire report;
2. The panel has deferred many aspects of his recommendations for later consideration by committees yet to be formed, thereby making the recommendations expressed to date both incomplete and premature;
3. The panel's suggested amendments will destabilize and complicate an already unduly complex product, this change clearly not being in the interest of consumers;
4. The panel was not asked to and did not address the important policy considerations and FSCO considerations that are an essential element of the analysis, which analysis is required in order to ensure fairness for all Ontario consumers; and
5. The recommendations are fundamentally unfair and that they discriminate against classes or impairments and exclude many with severe impairments, again contrary to the interest of consumers.

In short, OTLA's response to the prepared changes was as follows:

- Modification of the definition of catastrophic impairment at this stage is completely unwarranted and will inject a considerable amount of uncertainty and cost into what is already one of the most complicated areas of the Statutory Accident Benefits schedule.
- There is no need to make the test more stringent. Meeting the definition of catastrophic impairment does not directly equate to an entitlement to the injured person. Rather it simply expands the monetary limits available to those who have suffered the most significant of impairments.
- A tightening of the definition will simply mean that the most vulnerable class of accident victims who have reasonable and necessary medical needs will become an added burden to Ontario's healthcare system or will have significant needs that are simply unmet.
- It is premature for the government to proceed with any amendments to the definition of "catastrophic impairment" based on the Report of the Catastrophic Impairment Expert Panel to the Superintendent dated April 11, 2011. The panel report is incomplete with significant portions of the work still deferred.
- The questions one of fairness to those who suffer the most significant of injuries versus premiums charged to the motoring public that allow insurers to earn a reasonable profit.

The foundation of OTLA's position is essentially that any change to the current definition of catastrophic determination at this time will be tantamount to attempting to fix a problem that nobody can show exists in a system that is primed to deliver healthy profits to insurers. While OTLA acknowledged that there are some recommendations in the report that may benefit consumers (for

example, the proposals for interim catastrophic benefits, these have not been adequately developed by the report).

CONCLUSION

OTLA got it right in when it stated that "the fundamental problem with the Panel's report is that the wrong questions were being asked. Where the line should be drawn depends entirely on what the system can afford. At the moment there is no reason to believe that the claimants now qualifying under the current definition are a financial burden on the system. In fact, all of the available financial data, combined with the substantial savings to be realized under the recent and drastic reduction in non-catastrophic benefits, supports the conclusion that the catastrophic definition ought to be expanded so that truly seriously impaired consumers are not hurt by the recent reduction in benefits to the non-catastrophically impaired".

It is also crucial that the government understand the disruption and stress that these complex proposals will have upon health care providers. The vast majority of health care providers want only to help the seriously injured with their rehabilitation and their quality of life. There can be no serious disagreement with the fact that the complexity of the changes being recommended will have a seriously detrimental impact on the provision of health care to the seriously injured. In the final analysis it will be the seriously injured who will pay the price for this disruption.

In closing, we meet at this conference in an hour of challenge. But we share a unity of purpose. As such, we ask for your help. Not for your money, but rather for your voice. Queens Park needs to know that neither the stakeholders in this crucial issue nor the general public are going to stand idly by and witness the continued denigration of the rights of those seriously injured in motor vehicle collisions across our province. As such, we strongly urge you to keep the pressure on Queens Park regarding this issue. At a minimum, we ask you to contact your MPPs to voice your concern. Our MPPs need to know how the standard (and mandatory) automobile insurance policy designed to protect Ontario consumers has been gutted since 2010 and how these proposed changes to the definition of catastrophic impairment will further threaten the health, well-being and future of the people of this province.