

The Court's Approach to Multiple Injuries, Pre-existing Injuries, and Psychological Injuries on the Determination of Catastrophic Impairment:

Overview -The Impact of Desbiens vs Mordini -

This decision analyses in detail the definition of “catastrophic impairment” under two categories of the definition. The “55% whole body impairment” (“WBI”) definition [see text of definitions below on next page in bold] and the “Marked or extreme Impairment due to Mental or Behavioural disorder” definition.

The un-appealed decision clarifies the Superior Court’s approach to determining whether a Plaintiff meets either definition of Catastrophic Impairment in cases involving;

- a) the impact of **multiple injuries** and how they should be considered under either definition;
- b) the impact of a severe **pre-existing injury** on meeting either definition;
- c) the impact of **psychological and mental problems when combined with physical injuries.**

A summary of the key principles arising from the decision appear at page 6 of this paper.

The Facts:

Mr. Justice Spiegel’s opening summarizes the sad realities facing this Plaintiff:

‘The Gods of good fortune have not been kind to Phillipe Desbiens.’

Fourteen years *before* the car accident in question, Mr. Desbiens became a paraplegic because of a roofing accident. The Defendant struck Mr. Desbiens while he was sitting in his wheelchair on the sidewalk. Mr. Desbiens was thrown 10 feet. Prior to the car accident he was found to have adapted well to his paraplegic condition.

As a result of the accident he was found to have suffered multiple permanent injuries including a displaced fracture of his right femur, severe soft tissue injuries to the right side of his body, chronic pain disorder and significant psychological impairments including depression and an adjustment disorder. The functional impact of these injuries resulted in difficulty in transferring in and out of his wheelchair and functioning as he had before. His psychological profile was reflective of a dysfunctional coping style as a result of the car accident.

This Bill 59 decision related to the combined effect of Sections 267.5(3) and (4) of the *Insurance Act* which prior to October 1, 2003 protected Defendants from claims for expenses for health care unless the Plaintiff sustained a "Catastrophic Impairment". It is of obvious relevance to the current SAB definition of Catastrophic Impairment (Ontario Regulation 403/96 for accidents occurring on or after the 1st of November, 1996) which has the same wording. The definitions for "55% whole body impairment" and "marked or extreme impairment due to mental or behavioural disorder" as considered in *Desbiens* appear in Sections 2 (1.2)(f) and (g) of the current SABs. These sections provide as follows:

- "(f) Subject to subsections (2) and (3), any impairment or combination of impairments that, in accordance with the American Medical Association's Guide to the Evaluation of Permanent Impairment, 4th Edition, 1993, results in 55% or more impairment of the whole person;***
or
- (g) Subject to subsections (2) and (3), any 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.”

Mr. Justice Spiegel exhaustively deals with a number of issues in reviewing the evidence and determining his legal ability to make his ultimate finding that Mr. Desbiens did meet the definition of catastrophic impairment under the 55% whole body impairment requirement. In the course of so doing he rejected, on the facts of that case, that Mr. Desbiens met the definition utilizing the (g) categories of Class 4 or 5 marked or extreme impairment due to mental or behavioural disorder.

Mr. Justice Spiegel made the following findings:

1. That despite significant impairments as a paraplegic, prior to the accident of November 8, 1999 Mr. Desbiens was a well functioning paraplegic before his motor vehicle accident;
2. That as a result of the motor vehicle accident he suffered a very dramatic loss of independence and became dependent on others to carry out most of his daily activities.
3. In analysing the AMA Guides (“the Guides”), he noted that Chapters 2 to 13 of the Guides deal with different organ systems where Chapter 14 dealt with

mental and behavioural disorders. The specific criteria for assessing impairments relating to Chapters 2 to 13 provided tables and figures to provide physicians assistance in translating clinical findings into impairment percentages. Unfortunately, Chapter 14 did not provide comparable charts and left the Trial Judge to determine whether it was appropriate or legally possible to assign impairment percentage ratings to psychological or behavioural challenges such as those suffered by Mr. Desbiens. He concluded that Mr. Desbiens did not sustain a catastrophic impairment as defined under Clause (g). This left Mr. Desbiens' only possible category for such a definitional finding as being (f) i.e. the 55% whole body impairment;

4. He found, based on all of the evidence, that Mr. Desbiens suffered a 40% whole body impairment (WBI) . His 40% finding of WBI was made of his pre-existing paraplegia which related to impairments of the musculo-skeletal system. The following summary is of the impairments so found:

Region	WBI %
Right Upper Extremity	23%
Right Lower Extremity	8%
Left Upper Extremity	7%

Cervical Spine	5%
Lumbar Spine	<u>5%</u>
Total	40% WBI

5. He found that the AMA Guides did not provide for any methodology for determining WBI taking into account an individual's pre-existing conditions. He therefore found that he was entitled to add the additional whole body impairment impact to the pre-existing whole body impairment assessment to determine whether or not a Plaintiff had achieved the 55% WBI percentage necessary to be defined as catastrophically impaired.
6. He found that in Mr. Desbiens' case by either approach, a "loss of function approach" or a "activities of daily living equivalent", Mr. Desbiens had achieved the 55% threshold by reason of the musculo-skeletal problems that further impaired his transferability and activities of daily living. He relied on the Plaintiff's physician Dr. Delaney, in exercising her discretion under the Guides and her report which provided:

"If we keep in mind that he was already paraplegic and we add these new impairments, which are responsible for his alteration and

function, we can clearly see that he has sustained a catastrophic impairment in the context of his current state and pre-existing medical condition.”

COUNSEL’S INSTRUCTION TO MEDICAL PRACTITIONERS

The Judge felt that the Plaintiff’s physiatrist, Dr. Delaney and the Defendant’s physician both confirmed that once they had calculated impairments exceeding 55% WBI, they did not spend as much time detailing further impairments. The Trial Judge felt that it would be more helpful to have physicians provide a complete analysis and quantification of all impairments even after the 55% WBI is reached. The purpose of course is to assist the Trial Judge in the event that there is a rejection by a Judge or Tribunal of any of the impairment ratings assigned by the physicians. This would allow the Court better evidence with which to determine if other impairments assisted in bringing the impairment rating over the 55% WBI threshold.

ALTERNATIVE APPROACH - COMBINING PHYSICAL, MUSCULO-SKELETAL AND PSYCHOLOGICAL IMPAIRMENTS

The Judge found that the physical impairments exceeded 55% and therefore qualified Mr. Desbiens under subclause (f), as being catastrophically impaired. However, he felt it was important to determine the matter in the alternative. He considered whether or not the psychological factors and impairments could be rated on a percentage basis under the

legislation and then considered as to whether or not the Plaintiff exceeded the 55% WBI percentage.

The first difficulty that was dealt with was that the AMA Guides in Chapters 14 and 15 for mental and behavioural disorders did not provide percentage analysis guidelines for physicians as did Chapters 2 to 13 (dealing with different organ systems). The Trial Judge examined the Regulations and analysed the Legislation in its total context having regard to the purpose of the Legislation and the consequences of the proposed Legislation. Under Section 10 of the *Interpretation Act* he found that the Legislation was deemed to be remedial and was to be given a “fair, large and liberal construction and interpretation”. He examined experts from the Legislative debates reviewing the change from Bill 164 to Bill 59 which purported to make Bill 59 “more fair” in terms of compensation.

In reviewing the Guides he found that physicians had discretion in assigning an impairment rating for all kinds of impairments and that it was “in accordance with the Guides to assign percentages to Mr. Desbiens’ psychological impairments and to combine them with his physical impairments in determining whether he meets the definition of catastrophic impairment under Clause (f)” (para 222, pg. 45 - The Decision)

CHARTER OF RIGHTS CHALLENGE UNDER SECTION 15

The Plaintiffs had challenged the Legislation on the basis of Section 15 of the Charter which provides:

“15(1) - every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on . . . mental or physical disability.”

The Judge did not conduct an extensive analysis of Charter rights but did conclude as follows:

“In my view, 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 WBI is unjust. Moreover, it is inconsistent with the principals and norms of Section 15 of the Charter . . . in my view, the Defendant’s interpretation leads to discrimination against persons who have a mental disability. It is trite to say that an outcome that is inconsistent with the Charter principals and norms cannot be considered.”

The Judge therefore accepted the assessment by the Plaintiff’s psychologist Dr. Finlayson that the psychological problems as a result of the accident would be worth a 25% WBI. That combined with the 40% WBI related to musculo-skeletal problems resulted in a overall WBI of 55% which satisfied the requirements of Clause (f).

IMPORTANT PRINCIPLES ARISING FROM THE DESBIENS AND THE MORDINI CASE

Desbiens is one of the few cases that considers a number of principals with respect to assessing catastrophic impairment issues. The potential Appeal has now been abandoned. The principals that may be gleaned from this case are as follows:

1. In a case involving pre-existing impairments, medical assessors and the Court are entitled to consider cumulatively the impact of the motor vehicle accident injuries *stacked upon the pre-existing* whole body impairment levels to determine whether or not the 55% WBI threshold has been achieved;
2. While psychological impairments under the Guides are not specifically categorized by the American Medical Association in percentages, it is appropriate for physicians and the Court or Arbitrator to assess the *percentage* assessment for *psychological or behavioural problems* even though there are no percentages in the pertinent chapters of the Guides dealing with psychological or behavioural disorders. It is then appropriate to add those to the physical percentage assessments to determine if the 55% WBI threshold has been achieved.

3. Insurance Legislation and the definition of catastrophic impairment should be interpreted broadly and inclusively rather than restrictively, in a manner that will not deprive an injured person of medical, rehabilitation or attendant care benefits available under the SABs.

4. A medical assessment is not limited to identify and quantify only in percentages listed in the Guide. If an injured person has an impairment that is not specifically dealt with in the Guides it will be dealt with by way of analogy to other impairments under the Guides. A percentage impairment rating may be applied to such impairment.

5. When dealing with medical assessors it is important to have in mind and to specifically instruct them as is appropriate on the following matters:
 - a) the medical advisor has discretion and may apply common sense when applying the Guides to a particular Plaintiff to establish a realistic assessment of the level of impairment;
 - b) the assessor should specifically annotate each and every injury in terms of percentages of whole body impairment in detail and with written

reasons so that the Trier of fact can analyse the physician's assessment;

- c) even when the assessors have reached the 55% WBI under Clause (f) they should carefully document each and every additional injury for WBI impairment so that should the assessor not agree on any particular element the Trier of fact may clearly understand and have an appropriate guide for valuation. This may assist the Plaintiff in overcoming the 55% WBI in Clause (f);
- d) the assessors should have experience in doing WBI and other assessments under the AMA Guides as this clearly added weight to the opinion of Dr. Delaney and Dr. Finlayson;
- e) the expert should record his or her calculations in detail;
- f) the expert should be encouraged to conduct a detailed examination;
- g) the expert should be specifically advised that they may include pre-existing impairments in their global calculation of the WBI for the purposes of the assessment;

- h) the expert should confirm which disabilities relate or are causally connected to the motor vehicle accident.
6. Since Mr. Justice Spiegel held that physicians and medical assessors have a broad discretion in assessing impairment levels, it *may* be appropriate for the assessor to consider impairment ratings under more recent levels of the American Medical Association's Guides to the Valuation of Permanent Impairment. The statutory regulations for Clause 2(1.2)(f) and (g) both refer to the 4th Edition, 1993 for the purposes of the valuation. It is arguable that more recent editions, I believe there is now a 5th and 6th Edition out, may still be of benefit to physicians in considering development in impairment rating assessments and may in fact be of assistance in process. It is often an issue that is raised by physicians and otherwise in discussing and preparing for an assessment that the 4th Edition is not the working edition but is now antiquated.

GENERAL MATTERS WITH RESPECT TO CLAUSE (f) AND (g) ASSESSMENTS

Under Section 2(2.1) in dealing with the 55% WBI or the Class 4 or 5 impairment due to mental or behavioural disorder it is important to advise

the assessor or physician that that health practitioner has to state in writing that it is unlikely that the catastrophic impairment will cease or in the alternative, that two years have elapsed since the accident.

Schedule A: Catastrophic Impairment Background Materials:

INTRODUCTION

Able and knowledgeable legal assistance following a devastating injury arising out of a motor vehicle accident can be critical in the assistance of clients suffering devastating and catastrophic impairments. The within paper is designed as an overview of the statutory accident benefits (SABs) provisions defining catastrophic impairment, the increased benefits available once such a designation has been made which will provide assistance to counsel with respect to the procedures, collection of medical

information and the expanding use of the 55% whole body impairment measurement.

DEFINITION

In Canada, it appears that only Ontario has seen fit to include in its Statutory Accident Benefits Regulations, a distinction between catastrophic and non-catastrophic impairment. This definition with distinction first arose under the provisions of Bill 59 and has followed through into Bill 198 with some minor modification.

The current definition of catastrophic impairment for accidents occurring after the 30th of September, 2003, appears in Section 2 (1.2) and includes:

- i) paraplegia;
- ii) quadriplegia;
- iii) amputation or other impairment causing total and permanent loss of use of both arms or both legs;
- iv) the amputation or other impairment causing the total and permanent loss of use of one or both arms and one or both legs;
- v) a total loss of vision in both eyes;

- vi) a brain impairment that results in a score of 9 out of 15 on the Glasgow Coma Scale according to a test administered *within a reasonable period of time after the accident* by a person trained for that purpose (such as an Ambulance Attendant);
- vii) a brain impairment with a score on the Glasgow Outcome Scale of 2 (vegetative) or 3 (severe disability on the Glasgow Outcome Scale) according to a test administered more than *six months* after the accident by a person trained for that purpose;
- viii) an assessed *55% whole body impairment (WBI)* as assessed in accordance with the 4th edition of the American Medical Association's Guides to the Valuation of Permanent Impairment two years after the accident or earlier if the health assessor confirms there will likely not be an improvement;
- ix) an impairment that results in a Class 4 (marked) impairment or a Class 5 (extreme) impairment due to mental or behavioural disorder in accordance with the American Medical Association's Guides to the Valuation of Permanent Impairment, 4th Ed, 1993.

The complete text of the definitions is attached as Schedule A to this paper and includes the definition of catastrophic impairment for accidents that occurred before the 1st of October, 2003.

EFFECT OF DETERMINATION OF CATASTROPHIC IMPAIRMENT UNDER S. 40

Once the insured has been designated as catastrophic the maximum ***Attendant Care*** benefit increases from \$3,000 per month which is payable for 2 years (maximum of \$72,000.00) ***to \$6,000 per month to a maximum of \$1,000,000.00 with no time limit.***

The ***Medical and Rehabilitation Benefits*** increase from a maximum of \$100,000.00 for a maximum period of 10 years ***to \$1,000,000.00 with no time limit.***

Note that section 27 allows for an insured to purchase increased ***optional coverage*** which will increase the amounts available. The optional coverage section is attached.

PROCEDURES NECESSARY FOR DETERMINATION AND DESIGNATION OF CATASTROPHIC IMPAIRMENT

The criteria for determination of a catastrophic impairment is set out in Section 40.

In order to apply for catastrophic status the Applicant must submit an OCF 19 – Application for Catastrophic Impairment. (See attached copy of form)

This form is completed by the insured Applicant or substitute decision maker in conjunction with one of the applicant's qualified Medical Practitioners as set out in the regulations.

Once this form is submitted to the insurer the insurer must respond to it within 30 days.

Response is made on an OCF 20 – Catastrophic Impairment Determination and Request for Assessment. (See attached form)

The insurer on that form will indicate one of the following:

- X That the insured is catastrophic;
- X The insured is not catastrophic; or
- X The insurer requires the applicant to be assessed by a designated assessment centre

If the insurer determines that the Applicant has not sustained a catastrophic impairment and the Applicant disagrees then the Applicant can request a CAT DAC by signing the form and returning it to the insurer.

The results of the CAT DAC are binding on both the insured and the insurer. In the event that the insured disagrees with the results the insured may

proceed to a mediation and then if that is not successful proceed to either an arbitration or litigation.

If the insurer disagrees with the CAT DAC results then the insurer can proceed to mediation and if that fails can commence litigation. (Note that an insurer cannot take a file to arbitration.) In the interim the insurer must treat the insured as being catastrophic and make payments accordingly.