



ONCA Overturns Kusnierz; Restores Desbiens Approach

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The Ontario Court of Appeal has given the Plaintiffs’ Bar a super Christmas present, as it released today its decision in *Kusnierz v. Economical*. The Court overturned the trial judge’s decision and, in doing so, significantly expanded the class of individuals who might qualify as catastrophic impairment accident benefit claimants.

Under section 2 (1.2)(f) of the Bill 198 SABS (section 3 (2) of the current SABS), a person meets the definition of “catastrophic” where they sustained:

- (f) . . . 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) . . . 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.**

The issue for the Court of Appeal was whether an assessor can assign a whole body impairment percentage value to Chapter 14 mental and behavioural impairments under the *Guides* in order to determine whether they, in combination with physical impairments, result in a 55 per cent whole person impairment constituting a catastrophic impairment under cl. 2(1.1)(f).

In *Desbiens v. Mordini* (2004), a Superior Court judge wrote (in *obiter*) that a mental impairment can be assigned a whole body impairment percentage for the purpose of (f). This decision led to a number of cases where FSCO arbitrators assigned similar percentages to mental impairments to find that a claimant had sustained a catastrophic impairment under (f). The issue was also canvassed by the Superior Court in *Arts (Litigation Guardian of) v. State Farm* (2008), which followed *Desbiens*.

But in *Kusnierz*, the insurer was successful at trial in arguing that the *Guides* did not allow an assessor to assign a whole body impairment percentage to mental impairments to calculate the impairment rating under section 2(1.1)(f). The judge made the following conclusions:

I find that it is not permissible under the SABS to assign percentage values to mental and behavioural disorders under Chapter 14 of the Guides (which is referred to in clause 2(1.1)(g) of the SABS), and then combine them with the percentage values derived from impairments assessed under the other chapters of the Guides (referred to in clause 2(1.1)(f) of the SABS) in determining whether an individual meets the catastrophic impairment threshold of “55 per cent or more impairment of the whole person” prescribed by clause 2(1.1)(f) of the SABS.

I reach this conclusion for the following reasons, in a nutshell:

- (i) **The Guides deliberately do not permit the mental and behavioural disorders in Chapter 14 to be assessed in percent terms and combined with the percentage values derived from impairments assessed under the other chapters of the Guides for the purpose of determining whole person impairment;**
- (ii) **The structure of the SABS reinforces the bright line demarcation between mental and behavioural disorders referred to in Chapter 14 of the AMA Guides – specifically referred to in clause 2(1.1)(g) of the SABS – from the impairments assessed under the other chapters of the Guides which are referred to in clause 2(1.1)(f) of the SABS; and**
- (iii) **This interpretation is consistent with the purpose of the specific provisions of Bill 59 and the SABS that this issue engages.**

The Court of Appeal disagreed with the trial judge for a number of reasons, notably adopting the judge's reasons in *Desbiens*:

While Bill 59 allows only those who have suffered a catastrophic impairment to recover health care expenses in my view, the text of the Regulation itself indicates that the drafters clearly intended the definition of "catastrophic impairment" to be inclusive rather than restrictive.

Firstly, as has been noted, the definition of "impairment" as meaning "a loss or abnormality of a psychological, physiological or anatomical structure or function" is extremely broad. Indeed it is difficult to conceive of a more inclusive definition.

Secondly, clause (f) ensures that persons who do not suffer any of the specific injuries or conditions described in the other clauses of ss. 5(1), but nevertheless have an impairment, or a combination of impairments, that is so severe that they are among those with the greatest need for health care are able to recover the expenses of that health care. In effect the legislature, with clause (f), included a catch-all provision for the benefit of those who were likely in the greatest need of health care.

Thirdly, in order to ensure that no impairments were overlooked in determining whether the requirements of clause (f) and (g) were met, the analogous impairment provision, ss. 5(3) was included. This provision comes into play where an impairment is sustained that is not listed in the Guides.

Fourthly, there is nothing in the text of the Regulation that suggests that a combination of physiological and psychological impairments is not permitted. Indeed clause (f) permits *any* combination of impairments, both physical and psychological. The only requirement is that these impairments must result in a 55% WPI "in accordance with" the Guides. While the definition in clause (g) does not include mild or moderate psychological impairments there is nothing in the Regulation that prohibits such impairments from being considered under clause (f). If the intention were to exclude psychological impairments from clause (f), the insertion of the word "physiological" before the word "impairment[s]" would easily have achieved that purpose. [Emphasis in original.]

When the trial judge's decision in *Kusnierz* was released in October 2010, it sent shockwaves across the industry. The Court of Appeal's decision will undoubtedly do the same, as the cost of doing auto insurance business in Ontario has now increased at least tenfold.

Court of Appeal: [2011 ONCA 823](#)

Superior Court: [2010 ONSC 5749 \(CanLII\)](#)

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