

CATASTROPHIC IMPAIRMENT DETERMINATION: *DESBIENS & BEYOND*

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By now, most lawyers and physicians dealing with personal injury cases are aware that there is a significant difference in calculating the entitlement and quantum of accident benefits depending on whether an injured person has a catastrophic injury as opposed to a non-catastrophic injury. Suffice it to say that the entitlement to accident benefits is substantially higher where a person is deemed to have suffered a catastrophic injury.

A catastrophic injury is also significant in the context of a tort action. For accidents occurring between November 1, 1996 and October 1, 2003, only a catastrophically injured person can sue for health care expenses, which may cause the total assessment of damages to be much higher.

The importance of having a client designated as being catastrophically injured at the earliest possible stage has never been more important given the rising costs of health care and the limited recovery available to a non-catastrophically injured person.

¹ The author wishes to acknowledge the assistance of his associate, **William A. G. Simpson**, in the preparation of this paper. He also wishes to acknowledge the contributions provided by his partner, **Neil P. Wheeler**, who was counsel to Mr. Desbiens at trial.

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OVERVIEW OF CATASTROPHIC IMPAIRMENT

There are several definitions of “catastrophic impairment”. Most are specific to the qualification; for example, if an injured person has a reported Glasgow Coma Scale of 9 or less, or has both legs amputated, he or she is deemed to be catastrophically impaired under the legislation. The more difficult to apply is the catch-all definition under clause 5(1)(f) and 5(1)(g) of the legislation: if a person has an impairment, or combination of impairments, that results in an “impairment of the whole person” of 55% or more in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment, Fourth Edition*, then that person is deemed to be catastrophically injured. Alternatively, if a person suffers a marked or extreme impairment due to a mental or behavioural disorder, that person will be deemed to be catastrophically injured.

What happens in practice is that a physician evaluates an injured person and assigns a certain percentage of impairment to each of his or her permanent physical injuries. This measurement is done quantitatively.

Mental or behavioural disorders are measured qualitatively by reference to four categories: activities of daily living; social functioning; concentration; adaptation. An examiner may find that an injured person has suffered:

Area or aspect of functioning	Class 1: No impairment	Class 2: Mild impairment	Class 3: Moderate impairment	Class 4 Marked impairment	Class 5 Extreme impairment
Activities of daily living	No impairment is noted	Impairment levels are compatible with most useful functioning	Impairment levels are compatible with some, but not all, useful functioning	Impairment levels significantly impede useful functioning	Impairment levels preclude useful functioning
Social functioning					
Concentration					
Adaptation					

Where an injured person suffers either a **marked impairment** or an **extreme impairment**, a catastrophic injury designation may be made notwithstanding any physical impairment.

However, it had been thought that a physician could not combine a physical impairment with a psychological impairment to arrive at a total impairment of at least 55% of the whole person.

That school of thought changed, for the better, in November, 2004. In *Desbiens v. Mordini*³, Mr. Justice Harvey Spiegel decided that, in fact, it was reasonable to combine physical impairments with psychological impairments in calculating the percentage of whole body impairment of 55% or more. Thus, *Desbiens* clarifies a number of issues that

³ *Desbiens v. Mordini*, [2004] O.J. No. 4735 (S.C.J.).

arise when interpreting “catastrophic impairment”. The trial decision has not been appealed and should therefore be considered the state of the law in this area.⁴

Desbiens is a significant development for seriously injured people. The decision provides a new opportunity for injured people to obtain a catastrophic injury designation who might not otherwise qualify and be able to access much needed and significantly larger amounts of health care resources.

FACTS

In 1986, Mr. Desbiens was rendered a paraplegic when he fell off a roof in the course of his employment. At trial, Mr. Justice Speigel found that Mr. Desbiens continued to function well prior to the motor vehicle accident, notwithstanding his paraplegia. The court also found that Mr. Desbiens was largely independent in his activities of daily living before the car accident in question.

In 1999, Mr. Desbiens was struck by a car driven by Mr. Mordini. Mr. Desbiens was crossing a parking lot on a sidewalk in his wheelchair at the time of the accident. He was thrown approximately 8 to 15 feet from his chair as a result of the collision. He was fifty-six years old at the time of the accident.

⁴ I am advised that the decision not to appeal *Desbiens* followed an external review by a prominent Toronto based counsel who was influential in drafting these Regulations.

Mr. Desbiens suffered a fractured right femur. He also sustained significant soft tissue injuries. He suffered a great deal of pain. In addition to his physical injuries, Mr. Desbiens also reported suffering psychological injuries.

Mr. Desbiens initiated a tort action against the driver that struck him, Mr. Mordini. He alleged that he had sustained a catastrophic impairment. Mr. Desbiens took the position that he met the definitions of catastrophic impairment [as they now exist] in clauses 2(1.1) (f) and (g) of Ontario Regulation 461/96 (“the regulation”).⁵ The relevant portions of section 2 of the regulation read as follows:

- s.2 (1.1)** For the purpose of s.267.5(4) of the Act, “catastrophic impairment” means, subject to subsections (2) and (3), any 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% or more impairment of the whole person, or
- (f) subject to subsections (2) and (3), 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;
 - (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.

⁵ O. Reg. 403/96, *Statutory Accident Benefits Schedule – Accidents on or after November 1, 1996*.

- 2(2)** Clauses (f) and (g) of the definition of “catastrophic impairment” in subsection (1.1) do not apply in respect of an insured person who sustains an impairment as a result of an accident that occurs before October 1, 2003, unless,
- (a)** the person's health practitioner states in writing that the person's condition has stabilized and is not likely to improve with treatment; or
 - b)** three years have elapsed since the incident.

- (2)(3)** For the purpose of clauses (f) and (g) of the definition of “catastrophic impairment” in subsection (1), an impairment that is sustained by a person but is not listed in the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, shall be deemed to be the impairment that is listed in that document and that is most analogous to the impairment sustained by the person.

In section 1 of the regulation, impaired is defined as follows:

. . . “impairment” means a loss or abnormality of a psychological, physiological or anatomical structure or function.

JUSTICE SPIEGEL’S ANALYSIS

It is significant that Justice Spiegel began his analysis of the catastrophic impairment issue by considering the American Medical Association Guides (“the Guides”). The court observed that the purpose of the Guides was to achieve a greater degree of objectivity in measuring the degree of permanent impairment by providing a standard framework and method of analysis.

Justice Spiegel also observed that the evaluation criteria and permanent impairment percentages are predicated upon the person being assessed as able-bodied. The court noted that the Guides are silent on how to deal with a person who, as a result of a pre-existing impairment, carried out his or her activities of daily living differently than an able-bodied person.

1. **Marked impairment under clause 2(1.1)(g)**

As noted above, an impairment is catastrophic if, in accordance with the Guides, it results in a **marked impairment** (class 4) or **extreme impairment** (class 5) due to mental or behavioural disorder. Justice Siegel observed that clinicians were directed by the Guides to examine four categories of functioning in order to assess the severity of the impairment: activities of daily living; social functioning; concentration; and deterioration or decompensation in a work-like setting. Dr. Finlayson, Mr. Desbiens' neuropsychologist, testified at trial that he found Mr. Desbiens had a marked impairment in the area of adaptation.

The trial judge held, and it was not disputed at trial, that Mr. Desbiens only needed to establish that he had a marked or severe impairment in one of the four areas of functioning in order for him to be catastrophically impaired under clause (g).⁶

⁶ This issue of one or more marked or extreme impairments being necessary to make a catastrophic injury determination arises because of a subsequent edition of the Guides, the *Fifth Edition*, which states that a marked impairment must be found in two of the four categories before a catastrophic injury designation can be made. However, the *Fifth Edition* has not been incorporated into the regulation and does not apply. It remains to be seen whether the legislature will adopt the *Fifth Edition* and amend the regulation as a response to *Desbiens*.

This is a significant conclusion, which has been adopted in at least one subsequent FSCO arbitration, which is discussed below. Arguably, *Desbiens* clarifies any ambiguity about whether a person must have a marked or extreme impairment in more than of the four areas of functioning. Only one marked or extreme impairment is required in order to be designated as being catastrophically injured.

2. Impairment under clause 2(1.1)(f) with pre-existing conditions

Mr. Desbiens called evidence from his physiatrist, Dr. Delaney, that showed he suffered musculoskeletal impairments (without regard to any pre-existing impairments) that totaled a 40% impairment of the whole person.

Justice Spiegel accepted Dr. Delaney's evidence that the Guides permitted and, in fact, anticipated, that an assessor would exercise discretion where the initial impairment percentage did not accurately reflect the real, functional impairment sustained by the injured person.

Dr. Delaney testified that, even though her initial finding of whole body impairment was 40%, she had no doubt that, when imposed upon Mr. Desbiens' pre-existing paraplegia, her calculation of his whole body impairment exceeded 55%. She noted in her evidence that paraplegics rely on their upper extremities, which affects mobility and transfers. Dr. Delaney testified that, because the Guides were developed with able bodied people in mind, they did not adequately reflect the functional impact such impairments would have on a paraplegic.

In this regard, Dr. Delaney's evidence was accepted by Justice Spiegel. In the result, notwithstanding the fact that Mr. Desbiens only registered a 40% impairment of the whole body initially, when imposed upon his pre-existing condition, the court found that Mr. Desbiens physical impairment exceeded 55% whole body impairment.

Again, this is a significant conclusion that clarifies the manner in which the 55% whole body impairment is calculated. An injured person who has a pre-existing impairment is entitled to have that prior impairment factored into the subsequent assessment of whole body impairment. This principle has not been followed by the DAC's and continues to be a problem, which is discussed later in this paper.

3. Impairment under clause 2(1.1)(f), combining physical and psychological impairments

At trial, Mr. Desbiens argued that his physical and psychological impairments should be combined under clause (f) in order to determine whether his whole person impairment exceeded 55%.

In reaching his decision on this point, Justice Speigel began by analyzing the manner in which the legislation should be interpreted. The court concluded that the text of the regulation clearly reflected the legislature's intent to define catastrophic impairment inclusively as opposed to restrictively. Justice Spiegel observed that the definition of "impairment" was very broad. The court noted that a major purpose of the legislation was to ensure that innocent victims of motor vehicle accident who were in the most need would be able to recover their health care expenses. Indeed, Justice Spiegel concluded

that clause (f) of the regulation was designed to be a catch-all provision for those injured people who did not fall within any of the specific categories contained elsewhere in section 5. Significantly, the court concluded that there was nothing in the text of the regulation itself to suggest that physiological and psychological impairments could not be added. In fact, clause (f) refers to “any” combination of impairments.

Having reviewed these principles of interpretation, the court proceeded to consider whether percentages could be assigned to psychological impairments in accordance with the Guides. Chapter 14 of the Guides, which deals with psychological impairments, did not provide ranges of percentages that can be applied by an assessor. However, Chapter 4 of the Guides, which deals with emotional and behavioural differences, did provide percentages. The only difference between these chapters is the cause of the impairment. Moreover, Justice Spiegel observed that the impairment descriptions under Chapter 4 and Chapter 14 were quite similar and outlined them as follows:

Chapter 4: Emotional and Behavioural Disturbances:			Chapter 14: Mental and Behavioural Disorders	
Impairment Description	WPI%		Impairment Description	Class
Mild limitation of daily social and interpersonal functioning	0-14		Mild impairment: Impairment levels are compatible with most useful functioning	2
Moderate limitation of some but not all social and interpersonal daily living functions	15-29		Moderate impairment: Impairment levels are compatible with some, but not all, useful functioning	3
Severe limitation impeding useful action in almost all social and interpersonal functions	30-49		Marked impairment: impairment levels significantly impede useful functioning	4
Severe limitation of all daily functions requiring total dependence on another person	50-70		Extreme impairment: impairment levels preclude useful functioning	5

At trial, Mr. Desbiens neuropsychologist, Dr. Finlayson, testified that the plaintiff's psychological impairments would have been assessed a whole person impairment of 25%. This was based on Dr. Finlayson's findings that Mr. Desbiens' psychological impairments would have fallen within the "moderate limitation of some but not all social and interpersonal daily living functions". Justice Spiegel accepted this quantification of Mr. Desbiens' psychological impairments. The court reasoned that, even if he was wrong to accept Dr. Delaney's evidence about the proper quantification of Mr. Desbiens' physical impairments when superimposed upon his pre-existing paraplegia, when Mr. Desbiens' physical whole person impairment of 40% was combined with his psychological whole person impairment of 25%, the result was an overall whole person impairment of more than 55% based upon the combined values charge contained in the Guides.

SUBSEQUENT CONSIDERATION OF *DESBIENS*

The *Desbiens* decision has not been cited in any subsequently reported cases.⁷

However, in *David McMichael and Belair Insurance Company Inc.*⁸, Arbitrator David Muir considered *Desbiens* and relied upon its analysis. Arbitrator Muir had to consider whether Mr. McMichael sustained a catastrophic impairment under the statutory accident benefits schedule as a result of a June, 1998, motor vehicle accident. Like *Desbiens*,

⁷ As of October 4, 2005.

⁸ *David McMichael and Belair Insurance Company Inc.* (FSCO A02-001081, Reasons for Decision dated March 2, 2005).

Arbitrator Muir agreed that a class 4 marked impairment in any one area of functioning was sufficient to establish catastrophic impairment.

Arbitrator Muir also had to consider whether Mr. McMichael met the 55% definition of catastrophic impairment. A CAT-DAC found orthopaedic impairments of 8% and neuro-cognitive behavioural impairments of 29% to 31%. Arbitrator Muir concluded that Mr. McMichael did not meet the 55% test based on his orthopaedic and neurological impairments. However, Arbitrator Muir accepted that physical and psychological impairments could be combined together as was done in *Desbiens*. On this basis, Arbitrator Muir agreed with Mr. McMichael that he suffered a catastrophic injury that resulted in 55% or more impairment of the whole person. This was based upon accepted expert evidence that Mr. McMichael had a psychological impairment of 55% plus orthopedic impairments of 8%. When added together using the combined values chart, Mr. McMichael had a combined value of 59% whole body impairment.

SUMMARY OF PRINCIPLES ARISING FROM *DESBIENS*

The following points arise from *Desbiens* and should be kept in mind by lawyers and physicians practicing in this area:

1. Physical impairments and psychological impairments can be combined together to determine if an individual has sustained a 55% or more impairment of the whole body. Moreover, psychological impairments can be given percentage ratings.⁹
2. An assessor is not limited to identifying and quantifying only impairments that are directly discussed in the Guides. If an injured person has an impairment that is not discussed in the Guides, the assessor should consider the most analogous impairment under the Guides for comparison purposes.
3. Impairments suffered in a motor vehicle accident may be considered in the context of pre-existing impairments to determine if an injured person sustained a catastrophic impairment arising from a motor vehicle collision. An assessor may increase the initial percentage impairment rating if it does not appear to accurately reflect the individual's level of functioning.
4. With respect to the mental or behavioural definition, it is only necessary to establish a marked impairment or extreme impairment in one of the four areas of functioning considered in the Guides. It is not necessary to find an overall marked impairment or extreme impairment. This interpretation is consistent with the definition in part (g), which mentions "a" marked impairment or extreme impairment, and was not disputed during the *Desbiens* trial.

⁹ I am advised that, notwithstanding *Desbiens*, the Ministry has not revised the CAT-DAC Assessment Guidelines distributed to DAC teams. This creates some conflict for assessors who must follow the Assessment Guidelines, which do not specifically include the *Desbiens* principles. Arguably, the latter must take precedence.

5. “Catastrophic impairment” should be interpreted inclusively rather than restrictively and in a manner that will not deprive injured people of much needed health care expenses.

6. The medical assessor should exercise judgment, discretion and common sense when applying the Guides.

PRACTICAL TIPS AND CONCLUSION

Since *Desbiens* was decided, there have been a number of implementational challenges for lawyers and physicians alike.

Recently, a CAT-DAC assessment team refused to assign a percentage to our client’s psychological impairments. Apparently, to do so would contravene the FSCO directives to medical assessors. Ultimately, we were able to resolve the impasse by getting the insurer to agree in writing that percentages should be assigned in this case. Once the assessment team had received consent from the plaintiff and insurance company, percentages were assigned as requested and a catastrophic impairment designation was made once the physical and psychological impairments were combined.

On another file, the CAT-DAC assessment team consisted of a psychiatrist, neuropsychologist and occupational therapist. The neuropsychologist concluded that our client was not catastrophically impaired. However, the psychiatrist and occupational therapist reached the opposite conclusion. The assessment team released a report that

said it was unable to reach a consensus on whether the client was catastrophically impaired. In response, we took the position that it was sufficient to have one assessor determine that the client was catastrophically impaired, let alone two. The insurance company representative agreed to a phone consultation with the CAT DAC leader to confirm that, in his opinion, if the issue went to a trial or mediation, the insurance company would lose. Thus, it was agreed that the client was catastrophically impaired, notwithstanding the opinion of the neuro-psychologist.

An emerging issue is an injured person's right to receive a second CAT-DAC assessment for psychological impairments where he or she has previously undergone a CAT-DAC for physical impairments. Arguably, based upon *Desbiens*, it is entirely reasonable to submit the appropriate report to an insurer and trigger a second CAT-DAC to determine the degree of psychological impairment. Again, this is being resisted by some insurers. However, in light of the clear principle that physical and psychological impairments can be combined together, insurers should expect to receive more of these requests.

Pressure should be brought upon the Ministry to clarify the Assessment Guidelines in light of the *Desbiens* decision. It is important for lawyers, clients and physicians alike to know that the law in this area is consistently applied.

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