A catastrophic upheaval in interpreting 'impairment'

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The rules for properly calculating "whole person impairment" (WPI) ratings in accordance with the definition of "catastrophic impairment" in the Ontario Statutory Benefit Schedule (SABS) are now up in the air, following a recent decision of the Ontario Superior Court of Justice.

In *Kusnierz v. Economical Mutual Insurance Co.*, [2010] O.J. No. 4462 (S.C.J.), Justice Peter Lauwers rejected the accepted method for calculating WPI ratings established by Justice Harvey Spiegel in *Desbiens v. Mordini*, [2004] O.J. No. 4735 (S.C.J.). *Kusnierz* is under appeal.

The extent of benefits available to motor vehicle accident victims in Ontario varies enormously depending on the categorization of the extent of the injuries suffered. The legislation allows accident victims suffering from a "catastrophic impairment" to qualify for additional benefits of close to $2,000,000.

The definition of "catastrophic impairment" has remained largely unchanged since 1996. In *Kusnierz*, as in the earlier *Desbiens* decision, the focus was on the interpretation of the definition of "catastrophic impairment" as set out in subss. 2(1.1)(f) and (g) of the SABS (now repeated verbatim in subss. 3(2)(e) and (f) of the new SABS effective on or after Sept. 1). These provisions state:

"(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 question in both *Kusnierz*

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Contributory negligence and drunken passengers

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This holiday season brings with it newly enacted provincial drinking and driving laws in B.C., imposing stiff new civil fines and driving prohibitions.

With these new laws, there may be an increased incentive for seasonal revelers to arrange for rides home from restaurants and bars with other drivers — but there will still be instances where the designated driver is not himself sober. In such cases, should there be an accident on the drive home, what are the implications for the apportionment of liability among the driver, passenger and commercial establishment?

Since *Menow v. Jordan House Ltd.*, [1974] S.C.R. 239, commercial establishments in Canada have faced a share of liability in cases where they have over-served a patron and failed to take reasonable steps to ensure that the patron has a means of arriving home safely. In *Stewart v. Pettie*, [1995] S.C.J. No. 3, the Supreme Court extended the concept of commercial host liability to cases

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Personal Injury FOCUS

Insurance industry requested an overturning of Desbiens approach

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and *Desbiens* was whether the WPI test in subs. 2(1.1)(f) may include psychological elements referred to in subsection 2(1.1)(g), primarily those set out in Chapter 14 of the AMA Guides, 4th edition.

In *Desbiens*, the court allowed the combination of the two elements by concluding that, "...I find that it is 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)."

In *Kusnierz*, the court comes to the opposite conclusion and prevents the combination of the elements by stating: "These reasons, taken individually and together, lead to the conclusion that the mental and behavioural impairments contemplated by clause 2(1.1)(g) of the SABS are not combinable with the impairments to be assessed under clause 2(1.1)(f)."

As in *Desbiens*, the purpose of the SABS legislation was front and center in *Kusnierz*. In his concluding remarks on the issue of legislative purpose, Justice Lauwers mentions that the determination of purpose in the context of this catastrophic definition debate must be more "provision-specific."

Because *Kusnierz* was heard in January (although the decision was only released Oct. 19), information regarding the new Sept. 1 SABS was not before the court. However, a provision-specific review of the history leading up to the new SABS, and the new SABS itself, leads to the inescapable conclusion that the legislation purposely left the *Desbiens* interpretation intact.

The new SABS make no changes whatsoever to the wording of the WPI provision, despite express requests by insurance industry stakeholders to amend the definition and overturn the *Desbiens* approach. For example, the submissions by the Co-Operators to the Financial Services Commission of Ontario (FSCO) in July 2008 on FSCO's Five Year Review of Automobile Insurance stated:

"If it is not the intent to combine physical and psychological impairments, this may be done by removing from (f) the words 'an impairment or combination of impairments that...' and replacing with 'a physical injury only that....' This solves the issue where using the term "impairment" brings in the definition found in section 2 which includes physical, psychological and physiological impairments."

In its report on the five year review of automobile insurance (dated March 31, 2009), FSCO noted that, "Insurers support an amendment to the Regulation that would restore the concept that clauses (f) and (g) are not to be combined."

However, the report states, "FSCO is unable to conclude based on stakeholder feedback to date, whether it is more appropriate to combine physical and psychological injuries or treat them separately. Further consultation with experts in this area is needed."

If the purpose of the legislation was being undermined by the *Desbiens* approach, then the legislation could have been changed in the new SABS, as was suggested by the insurance industry — but it was not changed.

While *Kusnierz* is under appeal, catastrophic accident benefit applications relying on WPI ratings are at a complete standstill, much to the detriment of the rehabilitation of these seriously injured accident victims.

However, taking away catastrophic accident benefit entitlement only serves to increase the magnitude of the related tort claims, and these related tort claims will likely be expedited to offset the delay caused by the inability to access the enhanced accident benefits in the interim. ■

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