Piecing the Puzzle Together: Catastrophic Claims, Tort Claims and the New SABS
Peterborough | Thursday, April 14, 2011

Determining Catastrophic Impairment: The Role of the Health Care Professional

PRESENTED BY:
David F. MacDonald
416-868-3155
dmacdonald@thomsonrogers.com

UPDATED BY:
Robert M. Ben
416-868-3168
rben@thomsonrogers.com

Personal Injury Litigators since 1936.
www.thomsonrogers.com

KEY CASES

AMA Guides: Whole person impairment to include Percentage Assessment of Psychological Impairment

- ***Desbiens***
- ***Arts***
- ***McMichael***
- ***Augello***
- ***H. and Lombard***
- ***Pastore***
- ***M.R. and Gore***
- ***Jaggernauth and Economical***

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 **www.thomsonrogers.com**

Thomson Rogers
Barristers and Solicitors

KEY CASES

“Analogous impairment”

- ***Mrs. G. and Pilot, 2007*.**

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 **www.thomsonrogers.com**

Thomson Rogers
Barristers and Solicitors

KEY CASES

1 GCS of 9 or less is sufficient, no matter when

- ***Holland***
- ***Young***
- ***Tournay***
- ***Liu***

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 **www.thomsonrogers.com**

Thomson Rogers
Barristers and Solicitors

KEY CASES

Mental or Behavioural Disorders

- One "Marked Impairment" is enough for CAT
  - *Pastore* + *Pastore* Appeal
  - *Desbiens*
  - *McMichael*
  - *Fournie*

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 www.thomsonrogers.com

Thomson Rogers
Barristers and Solicitors

AMA Guides, Chapter 3 – Musculoskeletal System

Clinical Considerations for Assessment

- ROM
- Joint Disorders
- Amputation

  -“Whole person”
  - B.P. and Primmum
- The unique expanding definition of “ADLs”

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 www.thomsonrogers.com

Thomson Rogers
Barristers and Solicitors

AMA Guides, Chapter 13 - The Skin

Clinical Considerations for Assessment

- Scarring
- Disfigurement
- Temperature Regulation
- Sensory Impairment
- Limitation in performance of ADLs

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 www.thomsonrogers.com

Thomson Rogers
Barristers and Solicitors

AMA Guides, Chapter 4 - The Nervous System

Table 1 – Impairments Related to Aphasia or Dysphasia

- Communication Disorders
- Sensory Disturbances

Description	% Impairment of the whole person
Minimal disturbance of comprehension and production of language symbols of daily living	0 – 9
Moderate impairment in comprehension and production of language symbols of daily living	10 – 24
Inability to comprehend language symbols; production of unintelligible or inappropriate language for daily activities	25 – 39
Complete inability to communicate or comprehend language symbols	40 – 60

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 www.thomsonrogers.com

Thomson Rogers
Barristers and Solicitors

AMA Guides, Chapter 4 - The Nervous System

- List of Neuro or Mental disturbances to evaluate as a percentage using tables
- p. 142 from Chapter 4

THREE KEY TABLES WITH PERCENT IMPAIRMENT RATINGS:

Table 3 – Emotional or Behavioural Impairments, p. 12 of paper

Impairment Description	% Impairment of the whole person
Mild limitation of daily social and interpersonal functioning	0 – 14
Moderate limitation of some but not all social and interpersonal daily living functions	15 - 29
Severe limitation impeding useful action in almost all social and interpersonal daily functions	30 - 49
Severe limitation of all daily functions requiring total dependence on another person	50 – 70

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 www.thomsonrogers.com

Thomson Rogers
Barristers and Solicitors

AMA Guides, Chapter 4 - The Nervous System

Table 2 – Mental Status Impairments, p. 13 of paper

Impairment Description	% Impairment of the whole person
Impairment exists, but ability remains to perform satisfactorily most activities of daily living	1 – 14
Impairment requires direction and supervision of daily living activities	15 – 29
Impairment requires directed care under continued supervision and confinement in home or other facility	30 – 49
Individual is unable without supervision to care for self and be safe in any situation	50 – 70

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 **www.thomsonrogers.com**

Thomson Rogers
Barristers and Solicitors

AMA Guides, Chapter 4 - The Nervous System

Table 6 – Impairment Criteria for Sleep and Arousal Disorders, p. 13 of paper

Impairment Description	% Impairment of the whole person
Reduced daytime alertness with sleep pattern such that patient can carry out most daily activities	1 – 9
Reduced daytime alertness requiring some supervision in carrying out daytime activities	10 – 19
Reduced daytime alertness that significantly limits daily activities and requires supervision by caretakers	20 – 39
Severe reduction of daytime alertness that cause the patient to be unable to care for self in any situation or manner	40 – 60

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 www.thomsonrogers.com

Thomson Rogers
Barristers and Solicitors

MENTAL AND BEHAVIOURAL DISORDERS:

QUESTION: IS THERE A ROLE FOR:

- **Chiropractor**
- **The Occupational Therapist**
- **Speech Language Pathologist**
- **Physiotherapist**
- **Psychologist, and**
- **Neuropsychologist**
- **Other Health Care Professionals**

in helping to evaluate whether a person has sustained a mental or behavioural disorder?

ANSWER: YES!

Thomson Rogers
Barristers and Solicitors

MENTAL AND BEHAVIOURAL DISORDERS:

THE FOUR AREAS OF POTENTIAL FUNCTIONAL LIMITATION:

- **Activities of Daily Living**
- **Social Functioning**
- **Concentration**
- **Adaptation**

See Chapter 14, Guides to the Evaluation of Permanent Impairment, 4th Edition

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 www.thomsonrogers.com

Thomson Rogers
Barristers and Solicitors

MENTAL AND BEHAVIOURAL DISORDERS:

POSSIBLE LEVELS OF IMPAIRMENT

- **Class I – No Impairment**
- **Class II – Mild Impairment**
- **Class III – Moderate Impairment**
- **Class IV – Marked Impairment**
- **Class V – Extreme Impairment**

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 www.thomsonrogers.com

MENTAL AND BEHAVIOURAL DISORDERS:

QUESTION: What does it take to have a Catastrophic Impairment?:

- **Class IV – Marked Impairment**

"impairment levels *significantly* *impede* useful functioning"

Significant = more than minimal

Impede = hinder

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 **www.thomsonrogers.com**

Thomson Rogers
Barristers and Solicitors

MENTAL AND BEHAVIOURAL DISORDERS:

DETERMINING LEVEL OF IMPAIRMENT:

- **History of Pre-Accident Function**
- **Activities of Daily Living (ADL)**
- **Social functioning**
- **Concentration**
- **Adaptation**

Critical to obtain baseline of pre-accident function to determine the degree of impairment.

- **Broad definition of activities of daily living**

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 www.thomsonrogers.com

Thomson Rogers
Barristers and Solicitors

MENTAL AND BEHAVIOURAL DISORDERS:

ACTIVITIES OF DAILY LIVING include, but are not limited to:

(page 317 of the AMA Guides)

- **Self Care.**
- **Personal Hygiene.**
- **Communication.**
- **Physical activity.**
- **Sensory function.**
- **Hand function.**
- **Travel function.**
- **Sexual function.**
- **Sleep function.**
- **Social and recreational activities.**

Thomson Rogers
Barristers and Solicitors

MENTAL AND BEHAVIOURAL DISORDERS:

SOCIAL FUNCTIONING:

In assessing social functioning an assessor determines:

"An individual's capacity to interact appropriately and communicate effectively with other individuals…it is not only the number of aspects in which social functioning is impaired that is significant, but also the overall degree of interface with a particular aspect or combination of aspects."

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 www.thomsonrogers.com

Thomson Rogers
Barristers and Solicitors

MENTAL AND BEHAVIOURAL DISORDERS:

CONCENTRATION, PERSISTENCE AND PACE:

“Refers to the ability to sustain focused attention long enough to permit timely completion of tasks commonly found in work settings”.

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 www.thomsonrogers.com

Thomson Rogers
Barristers and Solicitors

MENTAL AND BEHAVIOURAL DISORDERS:

DETERIORATION OR DECOMPENSATION IN WORK OR WORK-LIKE SETTINGS (Adaptation):

"Refers to repeated failure to adapt to stressful circumstances. In the face of such circumstances, the individual may withdraw from the situation or experience exacerbation of signs and symptoms of a mental disorder; that is, to decompensate and have difficulty maintaining activities of daily living, continuing social relationships and completing tasks."

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 www.thomsonrogers.com

Thomson Rogers
Barristers and Solicitors

MENTAL AND BEHAVIOURAL DISORDERS:

QUESTION: In assessing Activities of Daily Living, Social Functioning, Concentration and Adaptation, do I only assess psychological functioning?

ANSWER: NO…

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 www.thomsonrogers.com

Thomson Rogers
Barristers and Solicitors

MENTAL AND BEHAVIOURAL DISORDERS:

Pastore v. Aviva

Mrs. Pastore is a sixty-six year old woman, fracture of left ankle, several surgeries relating to ankle, surgery on right knee.

Pre-accident degenerative changes in knees, asymptomatic.

Whole Person Impairment of 2% for left ankle and 20% for right knee Psychological impairment 22% whole person impairment.

Thomson Rogers
Barristers and Solicitors

MENTAL AND BEHAVIOURAL DISORDERS:

Pastore v. Aviva

Arbitrator:

"For Mrs. Pastore, the combination of physical limitations and the associated pain are intertwined…it is important to examine and consider the role of pain in relation to an individual's functional limitations. A complete assessment must consider the effect of pain and Mrs. Pastore's pain disorder on her activities of daily living."

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 **www.thomsonrogers.com**

Thomson Rogers
Barristers and Solicitors

MENTAL AND BEHAVIOURAL DISORDERS:

Pastore v. Aviva

Arbitrator:

"The pain not only limits her physical abilities to do the activity but it plays a role in the feeling of loss of meaningful activities or social relationships. This loss is noted as resulting in frustration, resentment or anger, which further increases the pain."

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 **www.thomsonrogers.com**

Thomson Rogers
Barristers and Solicitors

MENTAL AND BEHAVIOURAL DISORDERS:

Pastore v. Aviva

CAT Assessment:

Ms. Jane Wong, Occupational Therapist conducted three day occupational therapy assessment.

Ms. Wong concluded:

“There are physical and some emotional barriers that limit Ms. Pastore from functioning at her pre-accident status.”

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 **www.thomsonrogers.com**

Thomson Rogers
Barristers and Solicitors

MENTAL AND BEHAVIOURAL DISORDERS:

Pastore v. Aviva

Occupational Therapist detailed specific physical limitations. In addition Ms. Wong noted:

- **"Intermittent left ankle pain,**
- **Guarded knee movements due to fear of injury,**
- **Difficulty coping with pain and frustration,**
- **Difficulty sleeping,**
- **Fear of walking outside,**
- **Anxiety,**
- **Depression,**
- **Extremely low energy,**
- **Fear in a car,**
- **Strained relationship with husband and limited intimacy."**

Thomson Rogers
Barristers and Solicitors

MENTAL AND BEHAVIOURAL DISORDERS:

Pastore v. Aviva

Pre-Accident Function:

Mrs. Pastore's evidence was that before the accident she was an avid church-goer and active in related church social events, liked to play cards, bocce ball, bowling, was responsible for all housekeeping and cooking and was primary caregiver for husband who had impaired health.

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 www.thomsonrogers.com

Thomson Rogers
Barristers and Solicitors

MENTAL AND BEHAVIOURAL DISORDERS:

Pastore v. Aviva

Post Accident Function:

Since the accident Mrs. Pastore has been dependent upon her husband for housekeeping, personal care and mobility.

During the day she sits on the couch and watches TV. She cannot sit comfortably always and cannot sit for long periods without pain.

She has limited ability for standing and walking and reduced balance.

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 www.thomsonrogers.com

Thomson Rogers
Barristers and Solicitors

MENTAL AND BEHAVIOURAL DISORDERS:

Pastore v. Aviva

Post Accident Function:

She is only able to get around using a walker. She cannot use public transportation and cannot walk long distances alone. She cannot climb stairs except by going backwards.

She cannot participate in previous recreational activities or baby-sit her grandson.

She needs assistance with getting dressed, getting in and out of the bath tub, combing hair and cutting her nails.

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 **www.thomsonrogers.com**

Thomson Rogers
Barristers and Solicitors

MENTAL AND BEHAVIOURAL DISORDERS:

Pastore v. Aviva

CAT-DAC Concluded and Arbitrator agreed:

> **"Given the extent of interaction between Mrs. Pastore's recognized physical and behaviour pain-based disorder, it is not possible to <u>factor out</u> the impact of any such discrete physical impairments and associated pain limitations."**

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 www.thomsonrogers.com

Thomson Rogers
Barristers and Solicitors

MENTAL AND BEHAVIOURAL DISORDERS:

Pastore v. Aviva

CAT-DAC found and Arbitrator agreed:

> **"The impact of these physical, psychological and physical/psychological disorders on her daily functioning significantly impede her daily living tasks."**

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 **www.thomsonrogers.com**

Thomson Rogers
Barristers and Solicitors

MENTAL AND BEHAVIOURAL DISORDERS:

Pastore v. Aviva

Arbitrator cited Chapter 14 of the AMA Guides:

"Any limitation with respect to activities of daily living should be related to the mental disorder…" "What is assessed is not simply the number of activities that are restricted, but the overall degree of restriction or combination of restrictions."

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 www.thomsonrogers.com

Thomson Rogers
Barristers and Solicitors

MENTAL AND BEHAVIOURAL DISORDERS:

Pastore v. Aviva

Arbitrator stated:

"I do not interpret this as requiring a complete separation of physical and mental impairment, nor do I think it is possible when you are considering an impairment that also involves pain."

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 **www.thomsonrogers.com**

Thomson Rogers
Barristers and Solicitors

MENTAL AND BEHAVIOURAL DISORDERS:

Pastore v. Aviva

Arbitrator found:

> **"The combination of physical limitations and the associated pain are intertwined. They both play an integral part in having transformed her life from being a completely self-sufficient and independent individual and caregiver to her husband to becoming almost completely dependent on him and others for her most basic personal care needs."**

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 **www.thomsonrogers.com**

Thomson Rogers
Barristers and Solicitors

MENTAL AND BEHAVIOURAL DISORDERS:

Pastore v. Aviva

Arbitrator found:

> **"I agree with the CAT DAC conclusions that it is not possible to factor out the impact of any such discrete physical impairments and associated pain limitations, and that any impairment ratings should incorporate both on a "cumulative basis".**

***Pastore* decision was upheld on appeal at FSCO.**

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 **www.thomsonrogers.com**

Thomson Rogers
Barristers and Solicitors

MENTAL AND BEHAVIOURAL DISORDERS:

Marked Impairments:

One "Marked Impairment" is adequate to meet the definition of Catastrophic.

- Desbiens, McMichael, Pastore, Pastore Appeal and Fournie

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 **www.thomsonrogers.com**

MENTAL AND BEHAVIOURAL DISORDERS:

Fournie v. Coachman

Mr. Fournie, age 45 sustained comminuted fractures to his left ankle when he was a cyclist and struck from behind.

- **Required two crutches or two canes to ambulate outside the home.**
- **40% whole person impairment relating to his physical impairments.**
- **Reduction in activity level after the accident and a high self perception of pain.**

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 **www.thomsonrogers.com**

Thomson Rogers
Barristers and Solicitors

MENTAL AND BEHAVIOURAL DISORDERS:

Fournie v. Coachman

- **Depression, anxiety, concern about his future and a low level activity due to pain management.**
- **Diagnosed with major depressive disorder and post traumatic stress disorder.**
- **He could participate in recreation and socialization but was precluded from carrying them out adequately and in full.**

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 **www.thomsonrogers.com**

Thomson Rogers
Barristers and Solicitors

MENTAL AND BEHAVIOURAL DISORDERS:

Fournie v. Coachman

[2010] OFSCPN 15

An occupational therapist completed a three hour functional ability evaluation.

An insurer examination with a psychiatrist found Mr. Fournie had a pain disorder but the disorder was associated with his foot injury and not with psychological factors (which is different from the *Pastore* case where physical and psychological pain condition was "intertwined").

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 www.thomsonrogers.com

Thomson Rogers
Barristers and Solicitors

MENTAL AND BEHAVIOURAL DISORDERS:

Fournie v. Coachman

Dr. Alvin Shapiro, clinical psychologist and Dr. Harold Merskey, psychiatrist, found that Mr. Fournie suffered a Class IV Marked Impairment in his activities of daily living, adaptation to work and social functioning.

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 www.thomsonrogers.com

Thomson Rogers
Barristers and Solicitors

MENTAL AND BEHAVIOURAL DISORDERS:

Fournie v. Coachman

Dr. Merskey noted:

> **"Looking at the 4th edition of the AMA Guides, Chapter 14, page 310, I consider that the psychological disabilities, difficulty in focus, difficulty in concentration, etc., as outlined by Dr. Shapiro, [clinical psychologist] reflect a Class IV – Marked Impairment level which *significantly impedes* useful functioning. Domestic care, ordinary pleasures in every respect, recreation, establishment of relationships with a suitable partner, ability to travel and shop are all significantly impaired. Mobility and work are significantly impaired."**

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 **www.thomsonrogers.com**

Thomson Rogers
Barristers and Solicitors

MENTAL AND BEHAVIOURAL DISORDERS:

Fournie v. Coachman

Arbitrator stated:

> **Dr. Merskey believes that Mr. Fournie qualifies as catastrophically impaired because of pain. He did not specify which of the four aspects of functioning (ADL, Social Functioning, Concentration and Adaptation) were affected by Mr. Fournie's pain.**
>
> **Dr. Merskey used the Pain Intensity Frequency Grid in the Guides (Chapter 15 page 310) to indicate that Mr. Fournie had "Marked" Impairments.**

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 **www.thomsonrogers.com**

Thomson Rogers
Barristers and Solicitors

CHAPTER 15 – PAIN INTENSITY FREQUENCY GRID

Intensity		Frequency			
		Intermittent	Occasional	Frequent	Constant
	Minimal				
	Slight				
	Moderate				
	Marked				

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 www.thomsonrogers.com

Thomson Rogers
Barristers and Solicitors

CHAPTER 15 – PAIN INTENSITY FREQUENCY GRID

PAIN INTENSITY FREQUENCY GRID:

Marked: The pain precludes carrying out most activities of daily living. Sleep is disrupted. Recreation and socialization are impossible. Narcotic medication or invasive procedures are required and may not result in complete pain control.

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 www.thomsonrogers.com

Thomson Rogers
Barristers and Solicitors

GLASGOW OUTCOME SCALE

Severe Disability

- Need for attendant care
- "Not independent = severely disabled", see pp. 24-27 of paper, Jennett and Teasdale definition
- Wilson's standard direct structured interview may enhance GOS scoring accuracy

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 www.thomsonrogers.com

Thomson Rogers
Barristers and Solicitors

CAUSATION

If accident made a material (more than minimal) contribution to the impairment or to its worsening, then the impairment was directly caused by the accident and should be rated or assessed under CAT criteria

- *Monks*
- *Athey*

There is no room for the “crumbling skull’’ theory in accident benefit cases

- *Monks*

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 **www.thomsonrogers.com**

Thomson Rogers
Barristers and Solicitors

CAT CASE STUDIES

What assessments by which health care professionals would help determine level of impairments for CAT determination?

Which AMA chapters apply?

SCENARIO 1

Elizabeth, 12, suffers partial lower leg amputation, sleep disorder, anxiety

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 **www.thomsonrogers.com**

CAT CASE STUDIES

What assessments by which health care professionals would help determine level of impairments for CAT determination?

Which AMA chapters apply?

SCENARIO 2

Ernie, 15, suffers fracture to right tibial plateau, moderate brain injury, gcs 10, no return to school after 6 months, withdrawn socially, quiet voice

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 **www.thomsonrogers.com**

Thomson Rogers
Barristers and Solicitors

CAT CASE STUDIES

What assessments by which health care professionals would help determine level of impairments for CAT determination?

Which AMA chapters apply?

SCENARIO 3

Sandy, 59, suffers mild abi, returns to work after 3 weeks, works everyday for 4 years, sleeps in breaks and at lunch at work. After work goes home to bed, can't be roused, ignores family and friends. Finally, as a result of fatigue, depression and counsellor advice, leaves work, applies for CAT.

390 Bay St., Suite 3100 Toronto, ON M5H 1W2 Tel: 416-868-3100 **www.thomsonrogers.com**

Thomson Rogers
Barristers and Solicitors