A CATASTROPHIC UPHEAVAL

KUSNIERZ DECISION CHALLENGES DESBIENS RULING

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Following the decision in Kusnierz v. Economical Mutual Insurance Co., 2010 ONSC 5749 (S.C.J.), the rules for calculating whole person impairment (WPI) ratings in accordance with the definition of "catastrophic impairment" in the Ontario Statutory Accident Benefits Schedule (SABS) are now up in the air.

In Kusnierz, 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.). The Kusnierz decision is under appeal.

The benefits available to motor vehicle accident victims in Ontario vary enormously depending on the categorization 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. As in the earlier Desbiens decision, the focus in Kusnierz was on the interpretation of "catastrophic impairment" as set out in subsections 2(1.1)(f) and (g) of the SABS (now repeated verbatim in subsections 3(2)(e) and (f) of the new SABS effective September 1, 2010).

The question in both Kusnierz and Desbiens was whether the WPI may include psychological elements, primarily those set out in chapter 14 of the AMA *Guides*, 4th edition.

In the Desbiens case, the court allowed the combination of the two elements (physical and psychological) by concluding 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 the Kusnierz case, the court comes to an 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)."

The purpose of the SABS legislation was central in the Kusnierz case. Justice Lauwers' concluding remarks on the issue of legislative purpose mention that the determination of purpose in this catastrophic definition debate must be more "provision-specific."

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Because the Kusnierz case was heard in January (although the decision was only released October 19), the new September 1 SABS was not before the court. However, a provision-specific review of the lead-up to the new SABS – and the new SABS itself – points to the conclusion that the legislation purposely left the Desbiens interpretation intact.

The new SABS makes no changes 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 submission by The Co-operators to the Financial Services Commission of Ontario in July 2008 regarding 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 March 31, 2009 Report on the Five Year Review of Automobile Insurance, FSCO noted, "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 says, "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 the Kusnierz case is under appeal (scheduled to be heard by the Ontario Court of Appeal on November 16, 2011), catastrophic accident benefit applications relying on WPI ratings are at a standstill, much to the detriment of the rehabilitation of these seriously injured accident victims.

Taking away catastrophic accident benefit entitlement only serves to increase the magnitude of the related tort claims. These 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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