

# Personal injury bar shaken by catastrophic injury report

BY MICHAEL McKIERNAN  
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The personal injury bar has been thrown into a state of uncertainty by an expert report on the definition of catastrophic impairment.

Thomson Rogers partner Darcy Merkur told an audience at the firm's Back to School conference last week that the report, commissioned by the provincial government as part of the Financial Services Commission of Ontario's five-year review of automobile insurance, would render the current definition unrecognizable.

"That's not to say it's all bad, but I consider it a complete overhaul," Merkur said during a session at the Four Seasons Hotel in Toronto on Sept. 8. "The future is uncertain, and we don't know whether the changes are going to happen."

After 15 years of building up a base of jurisprudence under the existing definition, Merkur said lawyers will no longer be sure of how a court will decide matters if the government adopts the proposed changes in legislation, a situation that would upset the stability of the current system.

"We've had 15 years of this definition and we finally understand and can predict what's going to happen. It forces the insurance company to act somewhat reasonably, and now we're going back to basics where it will take us 15 more years to figure out what's meant."

The definition is critical because victims who meet the threshold gain access to as much as \$2 million of additional benefits for medical and rehabilitation services.

The panel recommended an assortment of new tests to measure spinal cord and brain injuries as well as a new interim designation to allow claimants to get early treatment to stop their injuries from becoming catastrophic in the future.

Merkur said intense lobbying by lawyer groups and stakeholders in the accident benefit world have made immediate changes unlikely. But after this fall's provincial election, a new government may be in a better position to move forward on implementing the recommendations, he noted. According to Merkur, the Ontario Trial Lawyers Association has raised a "war chest" to respond if and when any changes are announced.

In the meantime, Merkur said analysis is needed on the potential impact of the proposed changes, especially since the commission has previously demanded "compelling reasons" for regulatory changes that will increase complexity in the accident benefit system.

"We don't know whether the threshold for catastrophic is going up or down. We're worried that it's been raised so that less people will qualify, but no cost

analysis has been done. More analysis has been done to figure out if it will lead to more disputes and more delay. I don't know of a compelling reason to change things and I don't think you can have one until you do the financial cost analysis. So in my view, it's way premature to announce significant changes to a catastrophic definition without doing that analysis. Perhaps at the end of the day it will all be pushed back."

According to Merkur, the report has raised the hackles of many players in the system and not just lawyers.

He said brain injury associations were upset about the makeup of the panel and feared it appeared biased given that three of the eight panellists had been consultants to the Insurance Bureau of Canada and two of them stated they were unable to agree that a person who becomes paraplegic or quadriplegic after a traffic accident



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would receive the catastrophic designation.

The panel also recommended an in-patient rehabilitation requirement in order to

be designated catastrophically impaired, but Merkur said wait times and limited supply made that idea "seem preposterous." There are just 109 beds for people with traumatic brain injuries in the entire province and patients must wait on average about 115 days to get one of them.

According to Merkur, the interim catastrophic designation, while sounding like a good idea, would in practice lead to more disputes early in the process. "Insurers are not going to accept [the designation] unless they absolutely have to," he said.

Another recommendation from the panel concerned the combination of physical and psychological ratings when evaluating whole-person injuries, which must reach a 55-percent threshold for a catastrophic impairment designation. The panel recommended that the two values couldn't be combined in light of the of the

recent Ontario Superior Court decision in *Kusnierz v. the Economical Mutual Insurance Co.*

The judge in that case denied the plaintiff a designation after part of his left leg was amputated, despite the fact that his mental and behavioural impairments would have bumped his whole-person impairment beyond the 55-per-cent threshold, because of the strict demarcation of mental disorders and other impairments in the structure of the benefits schedule.

The *Kusnierz* ruling was at odds with another Superior Court decision, *Desbiens v. Mordini*, and the commission's own guidelines. Ontario's Court of Appeal is set to hear arguments in the *Kusnierz* case this November.

"That's led to a lot of stakeholders saying, 'Hold on, the Court of Appeal is about to decide that, so why are you getting involved?'" Merkur said. **LT**



## Bookworm

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