

INSURANCE LAW BULLETIN

January 2012 – Rose Bilash & Jonathan de Vries

SABS CATASTROPHIC IMPAIRMENT UPDATE

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On December 23, 2011, the Court of Appeal for Ontario released its decision in *Kusnierz v. The Economical Mutual Insurance Company*. The appeal provided the Court with the opportunity to comment on the determination of catastrophic impairment pursuant to section 2(1.1)(f) of the 1996 *Statutory Accident Benefits Schedule* (now section 3(2)(e) of the current SABS).

(1.1) For the purposes of this Regulation, a catastrophic impairment caused by an accident that occurs before October 1, 2003 is,

...

(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;

BACKGROUND

The claimant, Robert Kusnierz, was involved in a single vehicle accident on December 24, 2001, that left him with a below the knee amputation. He suffered numerous physical and psychological injuries as a result of the accident, including ongoing deterioration of his stump, poor fitting prostheses, pain and clinical depression. The connection between the claimant's physical and psychological impairments was not disputed. It was further accepted that the claimant could only qualify for a catastrophic impairment under section 2(1.1)(f).

At the Court of Appeal, the main issue in dispute was whether section 2(1.1)(f) permitted an assessor to assign a whole body impairment percentage value to Chapter 14 mental and behavioural impairments in order to determine whether they, in combination with physical impairments, resulted in a 55 percent whole person impairment, and therefore constituted a catastrophic impairment.

The trial judge had held that this combination was not permissible for several reasons. First of all, the *Guides* do not permit mental and behavioural disorders in Chapter 14 to

be assessed in percentage values. Furthermore, the SABS itself restricts the use of Chapter 14 disorders to section 2(1.1)(g),* and does not provide for them to be used under section 2(1.1)(f).

THE COURT OF APPEAL'S DECISION

The Court of Appeal unanimously reversed the trial judge. Writing for the Court, MacPherson J.A. stated that the language of the SABS, the purpose of the *Guides*, the *Guides'* references to combining physical and psychological impairments and the goals of the SABS led the Court to conclude that the combination of physical and psychological impairments was appropriate under section 2(1.1)(f).

The Court of Appeal held that the drafters of the SABS "clearly intended" that the definition of catastrophic impairment was to be inclusive rather than restrictive. This conclusion was supported by the broad definition of "impairment" under the SABS as meaning "a loss or abnormality of a psychological, physiological or anatomical structure or function". Furthermore, the effect of section 2(1.1)(f) was to provide a catch-all provision for the benefit of those persons in greatest need of health care who could not otherwise qualify for enhanced benefits under any other category of impairment(s). The analogous impairment provision found in section 2(3) of the SABS ensured that no impairments were overlooked and therefore also supported the notion of combining. In addition, nothing in the text of the SABS expressly prohibits the combination of physical and mental impairments for the purpose of determining catastrophic impairment.

Second, the purpose of the *Guides* supported combination. MacPherson J.A. acknowledged that while the express purpose of the *Guides* was to provide a system for evaluating impairments that was objective and standardized, a parallel purpose of the *Guides* was to assess the total effect of a person's impairments on his or her everyday activities. Neither of these objectives could be ignored. MacPherson J.A. also noted that "in at least five places, the *Guides* recommend that physicians refer to Chapter 14 in assessing the total impairment of persons suffering from both physical and behavioural/mental impairments". Accordingly, combining physical and psychiatric impairments could be done "in accordance with" the *Guides*.†

Third, permitting combination produced results that were consistent with the purpose of the SABS. The Court of Appeal agreed with the trial judge that catastrophic designations should be rare and exceptional. However, combining impairments was not inconsistent with this purpose as only a few cases would meet the threshold requirement of permanence and a combined rating of 55 per cent.

* This provision permits a catastrophic impairment designation where the claimant has suffered a class 4 or class 5 impairment due to mental or behavioural disorders. The comparable provision in the current SABS is section 3(2)(f).

† MacPherson J.A. cited several situations in the *Guides* where an assessment of a person's physical impairment, such as disfigurement of the face, gynecomastia or skin disorders, should take into account Chapter 14 mental and behavioural impairments. MacPherson J.A. went on to note that "although the *Guides* do warn against assigning percentages to non-neurological psychiatric impairments, there are ... a number of indications that combination may be permissible under certain circumstances."

Lastly, the Court of Appeal found that allowing combination promoted fairness and the objectives of the regulatory scheme. MacPherson J.A. stated that “it seems unfair to deny to persons with combined physical and psychiatric impairments the enhanced benefits that are available to persons with similarly extensive impairments that fall entirely into one category or the other”.

COMMENTARY

The *Kusnierz* case ultimately turned on two competing interpretations of the SABS: a literal, technical interpretation, and a broader, results-orientated interpretation. The Court of Appeal decided to adopt the latter. MacPherson J.A. noted that the legislature could have expressly forbidden the combination of physical and psychiatric injuries but did not do so. The Court conceded the opposite was true as well: the legislature could have, but did not, expressly provide for the combination of physical and psychiatric injuries. Given the absence of a clear qualification either way, the plain language of section 2(1.1)(f) suggested that combination was permissible.

The Court of Appeal’s decision follows a general trend of interpreting remedial legislation such as the SABS in a liberal manner. The role of the *Guides* is something of a complicating factor in this case, given that they are not legislative instruments and derive from outside Ontario. Nevertheless, the dominant consideration in the Court’s reasoning was the SABS itself, including its wording and, more importantly, its purpose.

There may also have been additional policy considerations in play. While the *Kusnierz* case involved an older schedule, its reasoning will be equally applicable to the current SABS. The Court of Appeal may have felt obligated to consider that under the current SABS there are significantly fewer medical and rehabilitation benefits available to consumers from the outset (unless costly optional benefits are purchased). Accordingly, the Court may have felt compelled to balance the shortfall of benefits available up front with the ability to secure additional funding down the road through a more expansive definition of catastrophic impairment.

This more expansive definition of catastrophic impairment bears noting. Given that the definition of a catastrophic impairment has been amended in the current SABS to include single arm or leg amputees and the total permanent loss or use of a limb, the scope of entitlement under the new 55% WPI is much broader. Had *Kusneirz* been considered under the current SABS, the claim would have been deemed catastrophically impaired.