



Toronto ABI Network Conference 2014
Allstream Centre, Exhibition Place, Toronto
November 20 and 21, 2014

**CATASTROPHIC IMPAIRMENT: EARLIER
DETERMINATION, FACTORING IN
PREMORBID IMPAIRMENTS AND POST
ACCIDENT POTENTIAL DETERIORATION**

David F. MacDonald*
Partner | Thomson, Rogers

416-868-3155
dmacdonald@thomsonrogers.com

*Certified Specialist in Civil Litigation

THOMSON ROGERS

PERSONAL INJURY LAWYERS

Personal Injury Litigators since 1956.
www.thomsonrogers.com

Catastrophic Impairment Can Be Determined Earlier than Two Years:

- A. Paraplegia or quadriplegia;
- B. Amputation of an arm or leg;
- C. Total loss of vision in both eyes;
- D. GCS of 9 or less;
- E. Glasgow Outcome Scale score of 2 (vegetative) or 3 (severe disability), when test administered more than six (6) months after the accident.

CATASTROPHIC IMPAIRMENT – Earlier Determination

QUESTION: Can Catastrophic determination based upon mental or behavioural impairments be made earlier than two years after the accident?

What about 55 percent whole person impairments?

Other Causes of Catastrophic Impairment Which are Determined Earlier than Two Years:

- 55% or more whole person impairment, when a physician/neuropsychologist states in writing that the insured person's condition is unlikely to cease to be a catastrophic impairment.
- Mental or behavioural disorder resulting in a Class IV (marked) or Class V (extreme) impairment when a physician/neuropsychologist states in writing that the insured person's condition is unlikely to cease to be a catastrophic impairment.

When can early CAT determination be made in practice?

CASE STUDY NO. 1

- John suffered a mild brain injury and an ankle fracture.
- Can't ride a bike or work.
- Within first six months he developed depression.
- His orthopedist indicates he is pre-disposed to osteoarthritis in his ankle.

QUESTION: Is John CAT or Non CAT?

THOMSON ROGERS

PERSONAL INJURY LAWYERS

6

If he is suffering a marked impairment in

- a) Activities of Daily Living;
- b) Social Functioning;
- c) Concentration, persistence and impatience; or,
- d) Adaptation to work or work-like settings

And he is unlikely to cease to be CAT . . .

THOMSON ROGERS

PERSONAL INJURY LAWYERS

7

ANSWER: He's CAT

Why?

Catastrophically impaired because pre-disposed to deteriorate both physically and potentially emotionally. Therefore person's condition is "unlikely to cease to be CAT".

CASE STUDY NO. 2

- Carol suffers a mild brain injury and suffers impairment in her balance and short term memory, is not working and requires help to care for her children.
- Assessed at six months.
- Receiving medication for depression and anxiety.
- Has exhausted her non-CAT medical rehabilitation benefits, may require hospitalization, risk of deteriorating.

QUESTION: Is Carol CAT or NON CAT?

ANSWER: Catastrophic

- physician states that she may require hospitalization if further deterioration
- marked impairment in adaptation in work or work-like setting (needs help caring for children and can't work)

Factoring in Pre-Morbid Impairments when Determining Catastrophic Impairment

Desbiens – pre-accident paraplegic

McMichael – pre-accident habitual narcotics user

Monks – pre-accident neck injuries

Mujku – pre-accident mental health history, depression, panic attacks

Arbitrators and judges find consistently that if the accident “materially contributed” to an impairment that is catastrophic, then the catastrophic impairment is caused by the accident.

QUESTION: What does “material” mean?

- A. 66.66%
- B. 51%
- C. 25%
- D. more than minimal

ANSWER: More than minimal

QUESTION: Is a person catastrophically impaired when the accident causes more than a minimal impact on their pre-accident impairments and as a result, they meet one of the criteria for catastrophic?

ANSWER: Yes.

What if the person's pre-accident impairments were worsening regardless of the accident?

A person whose pre-accident impairment causes them to be in a deteriorating condition is known as having a "crumbling skull".

In *Monks*, Court of Appeal found that where a claimant's impairment is shown on the "but – for" or material contribution causation test to have resulted from an accident, the insurer is liable for accident benefits.

Post-Accident Potential Deterioration

- This factor is especially relevant in assessments which take place within two years of accident
- If impairments have a reasonable possibility of deterioration, the potential for deterioration is to be taken into consideration by the assessor at the time of the assessment in determining catastrophic impairment

Post-Accident Potential Deterioration

- If exhaustion of med/rehab monies means no longer able to get treatment – is there a reasonable possibility for deterioration? If so CAT assessment must take into consideration.

Court and Arbitral Catastrophic Decisions – Important Decisions

Desbiens v. Mordini
Kusinerz and Economical

Definition of Catastrophic is intended by the drafters to be “inclusive” rather than “restrictive”.

Court and Arbitral Catastrophic Decisions Concerning the GCS

Court and Arbitral Catastrophic Decisions – Recent Decisions: GCS

Young and Liberty Mutual

“Valid and reliable” ought not be read into the legislation. Therefore intubation, paralyzing drugs, bleeding facial trauma all which could invalidate a GCS score, do not as it is a legal test not a medical one.

Time requirement is not established for the duration of the GCS score. Transient GCS scores are not excluded.

The issue of a reasonable period of time after the accident requires a case by case analysis.

Court and Arbitral Catastrophic Decisions – Recent Decisions

CONFOUNDED GCS SCORE

Tournay v. Dominion

The Applicant was injured in a motor vehicle accident. Was trapped in her car. Had to be intubated. GCS was 9.

QUESTION: Was she Catastrophic even though intubated?

ANSWER: Yes

THOMSON ROGERS

PERSONAL INJURY LAWYERS

20

Court and Arbitral Catastrophic Decisions – Recent Decisions: GCS

Lui v. 1226071 Ont., Inc

All that is required is one GCS score of 9 or less within a reasonable time period following the accident.

THOMSON ROGERS

PERSONAL INJURY LAWYERS

21

Court and Arbitral Catastrophic Decisions – Recent Decisions: GCS

Holland and Pilot Insurance

GCS of 4 recorded while injured person intoxicated was not invalid.

Court and Arbitral Catastrophic Decisions – Recent Decisions: GCS

Mallat and The Personal

The question to be answered is whether the GCS test was administered within a reasonable period of time after the accident in relation to the facts of the particular accident.

Court and Arbitral Catastrophic Decisions – Recent Decisions: GCS

M. M. v. Guarantee

Arbitrator rejected argument that GCS score of 9 or less must result solely from the insured person's brain impairment.

Court and Arbitral Catastrophic Decisions – Recent Decisions: GCS

Hodges v. Security National

Accident in 2009, three GCS readings at scene, each was 11 out of 15.

At hospital over next several days GCS readings were taken while he was on sedatives, pain killers and other consciousness-reducing medications. A GCS of 9 was obtained in the course of those readings, 3 days after accident.

QUESTION: Is he catastrophic?

Court and Arbitral Catastrophic Decisions – Recent Decisions: CAT Due to GCS of 9 or Less

ANSWER: Yes

The Arbitrator found that he was not required to question the validity of the score because of the unusual complicating factors which might affect the GCS score of a patient like Mr. Hodges.

Court and Arbitral Catastrophic Decisions

Roberts v. Gore Mutual

- Roberts was injured in three motor vehicle accidents. After the third accident in 2007 she suffered major depression, anxiety and fear of driving and post-traumatic stress disorder and numerous physical injuries.
- Arbitrator was satisfied Roberts suffered a mental behavioural disorder that was either caused by or exacerbated by the 2007 accident.
- having found she drove her children to school, was independent for self-care, able to take care of pets and showed no objective signs of significant difficulty with her concentration the Arbitrator found her to be...

Court and Arbitral Catastrophic Decisions – Recent Decisions

- Non-CAT

J. M. v. State Farm

J. M. suffered a knee injury which her IE assessor refused to assign a rating to because the injury did not require surgery.

QUESTION: → Catastrophic or Non-Catastrophic?

Court and Arbitral Catastrophic Decisions – Recent Decisions

ANSWER: Catastrophic

Did not require surgery because it would not correct J.M.'s impairment issues as such a rating should have been made and was found catastrophically impaired.

Court and Arbitral Catastrophic Decisions – Recent Decisions

Reichert and Chubb

Mr. Reichert had significant pre-existing psychological conditions which required treatment. The accident of 2007 materially contributed to his current presentation.

QUESTION: → Catastrophic or Non-Catastrophic?

Court and Arbitral Catastrophic Decisions – Recent Decisions

ANSWER: Catastrophically Impaired.

“The test for whether the accident caused for Mr. Reichert’s mental and behavioural disorder is the test the material contribution... I find that the accident materially contributed to the development of Mr. Reichert’s mental and behavioural disorder”.

Court and Arbitral Catastrophic Decisions – Recent Decisions

R.J. and Dominion

The applicant was injured and applied for Catastrophic Impairment, denied.

Applicant applied for mediation, insurer did assessments.

QUESTION: Was insurer responsible to pay the cost of rebuttal reports?

Court and Arbitral Catastrophic Decisions – Recent Decisions

ANSWER: Yes

Where counsel pointed out the weaknesses of the IE examination and requested that Dominion reconsider its determination, because Dominion did not, rebuttal reports would be necessary.

Court and Arbitral Catastrophic Decisions – Recent Decisions

B. (D.). V. Economical

D.B. applied for a catastrophic designation. Insurer said D.B. required a below the knee amputation and insisted that she be rated as an amputee as she did not follow the medical advice in proceeding with a below the knee amputation.

Amputation of the lower limb equals 28% Whole Person Impairment (WPI)

A wheelchair dependent applicant has an 80% WPI rating.

QUESTION: Catastrophic or Non-Catastrophic?

Court and Arbitral Catastrophic Decisions – Recent Decisions

ANSWER: Catastrophic

No need for Applicant to pursue an amputation.

Applicant to be evaluated in the condition as she presented at the time of the assessment.

Court and Arbitral Catastrophic Decisions – Recent Decisions

Dominion v. Chambers

The Applicant had three accidents which cumulatively caused a catastrophic impairment.

QUESTION: Do you look at the injuries in each accident or the cumulative effect?

Court and Arbitral Catastrophic Decisions – Recent Decisions

ANSWER: “The cumulative effect of the claimant’s injuries may well be relevant to the determination of whether a person has a catastrophic impairment to the extent that the identified accident may have served as a tipping point to render the Applicant as catastrophically impaired.”

However, looking at the added impact of the accident superimposed on the pre-existing injuries from other accident does not effectively render each accident subject to a retro-active catastrophic impairment determination.

Court and Arbitral Catastrophic Decisions – Recent Decisions

Pastore and Aviva

The Applicant had physical and mental impairments and was found to have a Class IV marked impairment in her activities of daily living.

QUESTION: Should physically-based pain be factored out of assessment of impairment due to mental disorder?

Court and Arbitral Catastrophic Decisions – Recent Decisions

ANSWER: Physically and mentally based pain that is intertwined can be considered cumulatively in a mental disorder assessment even if this results in double counting.

Court and Arbitral Catastrophic Decisions – Recent Decisions

M.D. v. Aviva

A person suffers a panic disorder, agoraphobia and major depression – cannot meaningfully engage with new people or strangers or cope in a stressful environment.

Cannot work, vomits daily.

However, can take children to school, feed them and cook for them.

Unable to attend parent/teacher interviews, organized extracurricular activities, nor initiate activities with other parents.

Court and Arbitral Catastrophic Decisions – Recent Decisions

M.D. v. Aviva

Found to have a Class IV marked impairment with respect to adaptation to work environments because impairment levels significantly impede useful functioning.

Marked mental and behavioural disorder equivalent to 40% whole person impairment

QUESTION: Is he catastrophically impaired

Court and Arbitral Catastrophic Decisions – Recent Decisions

ANSWER: Yes

WPI OF 60% in total. And only need one marked mental and/or behavioural impairment.

Court and Arbitral Catastrophic Decisions – Recent Decisions

Mujku and State Farm

Pre-accident history of mental health issues diagnosed with and treated for depression, panic attacks and had attended emergency departments and family doctor with complaints of pain.

However, remains physically active and socially engaged, was primary caregiver for her husband and independent for self-care, did housekeeping, attended to gardening.

Court and Arbitral Catastrophic Decisions – Recent Decisions

Mujku and State Farm

Accident modest repair costs of \$703.00, did not attend hospital, attended family doctor five (5) days after the accident indicated lack of motivation to take care of herself and doesn't care for her husband, housekeeping or home maintenance. Diagnosed after the accident with fibromyalgia, rotator cuff syndrome, severe major depression, pain disorder, adjustment disorder, anxiety disorder.

QUESTION: Is she catastrophic?

Court and Arbitral Catastrophic Decisions – Recent Decisions

ANSWER: Yes

Found to be markedly impaired and severe deterioration or decompensation in work or work-like settings due to her mental and behavioural disorders.

Court and Arbitral Catastrophic Decisions – Recent Decisions

Morelli v. State Farm

Arbitrator found insurer responsible to pay for rebuttal reports costing over \$12,000. On appeal, Order rescinded in part and insurer to pay reasonable cost of rebuttal report.

Court and Arbitral Catastrophic Decisions – Recent Decisions

QUESTION: Can there be more than one Catastrophic Impairment Assessment or Arbitration determination?

Court and Arbitral Catastrophic Decisions – Recent Decisions

ANSWER: Yes, but only if there is a material change in the condition of the Applicant between the first assessment and the later one.

THOMSON ROGERS

PERSONAL INJURY LAWYERS

48

THANK YOU

Please review conference paper for further catastrophic information.

Please feel free to call or email with questions.

David F. MacDonald*

Partner | Thomson, Rogers

416-868-3155

dmacdonald@thomsonrogers.com

*Certified Specialist in Civil Litigation

THOMSON ROGERS

PERSONAL INJURY LAWYERS

49