

## From Allen J. Wynperle



I hope it has been a productive and safe summer for all of my readers. This past summer, I attended the annual conferences for both the American Trial Lawyers' Association and the American Bar Association. It is clear that lawyers in many of the American jurisdictions are feeling increasingly threatened by tort reform. Many of the changes to the State and Federal laws in the United States would not be considered dramatic in a jurisdiction like Ontario. However, the tone of the debate in the United States is much more adversarial. Personal injury litigators feel as though Government officials have gone to great lengths to publicly denounce the work they perform on behalf of accident victims. From an outsider's point of view, it looks as though tort reform in the United States is here to stay. Hopefully, our American colleagues will learn to work within the new system.

In Ontario, we are fortunate to have so many good Counsel who have become experts in both the new tort and accident benefit systems. However, we must continue to expand the jurisprudence and push the parameters of these laws in order to ensure that accident victims are treated fairly under the circumstances.

To this end, I have written the second part of my article on catastrophic claims. In the last newsletter we dealt with the Desbiens ats Mordini decision. In this instalment, we will deal with the case of McMichael v. Belair.

As is customary, we will also be addressing a health care issue. Recently, the Government of Ontario has advised that health care fundings will flow through Local Health Integrated Networks (or LHIN). Over the coming years, our Local Health Integrated Network will become more important as funding decisions will be made at this level of bureaucracy. Thus, we have provided an article outlining the LHIN system for your information.

We look forward to any comments or questions that you may have.

Allen J. Wynperle



## Catastrophic Claims (Part 2)

In the last newsletter, we discussed the expanding definition of the term "catastrophic impairment". Since the publication of that newsletter, the decision of **McMichael and Belair** (FSCO) came to light. In this case the insured, David McMichael, was injured in June of 1998. He was a passenger in a taxi-cab that was 't-boned'. Mr. McMichael was ejected from the vehicle and suffered  
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*"We're here to help YOU piece your life back together."*

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injuries which included: an evulsion skull fracture, open femur fracture, broken ribs, fractured scapula, pneumothorax on one side, abrasions on the face, arm and hand, cuts that required plastic surgery, post-traumatic confusion and amnesia, broken bone on the left hand, TMJ displacement and a crushed T-9 vertebrae with a 25% loss of vertebral height. Ultimately, it was determined that Mr. McMichael had suffered a mild traumatic brain injury which caused some difficulty with verbal fluency, concentration, attention, organization, mental inflexibility and a mild degree of impulsive behaviour. During the recuperation process Mr. McMichael became a crack cocaine addict. Prior to the motor vehicle accident Mr. McMichael had used cocaine, as often as once per week. However, he was a reliable employee for a courier company (in fact, his employer had no idea he used any drugs prior to the accident).

Arbitrator Muir addressed several important issues in this case. The remainder of this article will focus on two issues in the Arbitration as follows:

- 1) the causal relationship between Mr. McMichael's drug addiction and his motor vehicle accident injuries, and;
- 2) the analysis of whether Mr. McMichael is catastrophically impaired as a result of his accident.

## Causation

Applicant's Counsel alleged that the crack cocaine addiction was a consequence of the injuries suffered in the motor vehicle accident. Applicant's Counsel made good use of experts - both treating and independent - including Dr. Barry, Dr. Ouchterlony, Dr. Bhalerao and Ms. Bray. Following an extensive review of the evidence, including testimony of Mr. and Mrs. McMichael, the opinions of the doctors and the case law with respect to causation, Arbitrator Muir found as follows:

Area or Aspect of Functioning	Class 1: No Impairment	Class 2: Mild Impairment	Class 3: Moderate Impairment	Class 4: Marked Impairment	Class 5: Extreme Impairment
Activities of daily living	No Impairment	Impairment levels are compatible with most useful functioning	Impairment levels are compatible with some, but not all, useful functioning	Impairment levels significantly impede useful functioning	Impairment levels preclude useful functioning
Social functioning					
Concentration					
Adaptation					

"To my mind, whether as a result of impaired impulse control as a consequence of a mild traumatic brain injury or as a vain attempt to self-medicate, the fact that Mr. McMichael turns to the use of crack cocaine is not outside the risk associated with the kind of injuries which can be sustained in an automobile accident such as the one experienced by Mr. McMichael".

Arbitrator Muir's conclusion is important because it recognizes the increased risk of drug abuse following an injury.

## Catastrophic Impairment

In this case, Mr. McMichael alleged that he was catastrophically impaired in accordance with Section 2 (1.1)(g) of the SABS, which states as follows:

### Catastrophic impairment means:

"(g) 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 a class 4 impairment (marked impairment) or class 5 impairment (extreme impairment) due to mental or behavioural disorder."

Arbitrator Muir referred favourably to the

recent Desbiens decision and agreed that the Statutory Accident Benefits Schedule was remedial legislation which should be interpreted broadly in favour of the injured person. When attempting to make a determination of catastrophic impairment in accordance with Section 2 (1.1)(g), one must look at Chapter 14 of the American Medical Association Guidelines (4th edition). Above you will note TABLE 1 has been reproduced from Chapter 14 of the AMA Guidelines which defines the classes of impairment 1 through 5.

In TABLE 2 below you will note a chart from Chapter 14 of the AMA Guidelines (4th edition) outlining the areas of function which must be examined in order to determine whether an individual is catastrophically impaired.

CAPACITIES		FUNCTIONAL LIMITATION		
	Activities of Daily Living	Social Functioning	Concentration, Persistence and Pace	Decompensation or deterioration at work or equivalent
Understanding and Memory				
Sustained concentration and persistence				
Social Interaction				
Adaptation				

In the McMichael decision, Arbitrator Muir determined that the assessor(s) (including the DAC) must look at all four areas of functional limitations separately. If the injured person achieves a Class 4 (marked impairment) in any of the four functional categories, then the injured person should be classified as catastrophically impaired. In the McMichael decision, Arbitrator Muir found that the Applicant suffered a Class 4 (marked impairment) in three out of the four functional categories. As a result, Mr. McMichael was entitled to the enhanced benefits of the catastrophically impaired individual. Thus, Mr. McMichael was found to be entitled to \$5,000 per month in attendant care benefits on an ongoing basis. The attendant care was mainly required as a result of the crack cocaine addiction. Applicant's Counsel advises that the case is under appeal.

### Conclusion

All of us must consider the issue of catastrophic impairment whenever we review our files. In light of recent decisions, Plaintiff's Counsel are likely to find an increased number of catastrophic claims amongst their existing caseload.

In any bid to expand the definition of catastrophic impairment, one must lay the proper foundation. It is likely that several treating physicians and/or independent experts will be required to reinforce your argument. Litigation aimed at expanding the definition of a catastrophic impairment will likely be a costly and somewhat risky endeavour. The injured person will meet serious resistance on such claims, especially if Counsel is attempting to expand on the recent jurisprudence. However, we are obliged to identify the appropriate cases and continue our suit for the disadvantaged claimant who finds their life destroyed by the effects of a motor vehicle accident.

# Community To Help Local Health Care Decisions

BY JEFF TIESSEN

## THE LOCAL HEALTH INTEGRATION NETWORK

**I**n June, Health and Long-Term Care Minister George Smitherman named the three founding board members of the Hamilton Niagara Haldimand Brant Local Health Integration Network. They will be charged with leading the start up of the Local Health Integration Network (LHIN) in our community and will be responsible for planning, integrating and funding local health services to make it easier for patients to access the care they need.

The Hamilton Niagara Haldimand Brant LHIN is one of 14 being created in Ontario. LHINs are local entities designed to plan integrate and fund local health – including hospitals, community care access centres, home care, long-term care, mental health, community health centres, as well as addiction and community support services – within a specific geographic area.

LHINs are a key component of the McGuinty government's vision for a health care system that helps Ontarians stay healthy by delivering good care when its needed, now and in the future. An environment is being created that asks local health care providers to come together and coordinate their service delivery with patients in

mind. Presented by the government as the “next evolution of health care in Ontario,” the initiative is based on the principle that local people are best suited to determine the urgency of local health care priorities.

“We are creating LHINs because local health services are best planned at the local level, by people familiar with the needs of a community,” Smitherman said. “You can't micromanage a \$33 billion health care system from an office in Toronto. We need local expertise from right across Ontario to help plan and co-ordinate health care services that are right for people in different communities.”

Smitherman recently announced that Grimsby will be the location of the headquarters for the Hamilton Niagara Haldimand Brant Local Health Integration Network. The LHIN includes the Niagara Region, Haldimand County, Brant County and the Regional Municipality of Hamilton Wentworth. It also covers part of Halton Region, specifically Burlington, and roughly half of Norfolk County, which is shared with the Southwest LHIN.

Smitherman announced that Juanita Gledhill of Hamilton will be the LHIN board chair, with Jack Brewer of Burlington

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## LHIN Goals

- Manage health system planning, coordination and funding at the local level.
- Engage the community in local health system planning and setting priorities, including establishing formal channels for citizen input and community consultation.
- Through greater integration of services, improve the accessibility of health services to allow people to move more easily through the health system.
- Bring economic efficiencies to delivery of health services, promoting service innovation, improving quality of care, and making the health care system more sustainable and accountable.

and Kim Stasiak of Thorold serving as founding board members. The government proposes that each LHIN board would have a full complement of nine board members by the end of the year.

“Leadership is the key to making any significant system change work,”

Smitherman said. “The founding board members for our LHINs have impressive records of service in their communities. They bring diverse leadership experience in the private and public sectors to the task of improving the way we manage our health care system.”

In her first official duty as chair, Gledhill announced that Pat Mandy has been selected as the CEO. “Pat is a respected health care leader with more than 25 years of experience in a variety of roles,” Gledhill said. “Her experience in change management will be vital as we establish the Hamilton Niagara Haldimand Brant Local Health Integration Network.”

The roles of LHINs will be phased in over time. Subject to the passing of legislation, they would begin by working with the local community and health care providers to set priorities and plan health services in their area. They would then move to integrating and co-ordinating local health services, and eventually, to determining and providing funding and resources.

“LHINs will make it easier for patients to access all of the different health services they need in their own communities, because these services will be



co-ordinated in those communities,” enthused Smitherman.

This initiative is part of the McGuinty government’s plan to build a system that delivers on three priorities – keeping Ontarians healthy, reducing wait times and providing better access to doctors and nurses.



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## Next Issue:

### LHIN in Review – A Closer Look

Send us your questions, comments or concerns.