

Arguing Catastrophic Claims

Presented By: *Mr. Allen J. Wynperle*
Dr. M. Allan Finlayson

Introduction

- TORT claim
- No future cost of care unless CAT (s. 267.5 of the Insurance Act)

CAT defined in s. 5(1)(f) of Reg 461/96

“Catastrophic impairment means:

Subject to subsections (2) and (3), any impairment or combination of impairments that, in accordance with the American Medical Association’s *Guidelines to the Evaluation of Permanent Impairment*, 4th Edition 1993, results in 55 per cent or more impairment of the whole person.”

Desbiens ats Mordini

Facts:

- MVA November 8, 1999
- Prior MVA 1975 – STI neck
(residual pain)
- 1986 WCB
 - fractured T11 and 12
- 1987 –1997 at least twenty visits for back pain.

Desbiens at Mordini (*cont.*)

Facts:

- 1987 – 1999 almost completely independent in ADL's.
- MVA injuries: Spiral fracture left femur
- ongoing leg pain
- Chronic neck, shoulder and increased low back pain.
- Headaches, memory/concentration, depression, and anxiety

Desbiens at Mordini (*cont.*)

Facts:

- Post-accident ADL's:
 - Dramatic loss of independence
 - Needs a lot of assistance with ADL's

Desbiens at Mordini (*cont.*)

Justice Spiegel's Findings:

- Catastrophic impairment threshold [s. 267.5 (3)] Meant to protect those injured persons most in need.
- Thus, definition of catastrophic impairment should be inclusive rather than restrictive.
- Broad definition of what qualifies as catastrophic impairment.

Desbiens at Mordini (*cont.*)

Justice Spiegel's Findings:

- Critical of legislative drafters
- Improper use of AMA guidelines

2 Important Conclusions:

1. Discretion of assessors
 - WPI 40%
 - Did not reflect level of impairment because of pre-accident vulnerability

Desbiens ats Mordini (*cont.*)

- Doctor said real WPI 70% (physical)
- Justice Spiegel agreed

2. Add physical and psychological impairment to arrive at WPI

i.e. Before Desbiens: Physical must = 55% WPI
After Desbiens: Physical + Psychological must = 55% WPI

“It is not nearly as important what illness a patient has, as what patient has the illness.”

Dr. William Osler

1849 - 1919



"So! If it's good, it's Mister Coffee. If it's bad, it's me."

Fundamental Error of Attribution

1. When observing others the tendency is to underestimate situational (external) factors and to overestimate dispositional (internal) variables
2. When explaining our own behaviours the tendency is to do the opposite

Chapter 4: Emotional or Behavioural Impairments

Severity				
	Mild	Moderate	Severe	Severe (+)
	Limitation of daily social and interpersonal functioning	Limitation of <i>some</i> but not all social and interpersonal daily living functions	Limitation impeding useful action in <i>almost all</i> social and interpersonal functions	<i>Limitation of all daily functions</i> requiring total dependence on another person
Whole Person Impairment %	0 – 14	15 – 29	30 – 49	50 - 70

Chapter 14: Assessing Mental Impairment Severity

CAPACITIES		FUNCTIONAL LIMITATION		
	Activities of Daily Living	Social Functioning	Concentration, Persistence & Pace	Decompensation or Deterioration at Work or Equivalent
Understanding and Memory				
Sustained Concentration and Persistence				
Social Interaction				
Adaptation				

Chapter 14: Mental and Behavioral Disorders

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 Social functioning Concentration Adaptation	No Impairment	Impairment levels are compatible with <i>most</i> useful functioning	Impairment levels are compatible with <i>some</i> , but not all, useful functioning	Impairment levels <i>significantly impede</i> useful functioning	<i>Impairment levels preclude</i> useful functioning
Whole Person Impairment %	0 – 5	10 – 20	25 – 50	55 – 75	>75

Desbiens at Mordini (*cont.*)

Conclusion:

- Vulnerable clients
- May effect catastrophic designation
- May choose TORT not AB.

Gate Derangement Table

- Alternative method for calculating WPI arising from lower limb injury

Severity	Patient's signs	WPI (%)
Mild	a. Antalgic limp with shortened stance phase and documented moderate to advanced arthritic changes of hip, knee, or ankle.	7.
	b. Positive Trendelenberg sign and moderate to advanced osteoarthritis of hip	10.

Severity	Patient's signs	WPI (%)
Mild	c. Same as category a or b above, but patient requires part-time use of cane or crutch for distance walking but not usually at home or in workplace	15.
	d. Requires routine use of short leg brace (ankle-foot orthosis [AFO])	15
Moderate	e. Requires routine use of cane, crutch, or long leg brace (knee ankle-foot orthosis [KAFO])	20.
	f. Requires routine use of cane or crutch and a short leg brace (AFO)	30
	g. Requires routine use of two cans or two crutches	40

Severity	Patient's signs	WPI (%)
Severe	h. Requires routine use of two canes or two crutches and a short leg brace (AFO)	50
	i. Requires routine use of two canes or two crutches and a long leg brace (KAFO)	60
	j. Requires routine use of two canes or two crutches and two lower extremity braces (either AFOs or KAFOs)	70
	k. Wheelchair dependant.	80

Gate Derangement Table

- Traditional method of calculation serious lower limb injury - 25-30%
- Gate Derangement Table – Use of Walker or Two-Canes – 60%.

McMichael ats Belair (FSCO)

Facts:

- Fractured skull, femur, ribs and shoulder blade
- Disabled from work
- Crack addict

McMichael ats Belair (cont)

Issue:

- s. 2 (1.1) of the SABS, 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

McMichael at Belair (cont)

(marked impairment) or class 5
impairment (extreme impairment)
due to mental or behavioural
disorder.”

- Confirms broad interpretations of catastrophic definition (Desbiens)

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Whole Person Impairment %	0 – 5	10 – 20	25 – 50	55 – 75	>75

McMichael at Belair (cont)

- If the injured person sustains a category 4 impairment in any one of the 4 activity areas then CAT
 - Crack/cocaine addiction = catastrophic.

Conclusion

- Send old cases back to CAT DAC before it's too late.
- Push CAT case forward in TORT.