

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:)	
)	
NIGEL ARTS, by his Litigation Guardian,)	T. H. Lehman, for the Plaintiffs
KIM ARTS)	(Responding Party)
)	
)	
)	Plaintiff
)	
- and -)	
)	
)	
STATE FARM INSURANCE COMPANY)	I.D. Kirby, for the Defendant (Moving
)	Party)
)	
)	
)	Defendant
)	
)	
)	HEARD: May 23, 2008

R. MacKINNON, J.

THE ISSUE

[1] The defendant automobile accident benefit insurer moves under Rule 21.01(1)(a) for a determination, before trial, of a question of law raised by the Statement of Claim as follows:

In determining whether an individual is catastrophically impaired pursuant to section 2(1)(f) of the Statutory Accident Benefits Schedule – Accidents on or after November 1, 1996, being Ontario Regulation 403/96 as amended, is it permissible to assign percentage ratings in respect of a person’s psychological or psychiatric impairments and combine them with a percentage ratings in respect of the person’s physical impairments, for the purpose of determining whether the

person's impairments meet the definition of catastrophic impairment as defined by section 2(1)(f) of the Statutory Accident Benefits Schedule?

[2] The parties filed an Agreed Statement of Facts. It is the Plaintiff's position in this action that he is catastrophically impaired as defined on three alternative definitions namely:

- (a) that he suffers from brain impairment which resulted in a score of 9 or less on the Glasgow Coma Scale pursuant to section 2(1)(e)(i) of the Schedule; and
- (b) that he suffers from a marked impairment due to a mental or behavioural disorder pursuant to section 2(1)(g) of the Schedule; and
- (c) that he suffers from a combination of impairments that result in 55 percent or more impairment to the whole person pursuant to section 2(1)(f) of the Schedule.

[3] The Glasgow Coma Scale criterion, [paragraph (a) above] and the marked impairment criterion [paragraph (b) above] are not before this court on this motion and, if pursued, will require a trial to determine. This motion deals only with criterion (c) above – that he suffers from a combination of impairments that result in 55 percent or more impairment of the whole person pursuant to section 2(1)(f) of the SABS.

BACKGROUND

[4] The plaintiff's 2001 application for determination of catastrophic impairment eventually resulted in the insurer's examination and report of September 10, 2007. It detailed that he suffered extensive injuries including: right posterior parietal depressed skull fracture and presumptive basal skull fracture with underlying brain contusion and evidence of intracranial haemorrhage and diffuse axonal injury; fracture of the right clavicle, right posterior maxillary, and lateral orbital wall of the right orbit; and soft tissue injuries to the neck, right shoulder and low back. He was also found to have blood in the left maxillary sinus and subsequently developed a significant visual field defect with left homonymous hemianopsia. He underwent an open craniotomy with elevation of the depressed skull fracture and debridement of the contused brain.

[5] The report verified that Mr. Arts suffered and continues to suffer from a number of impairments including chronic pain, cognitive impairments, headaches, subjective vertigo, tinnitus, sleep disturbance, anergia, vision impairment, panic attacks, specific phobia and reported sexual dysfunction. He also received a number of psychiatric diagnosis including mood disorder due to a general medical condition (brain injury) with depressive features, cognitive disorder, adjustment disorder with mixed anxiety and depressed mood – chronic, personality change due to a general medical condition (brain injury) – combined type (liable, disinhibited), and social anxiety.

[6] Of significance, the assessors were of the opinion that with respect to the whole person impairment ("WPI") under the American Medical Association's Guides to the Evaluation of Permanent Impairment ("AMA Guides"), there resulted a score of 23 percent WPI from only his

neuro-musculoskeletal injuries, including his traumatic brain injury. When the assessors also considered the mental and behavioural disorders under the AMA Guides, they concluded that Mr. Arts demonstrated mild to moderate mental and behavioural impairment representing 40 percent WPI on that item. In total, they found and concluded that if both the ratings for sections 2(1)(f) and (g) of the SABS Schedule were combined, Mr. Arts would have a total score of 55 percent WPI. That would meet the Ontario definition of catastrophic impairment.

ANALYSIS

[7] The Defendant argues that the AMA Guides recommend against the use of mental/behavioural percentages. It points out that the Guides in its fourth edition is not silent, but rather addresses and rejects the idea that percentage ratings can be combined for physical injuries and for mental or behavioural impairment. The insurer argues that the decision in *Desbiens v. Mordini* (2004) O.J. No. 4735 was wrongfully decided and/or that it did not deal with the specific issue at bar. Counsel for State Farm points out that the AMA Guides, at pages 301 – 302, specify the reasons for not estimating percentage mental impairments – namely, that there is insufficient scientific support for any method of applying a score to a psychological disorder which is suitable to any formal process. The insurer also points out that, in any event, it is still open to the Plaintiff to persuade a court at trial to find catastrophic impairment on either the Glasgow Coma Scale or the marked impairment criteria referenced above.

[8] I am not persuaded by the Defendant’s arguments. Counsel cautions that I should not exercise sympathy or torture regulation interpretation to achieve a satisfactory result for a needy Plaintiff. I have not. Rather, I have considered the reasoning and analysis of Spiegel, J. in *Desbiens* at paragraphs 212 through 262. I find his reasons and logic to be compelling, reasonable, and persuasive. I hold that paragraph 2(1)(f) of the Schedule requires consideration of all impairments, however caused, and that they be totalled together in arriving at whole person impairment (WPI). In coming to the conclusion that I have, I have also considered:

(a) The Plain Language of the Ontario Regulation.

[9] Section 2(1) defines catastrophic impairment in a number of ways. Between sub-paragraphs (f) and (g) is the inclusion of the word “or”. The word “impairment” is defined in the Schedule as including psychological impairments. Subsection (f) uses the words “impairment or combination of impairments. I agree with Justice Spiegel and find persuasive his reasoning at paragraph 242 in *Desbiens* where he found that there was nothing in the Schedule that suggests that a combination of physical and psychological impairments is not permitted to be considered. If the legislature’s intention was to exclude psychological impairments from clause (f), the inclusion of the word “physical” before the word “impairment” would easily achieved that purpose. Subsection 2(1)(f) is modified by the impairment definition in that same section 2.

(b) The AMA Guides do not prohibit inclusion of psychological impairment.

[10] The Guides are intended to be interpreted liberally. They make it clear that physicians must use their clinical judgment to arrive at impairment “estimates”. When one considers not

only pages 301-2 but rather pages 141-2 and the entirety of the AMA Guides which provide no absolute prohibition on the use of percentage ratings for psycho-emotional impairments, it is clear that those Guides recognize it may be necessary to arrive at percentage ratings in appropriate cases in order to provide physicians with informed guidance. The combined values table at pages 322-324 of the Guides specifically permits physicians to combine impairment ratings from different chapters to arrive at a compound impairment rate.

[11] In *Desbiens*, Spiegel J. found that the Guides clearly permit the use of clinical judgment to enable the assessor to assign percentage ratings to psycho-emotional impairments for the purpose of calculating WPI. I fully agree.

[12] The Guides were clearly not designed by the AMA for the purpose directed by the Ontario Legislature. They must be interpreted in a manner that is contextually consistent with the language of the SABS. The Schedule directs that a “combination of impairments” that results in a WPI of 55 percent meets the test for catastrophic impairment. The Schedule defines “impairment” to include psychological impairments. If percentage ratings can be used to categorize mental or behavioural impairments flowing from a brain injury (chapter 4 of the AMA Guides), there is no reason that they cannot also be used to categorize mental or behaviour impairments flowing from a psychological injury. To interpret the Schedule otherwise would produce an unreasonable outcome.

(c) Section 2(3) of the Schedule provides as follows:

2(3) For the purposes of clauses (1)(f) and (g), an impairment that is sustained by an insured person but is not listed in the (AMA Guides) shall be deemed to be the impairment that is listed in that document and that is most analogous to the impairment sustained by the insured person.

[13] I agree with the reasoning of Spiegel J. who noted that even if it was determined that percentage ratings could not in law be assigned to psycho-emotional impairments under the Guides, section 2(3) of the Ontario Schedule directs that psycho-emotional impairment be deemed to be the impairment listed in the Guides that is most analogous. Psychological impairments are the most analogous to the listed mental or behavioural impairments. I agree with the *Desbiens* reasoning that it is proper to interpret the words “not listed” in section 2(3) as encompassing both impairments that are not identified and impairments that are identified but not assigned any percentage.

(d) The purpose of the SABS Schedule.

[14] The legislature’s definition of “catastrophic impairment” is intended to foster fairness for victims of motor vehicle collisions by ensuring that accident victims with most health needs have access to expanded medical and rehabilitation benefits. That definition is intended to be remedial and inclusive, not restrictive. The legislature has determined that an injured person who has only a moderate psycho-emotional impairment, but no other impairments, does not meet the test for catastrophic impairment. The rationale is that such a person is likely to have lesser

medical and rehabilitation needs than a person with a marked psycho-emotional impairment. However, the injured victim at bar has both demonstrated psycho-emotional and physical impairments. It accords with the purpose of the Schedule (i.e. – to ensure that accident victims with greatest needs obtain enhanced benefits) to consider the combined impact of both psycho-emotional and physical impairments in determining Whole Person Impairment (WPI) under s.2(1)(f) of the Schedule.

[15] An injured victim may fall short of being found catastrophically impaired on the basis of any one of the other seven parts to the definition of catastrophic impairment, but when all of his/her impairments are considered, he/she may well have a 55 percent Whole Body Impairment. To deprive Ontario motor vehicle accident victims in these circumstances the right to recover needed attendant care and medical – rehabilitative benefits is both unreasonable and unjust. That cannot have been the intention of the provincial legislature.

[16] The SABS are remedial and constitute consumer protection legislation. As such, they are to be read in their entire context and in their ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislature. The goal of the legislation is to reduce the economic dislocation and hardship of motor vehicle accident victims and as such, assumes an importance which is both pressing and substantial.

(e) Miscellaneous considerations.

[17] I note in passing that the arbitrators and adjudicators under the financial services commission regime (FSCO) have expressed approval of the *Desbiens* reasoning in a number of arbitration and appeal decisions. While their reasons are not binding upon a court, their authors have substantial experience and expertise in the interpretation of the Ontario SABS. FSCO decisions are generally accorded court deference because of the Commission's interpretive expertise. While in the case at bar I do not defer to FSCO reasoning, I find it correct, weighty and helpful.

[18] The plaintiff's factum also addressed arguments dealing with the section 15 *Charter of Rights and Freedoms* equality rights. Because I am of the view that the insurer's interpretation of the Schedule is not correct, there is no reason for me to engage in a *Charter* analysis. Although obiter to my decision, I observe in passing that I find the reasoning of Spiegel J. in *Desbiens* persuasive at paragraphs 258 – 259:

In my view, to deprive innocent victims of motor vehicle accidents the right to recover much needed health care expenses because their psychological impairments cannot be combined with their physical impairments in considering their overall WPI is unjust. Moreover, it is inconsistent with the principles and norms of s.15 of the *Charter*... In my view the Defendant's interpretation tends to discriminate against persons who have a mental disability.

CONCLUSION

[19] For the reasons I have given, I find that it is permissible to assign percentage ratings in respect of a person's psycho-emotional impairments and to combine them with percentage ratings in respect of the person's physical impairments for the purpose of determining whether the person is catastrophically impaired pursuant to section 2(1)(f) of the Schedule.

[20] If the parties cannot agree on the issue of costs they may, within 20 days of the release of these reasons, submit their written submissions of no more than three pages, single spaced, together with Bills of Costs. The responding party may file materials of the same length within a further 10 days. Reply materials may be filed within five days thereafter. All costs materials shall be forwarded to me in care of my secretary at Barrie.

R. MacKINNON, J.

Released: May 28, 2008