Editor's Note: Addendum released on June 21, 2011. Original judgment has been corrected with text of addendum appended.

CITATION: Aviva Canada Inc. v. Ontario Trial Lawyers Assoc., 2011 ONSC 2164
DIVISIONAL COURT FILE NO.: 455/10
DATE: 20110513

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

CUNNINGHAM, A.C.J.S.C., MATLOW & LEDERER JJ.

BETWEEN:	)	
AVIVA CANADA INC. Applicant	)	*Robert H. Rogers* & *Kevin H. Griffiths*, for the Applicant
– and –	)	
ANNA PASTORE and FINANCIAL SERVICES COMMISSION OF ONTARIO	)	*Joseph Campisi, Jr.*, for the Respondent, Anna Pastore
Respondents	)	*Robert Conway*, for the Respondent, Financial Services Commission of Ontario
- and –	)	
THE ONTARIO TRIAL LAWYERS ASSOCIATION and INSURANCE BUREAU OF CANADA	)	*James L. Vigmond* & *Brian M. Cameron*, for the Intervenor, The Ontario Trial Lawyers Association, Intervener
Intervenors	)	*Lee Samis*, for the Intervenor, Insurance Bureau of Canada
	)	**HEARD:** February 23, 2011

LEDERER J.:

Introduction

[1] This is an application for the judicial review of a decision made under the provisions of the *Insurance Act*, R.S.O 1990, c. I.8. It determined that, as a result of injuries she suffered in a motor vehicle accident, the respondent, Anna Pastore, should be recognized as suffering a catastrophic impairment, as that term is defined by the accompanying regulations.

Background

[2] The accident took place on November 16, 2002. Anna Pastore suffered a fracture of her left ankle. She underwent several surgeries related to this ankle. Anna Pastore says that she was unable to use her left ankle and over-compensated on her right side, which then caused pain in both her right knee and right ankle. In September 2007, she underwent a right knee replacement. She attributes all of her surgeries to the motor vehicle accident.

[3] In May 2005, Anna Pastore made the applications necessary for her injuries to be recognized as causing a "catastrophic impairment". A person assessed with a catastrophic impairment qualifies for an additional range of benefits that would not otherwise be available.

[4] The *Statutory Accident Benefits Schedule-Accidents on or after November 1, 1996,* ("*SABS*")[1], at s. 2(1.1), defines "catastrophic impairment". There are seven separate definitions. This judicial review is primarily concerned with the last of these definitions, (s. 2(1.1(g)), which states:

> (g) subject to subsections (2) and (3), an impairment 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.

[5] The issue is whether, pursuant to this definition, Anna Pastore was catastrophically impaired due to mental or behavioural disorder. Subsection 2(1.1)(g) of *SABS* adopts the American Medical Association's *Guides to the Evaluation of Permanent Impairment* 4th edition, 1993 ("*Guides*"). The *Guides* outline the process to be undertaken to identify where an individual has suffered a catastrophic impairment due to mental or behavioural disorder. The

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[1] *SABS* O. Reg. 403/96

Guides refer to “four aspects or areas for assessing the severity of mental impairment”, also described as “four categories of functional limitation”. They are (1) limitations in activities of daily living (“ADL”); (2) social functioning; (3) concentration, persistence and pace; and (4) deterioration or decompensation in work or work-like settings[2].

[6] The *Guides* establish a five-category scale for rating mental impairment in each of the four areas of functional limitation:

> Class 1: no impairment
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> Class 2: mild impairment ‘implies that any discerned impairment is compatible with most useful functioning’;
>
> Class 3: moderate impairment ‘means that the identified impairments are compatible with some, but not all, useful functioning’;
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> Class 4: marked impairment ‘is a level of impairment that significantly impedes useful functioning’; and,
>
> Class 5: extreme impairment ‘precludes useful functioning’[3]

[7] Anna Pastore was referred to a Designated Assessment Center ("DAC") for a catastrophic impairment assessment. The assessment found that she had a Class 4 impairment (marked impairment) in her ADL due to mental or behavioural disorder. The DAC assessment team determined that Anna Pastore had a Class 3 impairment (moderate impairment) in each of the three remaining areas of functioning. They concluded that, accounting for these scores across the four areas of functioning, resulted in an overall assessment of a Class 3 impairment due to mental or behavioural disorder. Based on the understanding that a Class 4 impairment in only one area of functioning satisfies the definition of catastrophic impairment as found in s. 2(1.1)(g) of *SABS*, the DAC assessment determined that Anna Pastore was catastrophically impaired.

[8] The application proceeded to an arbitration. The Arbitrator accepted that the assessment of a Class 4 impairment in just one of the areas of functional limitation was sufficient to meet the definition of "catastrophic impairment".[4] She agreed with the DAC assessors that Anna Pastore had difficulties in all of the four areas of function, but that it was only within the sphere of ADL that she suffers from a Class 4 impairment. For this reason, this was the only area of function

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[2] *Guides*, at pp. 14/294 and 14/300
[3] *Guides*, at pp. 14/300 and 301
[4] *Pastore v. Aviva Canada* 2009 CarswellOnt 821 (“*Arbitrator’s Decision*”) at para. 113

that she reviewed in detail.[5] She agreed with the assessment and, like the DAC, found that Anna Pastore had a catastrophic impairment.

[9] At the arbitration, a second issue was presented. It appears to have arisen from one of the reports included in the DAC assessment. The psychologist, who was part of the DAC team, noted that it was not possible to "factor out" the impact of discrete physical impairments and the associated pain limitations. Thus, his impairment rating, in respect of mental or behavioural disorder, incorporated the cumulative effect of both pain as a symptom of physical injury and pain as a symptom of mental or behavioural disorder. Evidence was presented at the arbitration that suggested that this was not appropriate. Limitations associated with physical impairment could be and should be "factored out" so that any assessment under s. 2 (1.1)(g) dealt exclusively with impairment due to mental or behavioural disorder. This "factoring out" would reduce the level of impairment with the possibility that the rating for ADL would be reduced to something less than a Class 4.

[10] The Arbitrator did not accept this approach. She found that the combination of physical limitations and the associated pain are intertwined. They both play an integral part in how Anna Pastore's life has changed. She found that it was not possible to "factor out" the impact of discrete physical impairments and associated pain limitations and that any impairment rating should incorporate both on a cumulative basis. Thus, this concern did not impact on the analysis she undertook in respect of s. 2(1.1)(g) of *SABS*.

[11] Aviva Canada Inc. is the insurer of Anna Pastore. It appealed the decision of the Arbitrator. The appeal was brought, pursuant to s. 283 of the *Insurance Act*, and was restricted to a question of law. The appeal was dealt with by a Delegate of the Director. In dismissing the appeal, the Director's Delegate agreed with the DAC and the Arbitrator that Anna Pastore required a Class 4 impairment in only one of the four areas of functioning to establish a catastrophic impairment. In respect of the impact of the failure to attribute the limitations suffered by Anna Pastore to physical impairment or associated pain, the Director's Delegate concluded that the Arbitrator's determination that her behavioural and mental disorders resulted in a Class 4 impairment was a finding of fact. He wrote that it was not his role as an appellate officer to second-guess the Arbitrator's evaluation of the evidence or to substitute his own view of the weight it should be given.[6]

[12] This is the decision which is the subject of this application for judicial review. It is brought by the insurer of Anna Pastore.

[13] There are two questions which this court is asked to decide:

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[5] *Arbitrator's Decision*, at para. 92
[6] *Pastore v. Aviva Canada* 2009 CarswellOnt 8244 ("*Delegate's Decision*"), at paras. 65 and 68

1) Is a Class 4 (marked impairment) in only one area of functioning sufficient for a catastrophic impairment designation?

2) Should an impairment assessment under s. 2(1.1) (g) of *SABS* distinguish and exclude impairments that are due to physical injuries from impairments that are due to mental or behavioural disorder?

The Legislation

[14] The issues for the court are of statutory interpretation.

[15] *SABS* is published as Ontario Regulation 403/96, made pursuant to the *Insurance Act*, R.S.O. 1990, c. I.8. As such, it is incorporated into the legislation and is interpreted pursuant to the same principles.

[16] *SABS* has within it the definition of "catastrophic impairment", including subsection 2(1.1)(g). Under the *Insurance Act*, ss. 121(2.2) and 268.3, a regulation including *SABS*, may adopt by reference any code, standard or guideline as it reads before, after, or at the time the regulation is made. Subsection 2(1.1)(g) of *SABS* adopts the *Guides*. The incorporation of the *Guides* into the regulation includes them as part of the legislation[7]. The "4th edition" of the *Guides*, dated 1993, is "an integral part" of the regulation.[8]

The Legislative Context

[17] It is well-recognized that the preferred approach to statutory interpretation is one that recognizes the important role that context must inevitably play when the court is to interpret the text of a statute. A proper interpretation assesses the legislative provision, given the purpose of the statute. Insofar as the language of the provision permits, interpretations that are consistent with or promote the legislative purpose should be adopted while interpretations that defeat or undermine the purpose should be avoided. Where the provision under consideration is found in an *Act* that is, itself, a component of a larger statutory scheme, the surroundings that colour the words in the *Act* are more expansive.[9]

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[7] *Desbiens v. Mordini* 2004 CarswellOnt 4804 (S.C.J.), at paras. 227-228

[8] *Kusnierz v. Economical Mutual Insurance Co.*, [2010] O.J. No. 4462, 90 C.C.L.I. (4th) 91, at para 45.

[9] *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 CarswellBC 851 (W.L.), at para. 27; and, *Ontario (Ministry of Labour) v. United Independent Operators Ltd.*, 2011 ONCA 33, 2011 CarswellOnt 287 (W.L.), at para. 31.

[18] The legislative context for *SABS* was reviewed in *Desbiens v. Mordini*.[10] It is part of a continuing effort of the Government of Ontario to balance the value of statutory benefits, the right to sue in tort and the ability of the insurance industry to supply the required or appropriate product at an acceptable cost. The regime has, from time to time, been amended to adjust the balance. Between June 1990 and October 2003, there were three major legislative regimes governing compensation for persons injured in motor vehicle accidents.

[19] The first (Bill 68) was commonly referred to as the Ontario Motorist Protection Plan ("OMPP"). Under that regime, the owner or occupant of an automobile or any person present at the scene of an accident could not be liable either for pecuniary or non-pecuniary damages, unless the claimant sustained a permanent serious disfigurement or a permanent serious impairment of an important bodily function caused by continuing injury, which is physical in nature (permanent serious threshold). If the threshold was met, the claimant's tort rights were essentially unaffected by the OMPP. The plan provided for significantly-improved benefits on a no-fault basis.

[20] The OMPP was followed by the regime covering accidents occurring between January 1, 1994 and November 1, 1996 (Bill 164). Under this regime, a claimant, who sustained a serious disfigurement or a serious impairment of an important physical mental or psychological function (serious threshold), could recover non-pecuniary damages, but protected defendants were not liable for pecuniary damages regardless of the severity of the claimant's impairment. This program provided for generous benefits for income loss, medical, rehabilitation and attendant care which were available on a no-fault basis.

[21] Another approach (Bill 59) was introduced in 1996 by way of the *Automobile Insurance Rate Stability Act*[11] and the associated regulation, *Court Proceedings for Automobile Accidents that Occur on or after November 1, 1996.*[12] Claimants are barred from recovering non-pecuniary damages from protected defendants unless the claimants' injuries meet a threshold similar to the OMPP threshold. Pecuniary damages are recoverable without meeting any threshold, except for health care expenses, which are not recoverable unless the injured person has sustained a "catastrophic impairment".[13]

[22] There have been further changes. In 2003, the *Automobile Insurance Rate Stability Act, 2003* was promulgated[14], along with some amendments to *SABS*.[15] The regulatory scheme continues to be amended from time to time.

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[10] See footnote 7, above.
[11] S.O. 1996 c. 21
[12] O. Reg. 461/96
[13] *Desbiens v. Mordini, supra,* at paras. 230 to 232
[14] S.O. 2003, c. 9

[23] In his review of the evolution of the regime, the judge in *Desbiens v. Mordini*, *supra*, made reference to *Henderson v. Parker.*[16] In the course of the trial, it became necessary to interpret provisions found in Bill 59. The issue considered the limits on the ability of an injured party to sue. The judge in *Henderson v. Parker*, *supra*, made reference to the competing policy purposes at work:

> …[Bill 59] is essentially remedial legislation, which restricts the right to sue in certain respects, but offset that with first party benefits that are available regardless of fault. One of the objectives implicit in the title of the Act is to achieve stability in car insurance rates. It seems clear that one of the ways to do so was to reduce the extremely generous accident benefits provided for under Bill 164. The result may well be that some health care expenses, such as those that exceed the prescribed limits, may go unpaid. While that may seem unfair, that is what the legislature appears to have intended.[17]

[24] The judge in *Desbiens v.* Mordin, *supra*, made similar observations:

> Indeed a common thread runs through the remarks quoted above [from the legislative debates concerning Bill 59]. That is, the intention to restore fairness to the system for the innocent victims of motor vehicle accidents. Thus a major purpose of section 275.5(5) of the Act is to ensure that those innocent victims who are in the most need are able to recover health care expenses, perhaps at the expense of those who have less need. The legislature appears to recognize that catastrophically impaired plaintiffs are a special case, and health care costs can be enormous. Another important purpose is to control premiums. In my view, however, insofar as health care expenses are concerned, this was to be achieved by the drastic reduction in the level of medical and rehabilitation benefits available on a no-fault basis.[18]

[25] I take the last statement to be personal surmise which does not detract from the overall context of the legislation, being to find the balance between mixed and competing policy purposes.

[26] The impact of the purposive approach to an interpretation of *SABS* was recently reviewed in *Kusnierz v. Economical Mutual Insurance Co.*[19] The judge concluded:

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[15] O. Reg. 281/03, O. Reg. 313, O. Reg. 380 and O. Reg. 458
[16] (1998), 42 O.R. (3d) 462 (Ont. Gen. Div.); [1998] O.J. No. 4389 referenced in *Desbiens v. Mordini, supra*, at endnote 33
[17] *Henderson v. Parker* (1998), 42 O.R. (3d) 462 (Ont. Gen. Div.); [1998] O.J. No. 4389, at para. 33
[18] *Desbiens v. Mordini, supra,* at para. 237
[19] *Kusnierz v. Economical Mutual Insurance Co., supra*, at paras. 16-34

> Where the purposes of the legislation are mixed, as they are in the area of automobile insurance since the policy thrust go in different directions simultaneously, a purpose like 'fairness' can become a subjective standard of little guidance and interpretation. In my view, in this context the determination of purpose must be more provision-specific; *this requires a very close look at the words of the legislation.*[20]
>
> [Emphasis added]

The Standard of Review: Introduction

[27] This is a judicial review. Nonetheless, the parties did little to address the issue of the applicable standard of review. In his factum, counsel for the applicant submitted that the errors made by the Arbitrator and the Director's Delegate were sufficient to demonstrate an error in law which would attract correctness as the applicable standard of review. For his part, counsel for the respondent submitted that the court's role was not to re-assess the relevant factors and substitute its own view. Rather, he suggested, the court must determine whether the result falls within a range of reasonable outcomes. This is a re-statement of the standard of reasonableness, as found in *Dunsmuir v. New Brunswick*[21].

[28] Without the analysis that follows, it is difficult to deal with this question. I shall return to it later in these reasons.

1) Is a Class 4 (marked impairment) in only one area of functioning sufficient for a catastrophic impairment designation?

Case law

[29] In concluding that a finding of a Class 4 impairment in one of the four areas of functioning was sufficient to satisfy the definition for catastrophic impairment, the Arbitrator and the Director's Delegate relied on existing case law. While these cases refer to, they are not determinative of, the issue.

[30] In *Desbiens v. Mordini, supra*, a man, who some years before had been rendered a paraplegic, was involved in a motor vehicle accident. The court considered whether the accident resulted in a catastrophic impairment. A doctor had concluded that in the areas of ADL, social functioning and concentration, the impairment of the injured man fell within Class 3. In the area of deterioration or decompensation in a work-like setting (adaptation), the doctor found the man's impairment fell within Class 4. The judge reviewed the evidence, disagreed with the Class

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[20] *Kusnierz v. Economical Mutual Insurance Co., supra*, at para. 34
[21] *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at para. 47

4 finding and concluded that the man did not sustain a catastrophic impairment as defined in s. 2(1.1)(g) of *SABS*. In reviewing the assessment of the doctor, the judge observed:

> It is not disputed that it is sufficient for Mr. Desbiens to establish that his impairment in any one of the areas of functioning meets the requirements of clause (g).[22]

[31] It appears that, in the years since its release, this statement has been widely relied on. In *McMichael v. Belair Insurance Company Inc.*[23], the Arbitrator found that the applicant suffered Class 4 impairment in three of the "spheres of assessment" and, on that basis, met the standard imposed by s. 2(1.1)(g) of *SABS* for recognition of a catastrophic impairment. Nonetheless, he went on to comment on the sufficiency of such a finding in only one of the four areas of function. He relied on *Desbiens v. Mordini, supra,* but acknowledged that it was not determinative:

> …were I required to decide this question, I would agree with the approach adopted, *but not decided,* by the court in *Desbiens* that a Class 4 or marked impairment in one area of assessment was sufficient to meet the standard of paragraph (g).[24]
>
> [Emphasis added]

[32] The decision of the Director's Delegate also refers to *H. and Lombard General Insurance Company of Canada Limited.*[25] In that case, the Arbitrator found that a young woman, who had been injured in a car accident, had a marked impairment under one of the aspects of functioning and, on that basis, determined that she suffered a catastrophic impairment. The report makes the finding, but contains no analysis of *SABS* or the *Guides* which explains or justifies this interpretation.

[33] In summary, while there are cases which rely on the proposition that a Class 4 impairment in one of the areas of function is enough for a finding of catastrophic impairment to be made, there is nothing which is dispositive of the issue.

The Guides

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[22] *Desbiens v. Mordini, supra,* at para. 129

[23] *McMichael v. Belair Insurance Company Inc.* FSCO A02-001081, March 2, 2005, upheld on appeal (FSCO P05-0006, March 14, 2006, application for judicial review dismissed (2007), 86 O.R. (3d) 68 (Ont. Div. Ct.)

[24] *McMichael v. Belair Insurance Company Inc., supra,* as quoted in *Delegate's* Decisio,n at para. 20

[25] *Arbitrator's Decision* at para. 19 and see: *H. and Lombard General Insrance Company of Canada Limited* FSCO A06-000209, October 4, 2007 at p. 17

[34] The *Guides* are part of the legislative scheme. They provide a system for evaluating impairments that is objective and standardized:

> The major objective of the *Guides* is to define the assessment and reporting of medical impairments so that physicians can collect, describe and analyze information about impairments in accordance with a single set of standards. Two physicians, following the methods of the *Guides* to evaluate the same patient, should report similar results and reach similar conclusions. Moreover, if the clinical findings are fully described, any knowledgeable observer may check the findings with the *Guides* criteria.[26]

[35] They demonstrate a process of analysis that requires taking into account all four areas of functioning. The *Guides* point out that, as of yet, science cannot, with precision, translate impairments into functional limitations:

> Translating specific impairment directly and precisely into functional limitations, however, is complex and poorly understood; for example, current research finds little relationship between psychiatric signs and symptoms such as those identified during a mental status examination, and the ability to perform competitive work.[27]

[36] It may be that, in the future, a clearer relationship may be found:

> Eventually research may disclose direct relationships between medical findings and percentages of mental impairment. Until that time, the medical profession must refine its concepts of mental impairment, and prove its ability to measure limitations, and continue to make critical judgments.[28]

[37] At the moment, this difficulty is overcome by conducting assessments which identify and consider all four of the areas of functioning:

> To bridge the gap between impairment and disability, a group that advised the [Social Security Administration] on disability due to mental impairment identified the four categories of functional limitations discussed earlier (Section 14.3, p. 293). These categories tend to be complex social impairments that may be directly related to work or to other pursuits, such as recreation or caring for a family. Yet there is no specific medical test for any one of the categories. The physician's observations made during the medical examination should be

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[26] *Guides*, at p. 7, as quoted in *Kusnierz v. Economical Mutual Insurance Co.*, *supra*, at para. 63
[27] *Guides*, at p. 14/300
[28] Guides, at p. 14/301

> incorporated into the evaluation together with other relevant observations, including those pertaining to carrying out activities of daily living, social functioning, concentration, persistence and pace, and adaptation.[29]

[38] The consideration and possible conclusions are arrived at by weighing the interrelationship between the analysis of each of the four areas of functioning. It is not enough to look at just one:

> Taken alone a "marked" impairment would not preclude functioning, but together with marked limitation in another class, it might limit useful functioning. "Extreme" means that the impairment or limitation is not compatible with useful functioning.
>
> . . .
>
> In the ordinary individual, extreme impairment in only one class would be likely to preclude the performance of any complex task, such as the one involving recreation or work. Marked limitation in two or more spheres would be likely to preclude performing complex tasks without special support or assistance, such as that provided in a sheltered environment. An individual who was impaired to a moderate degree in all four categories of functioning would be limited in ability to carry out many, but not all, complex tasks. Mild and moderate limitations reduce overall performance but do not preclude performance.[30]

[39] The idea that marked limitation in two or more spheres or that an extreme impairment in one "would likely" preclude the performance of any complex task confirms the need to look further before any conclusion is reached. In the example included, in the *Guides*, within the outline of "A Method of Evaluating Psychiatric Impairment", the evaluator is depicted as taking into account all areas of functioning. It ends with the conclusion of the evaluator that "overall" the young woman had marked or psychiatric impairment (Class 4).[31]

Ontario Guidelines

[40] There may be aids external to legislation which will assist in coming to an understanding of its "total context":

> There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the

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[29] *Guides*, at p. 14/300
[30] *Guides*, at pp. 14/300 and 14/301
[31] *Guides*, at p. 14/302

> purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, *as well as admissible external aids*. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt the interpretation that is appropriate. An appropriate interpretation is one that can be justified. In terms of (a) its plausibility, that is, its compliance with legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.[32]
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> [Emphasis added]

[41] In this case, the Superintendent of Financial Services has issued various guidelines to be used as aids for interpreting the *SABS*. Among these guidelines are those that concern DAC and their approach to assessments. These guidelines have, from time to time, been amended or updated. DACs are no longer recognized as part of the regulatory regime. Nonetheless, as already referred to, they were operating at the material time and the guidelines provided in respect of their work do provide comment as to the assessments carried out in respect of s. 2(1.1)(g) of *SABS*. In this regard, the "Catastrophic Impairment Designated Assessment Centre Assessment Guidelines ("CAT DAC Guidelines") noted:

> Final classification of impairment due to mental and behavioural disorders, will take into consideration the four functional domains of *ADL; social functioning; concentration, persistence and pace; and work adaption,* under five levels of severity ranging from no impairment to extreme impairment. The SABS directs that catastrophic impairment is met when an individual reaches marked or extreme impairment (Class IV or Class V impairment) due to mental or behavioural disorder.[33]

[42] This supports a determination that an assessment of behavioural or mental disorders requires a consideration and accounting for all four, and not just one, of the areas of function.

Section 2(1.1)(g) of SABS

[43] The principal argument made in support of the proposition that a finding of a Class 4 impairment in only one of the four areas of function is sufficient for a finding of catastrophic

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[32] *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at 131, as quoted in *Bapoo v. Co-operators* (1997), 36 O.R. (3rd) 616, CarswellOnt 5101 (Ont. C.A.), at para. 8

[33] CAT DAC Guidelines, at p. 4-3

impairment is based on the words of s. 2(1.1)(g) of *SABS*. Where the clause refers to "*a* class 4 impairment (marked impairment) or class 5 impairment (extreme impairment)" [Emphasis added], it is referring to a single assessment, meaning an assessment in only one of the four areas of function. This is the interpretation placed on the subsection by the Director's Delegate. He finds that the word "a" in s. 2(1.1)(g) of *SABS* means "any or one single marked or extreme impairment out of the four areas of functioning, each of these specific areas being addressed in accordance with the *Guides*". [34]

[44] This ignores a consideration of the *Guides* as a whole. The *Guides* do not outline a process that is concerned with the impairment of a function, but of the life of a person as a whole. On this basis, the phrase "in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993", found in s. 2(1.1)(g) requires a finding of impairment resulting from an overall assessment of all four of the areas of functioning. Those who interpret the *Guides* cannot ignore the acknowledgement that it is difficult to translate specific impairment directly and precisely into functional limitations and that this difficulty requires a consideration of the interrelationship of all four areas of function. Understood in this way, the meaning of s. 2(1.1)(g) of *SABS* is clear. Determining catastrophic impairment based on an assessment that only takes into account one area of function is not in accordance with the *Guides.*

[45] The interpretation adopted by the Director's Delegate ignores the evidence that provides the context or the "surroundings that colour the words" of the section. From the context, we derive the legislative purpose. The Director's Delegate referred to s. 64 of the *Legislation Act, 2006*, S.O. 2006, c. 21 which states:

> An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.[35]

[46] He quotes another decision, by another arbitrator, considering s. 2 (1.1)(g) of *SABS*:

> If the provision is ambiguous and I find that it is, that ambiguity ought to be resolved, in the absence of anything pointing elsewhere, in a liberal manner having regard to the ultimate remedial purpose of the legislation.[36]

[47] Based on this, the Director's Delegate was persuaded that "narrowly interpreting the word 'a' in clause 2(1.1)(g) of the *Schedule* to mean an overall rating from all four areas of functioning noted on page 14/301 of the *Guides*, would result, contrary both to the intent and to the plain wording of the *Schedule*, in an unjust or unacceptable result of depriving much needed

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[34] *Delegate's Decision*, at para. 33
[35] *Delegate's Decision*, at para. 37
[36] *McMichael v. Belair Insurance Company Inc., supra*, at para. 177, as quoted in *Delegate's Decision* at para. 36

enhanced health care benefits to accident victims most likely in the greatest need".[37] I begin by observing that it is inconsistent to justify resolving an ambiguity because, to do otherwise, would be contrary to the "plain wording" of the provision. Either it is ambiguous or it is plainly worded; it cannot be both. The substantive problem is that this determination does not account for the objects of the legislation. It only considers one of them and does not have regard for the remedial purpose of the legislation. "Remedial" means intended as a remedy. In this situation, the problem being remedied is not just to provide benefits, but to do so in a manner that accounts for the impact the provision of those benefits will have on the cost of insurance to the general public. This is not the interpretation of an insurance contract where ambiguity is resolved in favour of the insured (*contra proferentem*). It is identification of the purpose of the legislation and the interpretation of the legislation in a manner that bears that purpose in mind.

[48] This problem is underscored by the determination of the Director's Delegate that a requirement to consider all four areas of function would end in a result that was "unjust and unacceptable." If we do not accept a Class 4 assessment in one area of function as a "catastrophic impairment", we are depriving victims "most likely in the greatest need". There is no objective support for this assertion. There is no data or analysis provided as to how or why an assessment that requires a consideration of all four areas of function would deprive any of a class defined as being those "in the greatest need". The assertion is simply what the Director's Delegate believes is right. To me, this is the imposition of a moral absolute. Unhappily, it is not so easy to balance who will receive these additional benefits against the cost.

[49] In *Kusnierz v. Economical Mutual Insurance Co.*, *supra*, the judge observed that, while the legislation was aimed at reducing no-fault benefits with savings going to stabilize insurance premiums, an exception was made for people who were catastrophically impaired. Their no-fault benefits were maintained and they were provided the right to sue for damages in excess of the maximum no-fault benefits. This led him to conclude that a purpose of the legislative scheme was to ensure that the victims most in need would be able to recover healthcare expenses.[38] This may be so, but it does not reduce the need to determine who are the victims most in need, (in other words, who fits the definition of catastrophically impaired), and to bear in mind the overall context of the legislation in arriving at that determination. It is not appropriate to simply opt for the more expansive or more inclusive definition.

[50] The Director's Delegate failed to properly appreciate the effect of the incorporation of the *Guides* into *SABS*. The effect has been explained in the following way:

> …Legislation by reference…has been consistently construed not to be ambulatory in its effect, but to incorporate the extrinsic law as at the date of the Act that is being construed, and to be unaffected by subsequent change of the law

[37] *Delegate's Decision*, at para. 38
[38] *Kusnierz v. Economical Mutual Insurance Co, supra*, at para. 40

> incorporated: [citations omitted] the effect of such legislation is as though the extrinsic law referred to was written right into the Act.[39]

[51] Rather than adhere to this understanding of the use of the *Guides*, the Director's Delegate treated it as free-standing text to be re-interpreted, independent of its origins, to suit a separate and distinct Ontario model for the treatment of catastrophic impairments. He adopted the words of another arbitrator in another case:

> Whatever the original creators may have intended when they developed the AMA Guides, the Guides, as included in the *Statutory Accident Benefits Schedule* have developed a life of their own, independent of the wishes and opinions of their creators.[40]

[52] In other words, contrary to the admonishment in the explanation referred to above, the Director's Delegate treats the *Guides* as "ambulatory" – that is, he treats them as if they were moved to the *SABS* without reference to where they came from. On this basis, he rejected the evidence of witnesses who could have provided insight as to the *Guides* as at the date of the promulgation of *SABS*. He accepted the following:

> Thus, the Respondent argues that the testimony of the Appellant's experts… regarding the *Guides* was provided in a vacuum and that they do not offer authoritative insights into the interpretation of catastrophic impairment in Ontario.[41]

[53] The interpretation of the *Guides* was undertaken, by the Director's Delegate, as if it bore no relationship to, and was independent of, the document that was incorporated into *SABS*. This perspective allowed the Director's Delegate to see the *Guides* as inherently inconsistent with *SABS* rather than as part of it:

> …to put it in other words, one might consider the [SABS] and the *Insurance Act* as a 'round stick,' the *Guides* as a 'square hole.' To the extent that the former does not dovetail with the latter, it is the latter that must adapt and be harmonized with the legislation.[42]

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[39] *R. v. Collins* (2000), 148 C.C.C. (3d) 308 (B.C.C.A.), at para. 20, as quoted in *Desbiens v. Mordini*, *supra*, at para. 227.
[40] *Augello and Economical Mutual Insurance Company* (FSCO A07-001204 at p. 14, December 18, 2008), as quoted in *Delegate's Decision*, at para. 27
[41] *Delegate's Decision*, at para. 28
[42] *Delegate's Decision*, at para. 39 at point 2

[54] Where the *Guides* were inconsistent with the purpose of the legislation *as he perceived it*, (that is to say, without concern for the impact on premiums) the Director's Delegate did not feel bound to find an interpretation which harmonized the words of the *Guides* with the words of the *SABS*. On this basis, he felt free to set aside the example found in the *Guides* when he determined that what was required for an assessment of a catastrophic impairment was a Class 4 impairment in only one of the four areas of function found in the *Guides*:

> That the *Guides* provide an example where an overall impairment rating is given does not mandate that the legislature intended the word 'a' in clause 2(1.1)(g) of the [SABS] to mean an overall impairment rating.[43]

[55] In the result, the Director's Delegate was able to and did set aside any words found in the *Guides* that suggest or point to the idea that an assessment of a catastrophic impairment requires a consideration of all four of the areas of function. With this approach, these words were not a part of the analysis which led the Director's Delegate to conclude that the word "a", as it appears in the phrase "results in 'a' class 4 impairment (marked impairment)", as found in s. 2(1.1)(g) of *SABS*, meant an impairment in only one of the four areas of function.

[56] The Director's Delegate also failed to take into account the guidelines published by the Province of Ontario as external aids to understanding the *Guides.* He accepted that the Arbitrator was correct when she found that "she was not bound by the CAT DAC Guidelines"[44]. The Arbitrator, in her decision, said:

> The Superintendent's Guidelines ('CAT DAC Guidelines') for undertaking catastrophic DAC assessments are clear in dictating that two marked impairments are required to render a catastrophic determination under the (g) criterion. I find that they are merely guidelines and as an assessment tool for clinicians, however they are not incorporated into the legislation. As such, I am not bound by this protocol. [FN 61][45]

[57] Acknowledging that these Guidelines point to an understanding that a finding of a Class 4 impairment in only one of the areas of function is insufficient to comply with s. 2(1.1)(g) of *SABS* and dispensing with it because it is not binding is to ignore any assistance the Guidelines may provide in understanding the context and purpose of the legislation including the *Guides*.

[58] In fairness, I should observe that the Arbitrator went on to say:

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[43] *Delegate's Decision*, at para. 39 at point 2
[44] *Delegate's Decision*, at para. 30
[45] *Arbitrator's Decision*, at para. 115

> Further, both *Desbiens* and *McMichael* note that the CAT DAC Guidelines used in undertaking catastrophic DAC assessments likely misinterpret the terminology in clause (g) of the [SABS] when they indicate that at least two (Class 4) marked impairments are required.[46]

[59] As referred to above in the first of these cases (*Desbiens*), the issue of whether a Class 4 impairment in any one of the areas of function was enough to meet the requirements of s. 2(1.1)(g) was not disputed and the second (*McMichael*) recognized that, in the first, the issue was not decided.

[60] The *Guides* are incorporated into *SABS* and must be treated as part of the legislative scheme. A plain reading of the words in s. 2(1.1)(g) of *SABS*, specifically bearing in mind the context and purpose of the legislation and taking into account the CAT DAC Guidelines make clear that all four of the areas of function are to be accounted for in an assessment of catastrophic impairment.

[61] This is not to say that there cannot be a finding of catastrophic impairment that is dominated by the assessment of one of the four areas of function. The requirement is that all four must be considered in undertaking the assessment. The *Guides* do not say when an assessment leads to a determination of a catastrophic impairment. What they do is to lay out a process for a proper assessment. The process requires accounting for all four areas of function.

[62] The difficulty is that the conclusions arrived at in this case do not reflect a taking into account of all four areas of functioning. Each of the DAC, the Arbitrator and Director's Delegate relied on the Class 4 finding in respect of ADL as the basis for finding a catastrophic impairment. The DAC assessors did this in the face of finding Class 3 impairments in each of the three other areas of function.[47] They did this, not by considering or accounting for the interrelationship between the four, but because "according to the *Desbiens* and *McMichael* decisions", a Class 4 finding in only one of the areas of function was sufficient. In fact, the DAC team concluded that the scores across the four areas yielded an overall impairment due to mental or behavioural disorder of only Class 3. The Arbitrator accepted that ADL was the only area in which Anna Pastore suffered from a Class 4 impairment and, for that reason, is the only one of the four reviewed in her decision.[48] Again, there is no weighing of the relationship between each of the areas being assessed. For his part, the Director's Delegate was not persuaded that the Arbitrator erred in law in finding that Anna Pastore required a Class 4 (marked impairment) in only one of the areas of functioning to be found to be suffering a "catastrophic impairment".[49] In

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[46] *Arbitrator's Decision*, at para. 115
[47] DAC Catastrophic Impairment Report, at pp. 5 and 67
[48] *Arbitrator's Decision*, at para. 92
[49] *Delegate's Decision*, at para. 41

each of these decisions, there has been no consideration of the substance of the assessment beyond the finding that Anna Pastore has a Class 4 impairment in respect of ADL.

[63] I am confirmed in this conclusion by a further submission made by the applicant and those supporting its position. They submitted that to accept that a Class 4 impairment in only one of the four areas of function was enough to find a catastrophic impairment leads to an illogical result. This is based on the following set of propositions that arise from the decisions of the Arbitrator and the Director's Delegate:

> (1) The Arbitrator reviewed the physical impairments suffered by Anna Pastore and found that, by themselves, they were not catastrophic.
>
> (2) The Arbitrator considered whether Anna Pastore satisfied s. 2(1.1)(f) of *SABS*, another of the seven definitions of a catastrophic impairment . To do this, the Arbitrator combined the physical and psychological impairments of Anna Pastore and found that the they were not catastrophic, and yet when;
>
> (3) The Arbitrator considered the psychological impairments of Anna Pastore by themselves, Anna Pastore was found to be catastrophically impaired.

[64] The decision of the Director's Delegate answers this seeming lack of logic by pointing out that each of the provisions under s. 2(1.1) of *SABS* "are to be considered independently when determining catastrophic impairment…".[50] Legislation is to be read as a whole. Section 2(1.1)(f) of *SABS* states:

> (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

[65] The reason for the inconsistency is self-evident. The section refers to the "impairment of the whole person". If s. 2(1.1)(g) of *SABS* requires a Class 4 impairment of only one of the four areas of function, then a partial examination of impairment of the person is all that is required to assess an impairment based on mental or behavioural disorder . It is hardly surprising that, in these circumstances, the sort of result pointed to by the applicant would occur. On the other hand, if a comprehensive examination of all four areas of function contributing to an impairment under s. 2(1.1)(g) is required, it is less likely such a result would occur. It is only sensible that the assessments would be required to take place on a similar foundation leading to consistent and rational results.

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[50] *Delegate's Decision*, at para. 23

Standard of Review: Issue (1)

[66] In substance, the decision of the Director's Delegate failed to have regard for the tools the law provides to come to an understanding of the meaning of s. 2(1.1)(g) of *SABS*. This has led to a decision that is not based on the law or legal principle, but on his conception of a just result. This is an error of law and attracts a standard of review of correctness. If I am wrong in this, it does not matter. A decision which fails to properly account for the applicable legal principles lacks the "justification, transparency and intelligibility" required for a decision to meet the test of reasonableness as outlined in *Dunsmuir v. New Brunswick.* To put it differently, how is it possible to know if the decision "falls within a range of possible acceptable outcomes" if the legal principles to be relied on in coming to the result are not utilized?[51]

Conclusion: Issue (1)

[67] On this basis, I find that the decision of the Director's Delegate must be set aside. It failed to take into account all four of the areas of function identified in the *Guides*.

2) Should an impairment assessment under s. 2(1.1)(g) of *SABS* distinguish and exclude impairments that are due to physical injuries from an assessment of impairments that are due to mental or behavioural disorder?

[68] In finding that Anna Pastore suffered from a catastrophic impairment in respect of ADL, the DAC, the Arbitrator and the Director's Delegate did not consider only the pain associated with mental or behavioural disorder. They included pain that was associated with, or was a symptom of, the physical injuries suffered by Anna Pastore. They concluded that it was not possible to separate the two:

> "…it is not possible to *factor out* the impact of impairment and associated pain limitations, and that any impairment rating should incorporate both on a 'cumulative basis' ".[52]

[69] The applicant submitted that this is not "in accordance with" the *Guides,* as is required by *SABS*. In making this submission, counsel for the applicant referred to the *Guides*:

> Establishing that the pain is or is not a symptom of a mental impairment may be a difficult and complex task. Pain that presents only as a symptom of a mental disorder is rare. The following guidelines may be useful in determining whether

[51] *Dunsmuir v. New Brunswick, supra,* at para. 47
[52] DAC Catastrophic Impairment Report, at p. 66; *Arbitrator's Decision,* at para. 111; and *Delegate's Decision*, at paras. 50 and 70

> pain is a symptom of a mental impairment. (1) All possible somatic causes of the pain have been eliminated by careful, comprehensive medical examinations. (2) Some significant emotional stressor has occurred in the patient's life that may have acted as a triggering agent, and the stressor and the pain had occurred in a reasonable sequence. (3) Evidence exists of a mental disorder other than a conversion-related one, and the pain may be a symptom of the former; for example, delusional pain may occur in a patient who has a subtle paranoid disorder.[53]

[70] With these words, the *Guides* acknowledge the difficulty in separating out pain that is a symptom of a mental impairment and provides a suggested analytical process. The first step is to separate out somatic pain (pain related to the body especially as distinct from the mind[54]) through complete medical examinations.

[71] Counsel for the applicant suggested that including the contribution of pain from a physical impairment in an assessment of impairment due to mental or behavioural disorder could only increase the severity of impairment that an assessor would find. In this case, if pain that is a symptom of the physical injury is not considered as part of the analysis, the level of impairment found as a result of the assessment would be reduced. It could be that such an assessment of the mental or behavioural disorder would not result in a Class 4 impairment in respect of ADL; it could be reduced to a Class 3 impairment. If this were the case, Anna Pastore would not have been found to have a "catastrophic impairment".

[72] The *Guides* go on to point out how the overall assessment should be undertaken:

> Assessing impairment related to pain is difficult, and the process is not as clearly and precisely defined as with some kind of impairments. Therefore, determinations about difficult and borderline cases in this category should be made through a multidisciplinary, multispecialty approach, in which physicians who are knowledgeable about the different body systems are involved as needed.[55]

[73] This is the kind of assessment intended to be done by a DAC. In this case, the DAC did not undertake the analysis. It determined that it was not possible to separate the pain which was a symptom of the physical injury from pain that was associated with mental or behavioural disorder. It is the view of counsel for the applicant that this cannot be in accordance with the *Guides* because it fails to do what the *Guides* require.

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[53] *Guides*, at pp. 14/297-298
[54] *The Concise Oxford Dictionary, Ninth Edition* Clarendon Press, Oxford 1995
[55] *Guides*, at p. 14/298

[74] The Arbitrator understood that pain, as a symptom of mental disorder, could be seen as a distinct consideration:

> Chapter 14 of the *Guides* directs that in assessing impairment, any limitation with respect to activities of daily living should be related to the mental disorder. The clinician is directed to determine the impact of the mental condition on 'normal life activities.' … *I do not interpret this as requiring a complete separation of physical and mental impairments* nor do I think it is possible when you are considering an impairment that involves pain. The appropriate focus should be on how the mental part of an overall condition or impairment impacts the various spheres of function. The experience of pain and a diagnosis of Pain Disorder falls properly within this examination.[56]
>
> [Emphasis added]

[75] In the end, the analysis of the Arbitrator included the impact of pain as a symptom of physical injury as contributing to her analysis of impairment due to mental or behavioural disorder. She considered pain in the context of its effect on the person as a whole. The Arbitrator found that the impairment of Anna Pastore "has both a physical and mental component – it is complex with intertwined psychological and physical elements"[57]

[76] In other circumstances, this may be an appropriate approach. For example, it may or may not apply to an analysis under s. 2(1.1)(f) of *SABS*, which is another of the seven definitions of "catastrophic impairment".[58] It refers to "combination of impairments" and to "impairment of the whole person". What an approach which combines the physical and mental components does not do is fall within the requirements of s. 2(1.1)(g) of *SABS*, which defines impairment "due to mental or behavioural disorder". Such an approach ignores the process outlined in the *Guides.*[59]

[77] The Director's Delegate understood the issue. He observed:

> It is not disputed that the Respondent suffers a marked impairment in the sphere of activities of daily living. The dispute is whether this sphere of marked impairment is 'due to mental or behavioural disorder,' …[60]

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[56] *Arbitrator's Decision*, at para. 103
[57] *Arbitrator's Decision*, at para. 104
[58] *Desbiens v. Mordini, supra*, at para. 22, where physical and mental components were combined in considering s. 2 (1.1)(f); and, *Kusnierz v. Economical Mutual Insurance Co., supra*, at para. 68, where they were not.
[59] See: paras. [69] and [72], above
[60] *Delegate's Decision*, at para. 58

[78] He found that Anna Pastore met the statutory definition of “catastrophic impairment” and that the ruling of the Arbitrator “must stand”. He was not persuaded that the Arbitrator erred in law in her conclusion.[61]

[79] In coming to this decision, the Director’s Delegate examined the words of s. 2(1.1)(g) of *SABS*. He examined the import of the words “due to mental or behavioural disorder”. He was not persuaded that, in using these words, the Legislature meant to refer “solely” to psychological impairment or that “disorder” was used interchangeably with the word “impairment”.[62] The subsection is clear. It deals with “an impairment…due to mental or behavioural disorder”. The absence of the word "solely” cannot be used to extend its meaning to include other basis of impairment and, so far as I can see, there is no confusion arising from the use of the words “disorder” and “impairment”.

[80] The Director’s Delegate applied the "but for" or the "material contribution" tests as demonstrating the presence of a Class 4 impairment. "But for" Anna Pastore’s impairments due to mental or behavioural disorder, there would have been no Class 4 impairment. Accordingly, her mental or behavioural disorder was the cause of the Class 4 impairment. This is a test of causation used in the law of negligence. It was not relevant to the issue before the Director's Delegate. In the circumstances of this case, we are not concerned with what caused there to be a Class 4 impairment. The issue is whether there is such an impairment, as it is defined by *SABS*, in this case by s. 2(1.1)(g) of *SABS*, which incorporates the *Guides*. As with the Arbitrator, the decision of the Director's Delegate fails to account for the *Guides* and the process it contains.

[81] The problem remains that both the Arbitrator and the Director's Delegate failed to understand the significance of the incorporation of the *Guides* into *SABS*. They are not simply words included in the definition of catastrophic impairment to be interpreted as if they had no prior context. They are incorporated with the background and meaning they had on the date of the passage or promulgation of the legislative instrument they are part of.[63]

[82] The *Guides* direct a process that separates pain associated with physical injury from that associated with mental or behavioural disorders. The fact that, in any given case, an assessor may find this difficult or even impossible does not allow for this requirement to be ignored if there is to be a finding of "catastrophic impairment" as defined by s. 2(1.1)(g) of *SABS*. This is not a medical issue, but a statutory one:

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[61] *Delegate’s Decision*, at paras 69 and 70
[62] *Delegate’s Decision*, at paras 56, 58 and 61
[63] See: para. [50] above, where it is said: “Legislation by reference…has been consistently construed not to be ambulatory in its effect, but to incorporate the extrinsic law as at the date of the Act that is being construed…”

> Any notion of catastrophic injury, other than the specific meaning ascribed to that term by the legislation must be discarded when considering whether claimant meets the statutory test. The statutory scheme creates a bright line rule which is relatively easy to apply. This enhances the ability of those looking to the definition to know what injuries will and will not be considered catastrophic.[64]

[83] As it is in this case, there was evidence from a doctor who had been involved in the creation of the *Guides*, who had had reviewed close to a thousand and conducted over four hundred assessments under the *Guides* and who carried out an assessment of the impairment suffered by Anna Pastore. This assessment removed the layer of physical impairment and assessed only mental and behavioural impairments.[65] It was rejected by the Arbitrator because the impairment of Anna Pastore has both a physical and mental component. It was rejected by the Director's Delegate, in part, because the witness "could not offer authoritative insights into the interpretation of catastrophic impairment in Ontario".[66] In coming to these determinations, the Arbitrator has failed to account for the direction in the *Guides* and the Director's Delegate has failed to consider evidence that could have explained the background and context of the document as it was incorporated into *SABS*. They have both failed to understand the effect of the incorporation of the *Guides* into *SABS*. It is part of the legislation, to be interpreted as such.

[84] The Director's Delegate did say that the findings as to the impairment suffered by Anna Pastore were findings of fact.[67] Even if correct, this does not affect the decision in this case. The question is not the impairment suffered but whether, as determined, it demonstrates a "catastrophic impairment" as defined by s. 2(1.1)(g) of *SABS*. The definition concerns impairment "due to mental or behavioural disorder". Whether an assessment of impairment, pursuant to s. 2(1.1)(g), can consider pain which is a symptom of a physical injury is a question of law.

Standard of Review: Issue 2

[85] No administrative decision-maker is left free to act outside the provisions of the legislation that provides its authority. Where the Director's Delegate made a finding of a catastrophic impairment, under s. 2(1.1)(g) of *SABS*, which relies, in part, on pain which is a symptom of physical injury, he acted outside the mandate of the subsection. This is outside his jurisdiction. In such circumstances, it is not necessary to consider the standard of review.

[86] If this is incorrect, it would have no impact on this decision. *SABS* is part of the legislative scheme which bears directly on the decision taken by the Director's Delegate. There

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[64] *Liu v. 1226071 Ontario Inc.* (2009), 2009 CarswellOnt 4166, 97 O.R. (3d) 95, at para. 30
[65] *Arbitrator's Decision*, at para. 102
[66] *Delegate's Decision*, at para. 28
[67] *Delegate's Decision*, at para. 65

is no privative clause, but this is a discrete and special administrative regime. While there appears to be no qualification, in the *Insurance Act* or *SABS*, as to who the Director may delegate to consider an appeal from an arbitrator, for the purpose of this decision, there is no reason to assume that the Director's Delegate was anything other than experienced in these matters. In such circumstances, the standard of review is reasonableness. Deference would be owed. Deference does not require the court to show blind reverence to the interpretation found in or represented by the decision under review. In this case, it would not be reasonable to allow for the introduction of a consideration not recognized by s. 2(1.1)(g), particularly where the *Guides*, which is incorporated into *SABS*, direct a process which envisages the exclusion of it. To put it in terms expressed in *Dunsmuir*, in such circumstances, there is no range of "possible acceptable outcomes" which would include a consideration of pain that is a symptom of the physical injury suffered by Anna Pastore in determining whether there is a catastrophic impairment due to mental or behavioural disorder.

Conclusion: Issue 2

[87] On this basis, I find that the decision of the Director's Delegate must be set aside. The determination that Anna Pastore suffered a Class 4 impairment in respect of ADL improperly considered pain associated with her physical injuries.

Disposition

[88] The application for judicial review is granted. The decision of the Director's Delegate is set aside, but without prejudice to the matter being re-heard by a different Director's Delegate or, if appropriate, a fresh application being made by Anna Pastore seeking a determination that she is catastrophically impaired.

Costs

[89] No submissions were made as to costs. If the parties are unable to agree, brief written submissions should be provided on the following basis:

1. By Aviva Canada Inc. and the Insurance Bureau of Canada Inc., no later than fifteen days after the receipt of these reasons.

2. By Anna Pastore, the Financial Services Commission of Ontario and the Ontario Trial Lawyers Association, no later than ten days thereafter.

3. By Aviva Canada Inc. and the Insurance Bureau of Canada Inc., in reply, no later than five days thereafter.

CUNNINGHAM, A.C.J.S.C.

LEDERER J.

MATLOW, J. (Concurring, in part):

[90] I agree with the disposition proposed by Justice Lederer but only for the reasons given by him with respect to issue #2. They, alone, are fatal to the survival of the Delegate's disposition. I respectfully do not agree with his reasons in relation to issue #1. What follows, therefore, relates only to issue #1.

[91] **The decision under review in this** application is that of a delegate of the Director of Arbitrations (the "Delegate") upholding an arbitrator's decision that Ms Pastore qualified as a person who had suffered "catastrophic impairment" and therefore was entitled to receive no-fault accident benefits at a greater level than if she had not qualified.

[92] I am persuaded that, in upholding the arbitrator's decision, the Delegate was correct in his analysis and disposition of the legal issues engaged in relation to issue #1 but not in relation to issue #2. His decision, therefore, failed to pass the standard of review and must be set aside.

[93] I adopt the Delegate's reasons on the issues of law that he addressed in relation to issue #1 as if they were my own. At the risk of repeating some of what he said, I add the following. From this point on my reference to the Delegate's decision is meant to refer to his decision only in relation to issue #1.

[94] The starting point for an analysis of the Delegate's decision must begin with a careful reading of the Schedule that sets out various definitions of "catastrophic impairment". The definition in issue in this case is set out in section 2 (1.1)(g) quoted above in paragraph 4. I agree that, by reason of the inclusion of "a" in the definition, the plain and ordinary meaning of the definition requires only one finding of a class 4 (marked impairment) or one finding of a class 5 impairment (extreme impairment) to qualify an impairment as a catastrophic impairment.

[95] I find nothing in the Guides that requires more than such a single finding. Nor is there any requirement in the Guides that every assessment allot a mental impairment class number to each of the four areas of functional limitations before an impairment can be found to qualify. Accordingly, once such a finding is made, there would be no point in continuing with the assessment to consider other functional limitations.

[96] The term, "catastrophic impairment", is not a medical term, but one used in a "rough" process intended to identify claimants who are entitled to enhanced no-fault benefits on the basis of criteria which can be applied, more or less, in a fair and consistent manner, with some level of objectivity and with a likely saving in cost to the insurers. It would probably not be inaccurate to call it an "insurance" term. It is part of a process premised on the assumption that most, but not all, claimants who qualify for designation likely have suffered a serious impairment, albeit not necessarily catastrophic in the vernacular sense, and are deserving of the higher level of benefits. The process has some similarity to the no-fault rules that are used to determine liability among insurers for property damage in cases involving motor vehicles.

[97] I respectfully disagree with the statement made by Justice Lederer in paragraph 16, above, and elsewhere in his reasons, that the Guides are "part of the legislation " and "an integral part of the regulation". They are guidelines, no more and no less.

[98] In my view, although the Schedule requires that assessments of impairments be done in accordance with the Guides, the Guides themselves do not become part of any legislation. This is so despite the fact that the Guides have been adopted, in the Schedule, by reference under the authority of the Insurance Act. The Guides are meant primarily for doctors and other health care professionals and contain methodology, recommendations and suggestions. They do not, however, contain rules or other mandatory requirements that could conceivably be incorporated as part of the law. They are referred to in the Schedule for a limited purpose only.

[99] The Schedule, on the other hand, has the status of a regulation enacted pursuant to the Insurance Act and is, unquestionably, part of the legislation.

[100] Accordingly, even if the Guides were to contain a provision that purported to require, or interpreted the Schedule to require, that something more than "a class 4 impairment or a class 5 impairment were required to establish a "catastrophic impairment", it would be of no effect.

[101] In the alternative, even if the Guides were part of the legislation, they would be subordinate to the Schedule and the same result would follow.

[102] An informative article dealing with the SABS scheme, including the Guides, entitled, "The Catastrophic Threshhold: Where It Is And Where It Soon May Be", by Jennifer Griffiths was recently published in The Advocates' Quarterly (of which I am the editor) at (2011), 38 Adv. Q. 45. It contains a useful review of recent cases, including this one, both at the FSCO and before the courts. Reference is made by the author to the judgment of Lax, J. in *Snushall v. Fulsang,* [2003] O.J. No.149 in which the history and the origin of the Guides are set out. The following are some partial excerpts taken from her judgment.

> The AMA Guides
>
> 12 The AMA Guides originated in 1958 as a compilation of articles when the American Medical Association struck a committee on the rating of physical impairment. Over the next thirteen years, that committee and several subcommittees prepared papers on the evaluation of impairments for different body systems. The individual work products of the committees were published as thirteen separate articles and ultimately collected in 1971 as the first edition of the Guides to the Evaluation of Permanent Impairment. Subsequent revisions led to the second edition in 1984, the third edition in 1990, the fourth edition in 1993 and the fifth edition in 2000. Although the fifth edition of the Guides is the most current, the Regulation requires that whole person impairment of 55% or more be determined in accordance with the Guides fourth edition, published in 1993.

> 13 The Regulation permits reference to the categories of catastrophic impairment that incorporate the Guides only if the injured person's condition has plateaued. It is necessary that a health practitioner certify that the injured person's condition has stabilized and is not likely to improve with treatment or that three years have elapsed since the accident. This is, in effect, a statutory definition of permanent impairment and is consistent with the Guides, which is used only for permanent impairments.
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> 14 Chapters 1 and 2 of the Guides provide background and introductory material on impairment, a methodology for medical assessments, and rules for the evaluation and reporting of permanent impairment. Eleven chapters follow this and each describes a particular body system. Chapter 14 deals with Mental and Behavioural Disorders and is relevant to the determination of catastrophic impairment under s. 5(1)(g) of the Regulation, but was not in issue in this case. Finally, Chapter 15 addresses impairments relating to pain.

[103] Section 17.7 of the Guides is headed “A Method of Evaluating Psychiatric Impairment”. The following excerpts from the discussion in this section provide important insight into what the Guides say they are intended to be.

> Medically determinable impairments in thinking, affect, intelligence, perception, judgment, and behavior are assessed by direct observation, for mental-status examination, and neuropsychological testing. Translating specific impairments directly and precisely into functional limitations, however, is complex and poorly understood, for example, current research finds little relationship between psychiatric signs and symptoms such as those identified during a mental status examination, and the ability to perform competitive work.
>
> To bridge the gap between impairments and disability, the group that advised the SSA on disability due to mental impairment identified the four categories of functional limitations discussed earlier (Section 14.3 p. 293). These categories tend to be complex social impairments that may be directly related to work or to other pursuits, such as recreation or caring for a family. Yet there is no specific medical test for any one on these categories. The physician’s observations made during the medical examination should be incorporated into the evaluation together with other relevant observations, including those pertaining to carrying out activities of daily living, social functioning, concentration, persistence and pace, and adaptation.
>
> ……
>
> In the ordinary individual, extreme impairment in only one class would be likely to preclude the performance of any complex task, such as one involving recreation or work. Marked limitation in two or more spheres would be likely to preclude performing complex tasks without special support or assistance, such as that provided in a sheltered environment. An individual who was impaired to a moderate degree in all four categories

> of functioning would be limited in ability to carry out many, but not all, complex tasks. Mild and moderate limitations reduce overall performance but do not preclude performance.

[104] There is no claim within the Guidelines that they are, or were ever intended to be, part of any legislation.

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MATLOW, J.

Released: 201105

CITATION: Aviva Canada Inc. v. Ontario Trial Lawyers Assoc., 2011 ONSC 2164
DIVISIONAL COURT FILE NO.: 455/10
DATE: 20110513

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

CUNNINGHAM, A.C.J.S.C., MATLOW & LEDERER JJ.

BETWEEN:

AVIVA CANADA INC.

Applicant

– and –

ANNA PASTORE and
FINANCIAL SERVICES COMMISSION OF ONTARIO

Respondents

- and –

THE ONTARIO TRIAL LAWYERS ASSOCIATION and INSURANCE BUREAU OF CANADA

Interveners

JUDGMENT

LEDERER J.

Released: 20110513

CITATION: Aviva Canada Inc. v. Ontario Trial Lawyers Association, 2011 ONSC 2164
DIVISIONAL COURT FILE NO.: 455/10
DATE: 20110621

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

CUNNINGHAM, A.C.J.S.C., MATLOW & LEDERER JJ.

BETWEEN:	
AVIVA CANADA INC. Applicant	*Robert H. Rogers* & *Kevin H. Griffiths*, for the Applicant
– and –	
ANNA PASTORE and FINANCIAL SERVICES COMMISSION OF ONTARIO Respondents	*Joseph Campisi Jr.*, for the Respondent, Anna Pastore *Robert Conway*, for the Respondent, Financial Services Commission of Ontario
- and -	
THE ONTARIO TRIAL LAWYERS ASSOCIATION and INSURANCE BUREAU OF CANADA Intervenors	*James L. Vigmond* & *Brian M. Cameron*, for the Intervenor, The Ontario Trial Lawyers Association *Lee Samis*, for the Intervenor, Insurance Bureau of Canada
	HEARD: February 23, 2011

ADDENDUM

LEDERER J.:

[105] Since the release of this decision, counsel has pointed out that there is an oversight. In paragraph 86, it is suggested that there is no privative clause that applies to the decision made by the Director's Delegate. Counsel has referred the court to s. 20 of the *Insurance Act,* R.S.O. 1990 c. I.8, which states:

> **20.** (1) This section applies with respect to proceedings under this Act before the Tribunal, the Superintendent and the Director and before an arbitrator. R.S.O. 1990, c. I.8, s. 20(1); 1997, c. 28, s. 77.
>
> (2) A person referred to in subsection (1) has exclusive jurisdiction to exercise the powers conferred upon him or her under this Act and to determine all questions of fact or law that arise in any proceeding before him or her and, unless an appeal is provided under this Act, his or her decision thereon is final and conclusive for all purposes.
>
> (3) An application for judicial review and any appeal from an order of the court on the application does not stay the decision made under this Act.
>
> (4) Despite subsection (3), a judge of the court to which the application is made or a subsequent appeal is taken may grant a stay until the disposition of the judicial review or appeal. R.S.O. 1990, c. I.8, s. 20(2-4).

[106] This section is a privative clause, but it has no impact on the decision in this case. It does not reflect on the substance of the answers to the two principle issues the court was asked to consider:

> 1) Is a Class 4 (marked impairment) in only one area of functioning sufficient for a catastrophic impairment designation?
>
> 2) Should an impairment assessment under s. 2(1.1)(g) of *SABS* distinguish and exclude impairments that are due to physical injuries from impairments that are due to mental or behavioural disorder?

[107] Moreover, it does not impact on the court's consideration of the standard of review. The finding of the court is that the applicable standard of review, for the first of these questions, was correctness, as the Director's Delegate had ignored the applicable law and based his decision on what he believed was a just result. For the second question, the court found that, as the Director's Delegate acted outside his jurisdiction, it is not necessary to consider the standard of review. The presence of a privative clause would not affect these findings.

[108] In any event, the decision considers what the outcome would be if the applicable standard was reasonableness. It does not change. The decisions of the Director's Delegate failed to meet the test of reasonableness as outlined in *Dunsmuir v. New Bunswick.*[68]

CUNNINGHAM, A.C.J.S.C.

LEDERER J.

Released: 20110621

[68] [2008] 1 S.C.R. 190 at para. 47

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CUNNINGHAM, A.C.J.S.C., MATLOW & LEDERER JJ.

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– and –

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ADDENDUM

LEDERER J.

Released: 201106 21