

## **Accident Benefits Catastrophic Impairment *Kusnierz v. Economical Insurance:* New Case Respecting 2(1.1)(f) and (g)**

On October 19, 2010, the Superior Court released the *Kusnierz* decision which, among other things, dealt at length with the long-disputed issue of whether multi-disciplinary assessment teams who assess catastrophic impairment can combine clause 2(1.1)(f) with clause 2(1.1)(g) under the definition of catastrophic impairment outlined in the *SABS*.

The Plaintiff was involved in a serious accident on December 24, 2001. He applied for and was denied catastrophic designation. He initiated a claim, which among other things, sought a declaration that he sustained a catastrophic impairment. Justice Lauwers made a finding that the American Medical Association Guide to the Evaluation of Permanent Impairment (Fourth Edition) does not permit the combination of mental and behavioural impairments with physical impairments. More specifically, the court concluded that there was a clear distinction between mental and behavioural disorders referred to in Chapter 14 of the *Guide*, to which clause 2(1.1)(g) of the *SABS* specifically refers, and physical impairments assessed under the other Chapters of the *Guide*, to which clause 2 (1.1)(f) refers. The Court reasoned that:

- The impairments addressing mental and behavioural disorders are separately and specifically referred to in clause 2(1.1)(g) of the *SABS*.
- Chapter 14 of the AMA *Guide* does not permit an assessor to assign a percentage rating to mental and behavioural impairments.
- The AMA *Guide* is incorporated into the regulation and where there are no provisions in the regulation, the *Guide* takes precedent.
- The categories listed that qualify as catastrophic impairment under clause 2(1.1) are very serious and would, by their nature, be relatively rare. The Court found there was no indication of legislative intent that the list be expanded by the exercise of discretion to combine 2(1.1)(f) with (g).
- The definition of catastrophic impairment outlined to Section 2(1.1) has the word “or” between clauses 2(1.1)(f) and (g), not “and”.
- The Court also concluded that if the legislature wanted the mental or behavioural impairments contemplated by clause 2(1.1)(g) to be combinable with the impairments to be assessed under clause 2(1.1)(f), it would have been easy to say so clearly.

This decision suggests that clauses (f) and (g) cannot be combined which has been the practice in multidisciplinary CAT assessments since the release of the *Desbiens* decision. We are now left with conflicting case law. The Plaintiff, Mr. Kusnierz has filed a Notice of Appeal and this matter will be heard before the Court of Appeal for Ontario, likely in 2011. Dutton Brock will keep you up to date on this decision.

*If you would like more information on motor vehicle insurance, please do not hesitate to call.*

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