

# Accident Benefit

## REPORTER

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## From a 1% Whole Person Impairment CAT DAC to a 79% Whole Person Impairment at Arbitration



**David A. Payne**  
Partner • Thomson, Rogers

*H. v. Lombard General Insurance [2007] F.S.C.O. File #A06-000209 (released October 4, 2007)*

In order to obtain access to enhanced no-fault benefits, including up to \$1,000,000.00 in attendant care benefits and \$1,000,000.00 in medical and rehabilitation benefits, a person injured in a motor vehicle accident must be deemed to be “catastrophically impaired”.

A common issue in determining if someone is catastrophically impaired is whether they have a Whole Person Impairment of 55% or more in accordance with the

American Medical Association’s Guides to the Evaluation of Permanent Impairment, 4th Edition 1993 (“Guides”).

Recently, Thomson, Rogers on behalf of a new client applied to an insurer with supporting medical documentation for an acknowledgment that she was catastrophically impaired as a result of a Whole Person Impairment of 55%.

The insurer denied the application and the issue was referred to a Designated Assessment Centre, which declared our client to not be catastrophically impaired with a Whole Person Impairment as a result of her injuries suffered in a motor vehicle accident of only 1%.

Thomson, Rogers retained leading experts in the use of the American Medical Association’s Guides and the Statutory Accident Benefits Schedule and appeared before an Arbitrator at the Financial Services Commission of Ontario to dispute the 1% finding of the D.A.C.



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**Thomson**  
Rogers

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From a 1% Whole Person Impairment CAT DAC to a 79% Whole Person Impairment at Arbitration – *Continued from cover story*

*After a lengthy hearing, the Arbitrator ruled that our client was catastrophically impaired with a 79% Whole Person Impairment. A 78% “mistake” by the Designated Assessment Centre.*

Since March 1, 2006, persons injured in a motor vehicle accident are no longer referred to a Designated Assessment Centre when an insurer has denied a benefit. Now the insurer can send the claimant to a group of physicians chosen and paid for by the insurer to provide an opinion. In short, the “mistakes” are now likely to be even more frequent than with the D.A.C. system.

Some of the more significant legal issues that arose or were affirmed in this decision were the following:

1. In calculating the Whole Person Impairment, it is proper and correct to assign a percentage impairment to a medical impairment which has not yet occurred, i.e., future arthritis.
2. Significant pre-existing injuries and impairments are not a bar to a finding of catastrophic impairment when those injuries and impairments are significantly exacerbated in a motor vehicle accident.
3. Every impairment, no matter how small, whether referenced in the Guides or not, is to be rated.
4. A finding of a marked impairment due to a mental or behavioral disorder in one of the four domains set out in the Guides satisfies the criteria for catastrophic impairment.
5. If there is an impairment due to a mental or behavioral disorder that is not automatically deemed catastrophic due to it not being a “marked impairment”, the impairment is still to be assigned a Whole Person Impairment percentage and incorporated into the 55% calculation.
6. Notwithstanding the individual suffered from the same impairment, both before and after the accident from other causes, it is only necessary to show the motor vehicle accident made a significant contribution to the impairment in order to include the impairment in the 55% calculation.
7. It is imperative for an injured claimant to have his or her friends, associates, family, colleagues, co-workers and employers all provide evidence of who the injured claimant was before the accident and after. The Arbitrator made it clear that the evidence of the lay witnesses was “consistent and persuasive”.



8. Draft reports prepared by physicians in regard to a claimant are producible. In this decision, the Arbitrator ordered a D.A.C. draft medical report produced. This “draft” opinion was prepared by the only D.A.C. doctor who ever physically examined the claimant and concluded she was “close to catastrophic”. From there, the opinion went to “editors” who managed to take this opinion and declare that the insured was not close to catastrophic (55% Whole Person Impairment) but rather a mere 1% Whole Person Impairment.

That case illustrates how important it is for claimants to have access to lawyers who will vigorously advocate at an Arbitration or trial for their rights.

As usual, behind the scenes in this case were the health care service providers advocating for the rights of their injured victim. Without their initiative and assistance, the client would never have known to retain counsel and stay the course through to victory.

I cannot state strongly enough that it is the health care providers who we, as lawyers, count on to urge their patients to ensure they are getting the no fault assessments and benefits they deserve.

David A. Payne  
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# Court Comes to the Aid of Injured Parents and Other Caregivers



**Leonard H. Kunka**  
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The recent decision of the Ontario Divisional Court in *G.B. v. Pilot Insurance Co.* [2008] O.J. No. 288 has provided a welcome interpretation of the “other goods and services” provision under the Medical, Rehabilitation and Attendant Care benefits section, s. 15(5)(1), of the Statutory Accident Benefits Schedule-Accident on or after November 1, 1996 (hereinafter referred to as the S.A.B.S.).

On August 28, 1998, Miss G. was involved in a car accident. At that time, she was 22 years old, single and childless. As a result of the accident, she suffered serious injuries. Some

5-1/2 years post accident, after Miss G. had married, she gave birth to a daughter on April 20, 2004. Due to the injuries she suffered in the accident, Miss G. was unable to perform many of the activities necessary to care for a young child.

Miss G. applied to Pilot insurance for payment of nanny expenses, under the “other goods and services” sub-section of the medical/rehabilitation benefits section of the policy [s. 15(5)(1)]. Pilot refused to pay for the nanny expenses.

The issue came before Arbitrator Blackman, who considered numerous arguments presented by Pilot, for why Pilot should not have to pay the nanny expenses. The Arbitrator rejected each of Pilot’s arguments, and ordered Pilot Insurance Company to pay Miss G. the nanny expenses pursuant to s. 15(5)(1). Pilot Insurance appealed the decision to the Director’s Delegate, and successfully overturned the Arbitrator’s decision. The Director’s Delegate concluded that to allow nanny expenses to be claimed under the medical/rehabilitation benefits section (s. 15), would make the caregiver benefit section (s. 13) meaningless.

The Divisional Court overturned the appeal decision of Director’s Delegate Makepeace, and restored Arbitrator Blackman’s Order that the nanny expenses be paid as a medical/rehabilitation expense under s. 15(5)(1) of the S.A.B.S.

Throughout the case, Pilot Insurance argued that child care was governed exclusively by s.13 (the caregiver benefit section) of the S.A.B.S. Pilot further argued that “nanny expenses”, were essentially child care expenses, and could not be obtained under the medical/rehabilitation section (s. 15 of the S.A.B.S.), as this would constitute “double-dipping” by the insured.

Justice Lane on behalf of the three member Divisional Court, carefully reviewed s.15 (the Medical/Rehabilitation Benefits section) and its interplay with s. 13 (the Caregiver Benefits section). Justice Lane concluded that s. 15 of the S.A.B.S. is a broadly worded section which in the case of a dispute, must be



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## Court Comes to the Aid of Injured Parents and Other Caregivers – Continued from page 3

*The Divisional Court focused on the fact that the application for nanny expenses was framed as a medical/rehabilitation expense, and that there was medical evidence led at the Arbitration to support both a medical and rehabilitative purpose for providing the nanny services to Miss G.*

given an interpretation most favourable to the insured. Justice Lane also stated that nothing in Section 15(5) expressly excludes nanny services from the scope of medical/rehabilitation benefits.

Based on the medical evidence, the Arbitrator and the Divisional Court concluded that the nanny services qualified as a medical/rehabilitation expense, since provision of such services to the applicant would “reduce or eliminate the effects of a caregiver’s accident-related disability or facilitate her reintegration into her family and the labour market.”

Justice Lane also dismissed the double-dipping argument. In considering whether nanny expenses could be considered under section 15, despite the wording of the caregiver benefits section (section 13) his Honour stated:

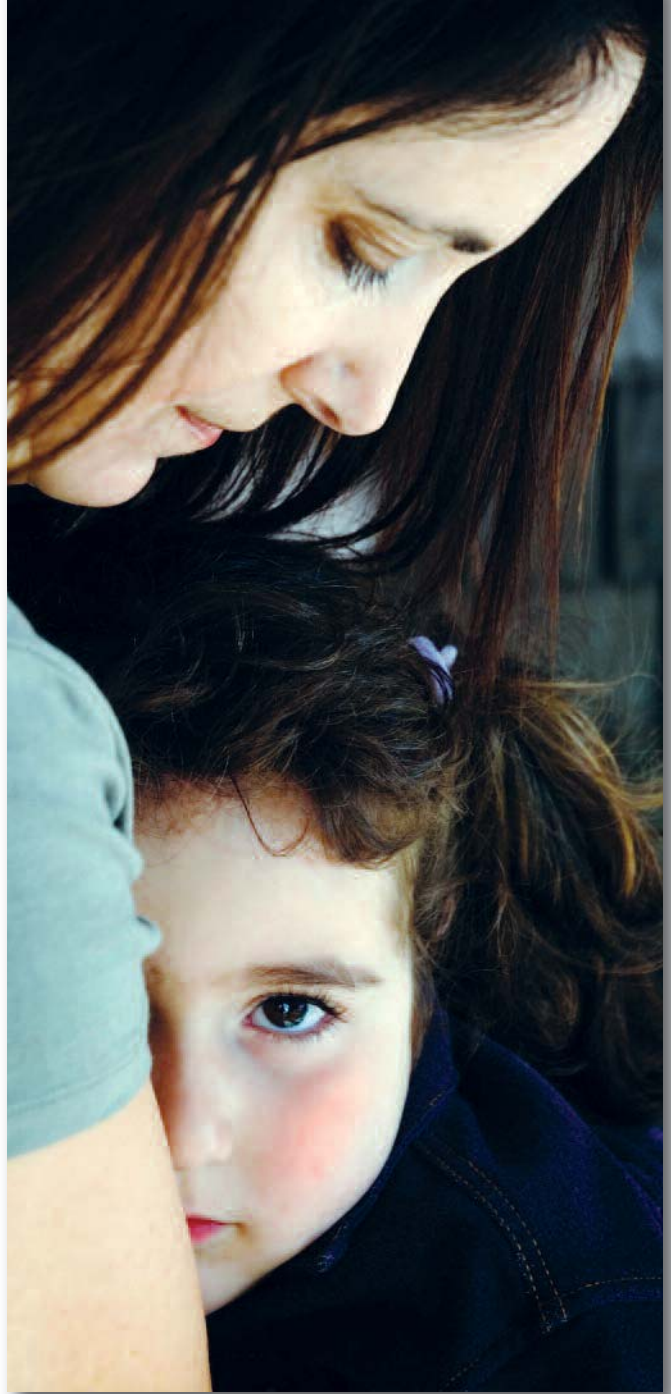
*“Section 15 deals with the rehabilitation of the injured person herself; Section 13 deals with an allowance to replace the caregiving services which the injured person provided to others at the time of the accident.*

*The circumstances giving rise to the need are utterly different, as are the terms on which payment can be made under the two sections.*

*There is no necessary or logical inference that because such expenses can be obtained pursuant to one section of the Regulations in one set of circumstances, they could not be obtained in a different set of circumstances under a different section of the regulations, always subject to the common sense rule that the same expenses will not be covered twice.”*

The decision of the Divisional Court underscores the importance of ensuring that if a claim is being made for services under section 15, and in particular under the “other goods and services” category [s. 15 (5)(1)], a medical/rehabilitative purpose must be demonstrated in order to be entitled to the benefit claimed.

It would appear that the reasoning of the Divisional Court would apply whether the injury was physical, psychological or as a result of a brain injury, as long as the injury inhibits the person’s ability to provide care, and



interferes with their ability to continue rehabilitation.

Similarly, the reasoning of the Divisional Court should extend to a myriad of other situations where family members provide care to other family members, such as:

- i) fathers who prior to the accident were assisting in the care of their children;
- ii) parents who prior to a an accident were caring for a disabled child;
- iii) a child who prior to the accident, was providing care to an elderly or disabled parent.

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# Divorce (Family Law) and Accident Benefits

## *How is property divided between married spouses?*



**Joanna Harris**  
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Upon divorce in Ontario, the Family Law Act operates to equalize certain property between married spouses. Many people believe that in Ontario the property is shared 50/50 between divorcing spouses. This is not accurate.

The Ontario Family Law Act provides for an “equalization of net family property” so that upon separation, the married spouse whose “Net Family Property” is the lesser of the two net family properties is entitled to one half of the difference between them. In short a person’s net family property is the difference between their net worth on the date of marriage and the date of separation with certain qualification which are beyond the scope of this article. The statutory definitions applicable are as follows:

- a) “Property” includes any interest, present or future, vested or contingent, in real or personal property.
- b) “Net Family Property” is the value of all the property that each spouse individually owns on the “valuation date”, after deducting the following:
  1. the spouse’s debts and other liabilities as of the valuation date; and
  2. the value of property, other than a matrimonial home, that a spouse owned on the date of the marriage, after deducting the spouse’s debts and liabilities.

The Family Law Act seeks to equalize each married spouse’s increase in net worth created during the marriage. This does not apply to unmarried spouses.

## WHAT IS NOT INCLUDED IN NET FAMILY PROPERTY?

Certain types of property may be excluded from a spouse’s “net family property” under the provisions of the Family Law Act under the definition of excluded property and include, “damages or a right to damages for personal injuries, nervous shock, mental distress or loss of guidance, care and companionship, or the part of a settlement that represents those damages”. Again, a full explanation of the concept of what “excluded property” under the Family Law Act is beyond the scope of this article.

This exclusion from “Net Family Property” can apply even if the damages have been used to acquire other property as long as the subsequent property is not a matrimonial home and the damages can be traced into the property acquired using the excluded property.

Generally speaking, in personal injury litigation, there are two major types of damages: damages for pain and suffering and damages for loss of income. While damages for pain and suffering are clearly excluded, there is an issue as



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*The Divisional Court focused on the fact that the application for nanny expenses was framed as a medical/rehabilitation expense, and that there was medical evidence led at the Arbitration to support both a medical and rehabilitative purpose for providing the nanny services to Miss G.*

to whether an entitlement to a future income stream or the component of damages relating to future income loss will be considered property between married spouses.

Under the Family Law Act the exclusion of damages is intended to permit spouses to retain property that is “completely personal” to them, and to which they are entitled for the purpose of replacing “some aspect of their enjoyment of life which cannot be truly shared with any other individual, no matter how close the relationship”.

Accident benefits are not explicitly excluded by section 4(2)3 of the Family Law Act, but have been held by the courts to be excluded property. It is important to note that the burden of proving the right to exclude property lies on the spouse who claims it. If properly argued, accident benefits should be excluded from the calculation of the recipient’s net family property. Damages for future loss of income may not be “property” if needed to satisfy a claim by the other spouse for spousal support: Question whether that will apply of there is no claim for spousal support.

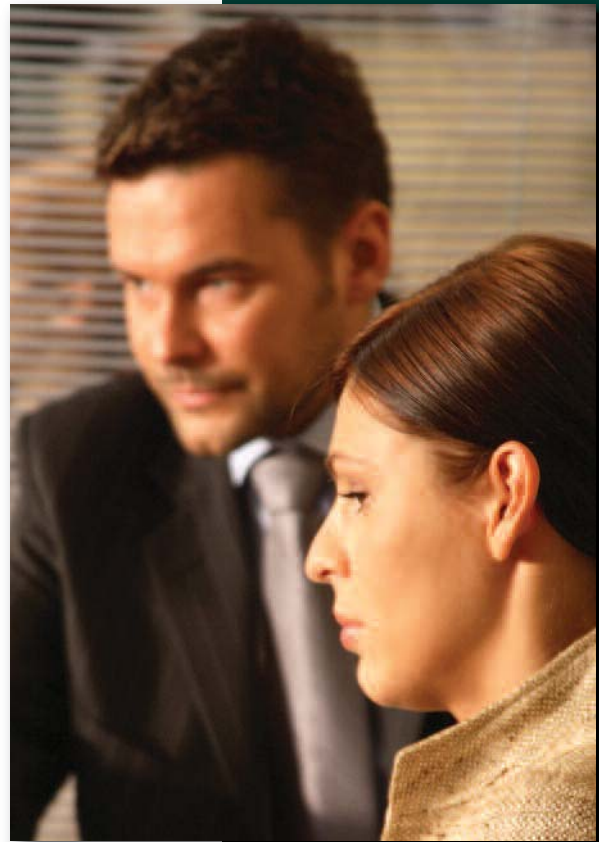
Will accident benefits be included in the calculation of a payor’s income for support purposes?

Upon divorce or separation in Ontario, spouses, married or unmarried, may have an additional entitlement under the Divorce Act or the Family Law Act respectively to spousal support. In addition, children always have an entitlement to support from both their parents.

Although accident benefits may be excluded from the calculation of “net family property” as described above in relation to Family Law Act property claims as between married spouses, accident benefits may be included in the calculation of a spouse’s income for the purposes of determining ability to pay spousal or child support. This concept applies to both married and unmarried spouses.

This article provides a general overview of the treatment that certain issues will receive in the family law context. Your specific situation should be discussed with a family law lawyer as the scope of this article does not permit a full explanation of the concepts and their application.

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