

North York Rehabilitation Centre

Saturday, February 28<sup>th</sup>, 2009

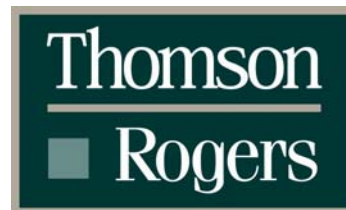
# CATASTROPHIC IMPAIRMENT: Recent Court and Arbitral Decisions

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Barristers and Solicitors

# TOPICS

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- 1. Key Cases from 2008**
- 2. Pitfalls of Catastrophic Assessments**
- 3. Marked or Moderate Impairment – Mental and Behavioural Disorders**
- 4. Appearing at the Arbitration**

# 1. KEY CASES

## Monks v. ING Court of Appeal April 14, 2008

- 3 accidents
- Question: Did 3<sup>rd</sup> accident cause catastrophic impairment?
- Endorses S. C. C. Athey v. Leonati approach
- “Material contribution”
- if 3<sup>rd</sup> accident materially contributed to overall condition (paraplegia) then is responsible for whole condition
- “no crumbling Skull” argument available in SABS

# KEY CASES

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## Arts v. State Farm Supreme Court of Ontario May 28, 2008

- follows Desbiens
- finds that SABS Section 2 (1) (f) requires consideration of all impairments however caused and that it be totalled together in arriving at a whole person impairment

# KEY CASES

## Augello and Economical December 18, 2008 Arbitrator Wilson

- accepts Desbiens methodology and accepts Arts

**“one is entitled to assign ‘percentages to Mr. Desbiens’ psychological impairments and to combine them with his physical impairments in determining whether he meets the definition of catastrophic impairment under clause (f)”**

# KEY CASES

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## Ms. G and Pilot and B. P. and Primmum

- accepts Justice Spiegel's methodology from Desbiens in assigning percentage to mental and behavioural disorder for inclusion as part of the (f) assessment of whole person impairment

# KEY CASES

## Pastore and Aviva February 11, 2009 Arbitrator Nastasi

- Arbitrator found Ms. Pastore had a catastrophic impairment as she had a marked impairment of a single area of function (activities of daily living)
- assessor should not assess credibility of injured person as assessment of credibility is

“a role reserved for the decision maker”

- Arbitrator found

“it is open to assessors to use not only previous editions of Guides but also those subsequent to the fourth edition to assist them in determining the most accurate impairment rating for an individual - the use of Table 3 (Chapter 4) will provide the most favourable representation of Ms. Pastore’s psychological impairment”.

# KEY CASES

## Pastore and Aviva February 11, 2009 Arbitrator Nastasi (cont'd)

**“Ms. Pastore suffered a class 4 – marked impairment in activities of daily living spheres and function due to her recognized pain disorder”**

- Arbitrator relies on three day occupational therapy assessment
- Impact of

**“such discreet physical impairments and associated pain limitations...on her daily functioning significantly impede her daily living tasks” =**

- marked impairment
- Chapter 14 of the Guides does not

**“require a complete separation of physical and mental impairments...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.”**

# KEY CASES

**Pastore and Aviva February 11, 2009 Arbitrator Nastasi (cont'd)**

- cites Desbiens in support of methodology assessing pain within the scope of Chapter 14 of Guides
- agrees with CAT DAC that

**“it is not possible to factor the impact of any such discreet physical impairments and associated pain limitations”**

**and that**

**“any impairment rating should incorporate both on a ‘cumulative basis’.”**

# KEY CASES

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**Pastore and Aviva February 11, 2009 Arbitrator Nastasi**  
(cont'd)

One “Marked” Impairment = CAT under (g)

- **Desbiens**
- **McMichael v. Belair**

## 2. Pitfalls of CAT I E Assessments

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- **Failure to interpret Guides appropriately:**

**“if the provision is ambiguous...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 legislation”**

- **Wawanesa v. Smith 1998 Ontario Court of Appeal**
- **Pastore and Aviva**

# Pitfalls of CAT I E Assessments

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## Psychiatric Evaluation

- **failure to obtain collateral information**
- **short assessment**
- **failure to rely on O.T. situational on Work Place / Home / ADL Assessment**

# Pitfalls of CAT I E Assessments

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Failure to Accept accident has “significantly contributed”  
to impairment

– Monks v. ING

### 3. Is it a Marked Impairment or Moderate Impairment?

- moderate impairment =  
“impairment levels are compatible with some, but not all useful functioning”
- marked impairment =  
“impairment levels significantly impede useful functioning”
- “significant” = more than *de minimus*
- function can be altered by twenty-five (25) percent or less and still be considered to be significantly impeding useful functioning
- Athey
- Monks

# 4. Appearing at the Arbitration

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**“Primary duty of the expert to the tribunal is to provide non-partisan, fair and objective assistance to the adjudicator within their area of expertise, uninfluenced by the exigencies of litigation”**

- **Rule 4.1.01, *Rules of Civil Procedure***
- **Director’s Delegate Blackman**

# Appearing at the Arbitration

**“Experts report should set out any assumptions and provide a logical, comprehensive, step-by-step analysis as to how each specific impairment was assessed and how the final determination was reached.”**

- **Lawyers should have a chart prepared detailing each part of calculation of whole person impairment**
- **Chart should have room to incorporate additional or different information**
- **Director’s Delegate Blackman**

# Appearing at the Arbitration

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- **don't be an advocate**
- **don't make findings of credibility**
- **highlight where you agree and where you disagree with other experts and why you disagree**
- **be forthright regarding weaknesses in your opinion**

# Appearing at the Arbitration

- **be careful not to address “legal issues”**
- **in addressing cause, understand that there is a different legal standard than the medical standard**
- **not cause based on medical model**
- **legal causation is established if accident “significantly contributed” to development of or an exacerbation of condition**