



Canadian Insurance Claims Managers Association | General Meeting

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KUSNIERZ v. ECONOMICAL MUTUAL

What Does This Decision Mean for Future Catastrophic Cases?

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HOW DID WE GET HERE?

Two Competing Decisions:

- *Desbiens v. Mordini* - Allowed combining of physical and psychological Injuries (Justice Spiegel)

- *Kusnierz v. Economical* (Trial Judgement) - Did not allow combining of physical and psychological impairments. Also said that a percentage impairment could not be applied to psychological impairments (Justice Lauwers)

WHAT DID THE COURT OF APPEAL HAVE TO DECIDE?

- Can mental and behavioural impairments be assigned a percentage under clause 2(1.1)(g) of the SABS, and if so, can that percentage then be combined with physical impairments to determine if a person has suffered a 55% whole person impairment (ie. catastrophic impairment) within the meaning of clause 2(1.1)(f) of the SABS

WHAT DID THE COURT OF APPEAL DECIDE?

COMBINING OF PHYSICAL AND MENTAL/PSYCHOLOGICAL IMPAIRMENTS IS PERMISSABLE FOR THE FOLLOWING REASONS:

- 1)The language in the AMA Guides makes reference to combining physical and psychological impairments elsewhere
- 2)The Purpose of the AMA Guides supports combining
- 3)The Goals of the SABS supports combining
- 4)The language of the SABS supports combining

1) Examples within the Guides Where Psychological Impact is Considered

The Guides describe a number of situations where a person's physical impairment should take into account chapter 14 mental and behavioural impairment. Non-comprehensive examples include:

- **Facial Disfigurement**- 15-35% depending on mental/behavioural aspects to the disfigurement
- **Female Galactorrhea or Male Gynecomastia** - the percentage is higher if co-existing psychological component to the injury
- **Class 2 or 3 Skin Impairments** also are rated higher if there is a psychological component to the impairment

2) The Purpose of the Guides Supports Combining

- The purpose of the Guides is to assess the total effect of a person's impairments on his/her every day activities, and to disregard mental and behavioural consequences of an injury could defeat the purpose of the Guides
- The C of A quoted a section of the Guides which recognizes that in making diagnoses, Drs. often make their judgement on clinical impressions rather than objective, analytic or empirical evidence

3) The Goal of the SABS Supports Combining

- Not combining physical and psychological impairments leaves a gap in the definition of CAT impairment
- Combining will not lead to a floodgate of CAT cases
- The purpose of the SABS is to ensure that most seriously injured people have access to a broader and more extensive range of benefits, and combining injuries captures that intended group

4) The Language of the SABS Supports Combining

- The definition of CAT impairment is very broad and intended to be inclusive rather than restrictive
- The definition of impairment in the SABS is “a loss or abnormality of a psychological, physiological or anatomical structure or function”
- Clause (f) is designed to capture injuries not specified elsewhere in the guides
- The “analogous” impairment provision in clause 2(3) is also designed to ensure that no impairment is overlooked
- Clause (f) itself speaks of “a combination of impairments” which the court felt was broad enough to encompass any combination of impairments
- Nothing in the SABS specifically prohibits combination

THANK YOU

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