Catastrophic Definition Changes for Auto Accidents On or After June 1, 2016*

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**** The CAT definition changes are in force for accidents occurring on or after June 1, 2016. The CAT monetary limit reductions are on force the later of June 1, 2016 or the date on which the auto policy insuring the injured person is renewed after June 1, 2016.***

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CONTEXT AND GOALS

On August 27, 2015 the Ontario Legislature released the regulation with the changed definition for Catastrophic impairment determination which will affect those in accidents on or after June 1, 2016 or when their policy renews thereafter, whichever is later. By now, many clinicians have had the opportunity to review the definition and/or have received general impressions from various commentators about the changes.

Despite the reduced amounts available for medical, rehabilitation and care needs for those with the most serious injuries and the loss of the GCS as an enabling criteria, there is room for hope that science and your clinical dedication to the patient may assist those in need in gaining access to funding as catastrophically impaired. We must look closely and carefully at the definition to discern how this may be done and what role clinicians can play to serve the interest all have in having those with catastrophic impairments trigger entitlement to CAT status and obtain funding for the services they require. I have distributed the annotated definition with this paper together with the new CAT assessment tools referred to by the new definition. The tests are also available at:

https://www.thomsonrogers.com/directory/david-macdonald/#publications

Clinicians are concerned about the changes. That said, clinicians provide fulsome assessments which will be of critical importance in determining whether injured persons suffer impairment which meet the CAT definition criteria. The goals of this paper are first to provide a brief overview of the changes to the definition. Secondly, and more importantly, to provide an indication of the language within the proposed definition and the new tests which clinicians should incorporate into assessments and in preparing reports in order that relevant criteria are provided to assist in catastrophic impairment determination.

IDENTIFYING CLIENTS WITH POTENTIALLY CATASTROPHIC IMPAIRMENTS

On a quarterly basis, I update my paper entitled Catastrophic Determination. It includes a review of the AMA Guides, other current CAT criteria and a summary of all of the cases which are decided in relation to the issue of catastrophic impairment. The reader is encouraged to review that paper for up-to-date information concerning the decisions which have been made by Courts and Arbitrators concerning the current definition of “Catastrophic Impairment”. The link to my CAT paper that has all these decisions by court and arbitrators is: http://bit.ly/CATimpairment

Many of the principles which are reflected in those cases will continue to be imported into the methodology of catastrophic impairment assessors and the methodology of Arbitrators and Judges who are asked to determine whether a person has sustained a catastrophic impairment.
There are several principles which, despite the change in the definition, will survive and be important touchstones for all of us when we consider clients suffering impairments and their

potential for catastrophic impairment determination. The following paragraphs address a few of these.

COMPARISON OF PRE AND POST-ACCIDENT FUNCTION

The gap between pre and post-accident function is a very significant focus for each of the Arbitrators who have been asked to determine whether an Applicant has sustained a catastrophic impairment. The quality of the information available to help Arbitrators and Judges to make this determination and comparison is pivotal. Social workers, occupational therapists, physiotherapists, psychologists, case managers, nurses and physicians assessments which include information concerning the social, leisure, vocational, avocational, familial, cognitive and emotional levels of function and activities before the accident are increasingly relied upon by Arbitrators and Judges.

In accordance with each health discipline's scope of practice, the post-accident function in relation to each of these areas should also be discussed. Situational assessments are important to create a predictive understanding of the level of function and the level of impairment a person suffers when subjected to various activities on a prolonged basis.

THE SABS IS REMEDIAL

The SABS provisions and the language therein is to be interpreted in a remedial manner; that is, to assist the injured person in accessing benefits.

CAUSATION – *ATHEY – SUPREME COURT OF CANADA DECISION*

If an accident has made a material (more than minimal) contribution to the impairment or to the worsening of the impairment, then the impairment was directly caused by the accident and the sum of the impairments' impact upon a person's function should be evaluated. This will assist to determine whether a person with significant pre-existing impairments may, nonetheless, be catastrophically impaired. The accident is responsible for the totality of the impairments if it has caused a material impact to the pre-existing impairment.

IMPACT OF PRE-ACCIDENT INJURIES

The *Monks* decision, upheld by the Ontario Court of Appeal, supports the conclusion that services required to restore an insured person to their pre-accident level of function should not be reduced due to pre-existing injuries caused by an unrelated accident.

If an accident has had a material (more than minimal contribution to the development of or the worsening of an impairment, then the entire impairment is deemed to be directly caused by the accident. As such, a person with significant pre-existing impairments which are exacerbated by the accident, may, nonetheless be deemed Catastrophically impaired.

DEVELOPMENTAL CHANGES IN IMPAIRMENTS

The pre – June 1/2016 SABS CAT definition instructs us to take into consideration the developmental changes which may occur for children. We are instructed to consider those changes in determining whether children or adolescents have sustained a catastrophic impairment. This responsibility is enshrined in the new catastrophic definition changes as well.

POTENTIAL FOR DETERIORATION

Two Arbitral decisions, using the current definition of catastrophic impairment, have found it appropriate to rate the applicant not only on their current presentation but on the basis of impairment which is likely to occur due to future deterioration. The issue of potential deterioration as a result of the potential development of traumatic osteoarthritis has been considered in this context. Other sources of deterioration, including the lack of access to treatment to ameliorate the impairment, may also need to be considered by catastrophic assessors in determining entitlement to catastrophic designation.

HIGHLIGHTS AND OVERVIEW OF CAT DEFINITION CHANGES EFFECTIVE FOR ACCIDENTS ON OR AFTER JUNE 1, 2016:

1. Combined medical, rehab and care limits of $1,000,000.00[1].

2. A Physician can evaluate an injured person at three (3) months using AMA Guides 4th and 6th editions, to determine if person suffers a fifty-five percent (55%) WPI and if the physician states in writing that the person's condition is unlikely to improve to a WPI which is less than 55%.[2]

3. A person who suffers from paraplegia or tetraplegia will be deemed CAT if person's permanent grade using ASIA NEUROLOGICAL CLASSIFICATION OF SPINAL CORD INJURY Impairment Scale is A, B or C or alternatively D with impaired gait rated 0 to 5 on Spinal Cord Independence Measure (SCIM) question 12:

0. Requires total assistance
1. Needs electric wheelchair or partial assistance to operate manual wheelchair
2. Moves independently in manual wheelchair
3. Requires supervision while walking (with or without devices)
4. Walks with a walking frame or crutches (swing)
5. Walks with crutches or two canes (reciprocal walking)

[1] Reduction occurs the later of June 1, 2016 or the date of the injured insured's policy renewal per O.Reg. 34/10 s. 2(1.2)

[2] Please see attached annotated version of full text of June 1, 2016 CAT definition, and all tests used therein. Or find same at Author's website at:

over a distance of up to 10 metres on an even indoor surface, or D and urological impairment requiring implant or intermittent catheterization, or D and impaired anorectal function that requires an implant or bowel routine.

4. A person with an amputation of a single arm or leg is CAT if specific criteria is met: For amputation of a leg to be CAT, it must be through tibia or higher, or severe and permanent leg structure and function altered causing SCIM score applied on even indoor surface over 10 metres to be 0 to 5.

5. A person is CAT for total loss of vision in both eyes if visual acuity in both eyes is 20/200 or less after correction and the loss of vision is due to organic cause.

6. If a brain injured person is 18 years of age or older, a traumatic brain injury meets the CAT definition when the insured meets the following criteria:

   a. The injury shows positive findings of intracranial pathology on CT, MRI or any other medically recognized brain diagnostic technology; and

   b. When assessed with the Glasgow Outcome Scale ("GOS") and Extended Glasgow Outcome Scale ("GOS-E") testing results in a rating of:

      i) Vegetative State as of one month or more after accident;

      ii) Upper Severe Disability or Lower Severe Disability as of six months or more after the accident; or

      iii) Lower Moderate Disability as of one year or more after the accident.

7. If a brain injured person is under 18 years of age, a traumatic brain injury meets the CAT definition when the person meets the following criteria:

   a. The person was accepted for inpatient admission to a public hospital, and showed positive findings on CT, MRI or medically recognized brain diagnostic technology (MRBDT); or

   b. The person was accepted for inpatient admission for neurologic rehabilitation in a pediatric rehabilitation facility; or

   c. 1 month after the accident, they are King's Outcome Scale for Childhood Head Injury (KOSCHI) category 2, vegetative; or

   d. 6 months after the accident, they are KOSCHI category 3, severe; or

e. 9 months after the accident, function is seriously impaired, such that the person is not age-appropriately independent and requires in-person supervision or assistance for the majority of the waking day.

8. If a person is under 18 and the impairment can reasonably be believed to be CAT, it is deemed to be impaired most analogous in the AMA Guides, after considering the developmental implications.

9. If a person is under 18, has positive findings on CT, MRI or MRBDT and is admitted as an inpatient in a public hospital or neuro-rehabilitation program in rehabilitation hospital, the impairment is deemed to be CAT.

10. Physical and/or physical and mental/behavioural impairments, excluding Traumatic Brain Injury, are to be rated using AMA Guides 6th Edition Chapter 14.6 rating methodology, [instead of 4th Edition] and must result in 55% or more WPI to be CAT.

11. Physical and/or physical and mental/behavioural impairments, excluding Traumatic Brain Injury, are to be determined at two years after the accident or may be determined as early as at three months or more after the accident if a physician states in writing at that time that the impairments that meet or exceed 55% WPI are "unlikely to improve to less than 55%".

12. If a person only has a mental/behavioural impairment, including Traumatic Brain Injury, and an assessment using AMA Guides 4th edition, Chapter 14, results in a Class 4 marked impairment in "three or more areas of function" or a single Class 5 extreme impairment "that precludes useful functioning due to mental or behavioural disorder", the person is considered CAT.

13. If a person only has a mental/behavioural impairment, including Traumatic Brain Injury, number 12 can be determined two years after the accident or at any time earlier than that if a physician states in writing that the impairment is unlikely to improve to less than three Class 4 marked impairments in areas of function that preclude useful functioning.

DISCUSSION OF NEW CRITERIA AND IMPACT UPON PRACTICE:

Glasgow Outcome Scale: GOS-E Upper SD and Upper SD* at six months

a. patient is dependant for daily support for mental or physical disability

b. if can't be left alone for 8 hours is Lower SD = CAT

c. if can be left alone for more than 8 hours is Upper SD = CAT.

Key reliance will be upon the repeated evaluations of attendant care needs.

GOS-E Lower MD and Lower MD* at one year

a. The patient has some disability but is able to look after themselves. The patient is independent at home but dependent outside.

b. If the patient is able to return to work even with special arrangements and they have a moderate ability they are not CAT.

i) Query whether has qualitatively or quantitatively "returned to work"

c. If the patient is unable to return to work at the one year mark after the accident and they have a lower moderate disability they are CAT.

The Glasgow Outcome Scale ("GOS-E") evaluators need to use the structured interview questionnaire to evaluate if client is V, LSD, USD or LMD

The GOS-E Structured Interview Questionnaire (specifically, questions 2-7) shows the degree to which reliance is placed on a person's independence and need for assistance concerning their activities of daily living. The Form 1 assessments identifying the attendant care needs will be an important indicator for clinicians using the questionnaire to determine catastrophic status. A copy of the GOS-E Structured Interview Questionnaire is available through my website profile at: https://www.thomsonrogers.com/wp-content/uploads/2015/10/Structured-Interviews-Glasgow-Outcome-Scale-Extended.pdf.

Once the structured interview is completed, the new CAT definition relies on the paper published by Wilson, J., Pettigrew, L. and Teasdale, G., *Structured Interviews for the Glasgow Outcome Scale and the Extended Glasgow Outcome Scale: Guidelines for Their Use* (the "GOS-E Wilson paper").

At page 576, of the GOS-E Wilson paper the authors provide information concerning how to assign an outcome category under the GOS. A copy of the GOS-E Wilson paper, can be found at my publications link.

The GOS-E uses the asterisk ("*") to indicate the existence of a pre-injury disability. For example, the GOS-E Wilson paper indicates that: "[i]f a patient was not fully independent before injury, then they should be rated as Severely Disabled with an "*", therefore: (SD*)."

The Courts have held in *Desbiens* and *Monks* that Catastrophic Impairment evaluations applying the GOS-E must acknowledge that a person with a pre-injury disability may also meet the Catastrophic Impairment definition: (low SD*, upper SD*, or low MD*).

ASIA D and SCIM 0 to 5

The ASIA impairment scale for spinal cord injury has five ratings from "A", which is complete loss of motor or sensory function, to "E", which is normal motor and sensory function.

A client with an ASIA impairment scale rating A, B, or C is deemed catastrophic. ASIA D is described as "incomplete motor function is preserved below the neurological level and at least half of key muscles below neurological level have a muscle grade greater than or equal to 3".

Use the SCIM to determine if paraplegia or tetraplegia ASIA D or person with severe alteration of leg structure and function is CAT. The SCIM version III, item number 12, addresses mobility. The rating available is from 0 to 8. Rating 3 is: "requires supervision while walking (with or without devices). Rating 5 is: walks with crutches or two canes (reciprocal walking). Any rating between 0 and 5 meets catastrophic criteria.

A copy of the SCIM and the ASIA scales are at - https://www.thomsonrogers.com/wp-content/uploads/2015/10/SCIM-spinal-cord-independence-measure-version-III.pdf

KOSCHI 3 at 6 months – use for persons under 18 to assess brain injury

KOSCHI is a practical outcome scale for paediatric head injury. There are five categories. KOSCHI 3 notes "(b) implies a continued high level of dependency but the child can assist in daily activities; for example can feed self or walk with assistance or help to replace items of clothing. Such a child is fully conscious but may still have a degree of post-traumatic amnesia".

The KOSCHI scale is available at my web profile www.thomsonrogers/david-macdonald.

Under 18, "Seriously Impaired" at 9 months

Within this new CAT definition, the child must be "Seriously impaired" function and "not age appropriately independent" and requires "in-person supervision OR assistance for physical, cognitive or behavioural impairments for the majority of the insured's person waking day."

Paediatric occupational therapy attendant care assessments and narrative reports, child youth worker narrative reports and case management reports, pediatric neurologist and physiatrist reports, among others, are integral to evaluating whether a person under 18 meets the catastrophic impairment criteria in this section. Reliance upon child youth workers, tutors, having individual education plans (IEP or IPRC) will guide the evaluator. All the modifications and accommodations need to be appropriately listed in order to determine whether the injured person is not "age appropriate independent". Attendant care assessments following the OSOT Resource for Reflective Practice and identifying areas of dependence post-accident and

comparing with independence pre-accident are essential to assist CAT evaluators under this criteria.

"**Developmental Implications":**

In *Waldock v. State Farm Mutual Automobile Insurance Company*[3], Leonard H. Kunka of Thomson, Rogers, successfully argued that future deterioration of Mr. Waldock's orthopaedic injuries should be taken into account in assessing his WPI rating.

Osteoarthritis, lack of access to funding for rehabilitation leading to deterioration, and children growing into disability, among others, are important considerations when providing an appropriate rating under the AMA Guides.

Role of Radiologist and CAT – Recognizing Intracranial pathology:

Definition of "technology" is important in determining whether or not there is a positive finding on a CT Scan, MRI or any other medically recognized brain diagnostic technology.

What is a "positive finding"?.

Positive findings include by direct reference in the definition several types of brain injury pathology including brain injury in the form of diffuse axonal injury (DAI). As MRI and CT may not reveal Diffuse Axonal Brain Injury (DAI), the definition must therefore contemplate other forms of diagnostic technology which can indicate the presence of DAI. Some medically recognized forms of testing may include: diffusion weighted images (DWI), resting state functional MRI images T1 weighted, inversion recovery prepped three dimensional fast spoiled gradient echo (IR-FSPGR), mean diffusivity (MD) mass, tractography, and/or DTI Metrics. There are many areas of evolving technology which may be found to be "medically recognized brain diagnostic technology" revealing intracranial pathology. Query whether neuropsychological testing results which correlate with DAI satisfy this criteria.

AMA Guides 6th Edition for Some Mental and Behavioural Disorders

Chapter 14.6 of the 6th Edition provides several tools to be used. These include the BPRS (Brief Psychiatric Rating Scale) and GAF (Global Assessment of Functioning Scale) and the PIRS (Psychiatric Impairment Rating Scale).

The BPRS form and the BPRS sum score rating scales are at the previously described links. Certain elements of the scale are based upon self-report and certain elements are rated by the assessor.

The Global Assessment of Functioning Scale is reproduced on my web profile. GAF impairment scores range from 0 to 50% WPI (Whole Person Impairment).

[3] *Waldock and State Farm Mutual Automobile Insurance Company*, (2014) FSCO A13-001725

The PIRS consists of six areas of functioning, specifically self-care, social functioning, travel functioning, interpersonal relationships, concentration persistence and pace, and lastly, resilience/employability. Each of these scales include a rating of 1 to 5 from "no deficit" to "totally impaired". Once all six areas of functioning are rated, the ratings from each of these scales are listed from low to high. The middle two scores are added for the purposes of evaluating the impaired persons Psychiatric Impairment Rating Scale rating.

For the purposes of Chapter 14.6 of the 6th Edition, in determining the percentage of Whole Person Impairment related to those mental and/or behavioural disorders, rateable in Section 14.6 results from each of the BPRS, GAF and PIRS are listed and compared. The impairment rating is the median (middle) value of those scores. Those not ratable under the section may be ratable elsewhere in the AMA Guides 4th Edition.

Catastrophic Assessment Tool Box

At https://www.thomsonrogers.com/resources/catastrophic-impairment-cat-tool-box/ you will find the following literature that must be used under the definition in order to determine Catastrophic Impairment. These tools include:

- Structured Interviews for the Glasgow Outcome Scale (GOS)
- Structured Interviews for the Glasgow Outcome Scale Extended (GOSE)
- Spinal Cord independence Measure (SCIM), Version III
- California GAF to WPI Table from the Schedule for Rating Permanent Disabilities (Jan. 2009)
- Glasgow Outcome Scale
- Glasgow Outcome Scale – Extended
- GOSE Moderate Disability Lower and Moderate Disability Upper
- AMA Guides Fourth addition – Emotional or Behavioral Impairments
- AMA Guides Sixth addition – GAF / GAF Impairment Score
- AMA Guides Sixth addition – 14.6 Method of Impairment Rating
- AMA Guide Sixth addition – Table 14-8 BPRS Form
- AMA Guide Sixth addition – Table 14-9 Impairment Score of Brief Psychiatric Rating Scale (BPRS)
- AMA Guide Sixth addition – Table 14-10 Impairment Score of Global Assessment of Functioning Scale (GAF)

- AMA Guide Sixth addition – Table 14-11 Self-Care, Personal Hygiene, and Activities of Daily Living
- AMA Guide Sixth addition – Tables 14-12 to 14-15 Role Functioning, Social and Recreational Activities | Interpersonal Relationships | Travel | Concentration, Persistence and Pace
- AMA Guide Sixth addition – Table 14-16 Resilience and Employability
- AMA Guide Sixth addition – Table 14-17 Impairment Score of Psychiatric Impairment Rating Scale (PIRS)
- Kings Outcome Scale for Childhood Head Injury (KOSCHI)

CONCLUSION

Persons who have severe physical, neurological, neuropsychological, mental/behavioural, vascular, visual, spinal cord, orthopaedic and/or other disabilities as a result of motor vehicle trauma, will often require access to funding for their rehabilitation and care needs over their lifetime. Detailed clinical evaluations are critical, and should include measurements and findings using the tests ushered in by the new CAT definition. When appropriate, such evaluations should provide an accurate composite of an injured person's function in all areas of his or her life. These assessments provide catastrophic assessors essential information when addressing whether the person is entitled to catastrophic level of funding. Counsel will need to be active in seeking and funding the thorough assessments in order that their client may, where entitled, be deemed catastrophically impaired in order that they may secure funding for the reasonable and necessary treatment and care they require.

The triggers for entitlement to funding to meet these needs have changed. Your professional acumen, clinical expertise, regular and fully particularized reports will help guide those with severe impairments to appropriate redress through access to funding for rehabilitation and care; and, hopefully, to opportunities to embrace a significantly altered but meaningful quality of life, despite their severe injuries.

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