

INSURANCE LAW BULLETIN

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ONTARIO COURT OF APPEAL WEIGHS IN ON “CATASTROPHIC IMPAIRMENT”

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INTRODUCTION

A recent Ontario Court of Appeal decision has clarified the legal test that must be met in order for a claimant to meet the statutory definition of “catastrophic impairment”.

Meeting this definition can have a substantial impact on an accident benefits claim, as it significantly increases the maximum amount of attendant care benefits, medical and rehabilitation benefits (including case manager services), and housekeeping and home maintenance benefits available to a claimant. As such, it is important for insurers and claimants alike to be familiar with the definition of “catastrophic impairment” and the legal test that is required to meet it.

THE DECISION

The case of *Liu v. 1226071 Ontario Inc.* arose from a pedestrian/motor vehicle accident.¹ The plaintiff pedestrian, Ruofeng Liu, sustained serious head injuries after he was struck by the defendants’ vehicle. The accident occurred at approximately 8:15 p.m. Ambulance paramedics arrived at the scene of the accident at 8:31 p.m. At that time, the plaintiff was unconscious, and his initial Glasgow Coma Score (GCS) was 3 out of 15. However, the plaintiff’s GCS readings improved on his way to, and upon his arrival at, the hospital. His scores were as follows: 8 out of 15 (8:43 p.m.), 12 out of 15 (8:55 p.m.), and 14 out of 15 (8:57 p.m.).

¹ [2009] O.J. No. 3014 (C.A.) [*Liu*].

The evidence confirmed that the plaintiff did regain consciousness en route to the hospital. However, his consciousness level remained impaired in the days following the accident, and he subsequently suffered a “long period of post-traumatic amnesia”.²

The medical evidence led at trial was largely unchallenged. The court found that it “established beyond question that the appellant had, as the result of the accident, suffered a brain impairment.”

The single issue before the court was whether the plaintiff had sustained a “catastrophic impairment”. Under the then existing legislation, only if the plaintiff met this definition could he recover damages for health care expenses.³ The term was defined in O. Reg 461/96, s. 5(1):

"catastrophic impairment" means, ...

- (e) brain impairment that, as a result of the incident, results in,
 - (i) a score of 9 or less on the Glasgow Coma Scale, ... according to a test administered within a reasonable period of time after the incident by a person trained for that purpose....

There was no question that the plaintiff had suffered a brain impairment as a result of the accident. The dispute was whether his Glasgow Coma Score met the statutory requirements.

The defendant pointed to the fact that the plaintiff’s GCS readings rose to 12/15 within 33 minutes of the collision, and continued to rise thereafter. It was argued that this period of time was “well within what could be considered reasonable” and as such, the plaintiff should not be considered catastrophically impaired.

The plaintiff argued that he only needed to establish that he sustained “at least one GCS score of 9 or less” within a reasonable time post-accident. He submitted that the fact that subsequent GCS scores were 10 or greater was irrelevant.

The court agreed with the plaintiff and concluded that he did indeed meet the statutory definition of catastrophic impairment. Upon reviewing the relevant legislation, the Court held as follows:

² *Ibid.* at para. 11.

³ In *Liu*, the accident occurred in 1999, and was therefore subject to the previous Bill 59 regime. For accidents on or after October 1, 2003, a claimant can sue the at fault driver for health care expenses which exceed the accident benefit coverage if the claimant sustains a “permanent serious disfigurement or permanent serious impairment of an important physical, mental or psychological function” (s. 267.5(4) of the *Insurance Act*)

Provided there is a brain impairment, all that is required is one GCS score of 9 or less within a reasonable time following the accident. It is a legal definition to be met by a claimant and not a medical test...[T]he fact that there may have been other higher scores also within a reasonable time after the accident is irrelevant.⁴

COMMENTARY

It should be noted that the definition of “catastrophic impairment” under section 5.1 of O. Reg 461/96 has been revoked, as the statutory insurance regime underwent a number of changes, effective October 1, 2003 (see footnote 1). However, a virtually identical definition is found in s. 2(1.1) and (1.2) of the *Statutory Accident Benefits Schedule*. As such, although *Liu* was decided in the context of determining whether a claimant was entitled to sue an at fault driver for health care expenses under the prior regime, the Court’s interpretation of the phrase “catastrophic impairment” will be likely be relevant in determining whether a person meets the definition for the purposes of accident benefits under the *SABS*.

The decision in *Liu* establishes that one score of 9 or less on the GCS is all that is required to meet the statutory definition of “catastrophic impairment” (provided, of course, that there is a brain impairment). The Court’s reasoning suggests that subsequent GCS scores will be irrelevant, even if they are also taken within a “reasonable” period after the accident.

It is also noteworthy that the Court characterized the definition of “catastrophic impairment” as a legal test, and not a medical one. As such, it held that any notion of catastrophic injury, other than the specific meaning ascribed by the legislation, must be “discarded” when considering whether a claimant meets the statutory test. The Court rejected the lower court’s consideration of factors such as the plaintiff’s ability to make complex decisions, travel overseas on his own, and manage his own property, nutrition, health care, shelter, clothing, hygiene and safety.

The Court of Appeal held that these factors were irrelevant, and found that the lower court fell into error in equating the statutory test to a medical one. All that mattered was whether the plaintiff met the statutory definition, which the court described as a “bright line rule” created to “enhance the ability of those looking to the definition to know what injuries will and will not be considered catastrophic.”⁵ As such, insurers should be aware that courts will likely refuse to consider extraneous medical evidence, outside of what is required by the statutory test, in determining whether a claimant is catastrophically impaired.

⁴ *Liu*, *supra* note 1 at para. 27.

⁵ *Ibid.* at para. 30.

Finally, it should be noted that meeting the definition of “catastrophic impairment” does not mean that the claimant will be automatically entitled to increased benefits. Rather, he or she must justify every expense on the basis of need. As the Court held in *Liu*, “simply meeting the statutory definition does not automatically mean entitlement. It will still remain for claimants to prove their damages as the appellant did at trial”.⁶

⁶ *Ibid.* at para. 33.