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Robert M. Ben
ASSOCIATE | THOMSON, ROGERS

MULTI-MILLION DOLLAR JUDGMENT FOR WINTER DRIVING ACCIDENT

Following a lengthy trial against the County of Brant, Thomson, Rogers personal injury lawyers David F. MacDonald, Michael L. Bennett and Robert M. Ben recently obtained a multi-million dollar judgment for a client who suffered a serious brain injury during a winter driving accident.

Seventeen-year-old Jesse Ferguson was driving an SUV at night along a snow covered rural road in the County of Brant. He was travelling at the posted 60 km/h speed limit. However, unbeknownst to him, this was in excess of the critical speed of a sharp curve in the road (critical speed being the speed at which a vehicle will lose lateral control on a given curve). Jesse's SUV left the roadway at the curve, striking a tree. Jesse sustained a disabling brain injury as a result.

Jesse sued the County for breaching its obligations to maintain the road in state of repair; namely, that it failed to install an appropriate sharp curve and reduced speed advisory sign, and that it failed to maintain the road free of snow and ice. Instead there was a "winding road" and a "Y" intersection sign posted ahead of the curve.

The trial judge concluded that the case turned entirely on road signage and made no findings on the winter road maintenance issue except to say that there was certainly room for improvement in the County's weather monitoring, patrolling and salting practices.

The trial judge did find that the County was under a positive duty to inspect its roadways to ensure appropriate signage was in place, so that users of the roadway, exercising ordinary care, could travel upon it safely. The County's duty was enhanced given the evidence that the nature and character of the roadway and its surrounding neighbourhood had undergone a change (the accident happened on a rural road passing through a growing subdivision, which brought with it increased vehicular traffic).

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YOUR ADVANTAGE,
in and out of the courtroom

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Multi-Million Dollar Judgment for Winter Driving Accident
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The expert evidence for the plaintiff was that the safe advisory speed for the curve was, by reference to the Ontario Traffic Manual ("OTM"), 40 km/h and that a sharp curve and a reduced speed advisory sign were required. The trial judge acknowledged that the OTM is merely a guideline for municipalities and not a legally enforceable standard (even where a municipality enacts a bylaw adopting the guidelines, which was not the case here), but nonetheless found that the County should follow the guideline unless it has some compelling reason not to do so.

On the facts of this particular case, the County had assumed jurisdiction over the road and the existing signs approximately six years earlier upon amalgamation of a number of townships. Over that six-year period, it did not take any steps to monitor existing signage or consider whether updates might be required, despite residential growth and increased traffic in the area. In addition, chevron signs were placed at a nearby sharp curve, yet the County gave no consideration as to whether enhanced signage was warranted at the curve where Jesse was injured. The trial judge found that the County ought to have known that the curve required consideration in light of the OTM. In the court's view, the County had "more than enough time" to study and effect compliance with the OTM but failed to do so.

The trial judge found that the existing signs led drivers to believe that the curve was something less than a sharp curve and one that could be safely negotiated at 60 km/h. The signage in place prevented drivers from knowing that a safe speed to navigate the curve was 20 km/h less than the posted speed limit. The County allowed substandard signage to remain in place for too long. The trial judge noted that, after the accident, the County installed a 40 km/h speed advisory sign at the accident curve and the posted speed limit along the road was reduced to 50 km/h. The trial judge concluded that, for the County's failure to place the appropriate sign, Jesse could and would have reduced his speed sufficiently to successfully negotiate the curve. The County was held to be 55 percent liable for the accident.

The judgment is presently under appeal by the County, with the plaintiff cross-appealing on the assessment of the municipality's negligence. ■■■

INCURRED EXPENSES: DEFINING "ECONOMIC LOSS" IN LIGHT OF SIMSER V. AVIVA

Stacey L. Stevens
PARTNER | THOMSON, ROGERS

Esther J. Roche
ASSOCIATE | THOMSON, ROGERS

Changes to Section 3 of the *Statutory Accident Benefits Schedule* ("the SABS") were introduced by the Government of Ontario on September 1, 2010. The changes require an insured to prove expenses have been incurred in order to receive attendant care, housekeeping, and med/rehab benefits. Section 3(7)(e) of the SABS states that in order for an expense to be "incurred", and thus payable by the insurer, it must satisfy the following conditions:

(i) the insured person has received the services;

(ii) the insured person has paid or promised to pay or is otherwise legally obligated to pay the expense; and

(iii) the person who provided the goods or services:

(A) did so in the course of the employment, occupation or profession in which he was ordinarily engaged, but for the accident; or

(B) the person sustained an economic loss as a result of providing those goods or services to the insured person.

It is the last condition [subsection 3(7)(e)(iii)(B)] that has created much debate amongst automobile insurers, health care providers, personal injury lawyers, and accident victims alike, as the Legislature offered no further definition for the type of "economic loss" the insured needed to sustain in order to qualify the expense as an "incurred" expense.

Recently there have been two decisions that address the application of "economic loss" for the purpose of incurred expenses. In the Ontario Superior Court decision of *Henry v. Gore Mutual Insurance Company* 2012 ONSC 3687, a mother who worked full-time as an assistant manager of a retail store took a leave of absence from her job to care for her injured son. It was clear that the mother in this case was a non-professional caregiver who had lost income as a result of providing care services. The issue was whether the quantum of her income loss could be used by the insurer to determine the quantum of the insured's attendant care entitlement. The court held that there was no correlation between the quantum of the caregiver's economic loss and the amount of the insured's benefit entitlement. Rather, economic loss was a "threshold decision", which once found would trigger an insurer's obligation to pay the benefit at the assessed amount.

While this judgment was helpful in fitting the economic loss component into the larger SABS scheme, there were still questions as to the actual definition of economic loss. The mother in *Henry* sustained a clear, easily established and easily quantified income loss due to missed time from work. There are many non-professional caregivers (generally family members of accident victims) who will not fit so easily into the "lost income" category of economic loss. The question is, can these caregivers establish other forms of economic loss in a manner that will satisfy the incurred expense analysis?

On January 18, 2013, FSCO released its decision in *Simser v Aviva* (FSCO A11-004610, January 16, 2013), which sought to define "economic loss". In *Simser*, relatives of Kevin Simser provided attendant care and housekeeping services to him following a motor vehicle accident on November 10, 2010. Julie Simser testified that she provided care to Kevin, but was able to work her normal job with slightly modified hours (going to work early and leaving throughout the day). Unfortunately, Julie could not provide documentation that supported her assertion that she was not paid when she was not at work. Kasey Simser also claimed to have provided care to Kevin, and lost time from school as a result. Again, no evidence was

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Incurred Expenses: Defining "Economic Loss" in Light of Simser v. Aviva

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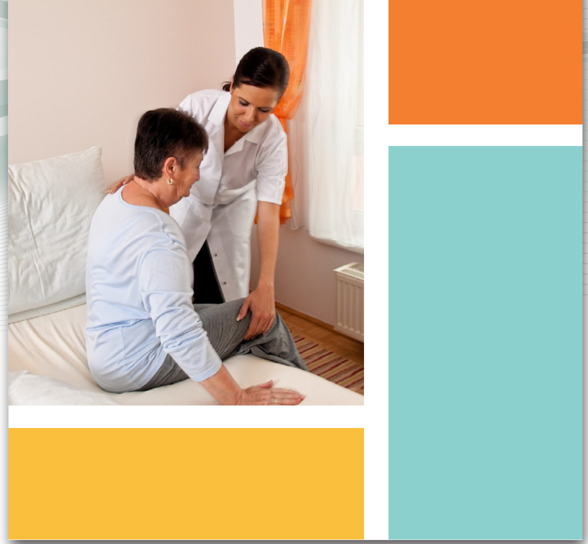

tendered with regard to Kasey's claim, and instead Julie Simser simply testified that Kasey had lost time from school to care for Kevin.

Counsel for Simser supported the economic loss claim with a report by Dr. Jack Carr, an economist, who advised the arbitrator that in the field of economics, "economic loss" included a loss of opportunity to engage in labour or leisure activities and not simply an income loss. Counsel for Simser argued that economic loss should be given a broad definition given the SABS' consumer protection purpose. Aviva, Simser's insurer, argued that "economic loss" should be given an ordinary, everyday definition in line with the definition in Black's Law Dictionary:

> *Economic loss: A monetary loss such as lost wages or lost profits. The term usually refers to a type of damages recoverable in a lawsuit. For example, in a products-liability suit, economic loss includes the cost of repair or replacement of defective property, as well as commercial loss for the property's inadequate value and consequent loss of profits or use.*

Arbitrator Lee preferred Aviva's definition, stating that all service providers will expend or lose time by providing a service to the insured, and if Dr. Carr's "loss of opportunity" definition were to be used, "every service provider will incur an economic loss in every instance." Arbitrator Lee did not completely shut the door to the "loss of opportunity" category stating, "there may be specific occasions where a loss of opportunity might equate to an 'economic loss' … I do not find that 'economic loss', should in every instance, encompass the loss of time, leisure, labour and opportunity". Arbitrator Lee concluded that the economic loss must relate to some form of financial or monetary loss and denied the payment of the benefits claimed by the Simser family.

Julie and Kasey Simser also made claims for out-of-pocket expenses (fuel charges, parking fees, and restaurant bills) incurred as a result of caring for Kevin. Simser's counsel argued that by paying these expenses, the insurer had already recognized an economic loss in relation to providing caregiving services.

Arbitrator Lee refused to accept this argument, distinguishing this loss from the concrete income loss established in *Henry* and found that a mere $50 in miscellaneous charges was insufficient to trigger the full payment of attendant care and housekeeping benefits. Arbitrator Lee reasoned that if he were to accept this argument then, "every service provider would be able to circumvent the amended regulations by purchasing a single meal in a restaurant, a tank of gas, or as suggested by counsel, by paying one cent on a bus ticket."

Arbitrator Lee's decision with regard to out-of-pocket expenses seems to contradict his earlier remarks regarding economic loss being financial or monetary in nature. The regulation does not require "income loss" but rather "economic loss" and an out-of-pocket expense is clearly a monetary loss.

As a judgment, *Simser* suffers from a lack of good evidence regarding "loss of opportunity" by Julie and Kasey Simser. It could be that a future case with better evidence and credible witnesses would result in a more advantageous judgment for family member caregivers. The case is currently under appeal, and we will have to wait to see whether "economic loss" will be given a broader definition than the cautious one given by Arbitrator Lee, who seemed to be overly concerned with keeping the proverbial "floodgates" closed. ■■■

David A. Payne
PARTNER | THOMSON, ROGERS

Adam J. Tanel
ASSOCIATE | THOMSON, ROGERS

INSURERS KEEP TRYING TO PUT THE CAT BACK IN THE BAG. DON'T LET THEM.

The accident benefits maze is difficult to navigate at the best of times. This is especially true for victims of a traumatic brain injury (TBI). The Ontario Government recognized this special vulnerability with a 2010 regulation that declared that any individual with a Glasgow Coma Scale (GCS) reading of 9 or less (as the result of a collision) is automatically deemed to be catastrophically impaired.

The purpose of this regulation was to create a "bright line" so that individuals with a GCS reading of 9 or less, did not have to jump through further hoops to be declared catastrophically impaired. That is not to say that TBI victims with a GCS above 9 are precluded from applying for a catastrophic determination, but merely that they will have a more difficult evidentiary burden when doing so.

Not surprisingly, insurers have been reluctant to accept the automatic catastrophic designation of TBI victims with a GCS of 9 or less. Insurers consistently dispute catastrophic designations, even in cases where there is a clear GCS reading of 9 or less.

Often the insurers' position is that the GCS reading was taken too long after the subject collision, or that the lowered GCS reading was the result of anesthetics and painkillers. These are red herrings. The legislation and the case-law are clear; a GCS of 9 or less leads to an automatic catastrophic designation.

Two recent FSCO decisions are instructive on this point. In *Mallat v. Personal Insurance*, the accident victim underwent 25 GCS tests. Only one of these tests provided a result of 9 or less. The low reading was taken 15 hours after the collision, after major surgery that had required consciousness altering sedatives. Nonetheless, FSCO had declared the victim to be catastrophically impaired.

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Insurers Keep Trying to Put the Cat Back in the Bag. Don't Let Them.
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In *Hodges v. Security National Insurance* (confirmed on appeal), FSCO declared that a GCS reading of 9 or less – taken four days after the collision – was sufficient to deem the accident victim catastrophically impaired.

While the crystal clear legislation and case-law has not prevented insurers from contesting catastrophic designations even in the most obvious cases, it seems as though they are not "sticking to their guns" when challenged. When an insurer indicates that it will contest the catastrophic designation of a victim with a GCS of 9 or less, they almost invariably properly retreat when advised in writing about the above-noted FSCO decisions.

If such a letter can convince the insurer not to fight the catastrophic designation, one may be left wondering why they would ever purport to contest the designation in the first place. The answer may very well be that they are playing the odds, knowing that an unrepresented accident victim or a victim with inexperienced and/or unsophisticated counsel may accept the initial denial. Often, the most vulnerable TBI victims are left not receiving benefits to which they are, at law, entitled.

One lesson for health care practitioners: if you have a patient whose records show a GCS reading of 9 or less, and you know that they are not receiving benefits proportionate to their catastrophic impairment, ask yourself why? And then do something about it. The cat, as they say, is out of the bag, and the insurers should not be allowed to change that.

CATASTROPHIC CLARITY

Harold Becker PhD, MD, FCFP
ASSISTANT PROFESSOR, FACULTY OF MEDICINE | UNIVERSITY OF TORONTO

On the eve of the FSCO Catastrophic Impairment Roundtable, I would like to offer some thoughts which hopefully will provide clarity to the issue of the redefinition of Catastrophic Impairment.

It is important to remember that Catastrophic Impairment is a legal definition, not a medical one. Therefore, what does or does not represent catastrophic impairment cannot be based on "science", nor can it be based on medical opinion. That is the essence of the discussion at hand.

Much of what is being contemplated in the redefinition is an attempt to cloak Policy as Science. If it is Policy to change the definition, so be it. FSCO should be honest and declare its intent to the 12 million Ontarians affected by the anticipated changes (not just the 9 million licenced drivers, as pedestrians are also affected by these definitions). If we cannot afford to pay for catastrophic injuries as they are defined within the present premium umbrella, then the IBC and FSCO should admit that there needs to be Policy change to address this.

The recent FSCO Roundtable was struck to examine three aspects of the recommendations of the Expert Panel, namely combining physical and psychiatric impairments; the definition of psychiatric impairment itself; and the definitions of catastrophic brain injuries and spinal cord injuries.

The new definitions suggested by the Expert Panel direct that physical impairments cannot be combined with psychiatric impairments, and particularly, that impairment from traumatic brain injury cannot be combined with mental and behavioural impairment arising from an auto accident. I must again point out that the "interpretation" of the AMA Guides in auto insurance legislation is a legal exercise, not a medical one. There is a statutory directive to utilize the AMA Guides in impairment scoring. Because the AMA Guides are incorporated into the SABS, judicial interpretation, not Expert Panel interpretation cloaked as "science", is mandated. So the question of whether the AMA Guides allows these combinations is not a matter for

"scientific" analysis by an "Expert Panel"; it is a judicial interpretation of the Statutory Accident Benefits Schedule and clear jurisprudence has already been established on this issue.

I am concerned that many stakeholders are continuing to suggest "me too" agendas for the change of the definition. Not only is this a futile exercise, I question fundamentally whether any change in the present definition is even necessary as the definition only affects about 1% of all claimants. Given that there are 60,000 claimants in the system each year, that means only 600 or so individuals are affected by the definition, and more likely than not about half of them will clearly meet any reasonable catastrophic definition, due to such things as severe brain injury, quadriplegia, amputations, etc. These need no interpretation. That leaves a few hundred claimants over whom this whole fight is evolving. For an insurance scheme that is supposed to be "remedial", this hardly seems the reason for the wholesale definition change.

What about the psychiatric catastrophic threshold requiring a Global Assessment of Function (GAF) of 40 or less? To me, the introduction of this new draconian definition is an unfortunate agenda-driven attempt to exclude mental illness in all but the most profoundly severe forms. If that is what the government wants to do, it should be straightforward and it should explain its intention honestly as a matter of Policy to the 12 million Ontarians who may be at risk. So far, this has not been done.

Regarding the third issue, namely the definitions of catastrophic brain injury and spinal cord injury, I have already indicated in my submission to FSCO regarding the Expert Panel's report in 2011 that I applaud the Panel's innovation in these areas. I have come to recognize from the submissions of others, however, that there may be significant reasons to review these definitions further.

It has taken eighteen years to accumulate the existing jurisprudence that is finally providing clarity to the interpretation of the definition as it stands. If the purpose of the definition change (as stated by FSCO), is to "clarify" how to apply the SABS, expect another 18 years before we get to the point we are at now in achieving that clarity. ■■■

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  Should you have any questions, please contact Joseph Pileggi at **jpileggi@thomsonrogers.com**.

UPCOMING EVENTS

- **20th Annual Conference on Neurobehavioural Rehabilitation in Acquired Brain Injury**
  "Innovative Strategies for Issues Complicating Brain Injury"
  May 9-10, 2013 | Hamilton Convention Centre | Hamilton

- **Brain Injury Association of Quinte District Conference & Evening Reception**
  "The Amazing Brain: Resilience in the Face of Adversity"
  May 14 & 15, 2013

- **Heel & Wheels - 5K Run/Walk, 1K Walk/Roll**
  (Brain Injury Association Waterloo-Wellington)
  Sunday, June 2, 2013 | Bingemans | Kitchener
  For more information, contact Robin Harrington 519-579-5300.

- **BIST/OBIA Mix & Mingle**
  Wednesday, June 12, 2013 | Steam Whistle Brewery | Toronto
  For more information, contact Terry Wilcox 1-800-263-5404.

- **Personal Injury Alliance Conference**
  "Catastrophic Impairment: A Look into the Future"
  Thursday, June 13, 2013 | The Carlu | Toronto

- **Back to School Conference – SAVE THE DATE**
  Thursday, September 12, 2013 | Four Seasons Hotel | Toronto

For more information on the conferences, please visit:
http://www.thomsonrogers.com/upcoming-events-seminars.

Thomson, Rogers holds various *Lunch & Learn seminars* throughout the year to assist health care providers, and other interested parties, in understanding the automobile insurance system. If you would like to arrange a *Lunch & Learn seminar* with Thomson, Rogers, please contact Joseph Pileggi at **jpileggi@thomsonrogers.com**

If you have any questions regarding the articles in this issue of the Accident Benefit Reporter, please contact the following authors:

Robert M. Ben
rben@thomsonrogers.com

Stacey L. Stevens
sstevens@thomsonrogers.com

Esther J. Roche
eroche@thomsonrogers.com

David A. Payne
dpayne@thomsonrogers.com

Adam J. Tanel
atanel@thomsonrogers.com

Dr. Harold Becker
hbecker@omegamedical.ca

Accident Benefit Reporter is a publication of Thomson, Rogers

Suite 3100, 390 Bay Street,
Toronto, Ontario M5H 1W2

Tel 416-868-3100

Toll Free 1-888-223-0448

Fax 416-868-3134

Visit our web site at:
www.thomsonrogers.com

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