

CITATION: Kusnierz v. Economical Mutual Insurance Company, 2011 ONCA 823
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COURT OF APPEAL FOR ONTARIO

MacPherson and LaForme JJ.A. and Hackland R.S.J. (*ad hoc*)

BETWEEN

Robert Kusnierz

Plaintiff (Appellant)

and

The Economical Mutual Insurance Company

Defendant (Respondent)

Paul J. Pape, David S. Steinberg and Shantona Chaudhury, for the appellant

Lee Samis and Lisa Armstrong, for the respondent

James L. Vigmond and Brian M. Cameron, for the intervener Ontario Trial Lawyers Association

Alan L.W. D'Silva, Mark Walli and Vanessa Voakes, for the intervener Insurance Bureau of Canada

Heard: November 16, 2011

On appeal from the judgment of Justice Peter Lauwers of the Superior Court of Justice dated October 19, 2010, with reasons reported at 2010 ONSC 5749.

MacPherson J.A.:

A. INTRODUCTION

[1] The appellant Robert Kusnierz was involved in a serious single vehicle accident ten years ago. He suffered numerous physical and psychological injuries as a result of the accident, including the loss of his left leg below the knee and clinical depression.

[2] Mr. Kusnierz was insured by the respondent insurance company. He sought accident benefits under the *Statutory Accident Benefits Schedule – Accidents on or after November 1, 1996*, O. Reg 403/96 (“SABS”). The respondent agreed that the appellant was entitled to some benefits. However, the parties disagreed on the classification of the appellant’s injuries and on the quantum of benefits flowing therefrom.

[3] The core of the dispute is this: if the appellant establishes “catastrophic impairment”, he is entitled to enhanced medical and rehabilitation benefits up to \$1 million; otherwise, he is entitled to a maximum of \$100,000.

[4] The trial judge interpreted the relevant *SABS* provisions and concluded that the appellant could not establish the legal threshold of “catastrophic impairment”. He dismissed the appellant’s action.

[5] The appellant appeals from this judgment.

B. FACTS

(1) The parties and events

[6] On December 24, 2001, Mr. Kusnierz, who was 29 years old, was a passenger in a car that veered off the road and rolled over several times. His left leg was badly injured and had to be amputated below the knee.

[7] The loss of part of his leg continues to be traumatic for Mr. Kusnierz, both physically and psychologically. Since losing his leg, he has suffered ongoing deterioration of his stump, which has impeded his use of prostheses. He has had ten different prostheses over the years. Still, he is unable to wear a prosthesis half of the time due to poor fit and pain that he describes as “unbearable”. Even with a prosthesis, he has trouble walking; he walks well only on level surfaces.

[8] On days that Mr. Kusnierz cannot attach the prosthesis – due to recurring cyst formation, swelling of the stump, and resulting pain – he stays indoors and uses a walker or a wheelchair.

[9] Mr. Kusnierz suffered other physical problems as a result of the accident, including sore shoulders, pain in his neck and lower back, headaches, visual disturbances, numb fingers, and soreness in his hips, knees and right ankle.

[10] In addition to physical impairments, the accident has also left Mr. Kusnierz with significant ongoing psychological impairments. He had no history of psychiatric problems before the accident, and the connection between his physical and psychological

impairments is not disputed. Ever since the accident, Mr. Kusnierz has withdrawn from other people emotionally and socially. According to the Designated Assessment Centre team that assessed him, Mr. Kusnierz's psychological symptoms are "severe" and he likely meets the DSM-IV diagnostic criteria for both a major chronic depressive disorder and, to a lesser degree, post-traumatic stress disorder.

[11] Finally, as a result of his disabilities, Mr. Kusnierz could not drive tractor trailers and lost his job. Today, he lives with his wife whom he married in 2009. He owns a trailer park/marina in St. William, a town near Port Dover, and is able to do some work on site.

(2) The Agreed Statement of Facts and Issues

[12] A more comprehensive summary of the facts, including a description of the extensive reports prepared by a large number of medical professionals, is not required because at the trial the parties filed an Agreed Statement of Facts and Issues, which provided:

1. Kusnierz is a person entitled to SABS (Ontario Regulation 403/96) benefits from Economical as a result of an accident which occurred on, or about, December 24, 2001.
2. Kusnierz has applied to be considered as a person who has sustained a "catastrophic impairment", as that term is used under the SABS.
3. Kusnierz has been assessed on behalf of both parties in order to determine whether or not he has sustained a "catastrophic impairment".

4. The assessors and the parties agree Kusnierz does not meet the definition of catastrophic impairment pursuant to section 2(1.1) (a), (b), (c), (d), (e), or (g) of the SABS and therefore that Kusnierz could only possibly be considered to have met the definition of “catastrophic impairment” under clause (f) of subsection (1.1) of section 2 of the SABS.
5. The parties have identified two issues for determination by the Court:
 - A. Whether it is permissible to assign percentage ratings in respect of Kusnierz’s psychological impairments under clause 2(1.1)(g) of the SABS and combine them with percentage ratings in respect of Kusnierz’s physical impairments under clause 2(1.1)(f) of the SABS, for the purposes of determining whether Kusnierz is catastrophically impaired pursuant to the SABS and the 4th Edition of the AMA’s Guide to the Evaluation of Permanent Impairment?

It is conceded by Economical that if Kusnierz’s physical and psychological impairments are combined he will meet the definition of catastrophic impairment.
 - B. Secondly, if the combining of physical and psychological impairment ratings is not proper, has Kusnierz nevertheless sustained a catastrophic impairment on the basis of 2(1.1)(f) of the SABS alone?
6. This agreement, the reports of assessors and experts related to catastrophic impairment and attendant care, as listed in the Joint Document Brief, and the American Medical Association’s *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993 constitute the entire record of these proceedings, without restriction on the ability of the parties to call the plaintiff and the authors of any of

these reports as witnesses to also give viva voce evidence.

(3) **The legislation**

[13] The relevant legislation in this case is s. 2 of the *SABS*, which provides:

2. (1) In this Regulation,

...

“impairment” means a loss or abnormality of a psychological, physiological or anatomical structure or function;

(1.1) For the purposes of this Regulation, a catastrophic impairment caused by an accident that occurs before October 1, 2003 is,

(a) paraplegia or quadriplegia;

(b) the amputation or other impairment causing the total and permanent loss of use of both arms;

(c) the amputation or other impairment causing the total and permanent loss of use of both an arm and a leg;

(d) the total loss of vision in both eyes;

(e) brain impairment that, in respect of an accident, results in,

(i) a score of 9 or less on the Glasgow Coma Scale, as published in Jennett, B. and Teasdale, G., *Management of Head Injuries*, Contemporary Neurology Series, Volume 20, F.A. Davis Company, Philadelphia, 1981, according to a test administered within a reasonable period of time after the accident by a person trained for that purpose, or

(ii) a score of 2 (vegetative) or 3 (severe disability) on the Glasgow Outcome Scale, as published in Jennett, B. and Bond, M., *Assessment of Outcome After Severe Brain*

Damage, Lancet i:480, 1975, according to a test administered more than six months after the accident by a person trained for that purpose;

(f) subject to subsections (2) and (3), an impairment or combination of impairments that, in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, results in 55 per cent or more impairment of the whole person; or

(g) subject to subsections (2) and (3), an impairment that, in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, results in a class 4 impairment (marked impairment) or class 5 impairment (extreme impairment) due to mental or behavioural disorder.

...

(3) For the purpose of clauses (1.1) (f) and (g) and (1.2) (f) and (g), an impairment that is sustained by an insured person but is not listed in the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993 shall be deemed to be the impairment that is listed in that document and that is most analogous to the impairment sustained by the insured person.

(4) The trial judgment

[14] The trial judge delivered comprehensive, well-organized and clear reasons for judgment.

[15] Early in his reasons, the trial judge noted that the essence of the trial was an exercise in statutory interpretation, essentially confirming the underlying purpose of the parties' Agreed Statement of Facts and Issues. Concerning Mr. Kusnierz, the trial judge stated:

Mr. Kusnierz was a credible and honest witness who did not embellish his evidence. He has suffered much and continues to suffer from the results of his injuries. He deserves the sympathy of the court.

[16] The trial judge then turned to the two legal issues set out in the Agreed Statement of Facts and Issues.

[17] On the first issue, he concluded that it was not permissible to combine cls. 2(1.1)(f) and 2(1.1)(g) of the *SABS* in determining whether a person was “catastrophically impaired”.

[18] With cl. 2(1.1)(g) of the *SABS* off the table, the trial judge turned to an assessment of Mr. Kusnierz under cl. 2(1.1)(f) standing alone. He concluded that Mr. Kusnierz had not established the whole person impairment (“WPI”) of 55 per cent required by this provision.

[19] The appellant appeals from the trial judgment. He contends that the trial judge erred in his answers to both of the questions posed in the Agreed Statement of Facts and Issues.

[20] By order of O’Connor A.C.J.O. dated September 9, 2011, the Ontario Trial Lawyers Association and the Insurance Bureau of Canada were granted leave to intervene in this appeal. The Trial Lawyers Association made submissions in support of the appellant’s position. The Insurance Bureau made submissions in support of the respondent’s position.

C. ISSUES

[21] The issues are:

(1) Did the trial judge err by concluding that the *SABS* do not permit an assessor to assign a whole body impairment percentage value to Chapter 14 mental and behavioural impairments in order to determine whether they, in combination with physical impairments, result in a 55 per cent whole person impairment constituting a catastrophic impairment under cl. 2(1.1)(f)?

(2) If the answer to Question (1) is ‘No’, then did the trial judge err by concluding that Mr. Kusnierz’ physical injuries did not result in whole person impairment of 55 per cent, and therefore did not constitute a catastrophic impairment under cl. 2(1.1)(f) of the *SABS*?

D. ANALYSIS

(1) **Can mental and behavioural impairments be assessed under cl. 2(1.1)(f)?**

[22] The trial judge concluded that it was not permissible to consider mental and behavioural impairments under cl. 2(1.1)(f) of the *SABS*. He summarized his conclusion in this fashion:

I find that it is not permissible under the *SABS* to assign percentage values to mental and behavioural disorders under Chapter 14 of the Guides (which is referred to in clause 2(1.1)(g) of the *SABS*), and then combine them with the percentage values derived from impairments assessed under

the other chapters of the Guides (referred to in clause 2(1.1)(f) of the SABS) in determining whether an individual meets the catastrophic impairment threshold of “55 per cent or more impairment of the whole person” prescribed by clause 2(1.1)(f) of the SABS.

I reach this conclusion for the following reasons, in a nutshell:

- (i) The Guides deliberately do not permit the mental and behavioural disorders in Chapter 14 to be assessed in percent terms and combined with the percentage values derived from impairments assessed under the other chapters of the Guides for the purpose of determining whole person impairment;
- (ii) The structure of the SABS reinforces the bright line demarcation between mental and behavioural disorders referred to in Chapter 14 of the AMA Guides – specifically referred to in clause 2(1.1)(g) of the SABS – from the impairments assessed under the other chapters of the Guides which are referred to in clause 2(1.1)(f) of the SABS; and
- (iii) This interpretation is consistent with the purpose of the specific provisions of Bill 59 and the SABS that this issue engages.

[23] I begin by noting, parenthetically, that “the Guides” referred to by the trial judge in the above summary are the American Medical Association’s *Guides to the Evaluation of Permanent Impairment*, 4th ed. (Chicago: American Medical Association, 1993), which are explicitly designated as the frame of reference for the impairments described in cls. 2(1.1)(f) and (g) of the *SABS*.

[24] With respect, I do not agree with the trial judge’s conclusion and his reasons in support of it. I prefer the opposite conclusion and the reasons of Spiegel J. in *Desbiens v.*

Mordini, [2004] O.J. No. 4735 (S.C.) and J.R. MacKinnon J. in *Arts (Litigation Guardian of) v. State Farm Insurance Co.* (2001), 91 O.R. (3d) 394 (S.C.), leave to appeal denied, [2008] O.J. No. 5740 (S.C.). The language of the *SABS*, the purpose of the *Guides*, the *Guides'* references to combining physical and psychological impairments, and the goals of the *SABS* lead me to conclude that the combination of physical and psychological impairments is appropriate under cl. 2(1.1)(f).

[25] First, in my view a proper interpretation of the words of cl. 2(1.1)(f) of the *SABS* is consistent with the appellant's interpretation. On this point, I can do no better than set out, and expressly adopt, Spiegel J.'s analysis in *Desbiens*:

While Bill 59 allows only those who have suffered a catastrophic impairment to recover health care expenses in my view, the text of the Regulation¹ itself indicates that the drafters clearly intended the definition of "catastrophic impairment" to be inclusive rather than restrictive.

Firstly, as has been noted, the definition of "impairment" as meaning "a loss or abnormality of a psychological, physiological or anatomical structure or function" is extremely broad. Indeed it is difficult to conceive of a more inclusive definition.

Secondly, clause (f) ensures that persons who do not suffer any of the specific injuries or conditions described in the other clauses of ss. 5(1)², but nevertheless have an impairment, or a combination of impairments, that is so severe that they are among those with the greatest need for health care are able to recover the expenses of that health

¹ In *Desbiens*, Spiegel J. was interpreting the definition of "catastrophic impairment" contained in s. 5(1) of the regulation *Court Proceedings for Automobile Accidents that Occur on or after November 1, 1996*, O.Reg. 461/96, which is substantially identical to *SABS* cl. 2(1.1). *SABS* cl. 2(1.1)(f) does differ slightly in referring to "an impairment or combination of impairments" while 5(1)(f) refers to "any impairment or combination of impairments". The two regulations were made at the same time.

² Compare *SABS* s. 2(1.1).

care. In effect the legislature, with clause (f), included a catch-all provision for the benefit of those who were likely in the greatest need of health care.

Thirdly, in order to ensure that no impairments were overlooked in determining whether the requirements of clause (f) and (g) were met, the analogous impairment provision, ss. 5(3)³ was included. This provision comes into play where an impairment is sustained that is not listed in the Guides.

Fourthly, there is nothing in the text of the Regulation that suggests that a combination of physiological and psychological impairments is not permitted. Indeed clause (f) permits *any* combination of impairments, both physical and psychological. The only requirement is that these impairments must result in a 55% WPI "in accordance with" the Guides. While the definition in clause (g) does not include mild or moderate psychological impairments there is nothing in the Regulation that prohibits such impairments from being considered under clause (f). If the intention were to exclude psychological impairments from clause (f), the insertion of the word "physiological" before the word "impairment[s]" would easily have achieved that purpose. [Emphasis in original.]

[26] The trial judge noted that the *SABS* legislator could have, but did not, expressly provide for the combination of physical and psychiatric injuries. With respect, the opposite is also true. The legislator could have, but did not, expressly forbid the combination of physical and psychiatric injuries. Without qualification either way, the plain language of cl. 2(1.1)(f) seems to suggest that combination of both kinds of impairment is possible.

[27] Second, the purpose of the *Guides* supports combination. In my view the trial judge erred by concluding that combining physical and psychiatric impairments "would

³ Compare *SABS* s. 2(3).

contradict the express purpose of the Guides, which is to provide a system for evaluating impairments that is objective and standardized”. With respect, this ignores the *Guides*’ parallel aim of assessing the total effect of a person’s impairments on his or her everyday activities. An objective, standardized system of assessment is only useful to the extent that it can reflect persons’ actual levels of impairment. To disregard the mental and behavioural consequences of a person’s injuries because they are too hard to measure would defeat the purpose of the *Guides*. This is reflected by the fact that the *Guides*, at p. 301, after cautioning against quantifying Chapter 14 impairments in percentage terms in ordinary cases, go on to allow quantification where necessary:

Physicians, of course, must often make judgments based more on clinical impressions than on accurate, objective, analytic empiric evidence. In those circumstances where it is essential to make an estimate, the ordinal or numeric scale might be of some general use.

[28] Third, the *Guides* describe a number of situations where an assessment of a person’s physical impairment should take into account Chapter 14 mental and behavioural impairments:

- At p. 230 (“Facial Disfigurement”): “We recommend that ‘total disfigurement of the face’ after treatment be deemed a 15% to 35% impairment of the whole person. *For the assessment of impairment related to mental and behavioral aspects of disfigurement, the reader may refer to the chapter on mental and behavioral disorders [Chapter 14].*”
- At p. 275 (“Mammary Glands”): “A female patient of childbearing age with absence of the breasts, a patient with galactorrhea sufficient to require the use of

absorbent pads, and a male patient with painful gynecomastia that interferes with the performance of daily activities would each have a 0% to 5% impairment of the whole person. *If there were a coexisting psychiatric impairment, the whole-person impairment would be greater.*”

- At p. 279 (“Disfigurement”): “With disfigurement there is usually no loss of body function and little or no effect on the activities of daily living. Nevertheless, disfigurement may impair by causing social rejection or an unfavorable self-image with self-imposed isolation, life-style alteration, or other behavioural changes. *If impairment due to disfigurement does exist, it is usually manifested by a change in behaviour, such as withdrawal from social contacts, in which case it would be evaluated in accordance with the criteria with the Guides chapter on mental and behavioral conditions.*”
- At p. 284 (Examples of Class 2 Skin Impairments): In example 5, a patient is assessed as having a “20% impairment due to chemically induced nail dystrophy, which is to be *combined* using the Combined Values Chart (p. 322) with an appropriate value for the paresthesia (see the part on the hand in *Guides* chapter on the musculoskeletal system) to estimate the whole-person impairment. *A mental and behavioral impairment (Chapter 14, p. 291) might further increase the estimate.*”
- At p. 285 (Examples of Class 3 Skin Impairments): In example 1, a patient is assessed as having a “30% impairment due to the skin disorder, *which is to be increased by an amount that is proportional to the estimated mental and behavioural impairment* (see Chapter 14).” [Emphasis added.]

[29] In his judgment, the trial judge noted the two skin examples, but wrote that “[t]he principle of interpretation known as ‘implied exclusion’, or, in Latin, ‘*expressio unius est*

exclusion alterius’, has obvious and reasonable application” (footnote omitted). With respect, this application of the *expressio unius* principle is incorrect.

[30] In my view, the *Guides*’ examples are illustrative, rather than exhaustive. In at least five places, the *Guides* recommend that physicians refer to Chapter 14 in assessing the total impairment of persons suffering from both physical and behavioural/mental impairments. These recommendations reflect the principle that a total impairment assessment must take both physical and psychiatric impairments into account. There is nothing in the text of the *Guides* to suggest that this principle should be limited to persons with mammary gland or disfigurement problems. Accordingly, it seems to me that combining physical and psychiatric impairments can be done “in accordance with” the *Guides*.

[31] Fourth, this combination produces results that are consistent with the purposes of the *SABS*. The trial judge noted that the *SABS* were designed to make “catastrophic impairments” exceptional, and that allowing combinations of psychiatric and physical impairments would expand the number of persons deemed to be catastrophically impaired. With respect, interpreting 2(1.1)(f) to allow assessment of physical impairments in combination with psychiatric impairments is not inconsistent with ensuring that “catastrophic impairments” remain rare. At oral argument, the respondent conceded that there are only a very few cases where there are permanent physical impairments and permanent psychiatric impairments that are not catastrophic if assessed separately, but are catastrophic if assessed together. Accordingly, the class of persons

entitled to “catastrophic impairment” benefits will remain small under either interpretation.

[32] Finally, allowing combination promotes fairness and the objectives of the statutory scheme. The trial judge acknowledged that interpreting the *SABS* and the *Guides* to prevent mental and behavioural impairments from being considered under cl. 2(1.1)(f) would leave a gap in the definition of catastrophic impairment. I agree that it seems unfair to deny to persons with combined physical and psychiatric impairments the enhanced benefits that are available to persons with similarly extensive impairments that fall entirely into one category or the other.

[33] However, while the trial judge concluded that resolving the unfairness would require an inappropriate deviation from the “clear intentions of the legislature”, I do not agree that the legislator chose to forbid the combination of physical and psychiatric impairments. Respectfully, I do not read the *Guides*, or the *SABS*, as articulating a policy position against combination. Although the *Guides* do warn against assigning percentages to non-neurological psychiatric impairments, there are, as discussed above, a number of indications that combination may be permissible under certain circumstances.

[34] For these reasons, I would conclude that the trial judge erred in his answer to the question posed in the first issue.⁴

(2) **The threshold under cl. 2(1.1)(f) standing alone**

[35] In light of the conclusion on the first issue, it is not necessary, strictly speaking, to address the second issue. However, for the sake of completeness, I would record that I can see no palpable and overriding error (the appellant concedes that this is the proper test) in the trial judge's analysis and calculation of the gait derangement and skin impairment components of the appellant's injuries. Accordingly, I would not allow the appeal on this ground.

E. DISPOSITION

[36] I would allow the appeal, set aside the judgment of the trial judge, declare that the appellant meets the definition of "catastrophic impairment" under cl. 2(1.1)(f) of the *SABS* and, accordingly, is entitled to enhanced medical and rehabilitation benefits thereunder, and direct the respondent to pay such benefits to the appellant.

⁴ In reaching this conclusion, I have not referred to the fresh evidence that the appellant sought to introduce, namely, evidence of the legislative purpose of the definition of "catastrophic impairment" in the *SABS* in issue in this appeal. The proposed fresh evidence consists of the transcripts of the hearings of the Standing Committee Report, and transcripts of the Legislative Assembly debates on Bill 59. I would not admit the fresh evidence. It does not meet three of the four criteria set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759. The evidence could have been adduced at trial, it is not relevant, and it could not reasonably be expected to have affected the result.

[37] The appellant is entitled to his costs of the appeal. If the parties cannot agree on costs, the appellant may make his submissions within 21 days of the release of this decision, and the respondent may make its submissions within 14 days thereafter.

RELEASED: *JCM*

DEC 23 2011

JCMacPherson J.A.

~~*J. Agre (K. L. J. A.)*~~

J. Agre. Horded. J. (ad hoc)