

# **UPDATE ON THE ANTICIPATED CHANGES TO THE DEFINITION OF “CATASTROPHIC IMPAIRMENT”**

SEPTEMBER 12, 2013

**DARCY R. MERKUR**, Partner

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

416-868-3176  
dmerkur@thomsonrogers.com

**THOMSON ROGERS**

**PERSONAL INJURY LAWYERS**

Thanks to an impressive campaign by victim advocates against changes to the definition to “catastrophic impairment” set out in the Ontario Statutory Accident Benefit Schedule and/or as a result of the Ontario premier suddenly announcing his resignation in October 2012, the anticipated narrowing of the definition of “catastrophic impairment” has been delayed.

For those with limited understanding of this topic, no-fault accident benefits, available to anyone injured in any way by an automobile in Ontario, provide extensive healthcare benefits (over \$2 million in total), to accident victims with injuries that meet a legal definition of a “catastrophic impairment”.

The “catastrophic impairment” definition (the “CAT” definition) has been virtually unchanged for over 15 years and recent appellate Court decisions have finally clarified how each of the legal tests should be applied.

Unfortunately, under pressure from the Insurance Bureau of Canada, the Ontario government has been entertaining an overhaul of the definition in what appears to be a controversial effort to restrict access to these enhanced benefits to only those who later prove to have needed them. In other words, the insurance companies do not want someone who makes a good recovery to be eligible to access ongoing care benefits even though they, as a result of making a good recovery, won't need to do so. Since our system is a needs based system designed to only pay benefits were the eligible claimant reasonably requires them, the insurer's motives in pushing for changes to the CAT definition are suspicious.

When I last presented on this topic at our Back to School conference in September 2012, I explained the history leading up to the potential changes. That history includes the following:

- FCSO's Five Year Review (published in March 2009)
- The CAT Expert Panel Phase I report regarding changes to CAT definition (released April, 2011)
- The CAT Expert Panel Phase II report regarding credentials for CAT assessors (released June, 2011)
- The Superintendent's Report on the Definition of Catastrophic Impairment in the Statutory Accident Benefit Schedule (December, 2011)

Despite my prediction in September 2012 of imminent changes, none have been made. Practically speaking the resignation of the Ontario premier changed the focus of the government and impacted the government's ability and willingness to implement changes. But now the election is behind us and the government is posturing to take action.

The NDP party has demanded reductions in auto insurance premiums and that initiative has, following some budget negotiations, been adopted by the government.

The government has made it clear that over the next two year period it intends to reduce Ontario auto insurance premiums by 15%.

The insurance companies have made it clear that the only way to do so would be to change the definition of “catastrophic impairment.” In other words, the insurance companies have insisted on a narrow CAT definition in order to address the demanded rate reductions.

For example, in September 2013, Ralph Palumbo, vice-president Ontario, Insurance Bureau of Canada, was quoted as saying the following in relation to the need to change the CAT definition in order to reduce insurance premiums:

*“We’re hoping that they (government) quickly introduce a new definition of catastrophic impairment. If you want to see some rate reductions, that’s the place to start to make sure that unnecessary costs related to catastrophic injures are taken out so that money goes to people who really need it.”*

You should recall that the CAT expert panel was asked to make the CAT definition more scientific, not to narrow it. Now, the insurance company has made it clear the two approaches go hand and hand—in short, the insurer’s insist that the new definition must, from a scientific basis, narrow the definition of CAT.

The potential CAT changes set out in the CAT Expert report and as recommended by the Superintendent in his Report to the Minister of Finance are summarized in detail in the paper I presented in September 2012. That paper, along with charts summarizing the proposed new CAT definition are attached at Tab B, Tab C and Tab D to this paper. At Tab E you will find the Superintendent’s Report on the Definition of Catastrophic Impairment in the Statutory Accident Benefit Schedule (dated December 2011 but only made public in June 2012).

As set out in that paper, the new CAT definition would overhaul the current tests used to assess CAT and replace them with what are considered more accurate, modern tests. Some of the new tests are widely used and may be an improvement over the old tests. However, the changes call for the elimination of the most popular CAT test, the GCS test, and that change alone completely changes the CAT landscape for benefits available to a large percentage of very seriously injured claimants.

We must all get ready to respond to the expected initiative to revisit the CAT changes. It seems like a virtual certainty that the CAT definition will again be debated as part of the firm mandate to reduce auto insurance premiums.

We need to organize and coordinate an effective response on behalf of accident victims in Ontario concerned about the practical implications of a narrow definition of CAT - a proposed definition that can only be accessed months post-accident often after the limited benefits have already been exhausted and treatment has stalled as a result.

More information about any announcement will be updated at [www.thomsonrogers.com](http://www.thomsonrogers.com)

It should only be a matter of weeks or months before more information is available.

**DARCY MERKUR**, Partner  
Thomson, Rogers  
Suite 3100, 390 Bay Street  
Toronto, ON M5H 1W2

416-868-3176  
[dmerkur@thomsonrogers.com](mailto:dmerkur@thomsonrogers.com)

***Please monitor [www.thomsonrogers.com](http://www.thomsonrogers.com) for updates on the CAT changes.***