

## WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of June 9 – 13, 2008

### Superior Court endorses *Desbiens* approach – whole person impairment assessment includes assignment of percentage ratings to psychological or psychiatric impairments

#### ***Arts (Litigation Guardian of) v. State Farm Insurance Co.* 2008 Carswell Ont 3102; 2008 CanLII 25055 (S.C.J.)**

A recent decision of the Superior Court of Justice warrants review this week. Defendant insurer brought motion to determine a question of law before trial: whether, when determining if insured is catastrophically impaired pursuant to section 2(1)(f) of the Statutory SABS, it is permissible to assign percentage ratings in respect of a person's psychological or psychiatric impairments and combine them with percentage ratings in respect of the person's physical impairments.

IME report completed after application for determination of catastrophic impairment concluded insured suffered from a number of physical and cognitive impairments. Insured was also diagnosed with mood disorder due to general medical condition (brain injury) with depressive features, cognitive disorder, adjustment disorder with mixed anxiety and depressed mood – chronic, personality change due to a general medical condition (brain injury) – combined type (liable, disinhibited), and social anxiety.

IME assessors opined that whole person impairment from neuro-musculoskeletal injuries was 23 percent. Mental and behavioural disorders represented 40 percent impairment. If both the ratings for sections 2(1)(f) and (g) of the SABS were combined, insured had a total score of 55 percent whole person impairment.

Insurer argued that AMA Guides recommend against use of mental/behavioural percentages, and that *Desbiens v. Mordini* (2004) O.J. No. 4735 was wrongfully decided. MacKinnon J. disagreed with insurer's argument, and found *Desbiens* to be compelling, reasonable, and persuasive. Paragraph 2(1)(f) of the SABS requires consideration of all impairments, however caused, and that they be totaled together in arriving at whole person impairment.

MacKinnon J. noted that an injured victim may fall short of being found catastrophically impaired on the basis of any one of the other seven parts to the definition of catastrophic impairment, but when all of his/her impairments are considered, he/she may well have a 55 percent Whole Body Impairment. I could

not have been the intention of the legislature to deprive motor vehicle accident victims in these circumstances the right to recover needed attendant care and medical/rehabilitative benefits. To do so would be both unreasonable and unjust.

### **Implications**

Consistent with numerous FSCO decisions, the Superior Court of Justice has upheld the *Desbiens* approach to whole person impairment when determining catastrophic impairment despite a push by insurers, supported by Dr. Ameis whose approach was rejected in *Desbiens*, to revisit the issue and overturn *Desbiens*. Hopefully, this issue can now be put to rest, and the practice of some insurers instructing IME assessors not to assign percentage ratings to psychological or psychiatric impairments may now cease.

