

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of July 20 to 24, 2009

Catastrophic impairment found by the Court of Appeal even when the GCS score rises above 9 within 40 minutes from the time of the collision.

***Liu v. 1226071 Ontario Inc. (Canadian Zhorong Trading Ltd.)*, 2009 ONCA 571, per MacFarland J.A.**

MVC April 9, 1999. The appellant Liu claimed tort damages for future medical and attendant care expenses from the respondent at-fault driver. In order to be entitled to recover damages for future health care expenses, the appellant had to demonstrate that he sustained a “catastrophic impairment” in accordance with the regulations under the *Insurance Act* and, in particular, that he had sustained a brain impairment and a GCS reading of 9 or less within a reasonable period of time after the collision. The collision occurred at 20:15 and the GCS readings were 3 at 20:31; 8 at 20:43; 12 at 20:55; and 14 at 20:57.

The appellant’s position was that at least one GCS score was 9 or less taken within a reasonable time after the collision and he should be deemed to be catastrophically impaired. The respondent’s position was that the plaintiff should not be considered catastrophically impaired because his GCS reading rose to 12 within 33 minutes of the collision which is within what would be considered a reasonable period of time in all the circumstances of the case. There was no issue as to whether the GCS tests were administered by a person trained for that purpose.

The trial judge referred to the Arbitration decision of *Liberty Mutual Insurance Co. v. Young* [2006] O.J. No. 952, where the Divisional Court found an arbitrator’s decision was not unreasonable in finding that one hour, within which four GCS scores were recorded, was a reasonable time in the circumstances of that case. However, although the trial judge found that the GCS for Liu was 9 or less in less than 40 minutes which was a reasonable period of time after the incident, the trial judge found that Liu was not catastrophically impaired and bolstered that finding with the evidence that had been presented that Liu was capable of managing his property and making complex decisions, and that the highest that the medical experts characterized his head injury was “moderate to severe” or “moderately severe”.

The Court of Appeal set aside the order of the trial judge and found the appellant was catastrophically impaired and therefore was entitled to recover damages for future health care costs. The Court of Appeal noted that that trial judge made a finding that a GCS of 9 or less was made within a reasonable time after the collision and that he suffered a brain impairment, and stated: “*In my view having made those findings the appellant met the statutory definition of catastrophic*

impairment and the trial judge's ruling to the contrary is in error and cannot stand." The Court of Appeal reasoned that it is a legal definition to be met and not a medical test, and it is irrelevant that there may have been higher scores also within a reasonable time after the collision. Further, the Court of Appeal commented that it matters not that there is some evidence that the appellant is capable of managing his property nor that his head injury has been described as "moderate to severe".

Implications:

This case further clarifies the scope of the legal test for satisfying the definition of "catastrophic impairment" under the *Insurance Act*. Although the test is no longer applicable in tort actions for collisions after October 1, 2003, and although parts of the regulations defining "catastrophic impairment" have changed, this test considering whether there has been a GCS score of 9 or less within a reasonable period of time after the collision still applies with respect to claiming extended accident benefits. Accordingly, it is important to ensure a complete and comprehensive investigation of medical documentation to determine whether any GCS scores of 9 or less had been documented. This investigation is important notwithstanding that other GCS scores at other reasonable times after the collision may have been documented as above 9 or that the insured person may have recovered to a level of function that may not be considered catastrophic from a medical perspective.

Accessing Arbitration Decisions

If you would like to read the arbitration decisions for yourself, they can be found at <http://www.fSCO.ca/english/insurance/auto/drs/decisions/default.asp>.

Please contact FSCO at 1-800-517-2332 ext. 7202 to obtain a password to gain access to the site.

If you have questions or comments about this edition of the newsletter, contact Sean Mackintosh at Legate & Associates: smackintosh@legate.ca.