

## Focus PERSONAL INJURY

# Pastore: long road to catastrophic designation

Decision recognizes serious and debilitating effects of chronic pain



Joseph Campisi

An important legal step has been reached in recognizing chronic pain as a serious and debilitating condition worthy of catastrophic designation for insurance purposes.

The Ontario Court of Appeal's long-awaited decision in *Aviva Canada Inc. v. Pastore* [2012] O.J. No. 4508 is the leading authority for interpreting catastrophic status in the area of psychological impairment. However, the decision risks becoming neutralized by legislation.

Following the oral submissions before the Court of Appeal, I was congratulated by an insurance company lawyer who had observed the appeal. He believed that we would be successful in overturning the decision of the Divisional Court, but he cautioned that the victory would be short-lived: It would only be a matter of time before insurers had the law changed.

With the release of the recent Superintendent's Report on the Definition of Catastrophic Impairment, we can expect to see some legislative movement in the near future. I am concerned that insurers may seek to lobby the government and use the decision in *Pastore* as evidence in support of the need to narrow the definition of catastrophic impairment. After all, arguments were made throughout the appeal process that an interpretation of the legislation in favour of the appellant would drive up the cost of insurance.

At the centre of Anna Pastore's application for catastrophic designation was the interpretation of the *Statutory Accident Benefits Schedule* covering accidents on or after Nov. 1, 1996. Subsection 2(1.1) defines "catastrophic impairment" and comprises seven categories of impairments: clause (g) specifically addresses entitlement based on mental and behavioural disorders.

The road for Pastore has not been easy. Her application to her auto insurer for catastrophic designation was rejected. A Designated Assessment Centre was then organized by Aviva to evaluate this application and the consensus of the medical team



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was that she met the definition of catastrophic impairment because of her mental and behavioural disorders. Aviva disputed this finding to the Financial Services Commission of Ontario (FSCO) but arbitrator Liz Nastasi reached the same conclusion.

Aviva then appealed to the FSCO director's delegate, Lawrence Blackman, who affirmed the arbitrator's decision that only one marked impairment was sufficient to meet the requirements under clause (g), and that Pastore's one marked impairment in her activities of daily living was a result of mental or behavioural disorders, even though she also suffered from physical pain.

Aviva appealed to the Divisional Court on two grounds:

- Is a class 4 (marked impairment) in only one area of functioning sufficient for a catastrophic impairment designation?
- Should an impairment assessment under s. 2(1.1)(g) of the *Statutory Accident Benefits Schedule* distinguish and exclude impairments that are due to physical injuries from impairments that are a result of a mental or behavioural disorder?

The Divisional Court was split on the question of how many class 4 impairments are required under clause (g), but the majority found that an overall assessment of all four areas of function was required; since Pastore's overall level of function was rated as moderate or class 3, she did not meet the definition in clause (g).

On the second issue of the appeal, the court was unanimous in concluding that the director's delegate erred because he improperly considered pain associated with Pastore's physical injuries in determining that she sustained a class 4 impairment in her activities of daily living.

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Following this setback, Pastore went to the Court of Appeal. At this stage, the court focused on the appropriate standard of review and concluded that the Divisional Court had wrongly applied the standard of correctness. A standard of reasonableness was required and in applying it to the issues in the appeal, the court unanimously found that both the arbitrator and the director's delegate were reasonable in interpreting the legislation vis-à-vis one marked impairment.

On the second issue, the court again concluded that the approach of the arbitrator and the director's delegate was reasonable because the focus was on how the mental part of an overall condition or impairment impacts the various spheres of function and the experience of pain and a diagnosis of pain disorder falls properly within this examination.

In the end, the decision of the arbitrator was restored and with a catastrophic designation, Pas-

tore can apply for up to \$1 million in medical and rehabilitation treatment, up to \$1 million in attendant care assistance, and housekeeping assistance for life.

One must bear in mind that a catastrophic designation is just a title that affords a claimant an opportunity to apply for enhanced benefits. A claimant still has the burden of proving that he or she is entitled to each and every enhanced benefit.

The full impact of this decision remains to be seen, but there is nothing to suggest that this decision will result in a flood of psychological catastrophic claims for insurers. What the Court of Appeal did was interpret the legislation according to its plain meaning and in a manner consistent with the remedial approach and the consumer protection objective of automobile insurance as discussed by the Supreme Court of Canada in *Smith v. Co-operators General Insurance Co.* [2002] S.C.J. No. 34. In this regard, there has been no change in the underwriting risk for auto insurers.

Most important, however, the Court of Appeal confirmed that in determining catastrophic designation, a claimant can have both physical and psychological impairments so long as only the psychological impairments are considered under clause (g) of the legislation.

The decision is a significant one because it recognizes the serious and debilitating effects of chronic pain, which by its very nature includes physical pain. In severe cases, a claimant can apply to the auto insurer for enhanced benefits.

Any legislation that is introduced to prevent chronic pain cases from meeting the catastrophic threshold will reverse the important judicial gains made in compensating psychological disabilities. It may also be discriminatory to deprive chronic pain sufferers with the opportunity to receive the same benefits that are available to individuals who have sustained other injuries as confirmed by the Supreme Court of Canada in *Nova Scotia (Workers' Compensation Board) v. Martin*; *Nova Scotia (Workers' Compensation Board) v. Laseur* [2003] S.C.J. No. 54. With hope, there will be plenty of life for the *Pastore* decision.

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