CAMPISI LLP

Personal Injury Lawyers

CHAMPIONS WITH HEART.

Catastrophic Injury
SETTLEMENTS GUIDE

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This guide has been prepared to provide accident victims, their loved ones, and their healthcare providers with a thorough overview of the criteria used to determine if they are catastrophically impaired.

This pamphlet is not nor is it intended to be legal advice, but merely conveys general information related to legal issues commonly encountered. Legal advice requires knowledge of your personal circumstances, and can only be obtained through a personal interview with a lawyer.

WHAT IS CATASTROPHIC IMPAIRMENT AND WHY IS IT IMPORTANT?

Under Ontario's "no-fault" car insurance regime, each insurer provides accident benefits coverage to its own customers, including income replacement, attendant care, and medical and rehabilitative treatment. Currently, the combined limit available for attendant care and med/rehab under the Statutory Accident Benefits Schedule (SABS) of the ***Insurance Act*** is $65,000. While this might seem like a lot of money, seriously injured car accident victims often exhaust these limits long before they have fully recovered from their injuries. In these cases, they must seek a determination of catastrophic impairment (catastrophic), a designation under the SABS that conveys entitlement to greatly enhanced accident benefits coverage to qualified insureds.

Who is this Guide For?

Our personal injury lawyers specialize in Ontario Law and often have confusion about whether an **accident victim qualifies for a Catastrophic Injury claim**.

To help address your questions, we've created a free guide to **provide accident victims, their loved ones, and their healthcare providers with a thorough overview of the criteria used to determine if they are catastrophically impaired**.

Ontario's legal criteria are quite complex, leading to a lot of uncertainty and confusion over whether a person is likely to qualify under Ontario law. In addition, insurance companies will not make the determination voluntarily in any but the clearest cases. As a result, we have found that many accident victims who should be considering an application for catastrophic benefits, and many healthcare providers who should be recommending it, fail to do so because they do not have a clear understanding of the types of injuries and impairments that will qualify.

If you are seriously injured, **reading this guide is the first step** you can take to avoid needless suffering when you, your loved one, or your patient needs ongoing treatment and care for their recovery that exceeds the non-catastrophic limits.

Take some time to read the guide to better understand the criteria used. **Once you've read the guide, or if you have questions, reach out to us at Campisi Law**. We have achieved exceptional results for our clients against Ontario's most powerful insurance companies (and the law firms that represent them) including AIG, Allstate, Aviva, Chubb, Cooperators, Desjardins, Economical, Intact, Lloyd's, Northbridge, RBC, RSA, TD, Travelers, Wawanesa and Zurich.

Also, for more information on available benefits and amounts, please see the Accident Benefits table in our Car Accident eBook.

Note: The catastrophic criteria were amended as of June 1, 2016. The following discussion will focus on the current SABS. However, as the former version is still in effect for collisions prior to June 1, 2016, the analogous pre-amendment provisions will also be considered.

What are the Different Ways to Qualify as Catastrophic Impairment?

In some cases, a Catastrophic Impairment designation can be determined immediately following the collision. For example, if an insured person meets the criteria set out in the SABS for any the following impairments, they will be deemed Catastrophic Impairment:

- **PARAPLEGIA OR TETRAPLEGIA**
- **AMPUTATION OF A LEG OR SEVERE IMPAIRMENT OF WALKING MOBILITY**
- **AMPUTATION OR TOTAL LOSS OF USE OF AN ARM**
- **LOSS OF VISION IN BOTH EYES**
- **A TRAUMATIC BRAIN INJURY OF SUFFICIENT SEVERITY**

These types of injuries are what come to mind when most people, including physicians, healthcare professionals, and unfortunately, insurance adjusters, think of catastrophic impairment. Accident victims who have suffered any of these obvious, life-altering physical injuries have a relatively clear path to securing enhanced benefits and generally are treated with respect and compassion.

In many cases, though, the victim has experienced one or more less drastic impairments, which might at first seem minor or temporary. However, the combined effect of these impairments can still be devastating and can lead to Catastrophic Impairment. Examples of these type of impairments include chronic pain and mobility issues from soft-tissue or orthopedic injuries, post-concussion syndrome following a mild traumatic brain injury, and/or post-traumatic stress syndrome and other psychological disorders. Sadly, these types of victims are often viewed with suspicion and are forced to fight for access to necessary benefits.

For the second type of claim, **two other categories have been established to address situations where it is not possible to identify a single impairment that qualifies as Catastrophic Impairment**. These are Whole Person Impairment (WPI) and functional impairment from a Mental or Behavioral Disorder (MBD).

Paraplegia or Tetraplegia

Under the previous version of the SABS, this category was left mostly undefined, leading to confusion and frequent litigation over the terms, “paraplegia” and “quadriplegia” (as it was then).

Under the current SABS, paraplegia and tetraplegia are evaluated under the American Spinal Injury Association (ASIA) Impairment Scale (or AIS).

The ASIA created a standardized classification scale for neurological impairment following a Spinal Cord Injury (SCI). Originally, it was intended to chart progressive neurological recovery over time. It has been incorporated into the Catastrophic Impairment criteria to provide clarity compared to the former definition.

The AIS evaluates sensory and motor function. The sensory component involves light touch and pinprick response testing. The motor examination grades five specific muscles groups in both the lower and upper extremities on a scale of 0 to 5. The results categorize the neurological impairment from SCIs under one of five categories:

A	Complete	No motor or sensory function is preserved in the sacral segments S4–S5.
B	Incomplete	Sensory function preserved but not motor function is preserved below the neurological level and includes the sacral segments S4–S5.
C	Incomplete	Motor function is preserved below the neurological level, and more than half of key muscles below the neurological level have a muscle grade less than 3.
D	Incomplete	Motor function is preserved below the neurological level, and at least half of key muscles below the neurological level have a muscle grade of 3 or more.
E	Normal	Motor and sensory function are normal.

To be deemed Catastrophic Impairment, a claimant must be permanently impaired under AIS A, B, or C The distinction drawn between AIS C and D is based on degree of motor function below the neurological level of injury (NLI). NLI depends on whether the claimant is para- or tetraplegic (for example, at L1 of the lower spine for a paraplegic). Motor function is graded under this scale:

0 = no activity
1 = flicker
2 = full range of motion with gravity eliminated
3 = full range of motion against gravity only
4 = full range of motion against gravity and some resistance
5 = normal

If more than half the tested muscle groups are level 2 or lower, the claimant will be AIS C (Catastrophic Impairment). If more than half are 3 or higher, the claimant will be AIS D (not automatically Catastrophic Impairment). In the event of a tie, the claimant will be classed as AIS D.

A claimant **can** be deemed Catastrophic Impairment under AIS D if one of the following criteria is also met:

1. the insured person's score on the Spinal Cord Independence Measure, Version III, item 12 (Mobility Indoors)… applied over a distance of up to 10 metres on an even indoor surface is 0 to 5;
2. the insured person requires urological surgical diversion, an implanted device, or intermittent or constant catheterization in order to manage a residual neuro-urological impairment; or
3. the insured person has impaired voluntary control over anorectal function that requires a bowel routine, a surgical diversion or an implanted device.

The Spinal Cord Independence Measure (SCIM) is a nine-point scale that describes impaired mobility:

0. Requires total assistance
1. Needs electric wheelchair or partial assistance to operate manual wheelchair
2. Moves independently in manual wheelchair
3. Requires supervision while walking (with or without devices)
4. Walks with a walking frame or crutches (swing)
5. Walks with crutches or two canes (reciprocal walking)
6. Walks with one cane
7. Needs leg orthosis only
8. Walks without walking aids

If a claimant requires two canes or crutches to walk 10 metres on a flat indoor surface, he or she will be deemed Catastrophic Impairment. The need for one cane will not meet the Catastrophic Impairment threshold.

The second and third criteria seem straightforward. However, there is no defined frequency for "**intermittent** catheterization" or a "bowel routine," both of which could vary significantly in degree of invasiveness and impact.

Severe Impairment of Ambulatory Mobility or use of an Arm, or Amputation

To qualify for Catastrophic Impairment, the claimant's impairment must that meet one of the following criteria:

i. Trans-tibial or higher amputation of a leg.
ii. Amputation of an arm or another impairment causing the total and permanent loss of use of an arm.
iii. Severe and permanent alteration of prior structure and function involving one or both legs as a result of which the insured person's score on the Spinal Cord Independence Measure, Version III, item 12 (Mobility Indoors), as published in Catz, A., Itzkovich, M., Tesio L. et al, ***A multicentre international study on the Spinal Cord Independence Measure, version III: Rasch psychometric validation***, Spinal Cord (2007) 45, 275-291 and applied over a distance of up to 10 metres on an even indoor surface is 0 to 5.

Prior to the 2016 amendments, this category simply read: **the amputation of an arm or leg or another impairment causing the total and permanent loss of use of an arm or a leg**. As in many of these amended criteria, the goal was to **eliminate ambiguity** while **narrowing the grounds** upon which a claimant could reach Catastrophic Impairment.

Under the current SABS, "arm" and "leg" are treated separately, with the "arm" criteria remaining largely unchanged.

Since more disputes arose around the "leg" criteria, they have been expanded with an **emphasis placed on functional loss**. A trans-tibial amputation occurs directly below the knee. Presumably, less "drastic" amputations (at the ankle for instance) were leading to automatic Catastrophic Impairment determinations at a rate that was unacceptable to the insurance industry. However, such amputations and other permanent alterations of prior structure and function **can still qualify** as Catastrophic Impairment, by meeting the same Spinal Cord Independence Measure (SCIM) restrictions discussed under tetraplegia (mobility impairment requiring the use of two canes or crutches). Alternately, an amputation can contribute to the calculation of Whole Person Impairment under Categories 6 and 7 (discussed later).

Loss of Vision of Both Eyes

To qualify as Catastrophic Impairment, the claimant's impairment must meet the following criteria:

i. Even with the use of corrective lenses or medication,
   A. visual acuity in both eyes is 20/200 (6/60) or less as measured by the Snellen Chart or an equivalent chart, or
   B. the greatest diameter of the field of vision in both eyes is 20 degrees or less.

ii. The loss of vision is not attributable to non-organic causes.

Formerly, the category simply specified, "**the total loss of vision in both eyes**". While this might seem like a straightforward definition, it led to significant challenges over the degree of vision loss required to be deemed "total"- particularly given the general emphasis placed on **functional** loss throughout the SABS. The amended criteria clarify that a claimant must be **legally blind** even with the use of corrective lenses (i. A and/or B), and the loss must be attributable to **organic** causes (i.e.: direct or indirect physical trauma vs. psychological or other "non-organic" causes).

Traumatic Brain Injury (TBI)

The TBI category underwent significant and complex revision following the 2016 amendments. Under former SABS, the imprecise language of this category was subject to many successful challenges at arbitration and in court. It required a "brain impairment" that resulted in specified scores on one of two tests: the Glasgow Coma Scale (GCS) or the Glasgow Outcome Scale (GOS). The GCS had to be administered within a "reasonable period of time." The GOS had to be administered more than 6 months post-accident.

"Brain impairment" can arise from relatively minor head injuries (including a concussion or even indirect trauma from a whiplash injury, for example). It **does not require** a TBI because it is a measure of **cognitive** dysfunction. Therefore, the presence of any brain impairment together with a GCS or GOS score meeting the definition could lead to a Catastrophic Impairment determination under the pre-amendment SABS.

ILLUSTRATION

The GCS is a short diagnostic tool that tests three areas: eye opening, verbal response and motor response. If an injury victim is rendered unconscious, from TBI and/or physical injuries, and the GCS is administered at the scene, they might be completely unresponsive and score well below the Catastrophic Impairment threshold (9 or less on a 15-point scale). If the person awakens and continues to demonstrate any altered responses indicative of brain impairment (e.g.: confusion, blurred vision, slowed responses), Catastrophic Impairment should result, whether the person experiences lasting brain impairment or not in the future.

Similarly, the GOS is a brief checklist of functional recovery. It addresses disability from a holistic perspective, NOT necessarily related to a TBI. If the accident victim remains "severely disabled" for whatever reason after 6 months, and suffered documented **any** brain impairment, they should be deemed Catastrophic Impairment.

Under the 2016 amendments, Catastrophic Impairment criteria for traumatic brain injury have been set out in greater detail, and split into adult and pediatric TBI categories, in recognition of the challenges associated with evaluating the impact of TBI on children's ongoing development.

If the insured person was 18 years of age or older at the time of the accident, a traumatic brain injury that meets the following criteria will lead to a Catastrophic Impairment determination:

i. The injury shows positive findings on a computerized axial tomography scan, a magnetic resonance imaging or any other medically recognized brain diagnostic technology indicating intracranial pathology that is a result of the accident, including, but not limited to, intracranial contusions or haemorrhages, diffuse axonal injury, cerebral edema, midline shift or pneumocephaly.
ii. When assessed in accordance with Wilson, J., Pettigrew, L. and Teasdale, G., Structured Interviews for the Glasgow Outcome Scale and the Extended Glasgow Outcome Scale: Guidelines for Their Use, Journal of Neurotrauma, Volume 15, Number 8, 1998, the injury results in a rating of,
    A. Vegetative State (VS or VS*), one month or more after the accident,
    B. Upper Severe Disability (Upper SD or Upper SD*) or Lower Severe Disability (Lower SD or Lower SD*), six months or more after the accident, or
    C. Lower Moderate Disability (Lower MD or Lower MD*), one year or more after the accident.

POSITIVE FINDINGS

A key difference is the requirement that an objectively verified "**injury**" must occur as the baseline for TBI as opposed to "Impairment." The injury must show up on diagnostic imaging including CT and MRI.

This requirement places a heavy burden on a claimant who has suffered a mild (or sometimes even moderate) TBI. While these injuries can have permanent and serious consequences for the victim, especially when considered together with other types of post-accident impairment, they usually will not be visible on standard diagnostic imaging.

Formerly, neuropsychological testing that confirmed cognitive impairment was sufficient to demonstrate brain **impairment** from a mild TBI. This will no longer suffice. There are other, more sophisticated diagnostic imaging technologies that can be used, including Single-photon emission computed tomography (SPECT) scan, functional MRI (fMRI) and quantitative electroencephalogram (QEEG). Although access to these technologies is currently limited and expensive, they are capable of documenting mild TBIs.

Extended Glasgow Outcome Scale

The current SABS has eliminated the GCS as an identifier of Catastrophic Impairment. As indicated in the illustration above, the GCS is a diagnostic shorthand designed to assess injury victims at the scene. It lacks the sophistication to establish the overall severity of a person's injuries or likely outcome.

For similar reasons, the GOS has been replaced by the Extended Glasgow Outcome Scale (GOSE) as a tool for determining Catastrophic Impairment. The GOSE was derived from the original GOS. It addresses ambiguities inherent in the GOS by expanding the categories from the original five (dead, vegetative, severely disabled, moderately disabled, good recovery). In their place the GOSE uses the following:

1. Dead
2. Vegetative State (VS)
3. Lower Severe Disability (SD-)
4. Upper Severe Disability (SD+)
5. Lower Moderate Disability (MD-)
6. Upper Moderate Disability (MD+)
7. Low Good Recovery (GR-)
8. Upper Good Recovery (GR+)

To be Catastrophic Impairment, a claimant's GOSE score must be:

A. Vegetative State one month or more after the accident,
B. Upper Severe Disability or Lower Severe Disability six months or more after the accident, or
C. Lower Moderate Disability one year or more after the accident.

Scoring is done through a series of questions that establish the claimant's level of functional recovery. The questions proceed in order from consciousness to functional in/dependence, work capacity, and social functioning.

If, the claimant is unable to obey simple commands one month after the collision, he or she will be deemed Catastrophic Impairment under Category A.

Questions 2 to 4 evaluate degree of independence, both in and out of the home environment:

2a) Is the assistance of another person at home essential every day for some activities of daily living?
2b) Do they need frequent help or someone to be around at home most of the day?
3) Independence Outside the Home: Able to Shop without assistance?
4) Independence Outside the Home: Able to Travel locally without assistance (drive, public transit, taxi)?

If the answer to any of 2, 3 or 4 is yes, the claimant has either Upper or Lower Severe Disability and will be Catastrophic Impairment 6 months post-collision under Category B.

Question 5 addresses the claimant's ability to work to his or her previous capacity. If unable to work, or only in a sheltered or non-competitive environment a year or more post-collision, the claimant has Lower Moderate Disability and will be Catastrophic Impairment under Category C. If at this time, she **has returned to work** in a reduced capacity, the claimant will not meet Catastrophic Impairment under the GOSE.

Questions 6 and 7 consider the social impact of the claimant's ongoing impairment. If the claimant **rarely or never participates** in former social activities outside the home, he or she will be Catastrophic Impairment a year post-collision under Category C. If her collision-related psychological impairments create **constant, daily and intolerable disruptions** with family and friends, she will be Catastrophic Impairment, also under C. Less severe social impact will not lead to a Catastrophic Impairment determination on its own.

> There are few life events that are as monumentally stressful, physically and emotionally painful as being in a catastrophic car accident. But, thanks to the amazing and compassionate team at Campisi Law, my husband Eric and I have successfully achieved fair settlements from both our Insurance company and the other driver's insurance company after being in a head on collision in 2014.
>
> My injuries were catastrophic and life altering, including a brain injury, broken bones and multiple internal organ injuries. Joe and the Campisi team worked hard to ensure that from the beginning, I had the financial means to afford the necessary and considerable medical and home supports as I continued the recovery process.
>
> ***~ Jan Christensen***

Children and Catastrophic

If the insured person is under the age of 18 years at the time of the accident and has suffered a traumatic brain injury that meets the following criteria will lead to a Catastrophic Impairment determination:

i. The insured person is accepted for admission, on an in-patient basis, to a public hospital named in a Guideline with positive findings on a computerized axial tomography scan, a magnetic resonance imaging or any other medically recognized brain diagnostic technology indicating intracranial pathology that is a result of the accident, including, but not limited to, intracranial contusions or haemorrhages, diffuse axonal injury, cerebral edema, midline shift or pneumocephaly.
ii. The insured person is accepted for admission, on an in-patient basis, to a program of neurological rehabilitation in a paediatric rehabilitation facility that is a member of the Ontario Association of Children's Rehabilitation Services.
iii. One month or more after the accident, the insured person's level of neurological function does not exceed category 2 (Vegetative) on the King's Outcome Scale for Childhood Head Injury as published in Crouchman, M. et al, A practical outcome scale for paediatric head injury, Archives of Disease in Childhood, 2001: 84: 120-124.
iv. Six months or more after the accident, the insured person's level of neurological function does not exceed category 3 (Severe disability) on the King's Outcome Scale for Childhood Head Injury.
v. Nine months or more after the accident, the insured person's level of function remains seriously impaired such that the insured person is not age-appropriately independent and requires in-person supervision or assistance for physical, cognitive or behavioural impairments for the majority of the insured person's waking day.

i As above for adult brain injury, this category relies upon "positive findings" on diagnostic imaging. As a result, mild TBIs are excluded. Currently the following public hospitals are listed in the Guideline (Superintendent's Guideline No. 01/16):

- Children's Hospital of Eastern Ontario (Ottawa)
- Hamilton Health Sciences (Regional Rehabilitation Centre)
- Health Sciences North (Sudbury)
- Kingston General Hospital
- London Health Sciences Centre – Victoria Hospital
- McMaster Children's Hospital
- St. Michael's Hospital
- Sunnybrook
- The Hospital for Sick Children
- The Ottawa Hospital
- Thunder Bay Regional Health Sciences Centre
- Windsor Regional Hospital (Ouellette)

ii The Ontario Association of Children's Rehabilitation Services has been re-named Empowered Kids Ontario-Enfants Avenir Ontario (EKO-EAO). Neurological rehabilitation is provided for congenital neurological conditions (for example, cerebral palsy) and traumatic and other acquired impairments, including brain injury. A moderate or severe brain injury is required to cause significant neurological damage.

iii iv v If a child's brain injury does not fulfill the criteria for either of these categories, Catastrophic Impairment will be determined with reference to the King's Outcome Scale for Childhood Head Injury (KOSCHI). It was developed as a tool for characterizing brain injury outcomes in children in response to the inapplicability of certain aspects of the GOSE.

The KOSCHI is divided into the following 5 categories:

1. **Death**

2. **Vegetative**
   Breathes spontaneously. No evidence of verbal or non-verbal communication or response to commands.

3. **Severe Disability**
   - A: Conscious, totally dependent. May be able to communicate. Requires specialized educational/rehabilitation setting.
   - B: Limited self-care abilities and predominantly dependent. May have meaningful communication. Requires specialized educational/rehabilitation setting.

4. **Moderate Disability**
   - A: Mostly independent for daily living but needs a degree of supervision/help for physical or behavioural problems. Has overt problems. May be in specialized rehabilitation/educational setting or in mainstream school requiring special needs assistance. Behavioural problems may lead to discipline or exclusion from school.
   - B: Age-appropriately independent for daily living, but with neurological sequelae frequently affecting daily life, including behavioural and learning difficulties. ay also have frequent headaches. Likely to be in mainstream school with or without special needs assistance.

5. **Good Recovery**
   - A: Appears to have made a full functional recovery but has residual pathology attributable to head injury. May suffer headaches which do not affect school or social life and may occasionally have some of the problems listed on the head injury checklist.
   - B: The information available implies complete recovery. No sequelae identified.

A child will be deemed Catastrophic Impairment if he or she remains vegetative (Category 2) a month post-collision or severely disabled (Category 3) after 6 months. Significantly, either of the sub-categories of severe disability is sufficient. However, after nine months, moderate disability will not lead to a Catastrophic Impairment determination. Instead, the final category is a hybrid, reserved for claimants who have not recovered **age-appropriate** independence and continue to require in-person supervision or assistance for physical, cognitive, or behavioural impairments for the majority of the waking day. Given the challenges faced in assessing the impact of brain injuries on a child's development (particularly with very young children), Catastrophic Impairment claims based on a lack of "age-appropriate" independence are usually resisted strongly by insurers.

Whole Person Impairment (WPI) and Mental and Behavioural Disorders (MBD)

The remaining two catastrophic criteria are used when the claimant's impairments do not meet any of the above-discussed categories. They utilize the diagnostic tools provided in the American Medical Association's Guides to the Evaluation of Permanent Impairment (the "AMA Guides") to assess the overall functional impairment caused by the claimant's physical, cognitive and psychological injuries. As such, they are the most challenging criteria to evaluate and the source of most Catastrophic Impairment disputes.

NOTE: In pediatric claims, if the impairments do not meet the standard WPI or MBD criteria, but, "can reasonably be believed to be a catastrophic impairment for the purposes of paragraph 6, 7 or 8 of subsection (1), the impairment shall be deemed to be the impairment referred to in paragraph 6, 7 or 8 of subsection (1) that is most analogous to the impairment, after taking into consideration the developmental implications of the impairment."

The Guides

According to the AMA, the Guides, "provide a reliable, repeatable measurement framework for permanent impairment in patients who have suffered an injury or illness resulting in long-term loss of a body part or reduction of body function. Once a patient has reached Maximum Medical Improvement, physicians use the AMA Guides to assess a patient's impairment and document findings." They are revised periodically to reflect advances of medical and rehabilitative practice – the 6th is most recent edition. The AMA recognizes that the Guides will be used on insurance and legal proceedings.

Despite the release of the 5th and 6th editions, the SABS continues to use the 4th edition of the Guides to determine physical impairments for calculating Whole Person Impairment (WPI) ratings and to rate Mental and Behavioural Disorders (MBD). Somewhat confusingly, it relies upon the 6th edition of the Guides to determine mental and behavioural impairment when combining these with physical impairments to calculate WPI.

The Guides do not discuss catastrophic impairment. The criteria for determining Catastrophic Impairment under the WPI and MBD categories in Ontario have been established by the legislature.

Whole Person Impairment (WPI)

Under the current SABS:

6. Subject to subsections (2) and (5), a physical impairment or combination of physical 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 physical impairment of the whole person.

WPI attempts to quantify the permanent loss of function a claimant experiences for **each** of the several impairments he or she suffered in the collision, by subtracting that loss from the (100% healthy) Whole Person. Because each such subtraction reduces the claimant's total remaining function, the successive ratings must account for this reduced level of function. The impairments are subtracted from most serious to least, to arrive at a final WPI rating that represents the claimant's permanent functional loss.

EXAMPLE:

A Catastrophic Impairment assessment team determines that a claimant has the following impairments:

Bilateral knee Impairments	Spine	Headaches	Abdominal Impairment
15%	12%	5%	20%

The **abdominal impairment** has the most serious impact on the claimant's function. Therefore the 20% WPI rating is used without modification for the overall rating.

However, the **knee impairments** (15%) must be discounted to reflect the impact of the abdominal impairment on the claimant, whose Whole Person is now only 80% (or 0.8) of a healthy individual's (100 – 20).

15 x 0.8 = 12% WPI

Similarly, the **spine impairment** (12%) must be discounted to reflect the impact of abdominal and knee impairments.

80 – 12 = 68%
12 x 0.68 = 8.16 or 8% WPI

Finally, the WPI for **headaches** (4%) must account for the impact of the claimant's more serious impairments.

68 – 8 = 60%
5 x 0.6 = 3% WPI

Next, the resulting percentages are totaled to determine the claimant's overall WPI rating.

20 + 12 + 8 + 3 = 43% WPI

In this example, the claimant does not qualify as Catastrophic Impairment under the WPI criteria.

Combined WPI

Prior to the amendments, WPI referred exclusively to physical impairments, while MBD dealt with psychological and behavioural impairments. However, in ***Kusnierz v. Economical*** (2012 ONCA 823), the Ontario Court of Appeal held that it was appropriate to combine physical and psychological impairments when calculating WPI. The 2016 amendments formalized and clarified ***Kusnierz***, adding criterion 7:

7. Subject to subsections (2) and (5) a mental or behavioural impairment, excluding traumatic brain injury, determined in accordance with the rating methodology in Chapter 14, Section 14.6 of the American Medical Association's Guides to the Evaluation of Permanent Impairment, 6th edition, 2008, that, when the impairment score is combined with a physical impairment described in paragraph 6 in accordance with the combining requirements set out in the Combined Values Table of the American Medical Association's Guides to the Evaluation of Permanent Impairment, 4th edition, 1993, results in 55 percent or more impairment of the whole person.

The most significant restrictive element of criterion 7 is the exclusion of traumatic brain injuries from the mental and behavioural impairment that can be used to calculate WPI. Post-***Kusnierz***, assessors were including cognitive impairments from brain injuries in their WPI calculations.

NOTE: **In practice, Catastrophic Impairment assessors usually provide WPI ratings alongside the MBD assessments discussed below.**

The WPI criteria (6 and 7) only apply if:

(a) two years have elapsed since the accident; or
(b) an assessment conducted by a physician three months or more after the accident determines that,
  (i) the insured person has a physical impairment or combination of physical impairments determined in accordance with paragraph 6 of subsection (1), or a combination of a mental or behavioural impairment and a physical impairment determined in accordance with paragraph 7 of subsection (1) that results in 55 per cent or more impairment of the whole person, and
  (ii) the insured person's condition is unlikely to improve to less than 55 per cent impairment of the whole person.

Prior to the amendments, a physician (or neuropsychologist in case of an impairment that was exclusively a brain impairment) was required only to state in writing that the claimant's condition was "unlikely to cease to be a catastrophic impairment." It was not necessary for three months to elapse. By eliminating the role of neuropsychologists and requiring the physician to attest that the claimant's WPI meets or exceeds 55%, the legislature has significantly increased the obstacles to accessing Catastrophic Impairment benefits.

Mental and Behavioural Disorders

Criterion 8 of the current SABS provides:

8. Subject to subsections (3) and (5), 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) in **three or more areas of function** that precludes useful functioning or a class 5 impairment (extreme impairment) in one or more areas of function that precludes useful functioning, due to mental or behavioural disorder.

As with the WPI criteria, Criterion 8 only applies if:

(a) two years have elapsed since the accident; or
(b) a physician states in writing that the insured person's impairment is unlikely to improve to less than a class 4 impairment (marked impairment) in three or more areas of function that precludes useful functioning, due to mental or behavioural disorder.

Again, as with the WPI criteria, the legislature has significantly increased the obstacles to accessing Catastrophic Impairment benefits with this amendment. Only a physician trained in Catastrophic Impairment assessments will be able to provide the required opinion with confidence.

Mental and behavioural disorders are assessed for Catastrophic Impairment purposes based on degree of permanent impairment in four areas (or domains) of function:

- Activities of Daily Living
- Concentration, Persistence and Pace
- Social Functioning
- Adaptation (to Work or Work-like Settings)

Activities of daily living include self-care, personal hygiene, everyday communication, ambulation, travel outside the home, sexual function, sleep, and social and recreational activities. They are assessed by the degree of independence, appropriateness, effectiveness, and sustainability the claimant demonstrates without supervision or prompting.

Social Functioning refers to the claimant's capacity to interact appropriately and communicate effectively with other individuals. It considers both the number of aspects of social functioning impacted and the degree of overall interference.

Concentration, persistence, and pace evaluates the claimant's ability to initiate and complete tasks requiring sustained effort considering the time to complete, frequency of breaks or interruptions, frequency and severity of errors, and degree of assistance required. Tasks can include scheduling, assembling items from a diagram or instructions, comparing/contrasting, or research and planning (e.g.: a trip, a party, a wedding).

Adaptation refers to the claimant's capacity to adapt to stressful circumstances in a structured, work-like environment. It is not synonymous with employability, but considers stresses common to work environments including attendance, decision-making, scheduling, completion of tasks, and interactions with superiors and peers.

There are five classes of MBD impairment:

1. **None**
2. **Mild –** impairment levels are compatible with most useful functioning
3. **Moderate –** impairment levels are compatible with some, but not all, useful functioning
4. **Marked –** impairment levels significantly impede useful functioning
5. **Extreme –** impairment levels preclude useful functioning

Prior to the amendments, the MBD criterion required "a class 4 impairment (marked impairment) or class 5 impairment (extreme impairment) due to mental or behavioural disorder." Despite strong opposition from the insurance industry, the groundbreaking Court of Appeal Pastore decision (successfully argued by Joseph Campisi) confirmed that a claimant would be deemed Catastrophic Impairment if she suffered a marked impairment in one of the four domains. Following Pastore, the many successful Catastrophic Impairment claims argued on its grounds provoked the strong legislative response highlighted above.

There is some justification for insisting on three marked impairments. In terms of WPI, three (or four) marked impairments will produce a WPI rating more closely approximating the 55% required for Catastrophic Impairment. It is conceivable that a claimant under the old SABS could have a marked impairment in Adaptation, and mild or no impairment in one or more of the other domains. However, by definition, a marked impairment **significantly impedes useful functioning** in the domain, which unquestionably has a catastrophic impact on the claimant's quality of life. The current SABS denies thousands of deserving claimants the access to enhanced Catastrophic Impairment benefits they need to rehabilitate and ameliorate the impact of their functional disability.

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>
> ***~ Melissa Micucci***

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