COURT OF APPEAL FOR ONTARIO

CITATION: Pastore v. Aviva Canada Inc., 2012 ONCA 642
DATE: 20120927
DOCKET: C54288

Rosenberg and Feldman JJ.A. and Swinton J. (*ad hoc*)

BETWEEN

Anna Pastore

Appellant

and

Aviva Canada Inc. and Financial Services Commission of Ontario

Respondents

and

Ontario Trial Lawyers Association, Insurance Bureau of Canada and the Attorney General of Ontario

Interveners

J. Thomas Curry, Ren R. Bucholz and Joseph Campisi Jr., for the appellant

Robert H. Rogers, for Aviva Canada Inc.

Robert Conway, for Financial Services Commission of Ontario

Lee Samis and Krista M. Groen, for the Insurance Bureau of Canada

James L. Vigmond and Brian M. Cameron, for Ontario Trial Lawyers Association

Matthew Horner and Hart Schwartz, for the Attorney General of Ontario

Heard: January 19, 2012

On appeal from the judgment of the Divisional Court (Cunningham A.C.J.S.C., Matlow & Lederer JJ.) dated May 13, 2011, with majority reasons by Lederer J. and reasons dissenting in part by Matlow J., reported at 2011 ONSC 2164, 280 O.A.C. 347.

Feldman J.A.:

A. INTRODUCTION

[1] After being hit by a car as a pedestrian in a 2002 accident, the appellant suffered significant pain and impairment as a result of her broken left ankle, and eventually looked to her insurer for enhanced accident benefits due to catastrophic impairment. This appeal, which proceeded based on leave to appeal from the decision of the Divisional Court, represents the fifth level of adjudication of her claim. The issues before the court are the interpretation of s. 2(1.1)(g) of the *Statutory Accident Benefits Schedule* and the proper standard of review of a decision of the director's delegate.

The Legislation

[2] *The Statutory Benefits Act Schedule – Accidents on or after November 1, 1996*, O. Reg. 403/96 (the *SABS*) were made pursuant to the *Insurance Act*, R.S.O. 1990, c. I.8. Subsection 2(1.1) defines "catastrophic impairment" and comprises seven categories of impairments. I set out the impairments in both ss. 2(1.1)(f) and (g) here for ease of reference, though it is the interpretation of clause (g) that is at issue on this appeal:

> (1.1) For the purpose of this Regulation, a catastrophic impairment caused by an accident that occurs before October 1, 2003 is,
>
> …
>
> (f) subject to subsections (2) and (3), an impairment or combination of 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 impairment of the whole person; or
>
> (g) subject to subsections (2) and (3), 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) or class 5 impairment (extreme impairment) due to mental or behavioural disorder.

B. FACTS AND ADJUDICATIVE HISTORY

[3] The appellant, Pastore, was hit by a car while crossing the street on November 16, 2002. Her injury was a fractured left ankle that did not heal properly, requiring a number of surgeries over the next five years and also resulting in a right knee replacement when the ankle pain led to a change in her gait. The impact on her life was great. Prior to the accident, Pastore was active and self-sufficient, acting as the primary caregiver for her husband of 38 years who was receiving chemo-dialysis. Since the accident, her mobility has been very limited. She is no longer able to do housekeeping or participate in recreational activities. She is almost completely dependent on others for her most basic personal care needs.

[4] In May 2005, Pastore applied to her insurer, the respondent Aviva, to have her injuries designated as causing a "catastrophic impairment", which would qualify her for significantly enhanced *SABS* benefits.

[5] She was first assessed for catastrophic impairment at a designated assessment centre (DAC) by a team that included a physiatrist, a psychologist, a psychiatrist and an occupational therapist. The DAC assessment found that the appellant had a catastrophic impairment consisting of a marked impairment in her activities of daily living due to mental or behavioural disorder under s. 2(1.1)(g) of the *SABS*.

[6] An assessment under s. 2(1.1)(g) is carried out by reference to the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (the *Guides*). Chapter 14 of the *Guides* sets out a three-stage process for evaluating catastrophic impairment based on mental disorder using four categories of functional limitation and five levels of dysfunction. The first stage is diagnosis of any mental disorders, followed by the second stage where the impact on daily life is identified. The third stage is assessing the severity of limitations by assigning them into the four categories and determining their levels of impairment. The *Guides* direct the assessment in the following "four categories of functional limitation":

(1) Activities of daily living (ADL);

(2) Social functioning;

(3) Concentration, persistence and pace; and

(4) Deterioration or decompensation in work or work-like settings.

[7] These four categories are each assessed based on the following five levels of impairment: class 1: no impairment; class 2: mild impairment, which "implies that any discerned impairment is compatible with most useful functioning"; class 3: moderate impairment, which "means that the identified impairments are compatible with some, but not all, useful functioning"; class 4: marked impairment, which "is a level of impairment that significantly impedes useful functioning"; and class 5: extreme impairment, which "preclude(s) useful functioning".

[8] The appellant was diagnosed with several disorders recognized in the DSM-IV-TR (American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th Ed., Text Revision (Washington, D.C.: APA, 2000)). Her disorders included Adjustment Disorder with Depressed Mood, Specific Phobia, and Pain Disorder with both Psychological Factors and a General Medical Condition. The DAC assessment concluded that the appellant had a class 4 impairment in the activities of daily living with an overall assessment of class 3 (moderate). It was because of the one class 4 (marked impairment) that the DAC report concluded that the appellant qualified as catastrophically impaired in accordance with s. 2(1.1)(g).

[9] The respondent insurer did not accept the DAC report. The parties then participated in mediation under s. 280 of the *Insurance Act*, which did not result in an agreement. Following the mediation, the appellant applied for arbitration under s. 282 of the Act.

[10] The respondent raised before the arbitrator the two issues that are before this court on the appeal: 1) Does s. 2(1.1)(g) require an overall assessment of marked impairment in all four categories or can marked impairment in one category result in a finding of catastrophic impairment?; and 2) Was it an error for the DAC assessors to include physical pain in the assessment of mental disorder in order to comply with the *Guides*?

[11] The arbitrator agreed with the decision of the DAC assessors. She was satisfied that one marked impairment was enough to comply with the *Guides'* approach to catastrophic impairment. Also, she heard evidence on the question whether all physically based pain can and should be factored out of the assessment of impairment due to mental disorder, or whether physically and mentally based pain that are intertwined can be considered cumulatively in a mental disorder assessment. She concluded that it was not essential to try to factor out all physically based pain, and that in fact it would not be possible to do so. Rather, treating both pain sources cumulatively did not derogate from the directive of the *Guides*.

[12] The respondent insurer exercised its right to appeal the decision of the arbitrator to the director of arbitrations on a question of law under s. 283 of the Act. The appeal was heard by a director's delegate (the delegate). He upheld the decisions of the arbitrator and of the DAC on the interpretation of s. 2(1.1)(g) and whether one function at the marked impairment level was sufficient for qualification as catastrophic impairment. On the second question of how to assess the sources of pain that are due to a mental disorder, he concluded that the question of causation involved a finding of fact by the arbitrator on which he deferred.

[13] Aviva then sought judicial review of the delegate's decision to the Divisional Court. The Divisional Court reversed the decision of the delegate, the majority on both grounds, with the dissenting judge agreeing that the delegate's decision was wrong on the second issue but not on the first issue.

[14] On the first issue, the Divisional Court applied the correctness standard of review, although the majority said that they would have come to the same conclusion applying the reasonableness standard. On the second issue, the court found that the delegate acted outside the mandate of s. 2(1.1)(g) and thus outside his jurisdiction by including pain from physical conditions in the assessment of impairment due to mental disorder. The Divisional Court also found that the decision of the delegate on the second issue was an unreasonable one.

[15] Leave to appeal to the Court of Appeal was granted. The appellant raises four issues before this court:

(1) Did the Divisional Court apply the correct standard of review?

(2) Was it reasonable to find that one impairment at the marked level (class 4) is sufficient for a catastrophic impairment designation under s. 2(1.1)(g)?

(3) Was it reasonable to include physically-based pain as "due to" a mental disorder in interpreting and applying s. 2(1.1)(g)?

(4) If the delegate's decision that physical pain can be considered under s. 2(1.1)(g) as due to a mental disorder is found to be unreasonable, does this amount to discrimination based on disability and a violation of the s. 15 *Charter* rights of those who suffer chronic pain and are denied *SABS* benefits?

[16] Two institutions were granted leave to intervene. The Ontario Trial Lawyers Association supports the appellant on the first issue, the proper interpretation of s. 2(1.1)(g) of the *SABS*, while the Insurance Bureau of Canada supports the respondent on that issue. The Attorney General of Ontario also intervened in response to the *Charter* issue, raised for the first time on the appeal.

C. ANALYSIS

Issue 1: Standard of review

[17] The respondent concedes that the Divisional Court erred in requiring the delegate to be correct in his interpretation of the legislation and in finding that he acted beyond his jurisdiction by including physical pain as due to a mental disorder. The respondent agrees with the appellant that the Divisional Court was required to apply the reasonableness standard of review to both aspects of the decision of the delegate.

[18] I agree that following the Supreme Court of Canada decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the correct standard of review in this case is the reasonableness standard. The delegate was engaged in the interpretation and application of his home statute, the *Insurance Act*, and the *SABS* regulations to that Act. Applying the first test in *Dunsmuir*, both the delegate's authority to interpret the *SABS* and *Insurance Act* and to grant or deny *SABS* benefits has been recognized in previous jurisprudence as reviewable on a standard of reasonableness: *Owusu v. TD Home & Auto Insurance Co.*, 2010 ONSC 6627, 92 C.C.L.I. (4th) 197 (Div. Ct.), at para. 1; *Wawanesa Mutual Insurance Co. v. Uribe*, 2010 ONSC 5904, 271 O.A.C. 39 (Div. Ct.), at para. 9; and *Aviva Canada Inc. v. Murugappa* (2009), 251 O.A.C. 193 (Div. Ct.), at paras. 5-6.

[19] In addition, applying the four factor test from *Dunsmuir*, at para. 64, it is evident that this is the type of decision and tribunal to which courts must accord deference. First, there is a clear privative clause contained in ss. 20(1) and (2) of the *Insurance Act*, which sections provide:

> 20. (1) This section applies with respect to proceedings under this Act before the Tribunal, the Superintendent and the Director and before an arbitrator.
>
> (2) A person referred to in subsection (1) has exclusive jurisdiction to exercise the powers conferred upon him or her under this Act and to determine all questions of fact or law that arise in any proceeding before him or her and, unless an appeal is provided under this Act, his or her decision thereon is final and conclusive for all purposes.

[20] The Divisional Court discounted the effect of the privative clause on both issues. On the first issue, the court held that because the standard of review was correctness and the delegate had ignored the law in his decision, the privative clause had no effect. On the second issue, the Divisional Court found that the delegate had acted beyond his jurisdiction and therefore it was not necessary to consider the standard of review, and again, the privative clause would not affect that finding.

[21] This finding regarding the effect of the privative clause does not accord with the modern approach on standard of review. The existence of a privative clause, one of the factors that is weighed in determining the applicable standard, weighs strongly in favour of the reasonableness standard.

[22] The other three factors are: second, the purpose of the decision-maker; third, the nature of the question of law; and fourth, the expertise of the tribunal. Together, these factors support a deferential standard. The specialized adjudicative scheme for deciding issues of entitlement to *SABS* benefits, which includes interpreting the legislation, recognizes the expertise and experience of the director (and the delegates) and gives the director the authority to make the final determination, to which deference is typically afforded.

[23] The Divisional Court also erred by finding that the delegate had exceeded his jurisdiction when he agreed that physical sources of pain could be considered as due to a mental disorder when applying s. 2(1.1)(g). In *Dunsmuir*, the Supreme Court defined questions of jurisdiction as follows: "'Jurisdiction' is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter" (at para. 59).

[24] The Supreme Court recently discussed the concept of excess of jurisdiction in administrative law in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 and affirmed that true questions of jurisdiction will be "exceptional". Rothstein J. for the majority stated, at para. 39:

> What I propose is, I believe, a natural extension of the approach to simplification set out in *Dunsmuir* and follows directly from *Alliance* [*Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160] (para. 26). True questions of jurisdiction are narrow and will be exceptional. When considering a decision of an administrative tribunal interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness. As long as the true question of jurisdiction category remains, the party seeking to invoke it must be required to demonstrate why the court should not review a tribunal's interpretation of its home statute on the deferential standard of reasonableness.

[25] The Divisional Court majority viewed the delegate's decision on the second issue as beyond his jurisdiction because he took into account physical pain which the court viewed as proscribed by the *Guides*. This was an error in law. The delegate was interpreting the legislation and the *Guides* and concluded that they allowed the DAC assessors and him to include as due to a mental disorder, inextricable pain that may be from physical causes. He was interpreting his home statute. This exercise was within his mandate and jurisdiction and should be judicially reviewed on the reasonableness standard.

[26] Before addressing both issues by applying the reasonableness standard of judicial review, it is worth quoting here the articulation of that standard from *Dunsmuir*, at para. 47:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do

> not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Issue 2: Was the delegate's interpretation of s. 2(1.1)(g) of the *SABS* that one function at the marked impairment level (class 4) was sufficient for qualification as catastrophic impairment, a reasonable one?

(a) The delegate's reasons

[27] A close review of the reasons for decision of the delegate demonstrates clear compliance with the reasonableness standard articulated by the Supreme Court of Canada. The reasons address the issue of the interpretation of s. 2(1.1)(g) clearly, setting out and dealing with each argument presented by Aviva, as the appellant at that stage, and arriving at an outcome that is one of a range of possible, acceptable interpretations of s. 2(1.1)(g).

[28] The role of the director under s. 283 of the *Insurance Act* is to determine whether the arbitrator made an error of law. To do that, the director (or the director's delegate) examines the reasoning and the process undertaken by the arbitrator, the conclusion she reached on the interpretation of the section and her

application of the evidence to the provision as interpreted. The director determines whether the arbitrator's decisions of law, including statutory interpretation, are correct. However, his decision need only be reasonable.

[29] The delegate began by referring to the five-day hearing that was held by the arbitrator and to her decision. The arbitrator found that Pastore's impairment did not qualify as a catastrophic impairment under s. 2(1.1)(f) of the *SABS* because her combination of impairments did not reach the required threshold of 55 per cent impairment of the whole person in accordance with the *Guides*. However, the arbitrator found that Pastore had sustained catastrophic impairment under cl. (g) because she had a class 4, marked impairment, in one of the four aspects of functioning set out in the *Guides*.

(i) Aviva's arguments before the delegate

[30] The first issue raised by Aviva was its position that the arbitrator erred in law by finding that to qualify as a catastrophic impairment due to a mental or behavioural disorder under cl. (g), only one of the four aspects of functioning needed to be a class 4, marked impairment, rather than all four.

[31] The focus of the submission was the meaning of the word "a" in the clause, which I repeat here for ease of reference:

> (1.1) For the purpose of this Regulation, a catastrophic impairment caused by an accident that occurs before October 1, 2003 is,
>
> …

> (g) subject to subsections (2) and (3), 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) or class 5 impairment (extreme impairment) due to mental or behavioural disorder. [Emphasis added.]

[32] Aviva submitted that "a" class 4 or class 5 impairment due to mental disorder was unambiguous and meant an overall impairment in all four of the functions: activities of daily living, social functioning, concentration and adaptation. It argued that had the legislature intended only one area of marked functional impairment to be sufficient, it would have said so specifically.

[33] Aviva also made the following five additional arguments about the proper interpretation of cl. (g), which the delegate set out: 1) Because Pastore's physical impairments alone or combined with her psychological impairments were not catastrophic under other clauses, it was illogical that her psychological impairments alone could be catastrophic under cl. (g); 2) The example provided by the *Guides* at p. 14/302 looks at an overall mental impairment rather than the rating from a single function, and the *Guides* should govern the interpretation of the *SABS*; 3) Because the approach under cl. (f) of s. 2(1.1) is to combine physical and mental impairments using an overall psychological impairment rating, that dictated that there also had to be a combined rating over all four functions under cl. (g); 4) The expert evidence before the arbitrator from Dr. Leclair was that the *Guides* required an overall impairment rating; and 5) The

arbitrator ignored the *CAT DAC Guidelines*, which were relevant external evidence that indicated that two functions at the marked impairment level were required under cl. (g), not just one.

(ii) Pastore's arguments before the delegate

[34] The delegate then set out Pastore's response to each of these submissions. Dealing first with the meaning of "a", Pastore argued that its plain meaning was as the singular indefinite article, and in that meaning, it required only a single area of marked or extreme functional impairment to qualify as catastrophic. This was the meaning that had already been given in a number of arbitration decisions and in the decision of Speigel J. in *Desbiens v. Mordini*, 2004 CanLII 41166 (although in that case, the point was conceded). Pastore submitted that this was consistent with the remedial approach and the consumer protection objective of automobile insurance, discussed by the Supreme Court of Canada in *Smith v. Co-operators General Insurance Co.*, 2002 SCC 30, [2002] 2 S.C.R. 129, at para. 11.

[35] In response to the argument that there is a logical inconsistency with cl. (f), Pastore argued that each subsection is separate and should be considered independently.

[36] On the issue of the direction from the *Guides*, Pastore pointed to the fact that the *Guides* do not say one must look at all four functions together, nor do

they direct how to arrive at an overall rating. Material from the American Social Security Administration (SSA) regulations, 20 C.F.R. pt. 404 subpt. P (1950), was used in the creation of the *Guides*. It was Dr. Leclair's evidence that, while two marked impairments are found in the SSA regime, the *Guides* did not include the requirement for two marked impairments in the material taken from the SSA regulations.

[37] Pastore's position was that the *Guides*, as included in the *SABS*, have been interpreted by Ontario adjudicators and have developed their own meaning within that context. As a result, the experts who testified as to the meaning of the *Guides* are not authoritative on their interpretation in the Ontario context. In that regard, Dr. Leclair conceded that the CAT DAC assessors had a better understanding of the *SABS* than he did. Therefore, the arbitrator was correct to prefer the view of the CAT DAC assessors to that of Aviva's experts. Also, Pastore's expert doctor's opinion was that one marked impairment was sufficient under cl. (g) for a finding of catastrophic impairment.

[38] Finally, Pastore argued that the arbitrator correctly found that she was not bound by the *CAT DAC Guidelines*.

(iii) The delegate's conclusions

[39] Having set out all of the positions of the parties, the delegate then proceeded to address each argument, the first and main one being the

interpretation of the word "a" as used in cl. (g). The delegate approached the statutory interpretation function first by examining the intent of the legislature based on the word used, then by checking the conclusion by testing the meaning against the accepted remedial purpose of the legislation.

[40] The delegate first went to the *Concise Oxford Dictionary* for its meaning of "a". Using the dictionary meanings, he found: "Consistent with these definitions, the word "a" in clause 2(1.1)(g) of the *Schedule* means any or one single marked or extreme impairment out of the four areas of functioning, each of these specific areas being addressed in accordance with the *Guides*." He observed that, even had the legislature used the phrase "one single" instead of "a", one could still have argued that that meant "one single overall marked impairment". He concluded that for that interpretation, the missing term was "overall", and that had the legislature intended the marked impairment to be "overall" or "across the board", it would have said so.

[41] The delegate then checked this conclusion against the remedial purpose of the legislation as required by s. 64 of the *Legislation Act*, 2006, S.O. c. 21,[1] and referred to a number of authorities including *Desbiens*. He concluded:

> I am persuaded that narrowly interpreting the word "a" in clause 2(1.1)(g) of the *Schedule* to mean an overall

[1] Subsection 64(1) of the *Legislation Act* reads: "(1) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects." Subsection 64(2) reads: "Subsection (1) also applies to a regulation, in the context of the Act under which it is made and to the extent that the regulation is consistent with that Act."

> rating from all four areas of functioning noted on page 14/301 in the *Guides* would result, contrary both to the intent and to the plain wording of the *Schedule*, in an unjust or unacceptable result of depriving much needed enhanced health care benefits to accident victims most likely in greatest need.

[42] The delegate then proceeded to address each of Aviva's specific arguments. He made the following findings:

(1) Aviva conceded in oral argument that the statutory language was ambiguous and that the *Guides* do not state that they require an overall assessment of marked impairment for a catastrophic impairment designation under cl. (g).

(2) The *Guides* give one example where an overall impairment rating is used. To the extent that the example is viewed as in conflict with the term "a" in cl. (g), the wording of the *Insurance Act* and of the *SABS* take precedence. As stated by Mackinnon J. in *Arts (Litigation Guardian of) v. State Farm Insurance Co.* (2008), 91 O.R. (3d) 394 (S.C.), at para. 12, "[t]he Guides were clearly not designed by the AMA for the purpose directed by the Ontario Legislature."

(3) The delegate rejected the argument that allowing a single, marked impairment to be catastrophic under cl. (g) would be inconsistent with cl. (f), which uses an overall impairment rating for the whole person. The argument ignores the disjunctive separation of the clauses by "or"

and the fact that there is no statement that meeting the criteria of cl. (f) is a prerequisite to meeting any of the other definitions of catastrophic impairment. As an example, the delegate referred to a catastrophic impairment under subclause (e)(i), which is a brain impairment defined in terms of a specific Glasgow Coma Scale score on a test taken a reasonable time following the accident. The designation applies whether or not the person meets the requirements of cl. (f).

(4) The delegate acknowledged that Pastore did not meet the 55 per cent whole person impairment level required in cl. (f) (it was 49 per cent, adding her physical injuries to her psychological impairment). He was not persuaded, however, that this was an inconsistency that required him to give a narrow interpretation to cl. (g).

(5) In rejecting the notion of inconsistency between subsections, the delegate noted that cl. (f) calls for combining impairments while cl. (g) does not. Further, although cl. (g) requires that the impairment be due to a mental disorder, the language of the clause does not limit the manifestations of the impairment to psychological ones. The manifestations, such as the activities of daily living, can be multi-faceted.

(6) The delegate found that experts in this case gave evidence before the arbitrator as to how to interpret the Act and the *SABS* which was

beyond their expertise. Their job was not to usurp the function of the adjudicator.

(7) Finally, the delegate noted that the *CAT DAC Guidelines* referred to in argument were a) not before him, and b) not the current ones as of the date of the accident. He also noted that the recommendation in the *CAT DAC Guidelines* requiring two functions at the marked level for a catastrophic impairment designation was in fact inconsistent with Aviva's position that not just two, but an overall assessment of marked impairment was required. On those bases, the delegate rejected Aviva's submission that the arbitrator erred in law by not deferring to the *CAT DAC Guidelines*.

(b) The reasonableness of the delegate's conclusions

[43] I have described the delegate's reasons for decision in some detail in order to demonstrate that they are thorough and address every issue raised by the parties. The decision is transparent and intelligible in its reasoning process. Finally, the conclusion that the word "a" in cl. (g) requires only a single function from the *Guides* to be at the marked impairment (class 4) level in order to qualify as catastrophic impairment, is certainly within the range of possible, acceptable interpretations.

[44] In reaching the opposite conclusion, the Divisional Court did not have the benefit of this court's decision in *Kusnierz v. Economical Mutual Insurance Co.*, 2011 ONCA 823, 108 O.R. (3d) 272, the majority relying instead on the trial judge's decision which was reversed by this court. In that case, this court (at para. 25) approved the view expressed by Spiegel J. in *Desbiens*, that the definition of "catastrophic impairment" was intended by the legislature to be inclusive and not restrictive. In *Kusnierz*, the issue was whether psychological impairments could be quantified under cl. (g) and combined with physical impairments under cl. (f) to reach a 55 per cent whole person impairment. This court held that there was nothing preventing such a combination and that it would meet the intent of the *SABS* to do so. The court noted that counsel had advised that the number of extra cases from such combinations would be small.

[45] The majority of the Divisional Court rejected the delegate's conclusion on several bases by applying the correctness standard of review. They were also of the view that his decision was not reasonable, for the same reasons. The majority mainly relied on what it viewed as the dual purpose of the *SABS*: not only to help people severely hurt in car accidents, but at the same time, to limit the expenses and costs of providing benefits to injured people.

[46] While the majority may be correct that the legislation is structured to give the enhanced compensation only to those whose injuries have had a catastrophic effect on their lives and to limit payments to others less severely

affected, that is achieved by adhering to the words used in the legislation, properly interpreted in context, particularly by those administrative decision-makers who interpret their home statute with expertise and experience. Those administrative decision-makers and this court have stated that the intent of the legislature is to give the phrase and concept of catastrophic impairment an inclusive and not a restrictive meaning.

[47] Much of the argument by the respondent is focused on its position that the *Guides* and the *CAT DAC Guidelines* require an overall class 4 impairment for a claimant to qualify as catastrophically impaired.

[48] While the *Guides* are specifically referred to in the *SABS*, they are silent on the number of functions required at the marked impairment level for an overall assessment of marked impairment. The majority of the Divisional Court was concerned that the delegate did not give effect to an example in the *Guides* in which the evaluator found marked impairment "overall". First, I note that in the example, only two of the four functions were at the marked impairment level, not all four. Second, because it is just an example, it does not preclude other examples where an overall finding of marked impairment could be based on only one function at the marked impairment level. The text of the *Guides* is silent on how many functions at class 4 are required to qualify an impairment as catastrophic.

[49] As for the *CAT DAC Guidelines*, their stated purpose is for use by the DAC assessors. It is unclear to what extent they were intended to assist arbitrators and the director. In any event, in this case both the arbitrator and the delegate did consider the *CAT DAC Guidelines*, but concluded that they did not assist. It appears that the arbitrator was working with a version that was no longer applicable when the accident occurred, and that the applicable version does not state a minimum number of functional domains to be at the marked or extreme level to amount to a catastrophic impairment.[2]

[50] In my view, the decision of the delegate, in which he concludes that the use of "a" in the definition of "catastrophic impairment" in cl. (g) refers to a single, functional impairment due to mental or behavioural disorder at the marked level, constituting a catastrophic impairment, is a reasonable decision. The reasoning process was logical and transparent and the result is within the range of reasonable, acceptable determinations.

[2] The arbitrator found that the *CAT DAC Guidelines* required two marked impairments for a catastrophic determination. However, as the delegate noted, the *CAT DAC Guidelines* relied on by Aviva to support this position were out of date at the time of Pastore's accident. The revised *CAT DAC Guidelines* that were in force at the time of the accident do not state a minimum number of functional domains that must be at the marked impairment level for a class 4 impairment to be found.

Issue 3: Was the decision of the delegate that it was not necessary to remove from consideration all physical sources of pain in conducting the assessment for the purposes of s. 2(1.1)(g), a reasonable one?

(a) The delegate's reasons

[51] Again the delegate began his reasons by setting out the issue raised by Aviva: that a lot of the pain that Pastore suffered from the accident was a result of the physical injuries to her ankle and knee and should not be included as "due to" her mental disorder. The delegate referred to the *Guides*, which state that in determining whether pain is a symptom of a mental impairment, the assessors must consider whether "all possible somatic causes of the pain have been eliminated by careful, comprehensive medical examinations." Aviva argued that Pastore's limitations were not caused by her mental disorder but that it was the other way around: her depression and anxiety came from her limitations.

[52] The delegate reviewed the evidence of the doctors at the hearing. Pastore's psychiatrist found that she had an Adjustment Disorder with Depressed Mood and that psychological factors played a significant role in her chronic pain issues. He diagnosed Pain Disorder Associated with Psychological Factors.

[53] Aviva argued that the pain from physical sources had already been counted in the assessment and could not be counted twice. The arbitrator had stated that she agreed with the CAT DAC assessor that it was "not possible to factor out the impact of any such discrete physical impairments and associated

pain limitations, and that any impairment rating should incorporate both on a 'cumulative basis'". Aviva submitted that this was an error and that the arbitrator should have determined whether the rating would have been lower on activities of daily living if only the psychological impairments were considered.

(i) The delegate's conclusions

[54] The delegate noted that cl. (g) does not refer to mental or behavioural "impairment", but rather to impairment "due to mental or behavioural disorder." In other words, it calls for a diagnosis of a mental disorder, then a causal analysis from the disorder to the impairments. Therefore, the issue was the meaning to be given to the phrase "due to". Did it mean 'due solely to' or 'as a contributing cause'? The delegate referred to the Supreme Court of Canada decision in *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333, a negligence case in which causation was discussed and the "but for" test, rather than the "material contribution" test, was affirmed as the basic test for determining causation.[3]

[55] The delegate then turned to the decision of the Court of Appeal in *Liu v. 1226071 Ontario Inc.*, 2009 ONCA 571, 97 O.R. (3d) 95, a case that dealt with s. 2(1.1)(e)(i), the brain injury impairment. In that case, the court held that the statutory test was legal and not medical and involves the claimant meeting the

[3] The Supreme Court of Canada recently further explained *Resurfice* in *Clements v. Clements*, 2012 SCC 32.

statutory test, whether or not there are other indicia that may speak against catastrophic impairment in a non-statutory context.

[56] The delegate concluded, applying that instruction, that there was no statutory requirement to dissect the mental disorder into constituent parts. Furthermore, a disorder is not an impairment, so that it is the disorder that must be mental, not the impairment.

[57] The arbitrator had found that Pastore was diagnosed with a disorder recognized in the DSM-IV-TR: Pain Disorder Associated with both Psychological Factors and a General Medical Condition. The arbitrator drew the causal conclusion that it was the impact of Pastore's emotional, behavioural and mental disorders that significantly impeded her daily living tasks and that the resulting impairment fell within class 4, marked impairment.

[58] The delegate again referred to the *Concise Oxford Dictionary* for the definition of "due to", which included "because of, owing to". He found there was ample support in the record for the arbitrator's causal conclusion. He then stated that based on the arbitrator's factual finding of causation, Pastore met the statutory definition of catastrophic impairment.

(b) The reasonableness of the delegate's conclusion

[59] Again, applying the *Dunsmuir* test for reasonableness, the delegate engaged in a full and logical analysis of the issue. He understood the problem,

he addressed the arguments made, he referred to case law of this court and of the Supreme Court of Canada and he arrived at a conclusion. The Divisional Court found that his conclusion was beyond his jurisdiction and also that it was unreasonable: not within "a range of possible acceptable outcomes."

[60] As discussed above, the delegate did not act beyond his jurisdiction. The issue for this court is whether the conclusion reached by the delegate, upholding the arbitrator and the CAT DAC assessors, was an unreasonable one.

[61] The Divisional Court again found that the Delegate did not follow the *Guides* on this issue and that because the *Guides* form part of the legislated assessment process, there is no option to deviate from them.

[62] The portion of the *Guides* in question on this issue is found under the subheading "Pain" within the heading "Special Impairment Categories". The issue discussed in this subsection is whether pain is a symptom of a mental disorder. It states the following:

> Establishing that pain is or is not a symptom of a mental impairment may be a difficult and complex task. Pain that presents only as a symptom of a mental disorder is rare. The following guidelines may be useful in determining whether pain is a symptom of a mental impairment. (1) All possible somatic causes of the pain have been eliminated by careful, comprehensive medical examinations. (2) Some significant emotional stressor has occurred in the patient's life that may have acted as a triggering agent, and the stressor and the pain have occurred in a reasonable sequence. (3) Evidence exists of a mental disorder other than a

> conversion-related one, and the pain may be a symptom of the former; for example, delusional pain may occur in a patient who has subtle paranoid disorder.
>
> Assessing impairment related to pain is difficult, and the process is not as clearly and precisely defined as with some kinds of impairments. Therefore, determinations about difficult and borderline cases in this category should be made through a multidisciplinary, multispecialty approach, in which physicians who are knowledgeable about the different body systems are involved as needed.[4]

[63] This passage states that because it is rare for pain to be a symptom only of a mental disorder, such pain must be carefully assessed. In order to determine whether pain is a symptom of a mental disorder, the assessor needs to remove from consideration, to the extent possible, any physical causes. In difficult and borderline cases, the *Guides* direct that this should be done using a multi-disciplinary approach.

[64] In fact, that appears to be exactly what occurred in this case. The DAC assessment was conducted by a multi-disciplinary team consisting of a physiatrist, a psychologist, an occupational therapist and a psychiatrist, who each conducted a clinical assessment of Pastore. In his part of the report, the psychologist stated (at p. 66):

> Given the extent of interaction between her recognized physical and behaviourally based pain disorder, it is not possible to **factor out** the impact of any such discrete

[4] It appears, as noted by the delegate, that the *Guides* sometimes use the term impairment and the term disability or disorder interchangeably, which causes some confusion.

> physical impairments, and associated pain limitations for purposes here. As such, the rating below incorporates these factors on a cumulative basis consistent with the recognized Pain Disorder.

[65] The arbitrator heard from Dr. Leclair, who directly challenged the conclusion of the DAC report, based on his view that the primary reason for Pastore's functional limitations was related to her physical impairments. But the arbitrator did not accept Dr. Leclair's view. Her opinion was that the proper approach was to focus on "how the mental part of an overall condition or impairment impacts the various spheres of function. The experience of pain and a diagnosis of Pain Disorder falls properly within this examination."

[66] The arbitrator agreed with the DAC assessors that it was not possible to factor out the impact of discrete physical impairments and associated pain limitations. She also agreed that the impairment rating had to be cumulative. The arbitrator concluded that the impact of Pastore's well-documented emotional, behavioural and mental difficulties on her daily functioning resulted in a marked impairment of those functions.

[67] In my view, the assessors and adjudicators applied the *Guides* in their approach to determining whether Pastore's functional impairments were due to her diagnosed mental disorder. The *Guides* acknowledge how difficult it is to separate out pain from physical causes and they suggest a multi-disciplinary

approach. That approach was taken, but the assessors were not able to factor out physical causes of pain and therefore took a cumulative approach.

[68] In his decision, the delegate approved that approach. In my view, his decision to do so was a reasonable one; it was within a range of reasonable, acceptable outcomes. The diagnosed mental disorder was “Pain Disorder Associated with Psychological Factors and a General Medical Condition”. Because the mental disorder itself involves pain and includes pain associated with a general medical condition, in this case it is certainly reasonable to include pain from the general medical condition to the extent that such pain is connected with the diagnosed mental disorder.

[69] A further argument that was raised on this issue was that there could be double counting of the pain impairment under clauses (f) and (g) in certain cases because, following this court’s decision in *Kusnierz*, the impairments under cl. (g) can be put together with physical impairments for a whole body impairment total under cl. (f). Since that did not occur in this case, the possibility of double counting under cl. (f) does not change the reasonableness of the delegate’s conclusion. In a case where that is a concern, the assessors and adjudicators may have to address the issue directly.

Issue 4: Section 15 of the *Charter*

[70] The appellant sought to raise an argument under s. 15 of the *Charter* if the court agreed with the Divisional Court on the issue of the treatment of pain from physical sources in analysing impairment due to a mental disorder. As I would allow the appeal from the Divisional Court on that issue, there is no need nor would it be appropriate to address the *Charter* issue.

D. RESULT

[71] In the result, I would allow the appeal, set aside the decision of the Divisional Court and reinstate the order made by the delegate. If the parties cannot agree on costs, brief written submissions may be provided.

"K. Feldman J.A."

"I agree M. Rosenberg J.A."

"I agree K. Swinton J. (*ad hoc*)"

Released: "K.F." September 27, 2012