

Troy Lehman

Oatley Vigmond

Troy Lehman is a partner at Oatley Vigmond. Troy's practice is entirely devoted to helping people with serious personal injuries. Troy is certified as a specialist in civil litigation by the Law Society of Upper Canada and his practice includes motor vehicle collision cases, medical negligence cases, occupiers' liability cases and wrongful death cases. Troy joined Oatley Vigmond in 2006 after gaining valuable experience working for five years as defence counsel in medical malpractice cases.

What's New in CAT Impairment?



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Accident Benefits Coverage – Then and Now

Benefit	Prior Coverage	New Coverage
Non-CAT – Amount available for med-rehab and attendant care	\$86,000 -\$50,000 MR -\$36,000 AC	\$65,000 -combined
Non- CAT – Duration of med-rehab benefits	10 years	5 years
CAT – Amount available for med-rehab and attendant care	\$2,000,000 -\$1mm MR -\$1mm AC	\$1,000,000 -combined

Change in Definition

- Makes it more difficult to meet test but for brain injured children.
- No case law interpreting new definition to date.

Adult Brain Injuries

- **Under previous definition:**
 - GCS of 9 or less, or
 - GOS of 2 (vegetative) or 3 (severe disability) 6 months post-injury
- **Now:**
 - Must have positive neuro-imaging indicating intracranial pathology and qualify under Extended Glasgow Outcome Scale as follows:
 - Vegetative state one month or more after the accident;
 - Upper Severe Disability or Lower Severe Disability six months or more after the accident; and
 - Lower Moderate Disability one year or more after the accident

Brain Impairment (Adults)

- 8 levels in the scale
- Minimum Score = 1; Maximum Score = 8
- Specific questions to determine upper or lower levels of disability are dictated by the structured interview

1 = Dead	
2 = Vegetative State	Condition of unawareness with only reflex responses but with periods of spontaneous eye opening.
3 = Low Severe Disability	Patient who is dependent for daily support for mental or physical disability, usually a combination of both. If the patient can be left alone for more than 8h at home it is upper level of SD, if not then it is low level of SD.
4 = Upper Severe Disability	
5 = Low Moderate Disability	Patients have some disability such as aphasia, hemiparesis or epilepsy and/or deficits of memory or personality but are able to look after themselves. They are independent at home but dependent outside. If they are able to return to work even with special arrangement it is upper level of MD, if not then it is low level of MD.
6 = Upper Moderate Disability	
7 = Low Good Recovery	Resumption of normal life with the capacity to work even if pre-injury status has not been achieved. Some patients have minor neurological or psychological deficits. If these deficits are not disabling then it is upper level of GR, if disabling then it is lower level of GR.
8 = Upper Good Recovery	

Brain Impairment (Children)

- ***Under previous definition:***
 - GCS of 9 or less, or
 - GOS of 2 (vegetative) or 3 (severe disability) 6 months post-injury
- ***Now qualify if they meet any one of the following criteria:***
 - 1) In-patient admission to public hospital with positive findings of intracranial pathology on any medically recognized brain diagnostic technology.
 - 2) Accepted for admission as in-patient to neurological rehabilitation facility that is a member of the Ontario Association of Children's Rehabilitation Services.



Brain Impairment (Children)

- 3) Vegetative state on Kings Outcome Scale for Childhood Head Injury ("KOSCHI") one month or more after injury.
- 4) Severe disability on the KOSHI six months or more after injury.
- 5) Nine months or more the child'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."

Spinal Cord Injuries

- *Under previous definition “paraplegia or quadriplegia” qualifies whether complete or incomplete and regardless of the ASIA outcome*
- *Now, must wait until “the insured person’s neurological recovery is such that the person’s permanent grade on the ASIA Impairment Scale...can be determined.”*
- *If ASIA A, B or C, then meet test for CAT*
- *If ASIA D, things get complicated*



Spinal Cord Injuries

- *If ASIA D, only CAT if one of following apply:*
 - The insured person’s score on the Spinal Cord Independence Measure, Version III, item 12 (Mobility Indoors) and applied over a distance of up to 10 metres on an even indoor surface is 0 to 5;
 - The person requires urological surgical diversion, an implanted device, or intermittent or constant catheterization in order to manage a residual neuro-urological impairment, or
 - The person has impaired voluntary control over anorectal function that requires a bowel routine, a surgical diversion or an implanted device

Loss of Use of Limb

- ***Under previous definition – “amputation of arm or leg or another impairment causing the total and permanent loss of use of an arm or a leg.”***
- ***Now, one of following:***
 - Amputation of an arm or another impairment causing the total and permanent loss of use of an arm (no change)
 - For legs must be trans-tibial or higher amputation
 - Injury to leg such that the insured person's score on the Spinal Cord Independence Measure, Version III, item 12 (Mobility Indoors) and applied over a distance of up to 10 metres on an even indoor surface is 0 to 5 (same test as for ASIA D spinal cord injuries)

Loss of Vision

- ***Under previous definition – “the total loss of vision in both eyes”***
- ***Now – loss of vision of both eyes that meets the following criteria:***
 - Even with corrective lenses:
 - A) Visual acuity is 20/200 or less; or
 - B) The greatest diameter of the field of vision in both eyes is 20 degrees or less
 - Loss of vision is not attributable to a non-organic cause (eliminates hysterical blindness)

Whole Person Impairment (WPI)

- Before, did person have a 55% WPI from combined physical and psychological impairments under 4th edition of AMA Guides
 - Now, test is:
 - Whether person has a 55 WPI from only physical impairments under the 4th edition, or
 - Combination of physical and psychological impairments but psychological impairments quantified under the 6th edition.
- *6th edition results in substantially lower ratings!

Psychological Impairment

- Before, need person with marked impairment due to mental or behavioral issues in 1 of 4 spheres: ADL, Social Function, Concentration-Persistence-Pace or Adaptation to Work
- Now, need to have marked impairment in three of 4 spheres

Interesting Case Law

LAT affirms that GCS is Legal Test

- **16-001305 v. Gore Mutual, 2017 CanLii 44026 (LAT)**
- **16-000145 v. Intact Insurance Company, 2017 CanLii 9823 (LAT)**
 - If have brain impairment and GCS of 9 or less test met.
 - Lack of long-standing neurological impairment irrelevant.

Inappropriate to Assign Ranges to WPI.

- **16-000013 v. Peel Mutual Insurance Company, 2017 CanLii 33649 (LAT)**
 - Assessor must exercise judgment and choose as precise a rating as possible.

Interest Owing from Outset, Not When CAT Determination Made

- ***Van Galder v. Economical Mutual Insurance* (2017) CarswellOnt 16686 (C.A.)**
 - 2004 accident.
 - 4 CAT apps made 2007 to 2012
 - Insurer accepts CAT in 2013
 - Retro AC and HK owing. When does interest start?
 - Court accepted that insured had suffered CAT

Insurer Not Entitled to Unlimited CAT Assessments

- **16-003144 v. Cumis General Insurance Company (2017) CarswellOn (LAT)**

- LAT indicates that insurers must make reasoned decisions about type and number of assessments.
- In-person physiatry examination found not to be reasonably necessary.

OT Assessments Important to Marked Impairment

- **Fallahi v. Aviva Canada Inc. (2017) CarswellOn3135 (FSCO)**

- Insurer examiner relies on functional assessment by OT in assessing marked impairment in adaptation.
- Plaintiff's examiner relies only on self report.
- Insurer examiner opinion is preferred.
- Lesson: OT assessment very important in assessing marked impairment, which is all about function.

Thank you!

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