

# Early ‘Catastrophic’ Determination is Vital for the Victim

By: Bernard L. Gluckstein, Q.C.  
*Gluckstein & Associates*

## Early ‘Catastrophic’ Determination is Vital for the Victim

As the fourth anniversary of Bill 59 advances, the tangled definitions of ‘catastrophic impairment’ are beginning to unravel. Hence, what follows is a discussion about the benefits available for the catastrophic and non-catastrophic designations, the definitions, and the application process. Under the current legislation, the level of benefits available to a person injured as a result of a motor vehicle accident substantially increases in the injured party is determined to have suffered ‘catastrophic’ impairment. The chart illustrates the benefits available, the dollar amount and the time restrictions assigned to each benefit.

	<u>Non-catastrophic</u>	<u>Catastrophic</u>
Medical/ Rehabilitation \$1,000,000	\$100,000  (up to ten years or 10 years from 15 <sup>th</sup> birthday)	(for lifetime)
Attendant Care \$1,000,000	\$72,000  (up to 2 years from date of accident)	(for lifetime)
Housekeeping & Home Maintenance	\$100/ week (up to 2 years From date of accident)	\$100/ week (for lifetime)
Case Management	NO	YES

In addition to the time and dollar restrictions, the non-catastrophic victim *cannot* sue the at-fault driver for any expenses that are not covered by the medical/ rehabilitation or attendant care benefits: *Henderson v. Parker* (1998), 42 O.R. (3d) 462 (Gen. Div.). It is critical to be aware of the improved benefits available and the importance of establishing the catastrophic designation at the earliest opportunity so that case management services, ongoing treatment needs and adaptive requirements can be addressed immediately. The regulations provide several definitions of ‘catastrophically’ injured. Some precisely describe the required impairment:

- Quadriplegia, paraplegia,
- The permanent loss of use of both arms or legs,
- Total loss of vision in both eyes or in the case of a brain impairment,
- A score of nine or below on the Glasgow Coma Scale (GCS)

When severe impairments are not apparent or when the GCS is not reported as significant, the insured has the option of applying for catastrophic determination under other categories:

- *Severe disability*- at six months' post-injury a score of vegetative or severe disability on the Glasgow Outcome Scale,
- *Whole person impairment*- any impairment or combination of impairments that result in 55 per cent impairment of the whole person, or
- *Mental or behavioural disorder*- any impairment that results in a marked impairment or extreme impairment due to a mental or behavioural disorder

The difficulty with qualifying a client under the category of severe disability is the required waiting period of six months. For six months the injured person receives no case management services, and any payment in excess of the statutory amounts for medical/rehabilitation or attendant care expenses is the responsibility of the client. To fit into the severe disability category, under the strict definition, would necessitate the 24-hour nursing and/ or attendant care. This would require a payment in excess of the statutory benefit of \$3000/ month for attendant care. This category is further complicated by the measures of the Glasgow Outcome Scale (GOS). To be considered catastrophic under this definition according to the GOS guidelines:

- The person may be conscious but needs the assistance of another person for some activities of everyday living
- The need for assistance may range from continuous total dependency to the need for assistance with only one activity
- The person should not be left alone overnight because they would be unable to plan their meals, or deal with callers or any domestic crises that arise

Although these definitions may be applicable for adults, their application to children is often meaningless. A child could meet these criteria without having suffered a brain injury. The issue of catastrophic impairment is further complicated in the categories of the Whole Person Impairment Rating and the Mental or Behavioural Criteria, by the two conditions that apply to these particular situations. The definition of catastrophic does not apply unless:

- The insured person's health practitioner states in writing that the insured person's condition has stabilized and is not likely to improve with treatment; or
- Three years have elapsed since the accident

The qualification of 'not likely to improve with treatment' may have the effect of making the injured person ineligible for medical and rehabilitation benefits on the basis that the proposed interventions would be both unreasonable and unnecessary, given that the

treatment would not improve the status of the individual. A health practitioner may therefore not be acting in the injured party's best interest if an application is made under this condition, because it may virtually eliminate access to critical resources and rehabilitation benefits. On the issue of the deferment of the catastrophic designation until three years post-accident, the attendant care benefits that any injured person would be eligible to receive expire at the two year mark. This would mean that before an application could even be made, the injured person would not have received case management services from the time of the accident and would not be eligible for attendant care benefits for one year thereafter. An application for Catastrophic Designation requires several important steps. Under the category of brain impairment, the first step calls for a health care practitioner to complete an application to the insurance company based on ambulance, hospital records and/ or any other pertinent information that indicates the degree of injury and the level of consciousness by way of the Glasgow Coma Scale. If this responsibility is not assumed by a treating hospital physician, it is often left to the family physician. Unfortunately, this may cause a considerable delay, as the family physician is usually unfamiliar with the form and/ or may not understand its implications.

### **Urgency**

The lawyer or the in-house medical consultant must therefore inform the physician of the importance and urgency of the application, and supply sufficient back-up material for them to make a determination. It is always open, however, for the insurance company to deny the application. Should there be a delay at the application stage, there are alternative ways of procuring an application for catastrophic impairment. The application form does not specify that the document must be completed by a treating practitioner. It simply lists the professionals who can make an application (e.g. Physiotherapist, chiropractor, dentist, optometrist, physician or psychologist). Therefore, it may be necessary to obtain an opinion and the completion of the application from a non-treating health practitioner. Another alternative would be to refer the client for an independent examination by a Catastrophic Designated Assessment Centre (CAT DAC) that is out of the area in which the injured individual resides. The completion of the application form for catastrophic impairment, by the appropriate CAT DAC, may only require a review of the hospital and ambulance records and may not even require a patient interview if the application is being made under Brain Impairment and the material is concise. However, if the application is being made under the Whole Person Impairment Rating Category, it may be necessary to provide the entire medical brief, inclusive of photographs, to illustrate the injuries, including the presence of any disfiguring scar tissue.

It is likely that the CAT DAC will require a scheduled patient interview when applying under the Whole Person category. Regardless of the origin of the application, a narrative letter from the person making the assessment should accompany the completed form, including a list of the records reviewed and the rationale for supporting the catastrophic designation. When catastrophic status is denied at this application stage by the insurer, the dispute is referred to a designated Assessment Centre (DAC) that specializes in catastrophic determination. Here is often a degree of clinical judgment applied in the first

catastrophic evaluation. The lawyer (or the firm's medical consultant) therefore must take a proactive role in generating and gathering the data that will ensure a finding of catastrophic impairment.

Bernard L. Gluckstein & DH