

**COMMENTARY ON ARTS V. STATE FARM INSURANCE
COMPANY (2008) O.J. NO. 2096**

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Justice MacKinnon's May 28, 2008, Ontario Superior Court of Justice decision in *Arts v. State Farm Insurance Company* strongly supports the controversial decision in *Desbiens v. Mordini* (2004) O.J. No. 4735 which determined that the Schedule requires consideration of all impairments, however caused, and that they be totalled together in arriving at whole person impairment (WPI).

The facts of this case are as follows: the plaintiff's 2001 application for determination of catastrophic impairment resulted in the insurer's examination and report of September 10, 2007. The report indicated that the plaintiff suffered injuries including: right posterior parietal depressed skull fracture and presumptive basal skull fracture with underlying brain contusion and evidence of intracranial haemorrhage and diffuse axonal injury; fracture of the right clavicle, right posterior maxillary, and lateral orbital wall of the right orbit; and soft tissue injuries to the neck, right shoulder and low back. Blood was also found in his left maxillary sinus and a subsequently developed visual field defect with left homonymous hemianopsia. The report also confirmed that the plaintiff continues to suffer from chronic pain, cognitive impairments, headaches, subjective vertigo, tinnitus, sleep disturbance, anergia, vision impairment, panic attacks, specific phobia and reported sexual dysfunction. His psychiatric diagnoses included: mood disorder due to a general medical condition (brain injury) with depressive features, cognitive disorder, adjustment disorder with mixed anxiety and depressed mood - chronic, personality change due to a general medical condition (brain injury) - combined type (liable, disinhibited), and social anxiety.

Using the American Medical Association's Guide to the Evaluation of Permanent Impairment ("AMA Guides") with respect to the WPI, there was a 23 percent WPI for the plaintiff's neuro-musculoskeletal injuries, and when considering the mental and behavioural disorders under the AMA Guides, the concluded that he demonstrated a mild to moderate mental and behavioural impairment representing 40 percent WPI. In total when combining both ratings, he would have a total score of 55 percent WPI which would meet the Ontario definition of catastrophic impairment.

The defendant State Farm moved for a determination before trial under Rule 21.01(1)(a) of the *Rules of Civil Procedure* and argued that mental/behavioural percentages should not be used nor combined with physical injuries, and further that *Desbiens* was wrongly decided.

In dismissing the defendant's motion, Justice MacKinnon found Justice Spiegel's reasoning in *Desbiens* "compelling, reasonable, and persuasive". He also considered these additional factors: the plain language of the *Schedule* which would permit combining physical and psychological impairments; the AMA Guides do not prohibit the

inclusion of a psychological impairment; the purpose of the *Schedule* being remedial and consumer protecting to reduce the hardship of automobile accident victims; and the FSCO arbitrators and adjudicators expressed approval of the *Desbiens* analysis in their decisions.

This decision confirms that insurers will be faced with an uphill battle if choosing not to apply percentage ratings for a person's psycho-emotional impairments and further in deciding against the combination of percentage ratings for physical impairments to determine catastrophic impairment.