

## **CDL Accident Benefits Newsletter**



**Sven Mascarenhas**, McCague Borlack LLP  
Editor in Chief, CDL Accident Benefits Committee

### A Word From the Editor

As someone who has likely written more on the trials and tribulations of the License Appeal Tribunal than any other lawyer in the province, their recent surge in decisions actually wound up working to the detriment of a project such as this – namely, because it wound up making it harder to ensure that the decisions herein are as up to date as we'd like them. But, still, here is the first of (hopefully) the new CDL AB Newsletter era – featuring a group of writers much more talented (and far less likely to make random 80s cartoon references in their papers) than myself.

To put the “surge” in perspective, the last time we put one of these out there were 800 LAT decisions showing up on CanLII; as of the date this is being typed, there are 2,759. The surge is primarily powered by the usual suspects of MIG- and treatment-related decisions, as well as numerous “medial and other reasons” notice decisions, but it is not isolated by any means to those areas, as the discussions herein should make clear.

While these papers are all somewhat varied in tone, a consistent issue is what, exactly, the LAT will base its decision on – the “consumer protection” approach (most often cited in terms of notice decisions) and the “common sense” approach which is in vogue for “accident” definitional cases and evaluating the cost of CAT assessments.

One other note: we have a number of articles here that were a bit too long for the usual “newsletter” format, so we have provided abstracts of the articles and then links to the actual articles themselves on the CDL website. I strongly encourage you to read the full articles – they're worth the effort.

Have a good summer.

- Sven H. Mascarenhas

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**The LAT Is Not Kitten Around When It Comes to CAT Whole Person Impairment Ratings:  
A review of *P.P. v Wawanesa*, Tribunal Number 18-000957<sup>1</sup>**

**David Raposo**, Dutton Brock LLP

In *P.P. v Wawanesa*, the Applicant was involved in a motor vehicle accident on December 3, 2014. He applied to the LAT for a determination that his injuries qualified him for a catastrophic designation, among other things. In support of his position that he sustained a catastrophic impairment, the Applicant relied on multidisciplinary assessments. Notably, the Applicant only applied for CAT designation under the 55% WPI threshold with an exact WPI score of 55%. From a physical perspective, the Applicant's assessors assigned him a 26% WPI and an additional 26% for mental and behavioural impairments. When those scores were applied to the combined value chart, the total score was 45%, falling short of the 55% threshold.

However, of note, while the Applicant's assessors acknowledged that the Applicant's impairments at the time of the assessments only totaled a 45% WPI they then went on to consider the possibility that the Applicant would undergo shoulder surgery in the future. The Applicant's assessors even acknowledged what the adjudicator called the "speculative nature of assigning a rating for future contingencies". Specifically, the assessing physiatrist stated "the current impairment rating for range of motion loss was included in this combined [55%] rating as an estimate of loss of range of motion following shoulder arthroplasty".

Adjudicator Flude observed that no allowance was made for the Applicant's possible improvement following surgery and concluded that the "score assigned is unreliable as it is entirely speculative". Pointedly, Adjudicator Flude stated at paragraph 48:

"The fact that the *Schedule* provides that a catastrophic assessment may be conducted before full medical stability might suggest that there is room for a speculative dimension to take into account future contingencies. The *Schedule* does not include such a dimension. The *Schedule* incorporates the guides and those are the standards that apply to the assessment of catastrophic impairment".

At paragraph 50, following review of the CAT definition in Section 3(2) of the *Schedule*, Adjudicator Flude reasoned:

"Clearly the intention of the legislature was not to speculate on the impact of future treatment. The language is clear the *Schedule* contemplates a snapshot of the Applicant's current condition. Had the legislature intended otherwise it could have included broader wording..."

By excluding the additional 18% for the possibility of future surgery, the Applicant's final WPI score was only 45% based on his own assessments and therefore not catastrophic.

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<sup>1</sup> 2020 CanLII 94798 (ON LAT)

This decision reinforces that the determination of catastrophic impairment is made in a “snapshot” of time and confirms that the inclusion of a score to account for possible future surgery or future prognosis is improper and only an insured person’s impairments at the time of the assessment should be counted.

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### **What the LAT is Saying About Discoverability: Developments after Tomec**

**Marina Priolo**, Bertschi Orth Solicitors and Barristers LLP

**ABSTRACT – Following the Court of Appeal’s confirmation that discoverability is an element of SABS limitations decisions in *Tomec*, the LAT has applied the decision numerous times with respect to all types of accident benefits. The author notes that the LAT has been consistent on Housekeeping, Attendant Care Benefits and Non-Earner Benefits, as discoverability provides an opportunity for those people whose condition deteriorated to a point that they had a need for certain benefits to obtain those benefits. However, it is also observed that Income Replacement Benefits are not nearly as clear-cut.**

**[READ MARINA’S ARTICLE HERE](#)**

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## CERB? CRB? And IRB's, How Do These Benefits Impact the Calculations?

**Katrina Zalenko, CPA, CMA & Amanda Paci, CPA, CMA, CFF, MDD Forensic Accountants**

**ABSTRACT – The Federal government's introduction of several new benefits during the COVID pandemic requires careful consideration. Specifically, CERB and CRB benefits must be distinguished for their potential impact on Income Replacement Benefits. The authors explore the possibility and pitfalls of treating CERB and CRB in the same manner as Employment Insurance, and the alternative of simply ignoring both benefits when calculating IRB, as well as the potential impact on a claimant's eligibility for IRB.**

[READ KATRINA AND AMANDA'S ARTICLE HERE](#)

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## The Common Sense Revolution and the Definition of "Accident" Under Section 3(1) of the SABS

**Michelle T. Friedman & Mohamed R. Hashim, Aviva Trial Lawyers**

**ABSTRACT – While the trend in the early years of the LAT appeared to be in favour of a consumer protection-based broadening of the definition of an "accident" for SABS purposes, the author notes ever-more-inventive suggestions as to what constitutes an accident under section 3(1) of the SABS. A "sea-change in the approach of adjudicators" has occurred, and a common-sense approach is**

now being applied in determining what constitutes an accident. Adjudicators are taking note of the reasonable expectations of the insurer along with the expectations of the insured. The article discusses the impact of the common sense approach on repairs, bystanders, and the applicant as rescuer.

[READ MICHELLE'S ARTICLE HERE](#)

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### **Possible Payment of CAT Assessments: The CAT Strikes Back**

**Sven H. Mascarenhas, McCague Borlack LLP**

**ABSTRACT – The LAT's increased comments on CAT assessments has led to a discussion of what components of the assessments are payable. Caselaw at the LAT has confirmed that the correct test in addressing CAT assessments and examinations under the Schedule is that of "reasonable and necessary". The author notes that the LAT has been consistent in denying payment for portions of CAT assessments that it deems to be unreasonable, duplicative, or both, with special attention being paid to items such as charging for a file review or a separate WPI assessment. While "the threshold is low", these limitations have been consistently applied, with the common sense approach prevailing, temporarily at least, over a consumer protection interpretation.**

[READ SVEN'S ARTICLE HERE](#)

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## UPCOMING EVENTS

### Webinar: LAT Jurisdiction to Apply s.7 in SABS Disputes Loss

Week of July 12, 2021 – 12:30 pm To be Confirmed Check your inbox for details soon

Chaired By: David Raposo, Dutton Brock

## PAST EVENTS

AB Fall Classic, Dec 3, 2020

Video recording available to purchase: [ORDER HERE](#)

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3-1136 Centre St. Suite 127  
Thornhill ON L4J 3M8  
416-340-9859 | [info@cdlawyers.org](mailto:info@cdlawyers.org)

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