Accident Benefit Reporter

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APRIL FOOLS – "CHANGES TO ONTARIO AUTO INSURANCE GIVE YOU MORE CHOICE"

Just in time for April Fools' Day, a letter arrived at my home from my automobile insurer. My insurer was "writing to inform you of upcoming changes to your automobile insurance." Enclosed with the letter was an "introduction to these changes, provided by the Financial Services Commission of Ontario." The letter advised "your coverages remain unchanged until your next renewal."

The enclosed "introduction" was entitled "Changes to Ontario Auto Insurance Give You More Choice."

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APRIL FOOLS – "CHANGES TO ONTARIO AUTO INSURANCE GIVE YOU MORE CHOICE"

Cont'd from cover story

This introduction indicated:

- On June 1, 2016, changes to auto insurance in Ontario will give you more choice and control over your insurance and premiums.
- Statutory accident benefits are changing, and new optional accident benefit choices will be made available to allow you to customize your policy to suit your individual needs.
- The choices will give you greater influence over the price you pay for insurance. The cost of your policy will vary based on the coverage you purchase.

The introduction further advised "your policy won't change until it is time for it to be renewed."

As George W. Bush famously once tried to say "fool me once shame on you, fool me twice shame on me."

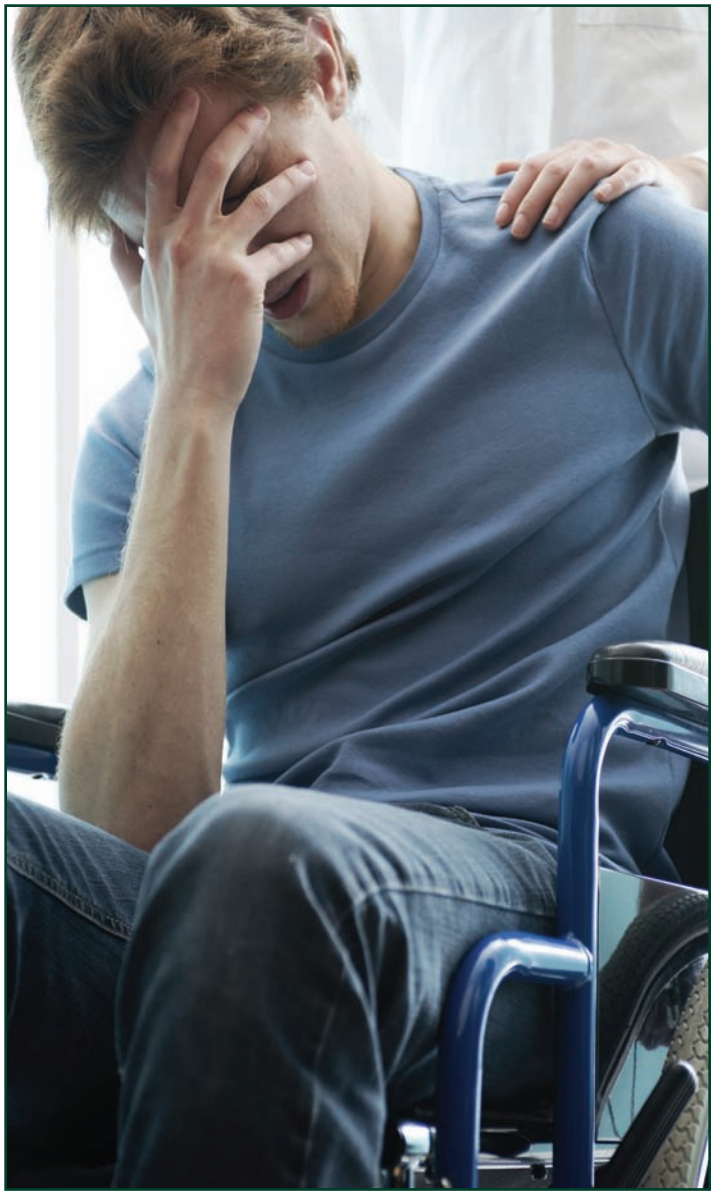
It is bad enough that the Ontario Government has chosen to reduce benefits and restrict access to those reduced benefits. But then the Ontario Government has the audacity to describe (spin) the reductions and restrictions as something that provides more "choice" to potential accident victims. As well, the Ontario Government is simply wrong (dare we say prevaricating) when it states that "your policy won't change until it is time for it to be renewed."

Ontario Regulation 251/15 with respect to No-Fault Statutory Accident Benefits becomes effective on June 1, 2016. For existing policies (those issued before June 1, 2016) the amounts of coverage (maximum limits) remain the same until the policy renews, but then the coverages are drastically reduced unless "optional" coverages are purchased.

Additionally, continuing access to existing coverages are restricted as of June 1, 2016. This is because of sweeping changes to the definition of "catastrophic impairment" that become effective as of June 1, 2016, even on existing policies.

One of the most sweeping changes is with respect to the definition of catastrophic impairment as it applies to brain impairments.

Up to June 1, 2016, a "catastrophic impairment caused by an accident is brain impairment that results in a score of 9 or less on the Glasgow Coma Scale." This definition



was described by the Ontario Court of Appeal as "a bright line rule which is relatively easy to apply."

As of June 1, 2016, this easy to apply rule will no longer exist. Instead, rules requiring positive diagnostic imaging results and at least Lower Moderate Disability Glasgow Outcome Scale (GOS) findings well after the accident in adults are now to be applied.

For children (under 18 years of age at the time of the accident) hospital admission with positive diagnostic imaging results or rehab hospital admission, or at least severe disability findings on the King's Outcome Scale for Childhood Head Injury (KOSCHI) many months after the accident are now required for a finding of catastrophic impairment.

It is anticipated that these more complicated and restrictive catastrophic impairment definitions will deny many seriously injured accident victims access to catastrophic benefits. These same severely injured accident victims would have qualified for those benefits had their accident occurred before June 1, 2016. At the very least, the ability to determine whether a person has sustained a catastrophic impairment will now be delayed in most cases under the new criteria. This will deprive accident victims of sufficient medical and rehabilitation benefits shortly after the accident when those victims most desperately need medical and rehabilitative measures.

When it comes to the "more choice" that the Ontario Government is providing to potential accident victims, it should be noted that this new choice is really only a bad choice. When it comes time to renew an automobile policy following June 1, 2016, the additional choice that has been given to potential accident victims is to drastically reduce the level of benefits available. Alternatively, an insured can pay more for optional benefits that will only provide what coverage was available to all up until June 1, 2016.

The new rules provide that once existing policies renew, the standard non-catastrophic level of medical, rehabilitation and attendant care benefits will reduce from $86,000.00 to $65,000.00 in total. Also, the standard catastrophic level of benefits will reduce from $2,000,000.00 to $1,000,000.00 in total (medical, rehabilitation and attendant care benefits).

The new choice provided to consumers is a bad choice as it means accepting a level of coverage roughly equivalent to what was available in Ontario back in the early 1990s.

Returning to George W. Bush, what he actually managed to say was "fool me once (long pause) shame on (long pause) you (long pause) fool me, you can't get fooled again."

With the changes coming to No-Fault Statutory Accident Benefits effective June 1, 2016, we will all be the fools as we will all have to either accept less coverage from our insurers or pay more for optional benefits only to maintain the coverage we all had up to June 1, 2016. ■■■

RECENT DECISION ON IMPACT OF SABS SETTLEMENT BEFORE TORT TRIAL

Carr Hatch
ASSOCIATE *THOMSON, ROGERS*

The recent Divisional Court decision in Mikolic v. Tanguay, 2015 ONSC 71(CanLII) sheds light on the credit a tort defendant receives when the statutory accident benefits case (SABS) settles before the tort trial.

At issue was what, if anything, from the SABS settlement was deductible from a jury award at trial of: $20,000 for past loss of income; $30,000 for future loss of income; and $15,000 for future care.

The SABS claim of the Plaintiff settled prior to the tort trial for an all-inclusive amount of $175,000. The settlement disclosure notice included $77,500 under the category of past and future income replacement benefits. The Plaintiff/Respondent argued that the disclosure notice was only

a "notional breakdown" of the settlement and "did not reflect reality." The Plaintiff/Respondent also argued the all-inclusive settlement included aggravated and punitive damages and costs and disbursements that were not accurately reflected in the settlement disclosure notice.

The trial judge held that because the SABS settlement payments were a lump sum and a compromise, the Defendants were not entitled to a deduction for the income replacement benefits portion of the SABS settlement against the trial award for future loss of income. The trial judge held that he could not determine from the evidence what amounts the Plaintiff had received in the SABS settlement for future loss of income, as the settlement disclosure notice combined the past and future income replacement benefits for a total of $77,500. The Divisional Court *disagreed* with the trial judge.

The Divisional Court relied heavily on paragraph 10 from the 2007 Court of Appeal decision in *Cummings v. Douglas*, 2007 ONCA 615(CanLII), which held that the income replacement benefit deduction under the SABS should be made from a global award for loss of income. The Divisional Court in *Mikolic* followed *Cummings* and ultimately determined that the trial judge should have deducted amounts received from the SABS settlement for "income loss" from the tort award instead of making any distinction for what was a past or future income replacement benefit.

Although the Plaintiff had no absolute entitlement to future income replacement benefits at the time of his SABS settlement, he accepted the $77,500 from his SABS insurer prior to the trial of the tort action. The Divisional Court determined that the $77,500 settlement of income replacement benefits could be deducted from the jury's separate awards at trial for past loss of income and for future loss of income.

The Divisional Court applied the same reasoning to future care deductions, where there was a SABS settlement of $37,500 for all "past and future medical benefits" and the jury award at trial was for $15,000 for future care. The Divisional Court deducted the SABS settlement from the jury award for future care.

What the Divisional Court in *Mikolic* did not address was the issue of accounting for legal costs, which was a key component of the *Anand v. Belanger*, 2010 ONSC 5356 (CanLII) decision. In *Anand*, Justice Stinson made it clear that the "net recovery after legal expenses" was the appropriate figure to be used to determine the amount of the SABS credit to the tort defendant. In *Anand*, the SABS settlement was $120,000 but the Plaintiff received a net amount of $80,040 after legal fees and disbursements. The court gave a credit of $80,040 as opposed to the $120,000 credit the defendant sought.

The Divisional Court's failure to deal with the issue of "net recovery after legal expenses" potentially raises a concern that tort insurers may attempt to argue they are entitled to a deduction for the full amount of a SABS settlement rather than the net amount. The *Mikolic* decision, however, can be distinguished from *Anand* on this point because the *Mikolic* court likely did not need to determine the "net recovery after legal expenses" for the SABS settlement because the amount of the SABS deductions in the case significantly exceeded the applicable jury awards at trial.

Lastly, as an aside, Plaintiff's counsel should always ensure interest is properly documented in the SABS settlement disclosure notice if settling the SABS case before the tort case, as interest on outstanding income replacement benefits will not be considered as payment for income loss or loss of earning capacity per the *Demers v. B.R Davidson*, 2011 ONSC 2046 (CanLII) decision. It would be bad practice for a lawyer to include any interest on outstanding income replacement benefits within the heading of "income replacement benefits" in the settlement disclosure notice, as the tort defendant could argue they are entitled to the full amount under that heading down the road. ■■■

STATUTORY DEDUCTIBLE CONFUSION

Darcy R. Merkur
PARTNER *THOMSON, ROGERS*

The risk analysis associated with the resolution of ongoing motor vehicle tort claims in Ontario has been turned on its head following the surprising December 8th decision by Justice Martin James of the Ontario Superior Court of Justice in Vickers v. Palacious, 2015 ONSC 7647 (Ont. S.C.).

Since October 1, 2003, Ontario has had in place a $30,000 statutory deductible on claims by injured persons against at-fault automobile owners and operators (unless the general damage award exceeded a vanishing deductible limit of $100,000). The deductible, along with a defined "permanent and serious" threshold, was designed to reduce automobile litigation by precluding cases by those with modest injuries and modest damages.

A statutory deductible of $15,000 has also been in place since October 1, 2003 on claims by family members (unless the Family Law Act award exceeded the vanishing FLA deductible limit of $50,000).

In the summer of 2015, the Ontario government announced changes to the statutory deductible aimed at bringing the deductible in line with inflation since 2003. At the same time, interestingly, the Ontario government, instead of increasing benefit entitlement with inflation, announced major reductions in available accident benefits come June 1, 2016.

The government deductible changes came into force as of August 1, 2015 via Ontario Regulation 221/15, amending Ontario Regulation 461/96.

The new provision, incorporated into section 267.5 of the Insurance Act, indicates that the prescribed deductible until December 31, 2015 is now $36,540 (increased by nearly 22%) and thereafter will increase every January 1st by inflation. In addition, the $100,000 vanishing deductible limit was also increased by nearly 22% to $121,799 and is to be increased with inflation every January 1st. Similarly, the deductible on claims by family

members was increased to $18,270 unless the amount exceeds the new inflated vanishing FLA deductible amount of $60,899.

In *Vickers*, the question was whether an October 29, 2015 jury verdict in an automobile tort claim arising from injuries sustained well before 2015 was subject to the new deductible provisions in force as of August 1, 2015.

The Honourable Justice James of the Ontario Superior Court of Justice reviews the genesis of the deductible amendments and concludes that, *"….the revised deductible is to apply to all pending actions."*

Justice James notes that *"…the deductible issue is a matter of procedural law and ought to be presumed to apply to this action."* Accordingly, Justice James applies the new post August 1, 2015 higher deductible of $36,540 to this pre - 2015 motor vehicle claim.

The decision in *Vickers* throws a wrench into the fair resolution of auto insurance tort claims. Plaintiff's personal injury lawyers argue it is blatantly unfair to apply increased deductible limits to ongoing claims.
The unexpected application of increased deductibles has drastic consequences on the viability and recovery of certain claims and on Offers to Settle made in the context of ongoing claims.

For example, for ongoing claims where accident victims expected a general damage award of between $100,000 and the new $121,799 limit, there will now be a $36,540 deductible that is applied, causing a major alteration in the anticipated recovery of the plaintiff (i.e. instead of recovering a full general damage award of say $100,540, without a deductible, the plaintiff would now get a recovery of just $64,000 after accounting for the new deductible and the new vanishing deductible threshold).

The impact could be even more profound on claims by family members as these claims are often modest but legitimate ones that marginally exceed the deductible.

The *Vickers* decision will likely be appealed, or, alternatively, the issue of the retrospective impact of the deductible changes will undoubtedly be addressed by an appellate court in the coming months. Sadly, until then, accident victims will be under pressure to consider reducing settlement demands in light of the uncertainty surrounding the appropriate deductible application.

The notion that amendments can be made by the government that drastically negatively impact the financial recovery of an accident victim with a longstanding ongoing claim is extremely controversial. Frankly, it cannot

legally be done (and especially cannot be done without express and clear legislative intention to do so, and even then will be challenged as illegal).

Imagine the reaction by the insurance industry if this 'procedural' deductible was eliminated or reduced to $1 on a retrospective basis. Insurers would be crying foul arguing that their insurance premiums were based on the law as it was when the contracts of insurance were bound. Similarly, it is not fair to suddenly reduce financial recovery for accident victims and their families in relation to ongoing claims that predate the August 1, 2015 amendment. ■■■

UPCOMING EVENTS 2016

EVENTS
2016

1. **May 10 Practical Strategies Webinar** The Dawn of a New Day: Understanding The "Catastrophic" Impact of the Coming SABS Changes. David MacDonald and Darcy Merkur will be panel speakers.
2. **May 12 BIAPH 8th Annual Une Affaire du Chocolat** Social Mix and Mingle is in support of the 'Brain Injury Association of Peel and Halton'. Bronte Harbour Banquet and Conference Centre, 2340 Ontario St., Oakville, Ontario. Time: 6:30 pm - 9:30 pm.
3. **June 5 MADD Canada's PIA Law Strides for Change Run** This year MADD Canada's PIA Law Strides for Change event will take place on Sunday, June 5th, 2016 at JC Saddington Park in Mississauga (Port Credit) Time: 9:00 am – 12:00 pm.
4. **June 8 12th Annual BIST/OBIA Mix and Mingle 2016** The celebration continues with the 12th annual BIST/OBIA Mix and Mingle. Steam Whistle Brewery, 255 Bremner Blvd., Toronto, Time: 6:00 pm – 10:00 pm.
5. **June 21 Hamilton Health Golf Tournament**
6. **September 16 Back to School Conference with PIA Law and Ontario Brain Injury Association** at the Shangri - La Hotel.
7. **October 20 Practical Strategies Experts Conference: Testifying Without Fear** Save the Date
8. **October 27 Brain Injury Association of Niagara Conference 2016** David Payne and David Tenszen will be presenting on behalf of Thomson, Rogers.
9. **November 10 -11 Toronto ABI Network Conference** Thomson, Rogers is proud to be the Diamond Sponsor.

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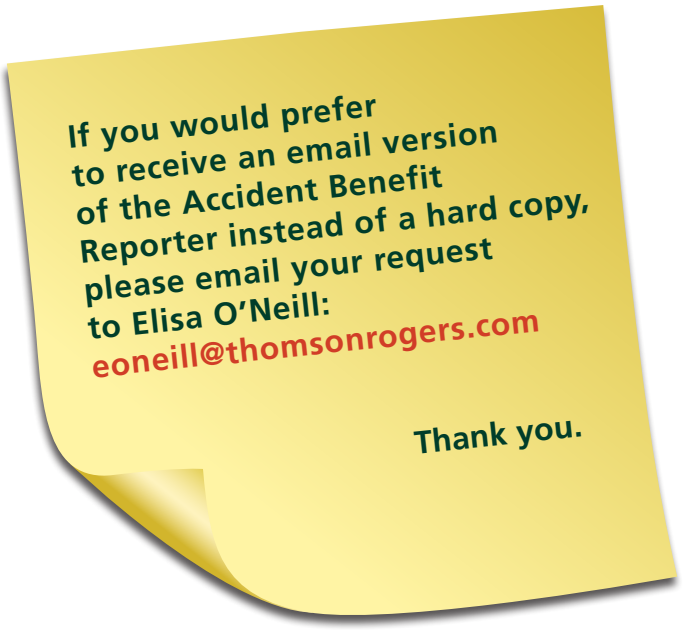

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