THOMSON ROGERS
PERSONAL INJURY LAWYERS

Accident Benefit Reporter

FALL 2016 REPORTER | 80th ANNIVERSARY SPECIAL EDITION
© A Thomson, Rogers Publication | Volume 17 Issue 2 | October 2016 | ISSN 1481 0239

IN THIS SPECIAL EDITION ISSUE

This year Thomson, Rogers proudly celebrates its 80th anniversary. In fondly looking back over the years, we often recall the many clients and friends who've touched our hearts, and inspired us with their courage and perseverance.

To honour our clients and recognize their achievements in reclaiming their lives, following traumatic injuries, we're helping them give back to the health care community that helped them throughout their recoveries. We will be donating a total of $80,000, in honour of our 80 years as a firm, to various charities and groups that have helped our clients and their families.

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AS PART OF THE PROCESS WE INVITED PAST CLIENTS TO PUBLICLY SHARE THEIR STORIES, AND IN DOING SO WE'RE MAKING A CHARITABLE DONATION IN REFERENCE TO EACH CLIENT STORY.

WE'VE SELECTED FIVE VERY INSPIRATIONAL CLIENT STORIES AND MATCHED THEM WITH THE GROUP PRIMARILY INSTRUMENTAL IN THEIR SUCCESS:

Scott Parkinson -
Brain Injury Association Peterborough Region

Anthony Aquan-Assee –
Ontario Brain Injury Association

Now we're asking for your help. We want the larger community to decide how our $80,000 anniversary donation is allocated. We have posted these client stories on our website, and various social media sites, to encourage you to decide how to allocate our donation. Watch the videos, read the stories and vote for the one that inspires you the most. Regardless of the winning story, each charity will be receiving a donation, so everyone is a winner!

Tina Manousos –
Spinal Cord Injury Ontario

Zoe Gottwald – War Amps
of Canada CHAMP Program

Fere Humble –
West Park Healthcare Centre

The 80th Anniversary campaign runs through to November 4th.
We will be announcing the results at the Toronto Acquired Brain Injury Conference at the Marriott Hotel in Downtown Toronto, on November 10th.

Please go to *www.ThomsonRogers.com/Inspirational-Success-Stories* and "like" your favourite story! Feel free to share this with family and friends.

If you have any questions regarding our 80th Anniversary campaign, please contact **Joseph Pilegi** at jpileggi@thomsonrogers.com

CASES HIGHLIGHT NEED TO BREAK DOWN STATUTORY ACCIDENT BENEFITS

By Leonard Kunka & Carr Hatch

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Two recent decisions by the Ontario Divisional Court and the Court of Appeal for Ontario provide a sobering reminder of the necessity of providing clear and unequivocal breakdowns of the amounts received for Statutory Accident Benefits (SABS), including any lump sum settlements.

A similar clear set of jury questions which separates each head of damage into past and also future losses in the tort claim must be provided to allow a judge to reduce the trial award by the corresponding statutory accident benefits, on a benefit-by-benefit basis, pursuant to s. 267.8 of the *Insurance Act*.

In the Divisional Court decision of *Mikolic v. Tanguay* 2016 ONSC 71, the plaintiff settled their SABS claim prior to the trial in the tort action for an all-inclusive amount of $175,000, with the settlement disclosure notice attributing $77,500 for past and future income replacement benefits and $37,500 for past and future medical benefits.

At the trial in the tort action, the jury awarded $20,000 for past loss of income, $30,000 for future loss of income and $15,000 for future care.

Justice Harrison Arrell ruled that he could not determine the amounts received in the SABS settlement for future income replacement benefits because past and future income replacement benefits were combined in the settlement disclosure notice. As a result, Justice Arrell declined to deduct the $77,500 SABS settlement from the tort jury award of $20,000 for past loss of income or $30,000 for future loss of income.

The Divisional Court in *Mikolic* overturned the trial decision and found that Justice Arrell should have deducted the combined total amount received for income replacement benefits from the past and future income loss tort awards. The Divisional Court applied the same reasoning in deducting the jury's award for future care because the SABS settlement for "past and future medical benefits" exceeded the jury award for future care.

Using similar reasoning as *Mikolic*, the decision from the Court of Appeal for Ontario in *Basandra v. Sforza* 2016 ONCA 251, upheld Superior Court Justice Wendy Matheson's deduction of the total SABS received by a plaintiff from the jury awards. The main reason was that the jury questions were lumped together at trial and did not adequately separate the heads of damages to allow Justice Matheson to perform an *apples-to-apples* deduction.

Because the jury questions combined the heads of attendant care, medical/rehabilitation expenses and housekeeping into one category, Justice Matheson was unable to apply the s. 267.8 reductions on a benefit-by-benefit basis. Consequently, the Court of Appeal,

like Justice Matheson, looked at the total amount received by the plaintiff from accident benefits, and compared that amount to the total jury award, and concluded that the plaintiff had received more in total accident benefits than awarded by the jury under the combined heads of damages.

The Court of Appeal felt that Justice Matheson balanced the policy objectives under the *Insurance Act* to promote full compensation, while respecting the other policy objective of avoiding double recovery.

The difficulty with both of the above cases is that neither case addressed the issue of the *net recovery* to a plaintiff after legal expenses, as was addressed in the *Anand v. Belanger* 2010 ONSC 5356 decision. If plaintiff 's counsel makes the decision to settle the SABS case before the tort case, they must be aware that "net recovery after legal expenses" is the SABS credit a tort defendant should receive pursuant to *Anand*. If the decision is made to settle the SABS case first, there should be a clear direction in the file showing what categories of benefits within the settlement disclosure notice the plaintiff *actually receives*, net of legal fees, to make it clear what the deduction should be at trial. This issue was likely not addressed because the credits received for each case significantly surpassed the damage awards in tort.

Another issue plaintiff's counsel must be aware of is that interest on outstanding benefits will not be considered as part of a benefit received as per the *Demers v. B.R Davidson Mining & Development Ltd*. 2011 O.J. No. 2260 decision. The relevant jurisprudence has put great weight on the contents of the settlement disclosure notice, and plaintiff's counsel must make sure each category within the notice is accurate. If plaintiff's counsel includes interest within a category of benefit at the SABS settlement stage instead of separating it within the settlement disclosure notice, they would be giving a credit to the tort defendant at trial that they should not have been entitled to.

Underlying the *Mikolic* and *Basandra* decisions is an increased burden to prove past losses and collateral benefits received. In addition, jury questions at trial will now have to be carefully worded to allow appropriate deductions to be made at the end of trial. In terms of best practices, counsel should either obtain agreement from defence counsel on past losses and collateral benefits paid, or include that information within their Request to Admit leading up to trial. Plaintiff 's counsel should be cognizant of this issue by tailoring questions, as specific as possible, at the Examination for Discovery stage of the case. As a safeguard, judges ought to consider addressing this issue at pre-trial conferences or else the length of trials could now be significantly extended by this need to now prove all past losses, even if already paid. ■■■

THOMSON ROGERS 80 years

LITIGATING CHRONIC PAIN CASES: WHAT PLAINTIFFS, HEALTH PRACTITIONERS, & PERSONAL INJURY LAWYERS NEED TO KNOW

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PARTNER *THOMSON, ROGERS*

INTRODUCTION

For a long time, "chronic pain" has been seen as an unfavourable term in personal injury litigation. Although, there have been some positive strides in recent years, there still remains a perception for many that the disability is not real. But for many people, chronic pain syndrome is a very genuine, very disabling condition; and it is one for which they are entitled compensation under the law if caused by another person's wrongdoing. Front and center in these cases is the credibility of the Plaintiff (the person bringing the lawsuit). As stated recently by Tzimas J.: *"The issue of credibility is especially important in a case where the source of pain is soft tissue injury and where the magnitude of the pain cannot be measured objectively.*[1]*"*

This article is a shortened version of a paper that I have authored (found at https://www.thomsonrogers.com/directory/deanna-gilbert/) to provide prospective Plaintiffs, health care professionals (both treating and medical-legal experts), and personal injury lawyers with an understanding of:

1. What to expect when embarking upon a chronic pain case;
2. Medical-legal strategies to create a persuasive chronic pain case; and
3. Recent judicial treatment of chronic pain cases.

WHAT PROSPECTIVE CHRONIC PAIN PLAINTIFFS SHOULD EXPECT

Expect a Jury

In civil litigation, the parties have the choice of seeking a trial by judge or jury. In Canada, a civil jury is made up of six adults who are chosen at random.

Juries are typically considered to be unpredictable and "cheap". They are also, arguably, more likely to bring their own personal experiences to the decision-making process as compared with a judge. For these reasons, in virtually every chronic pain case, the *Defendant* files a Jury Notice.

Expect to Face Biases

The single greatest hurdle in a chronic pain case is getting the jury to believe that the Plaintiff's pain is real. There are generally three biases that will have to be overcome:

1. There is often a biased belief that the Plaintiff is faking (otherwise known as malingering) in order to get money. Unlike most brain injuries, fractures, or tears, chronic pain is not associated with "objective" injury; meaning, that the syndrome was not caused by an injury that would show up on an X-ray, MRI, CT scan, or other diagnostic test. Rather, pain is something that is intrinsically felt.

[1] *Dimopoulos v. Imad Tafaso Mustafa*, [2016] O.J. No. 287 (Sup.Ct.) at para. 56 [*Dimopoulos*].

2. Even if the Plaintiff is believed to be in pain, there tends to be a biased belief that the pain cannot be "that bad". As compared with a brain injury, for example, pain is something that at some point everyone has experienced. The difficulty is that while people can relate to pain, they cannot necessarily relate to the level of severe, constant, long-term pain that is experienced by people with chronic pain. This translates to low awards for damages (compensation for losses).
3. Even if the Plaintiff is believed to be in serious pain, there can be a biased belief that the Plaintiff chooses to remain in pain in order to be compensated, rather than choosing to get better.

Expect the Litigation to Last for Years

Unfortunately, there is no deadline in civil litigation by which time the action has to resolve or the Judgment has to be made. *On average,* a personal injury case (non-medical malpractice) typically takes *approximately* three years. Chronic pain cases tend to fall on the outer edge of this range for three reasons:

1. Chronic pain, by its very definition, involves chronicity. A person who experiences neck pain on day one of a tortious incident (a wrongdoing, such as a motor vehicle crash) is not going to be diagnosed with "chronic pain syndrome" the same day. Rather, the diagnosis is one that is made after *many* months have passed with little to no improvement.
2. In motor vehicle cases (and *only* motor vehicle cases), there are statutory hurdles which limit the right to recover compensation unless a certain "threshold" of impairment is reached. This "threshold" applies to the recovery of general damages (claims for pain, suffering, and the loss of enjoyment of life) and health care costs (both past and future). If the disability does not pass the "threshold", the Plaintiff is not entitled to recover general damages or health care costs. The "threshold" is defined in the *Insurance Act*[2] as a "*permanent* serious disfigurement" or a "permanent serious impairment of an important physical, mental, or psychological function." Given this requirement for "permanency", there is going to be some delay before a medical expert can opine that a disability arising from a soft-tissue injury is permanent. This is distinct, for example, from a case involving an amputation where one can determine with ease that the disfigurement is permanent and serious.
3. Most of these cases (due to the credibility and threshold issue) will involve at least one defence medical examination. These examinations will be discussed later in this paper but, briefly, with respect to the duration of the lawsuit, defence medical examinations can prolong the litigation because: 1) they are not typically arranged until after the Plaintiff has been examined for discovery (a step in the litigation wherein the Plaintiff answers questions under oath); 2) there are wait times for these appointments since most assessors also have treating medical practices; and 3) for the same reason, the reports are not typically delivered for a few months after the assessment.

Expect Some Intrusion into Your Privacy

All personal injury cases involve a degree of intrusion into the Plaintiff's privacy; for example, by virtue of the Plaintiff's medical records having to be produced. In chronic pain cases, however, it is more common than in other personal injury cases for the Plaintiff to also be put under surveillance and/or for his or her social media accounts to be monitored. The purpose of surveillance and monitoring social media is to see whether an inconsistency can be established between what the Plaintiff says and what he or she does.

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[2] *Insurance Act*, R.S.O. 1990, c. I.8 at s. 267.5 [*Insurance Act*]. The definition is further narrowed in s. 4.2(1) of the *Court Proceedings for Automobile Accidents that Occur on or After November 1, 1996*, Reg. 461/96 [the *Regulation*].

STRATEGIES FOR BUILDING A SUCCESSFUL CHRONIC PAIN CASE

Do Not File a Jury Notice

For the reasons identified above, personal injury lawyers would generally be ill-advised to file a Jury Notice in a chronic pain case.

Try to Mitigate the Losses

Every Plaintiff has a duty to mitigate; meaning a duty to try to get better in order to reduce the losses that would otherwise be claimed in litigation. Plaintiffs who 'try but fail' are seen more favourably than those who 'never try at all.' For example, a Plaintiff who tries to return to work after an incident, but after two weeks realizes it is not physically feasible is one who will be better received by the defence lawyer than a Plaintiff who never attempted to return to work at all.

Avoid the Use of Absolute Words

There are many times throughout the course of the litigation where the Plaintiff will be asked about his or her impairments (speaking to rehabilitation professionals, testifying at examination for discovery, attending a defence medical examination, etc.). In litigation, words are taken at their literal meaning. A Plaintiff who says that he or she can "never" carry heavy bags and is caught on surveillance doing just that will be seen as a liar. Conversely, a Plaintiff who says that he or she "rarely" carries heavy bags and is caught on surveillance once doing just that has not been proved a liar.

Absolute words that should be avoided include: always, never, can't, and don't. Preferable words that provide some cushion include: typically, generally, usually, frequently, infrequently, rarely, 'with difficulty', and 'but' (e.g. yes, but…).

Properly Prepare for Examinations for Discovery & Medical-Legal Assessments

Examinations for discovery and medical-legal assessments (whether arranged by Plaintiff's counsel or the defence) are important steps in the litigation. Discovery evidence is given under oath or after an affirmation, and can be used to impeach the Plaintiff at trial. Similarly, the expert's opinion can be undermined if the expert relied upon something the Plaintiff said which is later proved to be inaccurate.

A competent personal injury lawyer will take the time to carefully and properly prepare the Plaintiff for his or her examination for discovery and for medical-legal/ defence medical examinations. Helpful preparation tips for Plaintiffs include, but are not limited to:

1. Avoid absolute words.
2. Use ranges and approximations to allow for some cushion.
3. Be responsive and particular, rather than evasive or overly broad.
4. Do not guess, as a guess can be proved wrong through records or other witnesses.
5. Do not deny pre-existing conditions or complaints, but do explain or distinguish them.
6. Do not get defensive or angry, or you may look like you have something to hide.
7. Avoid theatrics; if you are injured you do not need to "act" injured.
8. There is no such thing as "off the record".
9. Do not be afraid to correct an answer if you later realize it was incorrect, incomplete, or involved an absolute word.
10. Put forth a good effort with testing at medical/ defence medical examinations.

Be Proactive to Defend Against Surveillance & Social Media

Many of the tips above will proactively "defend" against the potential adverse impacts of surveillance and social media. With respect to social media, Plaintiffs should put their privacy settings at the highest and should avoid posting anything that they would not otherwise be prepared to put directly into the hands of the defence lawyer.

Choose the Right Medical & Rehabilitative Experts

In a chronic pain case, where the credibility of the Plaintiff is usually in issue, choosing the right medical-legal expert may include:

1. Choosing a physiatrist and/or psychologist who can speak to the experience of pain; rather than an orthopaedic surgeon or neurologist, who may be more focused on the presence or absence of an objective injury.
2. Choosing an expert who has done both Plaintiff and defence work, and whose opinion might, therefore, be given greater weight by a defence lawyer.
3. Choosing an expert whose opinion has been received favourably by a judge in another decision, or whose expertise in chronic pain has been highlighted by a judge.
4. Choosing one or more *treating* physicians, psychologists, and/or rehabilitation professionals to write an expert report, since these experts would not have become involved in the Plaintiff's care simply by being hired by his or her lawyer and who will have greater knowledge of the Plaintiff's condition from having treated him or her over time.

Brief the Expert on Medical-Legal Report Writing

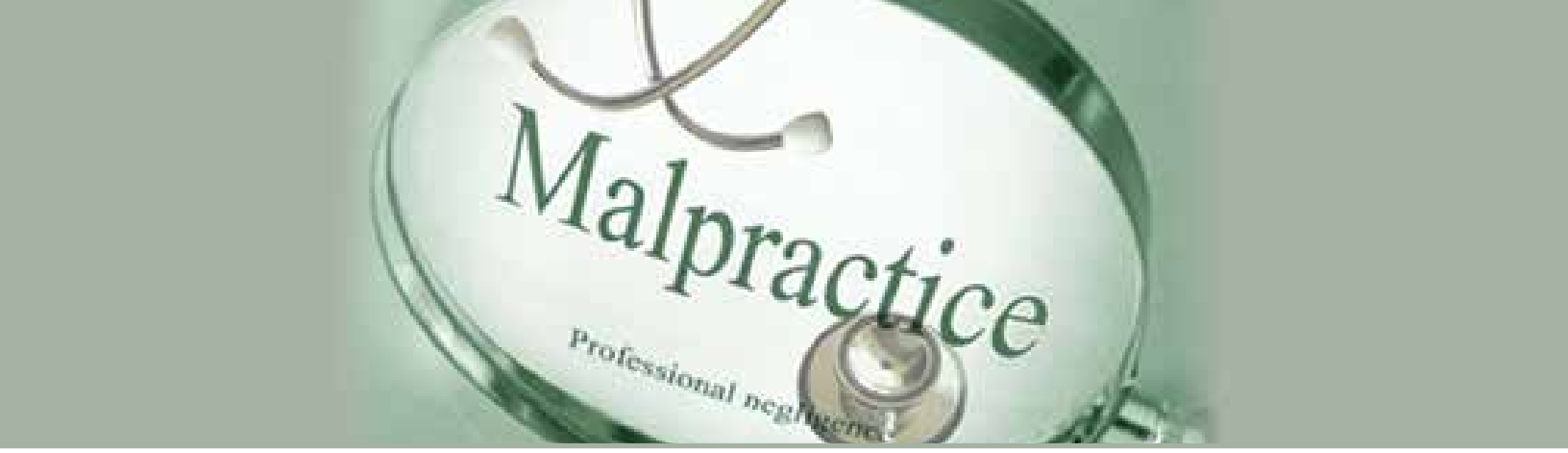
A competent personal injury lawyer will not only select the right expert(s) for the case, but help the expert(s) "hit the right notes" in the report. Proper expert report drafting is another topic in-and-of-itself. For a more fulsome review of expert report writing, please see a paper authored by Wendy Moore Mandel and I "Becoming an Expert 'Expert'" found at https://www.thomsonrogers.com/resources/becoming-an-expert-expert/. Briefly, however, in a chronic pain case, it is especially helpful when the expert specifically highlights in his or her report aspects of the Plaintiff's presentation that will help establish the Plaintiff's credibility (e.g. note that the Plaintiff answered questions in a forthright manner, acknowledged pre-existing complaints, provided a consistent history, etc.).

RECENT CHRONIC PAIN & THRESHOLD DECISIONS

A more fulsome review of chronic pain jury awards and threshold decisions since 2015 is found in the full paper version of this article. Briefly, however, the cases are "all over the map", confirming the theory that juries are notoriously unpredictable. For instance, in 2015 decision of *El-Khodr v. Lackie*, a 51 year-old tow truck driver with an inconsistent work history who developed chronic pain after a rear-end collision for which he did not receive immediate medical assistance was awarded general damages of $225,000.00 by the jury. Comparatively, in the 2015 decision of *Lee v. Rezai*, a middle-age woman who was the volunteer co-Director of a missionary youth organization and who developed chronic pain after a rear-end crash was awarded nothing for general damages. Notably, the Plaintiff's credibility in *Lee* was called into question.

CONCLUSION

In conclusion, successful chronic pain cases tend to be the exception, rather than the rule. With that being said, where the Plaintiff is credible and properly briefed, where the treating and medical-legal expert evidence is strong, and where the right evidence is introduced, these cases can result in significant awards for damages. If you are wondering whether you may have a viable chronic pain case, you may wish to consult with a personal injury lawyer. ■■■



AVOIDING CASE DISMISSAL IN MEDICAL MALPRACTICE LAWSUITS

A search of Ontario medical malpractice cases decided in the last 6 months shows that Plaintiffs risk having their cases dismissed if they do not have an experienced malpractice lawyer. Plaintiffs' claims are often dismissed because they have not commenced their action within 2 years.

Kate Cahill
ASSOCIATE *THOMSON, ROGERS*

Of approximately 14 medical negligence rulings in the last 6 months, 6 cases were dismissed on motions. Of the 6 cases that were dismissed, 4 were dismissed as a result of the Plaintiff's failure to commence an action within the 2-year limitation period provided for in the Limitations Act, 2002.

In **Liu v Wong**, the Plaintiff was injured when his physician removed surgical staples. The action was commenced more than 3 years after the removal. The action was dismissed as statute barred because Mr. Liu knew there were problems with his knee as soon as the staples were removed.

In **Colin v. Tan**, the Plaintiff underwent spinal surgery in 2006 and was rendered an incomplete quadriplegic. The Plaintiff attempted to add the surgeon to an existing action in 2013. The claim against the surgeon was held to be statute barred.

In **Novello v. Glick**, the Plaintiff brought an action for dental negligence in May of 2014. The dental treatment occurred in March of 2012. The action was dismissed.

In **Szanati v. Melynchuk**, the Plaintiff received medical treatment in 2008. The Plaintiff commenced an action against the hospital in 2010 and attempted to add the emergency physician in October, 2014. The claim against the doctor was held to be statute barred.

Determining when a limitation period starts to run in a malpractice action can be difficult; particularly when a patient is receiving ongoing treatment and hopes that his or her condition will be improved with further treatment. Therefore, patients who are concerned about medical negligence should always consult with experienced legal counsel as soon as possible to investigate whether their medical negligence case has merit. Early investigation is essential because the law is clear that, "a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered by the Plaintiff by the exercise of reasonable diligence."

Keeping these limitation period challenges in mind, victims of medical malpractice should not delay in looking for diligent and competent medical negligence lawyers who are able to: (1) identify the relevant medical issues; (2) retain qualified medical experts; (3) develop a clear theory of liability; and, most importantly, (4) sue all of the necessary Defendants within 2 years. ■■■

1. R.S.O. 2002, c.24, Sched. B, s.4
2. Liu v Wong, 2016 ONCA 366.
3. Colin v Tan, 2016 ONSC 1187.
4. Novello v Glick, 2016 ONSC 975.
5. Szanati v Melynchuk, 2016 ONSC 1293.
6. Ferrara v. Lorenzetti, Wolfe Barristers and Solicitors, 2012ONCA 851, at para 32.

UPCOMING EVENTS 2016

EVENTS
2016

1. **October 20 Practical Strategies for Experts: Testifying Without Fear**
2. **October 27 Brain Injury Association of Niagara Conference 2016**
   David Payne and Adam Tanel will be presenting on behalf of Thomson, Rogers.
3. **November 10 - 11 Toronto ABI Network Conference**
   Thomson, Rogers is proud to be the Diamond Sponsor. In addition, on November 10, our personal injury lawyers Craig Brown and Stacey Stevens will be presenting in a concurrent session. Their topic will be "Getting to CAT - A Roadmap for Health Care Professionals".

FOR MORE INFORMATION ON THE EVENTS LISTED ABOVE, PLEASE VISIT:

www.thomsonrogers.com/news/upcoming-events/

Want more information about topics such as the new Statutory Accident Benefit Changes, catastrophic definitions and proceedings through the License Appeal Tribunal? At Thomson, Rogers we pride ourselves in keeping you informed. For a TR lawyer to provide an informative presentation to your company or to a group of any size contact Joseph Pileggi - 416-868-3190, jpileggi@thomsonrogers.com.

If you would prefer to receive an email version of the Accident Benefit Reporter instead of a hard copy, please email your request to Elisa O'Neill: eoneill@thomsonrogers.com

Thank you.

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