

Accident Benefit Reporter

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RECENT DECISION ON IMPACT OF SABS SETTLEMENT BEFORE TORT TRIAL:

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.

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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. ■ ■ ■

UPCOMING EVENTS 2016



1. **April 21, 2016 PIA Law Practical Strategies Conference** This year's conference will address various topics surrounding Paediatric Traumatic Brain Injury. Presenting from Thomson, Rogers will be David Tenszen, Deanna Gilbert and Robert Ben. Keynote speaker will be Dr. Jacob Neufeld, Medical Director of Paediatric Rehabilitation at St. Luke's Children's Hospital in Boise, Idaho, USA.
2. **April 22 - 24 MADD Canada National Conference** Ian Furlong will be presenting on behalf of PIA Law.
3. **May 5-6 Hamilton ABI conference** Thomson, Rogers is proud to continue its support of the Hamilton Health Sciences as a Platinum sponsor of the 23rd Annual Hamilton ABI conference.
4. **May 10 PIA Spring Webinar** Topics will focus on the New SABS Changes coming into effect June 1, 2016. David MacDonald and Darcy Merkur will be panel speakers.
5. **June 5 MADD Canada's PIA Law Strides for Change** Time: 9:00 am – 12:00 p.m. 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).
6. **June 8 12th Annual BIST/OBIA Mix and Mingle** The celebration continues with the 12th annual BIST/OBIA Mix and Mingle. Steam Whistle Brewery, 255 Bremner Blvd., Toronto, 6-10 p.m.
7. **September 15, 2016 Back to School Conference with PIA Law and Ontario Brain Injury Association** SAVE THE DATE
8. **October 27 Brain Injury Association of Niagara Conference** 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.

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

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