ROGERS PARTNERS LLP

Changes to SABS – Ontario Regulation 347/13

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Below is an update from November 2015 on changes to SABS related to O. Reg. 347/13. Further are updates from January 2014 setting out Rogers Partners LLP's commentary on the issue.

November 2015

Recently, the Ontario Superior Court released its decision in *Davis v. Wawanesa Mutual Insurance Company*, 2015 ONSC 6624, written by Justice Quinlan. Justice Quinlan analyzed and interpreted the changes to the SABs pursuant to O. Reg. 347/13, which came into force on February 1, 2014. The particular issue was whether the claimant's attendant care benefits were limited to the actual economic loss incurred by friends or family members who provided the attendant care.

In this case, the accident occurred before February 1, 2014, and the attendant care services were rendered after February 1, 2014. Justice Quinlan determined (as we had predicted below) that the amendments to the regulation do not have retroactive effect and apply only to new claims arising from accidents occurring after February 1, 2014. As such, the claimant's attendant care benefits were not limited to the actual economic losses incurred by friends or family.

See the decision in *Davis v. Wawanesa Mutual Insurance Company*, 2015 ONSC 6624 here:
https://www.canlii.org/en/on/onsc/doc/2015/2015onsc6624/2015onsc6624.html?resultIndex=1

January 2014

On December 17, 2013, and without any fanfare, the government released Ontario Regulation 347/13, amending the Statutory Accident Benefits Schedule. According to the Ministry of Finance, the amendments (which affect the attendant care, medical & rehabilitation and weekly benefits) will help reduce costs and uncertainty in the system by continuing to crack down on abuse and fraud, and clarifying benefits for auto insurance claimants. The amendments come in to force on February 1, 2014.

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The first of the three changes modifies the requirements that must be met by an insured person who claims the Minor Injury Guidelines where the corresponding $3,500 limit does not apply because of a pre-existing condition. The new legislation amends section 18(2) of the 2010 SABS by striking out "a pre-existing medical condition that will prevent" and substituting "a pre-existing medical condition that was documented by a health practitioner before the accident and that will prevent" [emphasis added]. Thus, any pre-existing injury on which an insured intends to rely must be documented by a "health practitioner" prior to the accident ("health practitioner" being defined at section 3(1) of the 2010 SABS, notably excluding massage therapists and acupuncturists).

Arguably, if a treatment provider believes an insured person with a predominantly minor injury requires treatment outside of the Minor Injury Guideline, he or she now must attach to the Treatment and Assessment Plan (OCF-18) documentation from a health practitioner supporting the pre-existing condition.

Attendant Care/Incurred/Economic Loss

The second significant change involves the amount of attendant care benefits payable to an insured person. Subsection 19(3) of the SABS was amended by adding the following paragraph:

> *4. Despite paragraphs 1, 2 and 3, if a person who provided attendant care services (the "attendant care provider") to or for the insured person did not do so in the course of the employment, occupation or profession in which the attendant care provider would ordinarily have been engaged for remuneration, but for the accident, the amount of the attendant care benefit payable in respect of that attendant care shall not exceed the amount of the economic loss sustained by the*

attendant care provider during the period while, and as a direct result of, providing the attendant care.

In the recent Ontario Court of Appeal decision in *Henry v. Gore Mutual Insurance Company*, 2013 ONCA 480, the Court declined to define the term "economic loss" found in the SABS, but permitted payment of the full amount claimed in the Form 1 regardless of the actual amount of "economic loss" incurred by the service provider. The Court was of the view that economic loss was a threshold for entitlement but not a factor to be considered in quantifying the benefit.

The new Regulation effectively reverses the disposition of the Court of Appeal and clarifies that if an attendant care provider is not acting in the course of his or her regular employment (i.e. a family member) then the amount of the benefit payable shall not exceed the amount of the actual economic loss sustained – that is, the actual loss sustained is the "measuring stick" which determined the attendant care benefit payable, regardless of the amount recommended on the Form 1 by the health practitioner.

No Re-Election of Weekly Benefits

The final change made under the Regulation prevents an insured person from changing his or her election of income replacement, non-earner or caregiver benefits. Subsection 35 (3) of the Regulation is amended by striking out "is final and" and substituting "is final, regardless of any change in circumstances, and".

Commentary and Questions Arising

These changes could have a profound effect on claims administration, exposure to accident benefits payments and corresponding exposure on bodily injury (tort) claims, particularly with respect to attendant care payments. However, in the absence of transitional provisions providing guidance as to how the amendments are to be applied, there remain questions regarding which claims will be affected by the amendments. For example, will the amendments apply:

a) only to claims made under policies that renew after February 1?
b) only to new claims arising from accidents that occur after February 1?
c) to all existing claims, no matter the date of the accident and the date of policy renewal, but only for expenses incurred after February 1? Or
d) retroactively to all existing, ongoing and future claims, no matter the date of the accident and the date of renewal, for claims made after February 1?

Although we have undertaken research on the issue, there has been no conclusive answer as to how the amendments are to be applied, and we await either guidance from a FSCO arbitrator or the courts, or a further amendment to the SABs providing transitional provisions applicable to these recent amendments.

Nevertheless, our best prediction is that the amendments will be applied as set out in (b) or (c) above. That is, the amendments will apply to new claims arising from accidents occurring after February 1, 2014 – this will likely be the result favoured by FSCO and from a practical perspective will make the transition simpler and smoother. However, there are strong legal arguments that the amendments should apply to all existing claims, but only for expenses incurred after February 1, 2014.

We do not believe that the amendments will be given retroactive effect (such that insurers can now claim overpayments or repayments) given that they contain substantive changes to entitlement, rather than simply procedural changes.

Overall, the intent of the government seems clear, as all of the amendments act to reduce the amount of accident benefit funds potentially available to insured claimants.

We are hopeful that arbitrators and judges recognize this intent and apply the amended provisions accordingly.