



ROGERS PARTNERS LLP

**THE INTERPLAY BETWEEN
TORT AND ACCIDENT BENEFITS**

The Law and Practical Issues at Trial

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The Oatley McLeish Guide to Motor Vehicle Litigation 2017

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OVERVIEW

Deductibility of
Collateral Benefits

Past Benefits

Trust/Assignment
Mechanism

Future Benefits

Trial Considerations and Strategies

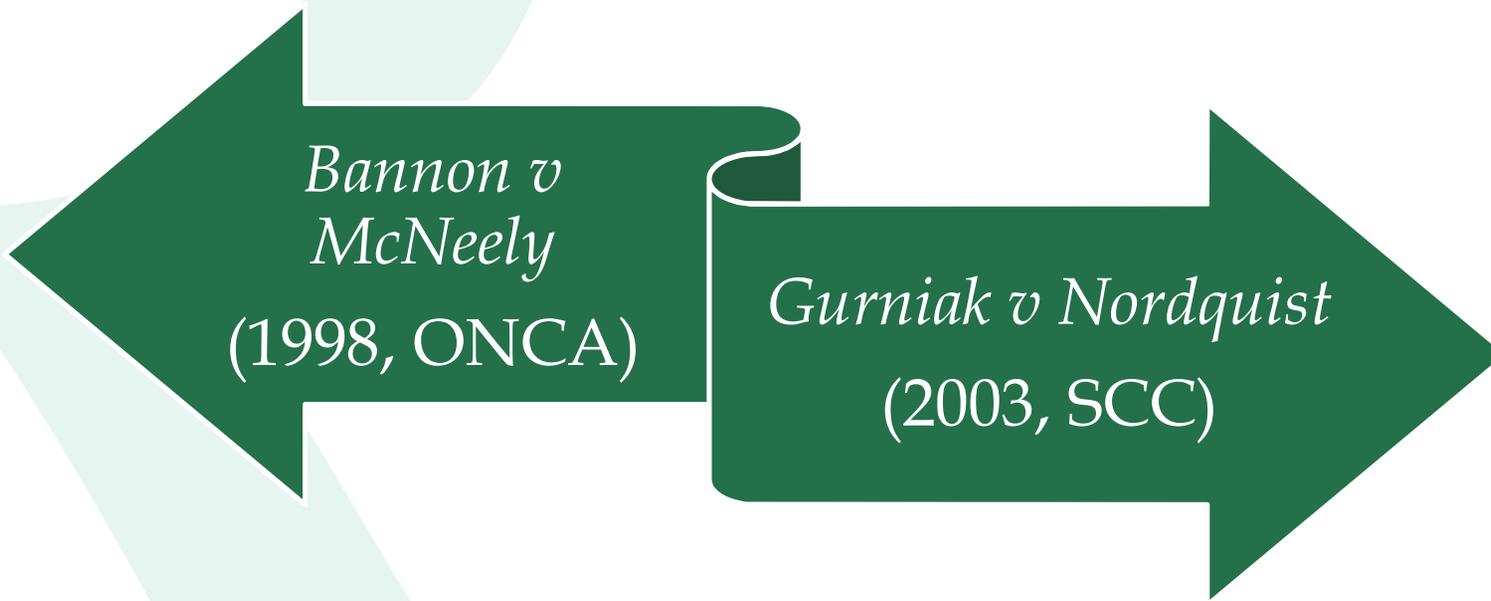
DEDUCTIBILITY OF COLLATERAL BENEFITS

The “Matching” Principle

- no double recovery (fully compensated, but not over compensated)
- a common law issue legislatively codified
 - essentially codified to remove the ‘insurance’ exception to the rule against double recovery
- *Insurance Act* – broad categorical matching required
 - s. 267.8(1): income loss and loss of earning capacity
 - s. 267.8(4): health care expenses
 - s. 267.8(6): other pecuniary loss (housekeeping)

DEDUCTIBILITY OF COLLATERAL BENEFITS

- Judicial interpretation of broad categorical matching:



*Bannon v
McNeely*
(1998, ONCA)

Gurniak v Nordquist
(2003, SCC)

DEDUCTIBILITY OF COLLATERAL BENEFITS

- *Bannon v McNeely* (1998, ONCA)
 - ABs to be deducted from a head of damage akin to that for which benefits were intended to compensate
 - subject and temporal matching
 - “apples should be deducted from apples, and oranges from oranges”
 - set in an earlier regime (OMPP), where future benefits to be deducted in certain circumstances

DEDUCTIBILITY OF COLLATERAL BENEFITS

- *Gurniak v Nordquist* (2003, SCC)
 - specific matching between benefit received under statutory accident benefit scheme and tort damages award not required for appropriate deduction to be made, beyond the “similarity” stipulated by the BC statute
 - Justice Gonthier: an express overruling of *Bannon*?

I cannot avoid the conclusion that by overruling *Jang*, this Court must necessarily be taken to have overruled these Ontario cases as well [i.e. *Bannon*].

Reliance on *Gurniak* in Ontario?

DEDUCTIBILITY OF COLLATERAL BENEFITS

- *Mikolic v Tanguay* (2015, Div Ct)

Trial Judge

- refused to deduct from future income loss and future care jury awards because AB settlement did not distinguish between amounts for past and future IRBs or for past and future medical and attendant care benefits
- subject matter and temporal matching required

Divisional Court

- not necessary to differentiate between past versus future IRBs or medical benefits for purpose of deduction of ABs from tort awards
- relied on ONCA decision in *Cummings* (2005) where court held that deduction of IRBs received to be deducted from global loss of income award (past and future) as award should not be arbitrarily impacted by date of trial

DEDUCTIBILITY OF COLLATERAL BENEFITS

- An easing of the strict temporal matching requirement post-*Mikolic*
- 2016 cases :
 - *Foninciello v Bendall and Acculine* (ONSC)
 - *Basandra v Sforza* (ONCA)
 - *Arteaga v Poirier and Pro-Landscape Construction* (ONSC)
 - *Cadieux v Saywell* (ONSC)

DEDUCTIBILITY OF COLLATERAL BENEFITS

- *Basandra v Sforza* (2016, ONCA)
 - Court upheld trial judge's deduction of benefits received for med/rehab, attendant care and housekeeping (approx. \$146,000) from jury award of \$105,000 for past and future care, med/rehab and housekeeping → nil award
 - jury award:
 - \$55,000 past care, medical/rehabilitation and housekeeping
 - \$50,000 future care, medical/rehabilitation and housekeeping
 - ABs received included lump settlement amounts that did not specifically allocate benefits to past versus future
 - CA held that trial judge acted reasonably in comparing jury award against ABs plaintiff had received and in ensuring no double recovery

DEDUCTIBILITY OF COLLATERAL BENEFITS

- *Cadieux v Saywell* (2016, ONSC)
 - trial judge held that both medical/rehabilitation benefits and attendant care benefits fell within “‘silo’ for deductibility” of “health care benefits” → deducted from jury award for future care costs, including damages for ABI support worker

DEDUCTIBILITY OF COLLATERAL BENEFITS

Deductibility of Benefits 'Available' but not 'Received'

- ss. 267.8(1), (4) and (6): deductions permissible are in respect of benefits received *or* that are “**available**” to the plaintiff prior to trial
- circumstances rare – codification of *Stante v Boudreau* (1980, ONCA)
- plaintiff not required to sue SABS carrier – application and denial enough (s. 267.8(21))

DEDUCTIBILITY OF COLLATERAL BENEFITS

- But be alert to:
 - less obvious cases where ABs available but not pursued – s. 267.8(22)(a)
 - ex. plaintiff slips and falls in parking lot while exiting a vehicle
 - denial of benefits due to plaintiff's failure to attend medical examinations required by insurer – s. 267.8(22)(b)
 - improvident and bad faith settlements of AB claim – s. 267.8(22)(c)
 - case law makes clear that, given s. 267.8(22)(c), defendant must prove settlement was entered into in bad faith – improvidence not enough

DEDUCTIBILITY OF COLLATERAL BENEFITS

Split and Deduct

- s. 267.8(8): deductions to be made *after* damages apportioned to account for any contributory negligence on the part of the plaintiff
- Often overlooked, but can have a significant impact...

DEDUCTIBILITY OF COLLATERAL BENEFITS

Example

Deduct and Split	Split and Deduct – s. 267.8(8)
<p>IRBs received: \$50,000 Jury award for past income loss: \$100,000 Jury apportionment of liability: 50/50</p>	
<p>$\\$100,000 - \\$50,000 = \\$50,000$</p> <p>$\\$50,000 / 2 = \\$25,000$</p> <p>Defendant pays \$25,000</p>	<p>$\\$100,000 / 2 = \\$50,000$</p> <p>$\\$50,000 - \\$50,000 = \\$0$</p> <p>Defendant pays \$0</p>

FUTURE BENEFITS TRUST/ASSIGNMENT MECHANISM

- s. 267.8(9) and (10)
 - trust and payment obligations on a plaintiff in respect of future collateral benefits
- s. 267.8(12)
 - assignment of future collateral benefits
- major departure from how future collateral benefits were handled under previous interface regime (OMPP) in which present value of future ABs to which plaintiff was “entitled” was to be deducted (s. 267(1)(a))

FUTURE BENEFITS TRUST/ASSIGNMENT MECHANISM

Strict *Bannon* Like Matching Revisited?

- *Gilbert v South* (2014, ONSC)
 - inadequate temporal matching – 10 year med/rehab entitlement versus generic global future care costs award
- 
- defendant denied a trust or assignment of “medical benefits” from AB insurer as it related to “future care costs” awarded by jury

FUTURE BENEFITS TRUST/ASSIGNMENT MECHANISM

- *Gilbert v South* (2015, ONCA)
 - insurer can only obtain an assignment of a plaintiff's future ABs or collateral benefits if
 - (a) jury award mirrors the collateral benefits at issue, and,
 - (b) no uncertainty as to plaintiff's entitlement to those benefits

Is Gilbert consistent with Cummings, Mikolic and Basandra?

FUTURE BENEFITS TRUST/ASSIGNMENT MECHANISM

- Consider application of *Gilbert in Fonseca v Hansen* (2016, ONCA)
 - global sum for future health care costs awarded by jury



- trust/assignment of future medical benefits limited to only four types of services referenced in jury charge and temporally limited for a period of one year

FUTURE BENEFITS TRUST/ASSIGNMENT MECHANISM

Example:

- plaintiff simply waits (if he/she can) 13 months to receive the four services mentioned in the jury charge
- plaintiff undertakes different treatment modalities (chiropractic care as opposed to massage)

Real risk of double recovery?

Chilling effect on AB settlements?

FUTURE BENEFITS TRUST/ASSIGNMENT MECHANISM

Impact on Offers to Settle and Costs

- Should the value of a trust/assignment be considered when a defence offer allows the plaintiff to keep all future collaterals, whereas the defendant is given an assignment of certain future benefits following the verdict at trial? → conflicting case law
- *Giordano v Li* (2015, ONSC)
 - no deduction of trust/assignment amount from the judgement for purpose of comparing against Rule 49 offer
- *Abel v Hamelin* (2007, ONSC)
 - net recovery to plaintiff after accounting for value of assignment compared against Rule 49 offers
- *Carroll v McEwen* (2016, ONSC) – appeal pending
 - present value of assigned benefits considered during costs hearing

TRIAL CONSIDERATIONS & STRATEGIES

Pre-Trial:

- status of AB file: quantification of benefits received, settlement terms, future entitlement
- offers to settle

At Trial:

- proving collateral benefits: how and when to adduce evidence
- jury questions

Post-Trial:

- trust/assignment
- costs (impact of offers to settle)

TRIAL CONSIDERATIONS & STRATEGIES

Jury Questions - complexity



Deductibility of
Benefits Available
or Received
Gurniak/Mikolic
relaxed matching

Fonseca/Gilbert
stricter matching?
Trust/ Assignment of
Future Collateral
Benefits



TRIAL CONSIDERATIONS & STRATEGIES

- *Basandra v Sforza* (2016, ONCA)

[T]rial counsel must ensure that jury questions are structured to permit the trial judge to carry out the reductions required by s. 267.8 of the *Insurance Act*, where that is an issue in the action. There should be a separate jury question for each past and future award in respect of each of the collateral benefits listed in s.267.8 of the *Insurance Act* that may arise in the case. Anything less would impair the trial judge's ability to discharge her responsibilities under the section.

Depends on what is being sought: deduction vs. trust/assignment?

Tension with defence preference of limiting jury questions on damages?

TRIAL CONSIDERATIONS & STRATEGIES

Proving Collateral Benefits: When and How?

- agreement with opposing counsel?
- documentary evidence
- *viva voce* evidence
- affidavit evidence
- presence of jury?

CONCLUSION

- Complicated interplay between tort and accident benefits
- Discussion of only a few of the issues that can arise:
 - deductibility of collateral benefits received or available and/or to which plaintiff is “entitled”
 - trust/assignment of future collateral benefits
 - evidentiary issues at trial
- Can have a significant impact on a case

Will want to have a plan to handle interface issue at trial



THE INTERPLAY BETWEEN TORT AND ACCIDENT BENEFITS

Questions?