THE INTERPLAY BETWEEN TORT AND ACCIDENT BENEFITS

The Law and Practical Issues at Trial

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OUTLINE

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I. INTRODUCTION

During the early stages of litigating a motor vehicle accident tort claim, the interplay between tort and accident benefits may not be given much consideration.

As such a file approaches trial, however, the issues that arise when considering the interplay between tort and accident benefits can be much more significant. Indeed, these issues may very well impact a plaintiff's recovery of *any* damages awarded at trial and, in turn, impact a party's entitlement to costs. In light of such potential consequences, these issues should be given careful consideration in advance of trial.

As might be anticipated, these issues relate mainly to the deductibility of collateral benefits (including accident benefits) paid, and the trust/assignment mechanism available to defendants in respect of future collateral benefits. This paper seeks to canvas some of the practical matters that may arise during the course of trial related to those topics, given the current state of the law on those issues.

We shall start with a review of the applicable legal principles, including the nature of the matching required for deduction of collateral benefits; the circumstances in which benefits 'available' but not 'received' may be deducted; the nature and impact of the split and deduct order of operations; and a review of the manner in which future collateral benefits are to be handled pursuant to the trust and assignment mechanism set out in the *Insurance Act*, and the impact of same in the context of a liability split, and as it relates to offers to settle and costs awards. We will then consider how these issues might be handled at trial, including addressing the need for, and preparation of, appropriate jury questions and proposing strategies to adduce collateral benefits evidence at trial.

II. DEDUCTIBILITY OF COLLATERAL BENEFITS

A. The "Matching" Principle: Apples from Apples or Fruit from Fruit?

Our system of tort damages is grounded in the principle that a plaintiff should receive full and fair compensation, that places him or her in the same position as he or she would have been in but for the tort committed, in so far as a monetary award may do so. Accordingly, the goal underpinning the deductibility of collateral benefits is the prevention of double recovery, which violates the principle of full and fair compensation.[1]

While a common law principle[2], an interface provision was subsequently legislated in Ontario with the tort reform implemented in 1989. After some evolution of the statutory scheme in the interim, the rule against double recovery is currently codified in section 267.8 of the *Insurance Act*, which mandates the deduction of collateral benefits from damages awarded to a plaintiff for losses arising directly or indirectly from the use or operation of an automobile.

A notable issue that has arisen with the judicial interpretation and application of section 267.8 is the extent to which collateral benefits, including statutory accident benefits pursuant to sections 267.8(1) (relating to income loss and loss of earning capacity), 267.8(4) (relating to health care expenses), and 267.8(6) (relating to other pecuniary loss), must strictly match the heads of damages awarded in a tort action in order to effect a deduction.

While these relevant provisions of the *Insurance Act* clearly codify the matching principle categorically (i.e. benefits for income loss to be deducted from damages for income loss; payments for health care expenses to be deducted from damages for health care costs; and other pecuniary benefits to be deducted from damages for other pecuniary losses), judicial interpretation and application of these provisions appear to have imported even more

[1] See *Ratych v Bloomer*, [1990] 1 SCR 940.
[2] See, for example, *Cox v Carter* (1976), 19 OR (2d) 917 (HCJ); *Ratych v Bloomer*, [1990] 1 SCR 940; *Cunningham v Wheeler*, [1994] 1 SCR 359.

stringent matching requirements than the broad categories set out in the *Insurance Act*. In this regard, two cases stand at somewhat opposing ends of the spectrum regarding how strict a matching is necessary, even within the categorical matching stipulated in the *Insurance Act*.

In *Bannon v McNeely*[3], decided under a previous deductibility regime, the Ontario Court of Appeal endorsed a strict matching approach, finding that, where possible, accident benefits deducted from a tort award pursuant to section 267(1)(a) must be deducted from a head of damage akin to that for which the benefits were intended to compensate, both, it would seem, in specific type and, arguably, in time. In short, "apples should be deducted from apples, and oranges from oranges."

On the other end of the spectrum is the Supreme Court of Canada's decision in *Gurniak v Nordquist*.[4] In *Gurniak*, the majority of the Court held that a specific matching between the benefit received under the statutory accident benefit scheme and the tort damages award was not required for an appropriate deduction to be made, beyond the "similarity" stipulated in the statute. Though relating to a British Columbia tort action with respect to the deductibility of benefits received under a Quebec no-fault insurance scheme, the majority's decision arguably has direct implications on the approach adopted by Ontario courts with respect to the deductibility of collateral benefits. Indeed, in concurring reasons, Justice Gonthier stated in *Gurniak* that the majority's approach must be taken as having overruled Ontario cases adopting the matching requirement, including *Bannon*.

However, despite the majority's decision in *Gurniak* and Justice Gonthier's comments therein, Ontario courts have, with few exceptions, continued to rely on *Bannon* and the strict matching approach to require both subject and temporal matching in order to effect a

[3] (1998), 38 OR (3d) 659. Notably, the Court's approach in *Bannon* deviated from prior trial level decisions where no-fault benefits were deducted from a general damages award or any tort damages, and not only damages of the same kind as covered by the benefits (see *Cox v Carter* (1976), 13 OR (2d) 717 and *Marshall v Heliotis* (1993), 16 OR (3d) 637).
[4] 2003 SCC 59.

deduction of collateral benefits from tort damages awards.[5] In fact, *Gurniak* has been cited a mere three times in Ontario, twice only in passing or argument. Not until the Divisional Court's recent decision in *Mikolic v Tanguay*[6] has *Gurniak* gained the sort of traction in Ontario that one would expect of a Supreme Court of Canada decision.

In *Mikolic*, the issue on appeal was whether the trial judge erred in his interpretation of section 267.8(1) and 267.8(4) of the *Insurance Act* (relating to the deductibility of payments made in respect of income loss and loss of earning capacity, and health care expenses respectively). Specifically, the question was whether the trial judge erred in refusing to deduct accident benefits the plaintiff received for past and future income replacement from the jury award for past and future income loss, and in refusing to deduct past and future medical benefits from the jury award for future care costs.

In the trial judge's view, it was necessary to match benefits received for *past* income replacement only against damages for *past* income loss and to match benefits received for *future* income replacement only against damages for *future* income loss. This same subject matter and temporal matching approach was followed with respect to past and future medical benefits.

The Divisional Court, having considered *Gurniak*, looked to the wording of section 267.8(1) and concluded that it was not necessary to differentiate between deductions from tort awards in respect of accident benefits received for past versus future income replacement benefits. Simply put, the defendant was not required to prove what portion of the total accident benefits settlement for income replacement constituted payment for past versus future income loss. The Divisional Court held that no differentiation between past and future income loss was required for the purpose of applying section 267.8(1). Similarly,

[5] See *Hornick v Kochinsky*, 2005 CanLII 13784 (ON SC); *Hoang v Vincentini*, 2012 ONSC 6644; *Mikolic v Tanguay*, 2013 ONSC 7177; *Siddiqui v Siddiqui*, 2015 ONSC 6260.
[6] 2015 ONSC 71.

pursuant to section 267.8(4), the total accident benefits received for all past and future medical benefits was deductible from the jury award for future care costs.

In coming to its decision, the Divisional Court in *Mikolic* relied on the Court of Appeal's decision in *Cummings v Douglas*[7], where the Court discussed what they termed a "subsidiary question" of whether income replacement benefits received should be deducted only from a tort award for past loss of income, or from awards for both past and future loss of income. The Court held that the deduction ought to be made from the *global* award for loss of income, as the award should not be arbitrarily impacted by the date the parties reached trial.

With the decisions in *Cummings* and *Mikolic*, there appears to be an easing of the stringent temporal matching requirement suggested in *Bannon* as to the deductibility of collateral benefits paid. Indeed, several decisions from 2016 reflect this more relaxed approach.

In *Foniciello v Bendall and Acculine*[8], the trial judge applied a deduction under section 267.8(1) of the total collateral benefits received with respect to income loss prior to trial (encompassing statutory income replacement benefits, as well as STD, LTD and CPP benefits) from his award for past loss of income. The resultant negative number, reflective of the balance of the collateral benefits received for past loss of income, was deducted from the plaintiff's award for future loss of income. In short, the total amount of income replacement benefits was deducted from the award for past and future income losses.

In *Basandra v Sforza*[9], the Court of Appeal upheld the trial judge's decision to deduct the benefits received for medical/rehabilitation, attendant care and housekeeping

[7] 2007 ONCA 615. *Cummings* is also notable for endorsing the split and deduct approach to deductibility of collateral benefits even in the OMPP regime, i.e. that a deduction must be applied on the amount actually awarded, after any reduction for contributory negligence. This approach was adopted despite the fact that under the OMPP, there is no comparable provision as that of section 267.8(8) found in Bill 59/198 which expressly mandates the split and deduct order of operations.
[8] 2016 ONSC 1119.
[9] 2016 ONCA 251.

(approximately $146,000) from the jury award of $105,000 for past and future care, medical/rehabilitation and housekeeping, resulting in a nil award.

The jury award was broken down as $55,000 for past care, medical/rehabilitation and housekeeping and $50,000 for future care, medical/rehabilitation and housekeeping. The plaintiff's accident benefits received included lump settlement amounts that did not specifically allocate benefits to past versus future expenses. The appellant plaintiff contended that the trial judge erred in applying the section 267.8 deductions in the absence of clear evidence of the quantum of each collateral benefit. The Court, however, held that the trial judge acted reasonably in comparing the jury award against the accident benefits the plaintiff had received and in ensuring that the plaintiff was fully compensated, and not over compensated, for the heads of damages at issue.

In *Arteaga v Poirier and Pro-Landscape Construction*[10], the parties agreed that after applying relevant deductions to the jury awards for future care, with the exception of $2,000 for housekeeping expenses, all amounts awarded by the jury were reduced to zero. The plaintiff had received $3,650 in housekeeping benefits as part of the settlement with her accident benefits insurer, but maintained that that amount was for past housekeeping expenses incurred prior to the accident benefits settlement, while the jury award was intended for post-trial housekeeping expenses. The trial judge rejected this position, finding that the words of the accident benefits settlement documents made it clear that the settlement was in respect of past, present and future claims of the plaintiff.

Based on the appellate authorities of *Cummings*, *Mikolic* and *Basandra*, it appears the plaintiff's argument, predicated on a past versus future temporal matching requirement, was unlikely to have been successful even if the judge accepted that the settlement was for past housekeeping expenses while the jury award was for future housekeeping losses. The resultant judgment of zero damages, of course, had a significant impact on costs.

[10] 2016 ONSC 6628.

Finally, in *Cadieux v Saywell*[11], the trial judge, relying on *Mikolic* and *Basandra*, held that the plaintiff's accident benefits settlement for medical benefits and attendant care benefits was to be deducted from the damages awarded for the future expense associated with an Acquired Brain Injury (ABI) support worker. The plaintiff argued that the attendant care portion of the accident benefits settlement ought not to be deducted against the jury award for the ABI support worker because the jury did not make a specific award for *attendant care*. However, the trial judge held that both medical/rehabilitation benefits and attendant care benefits fell within the "silo of deducibility" of "health care benefits" and so had to be deducted from the jury award for future care costs, which included damages for the ABI support worker.

In considering these recent cases, it is clear that the courts are moving away from a strict matching approach over and above the categorical matching stipulated by the *Insurance Act* with respect to deductions of collateral benefits from tort damage awards. Indeed, rather than the fruit-specific deductions of apples from apples (i.e. past income replacement benefits from a past income loss damages award), it may be more apropos to suggest that the deductions are to be fruit from fruit (i.e. simply total income loss benefits received from the total income loss award). This certainly appears to be the approach endorsed by the Supreme Court in *Gurniak* and, it is submitted, the approach now properly given effect by Ontario courts. As is discussed further below, this apparent shift in approach may have implications for counsel at trial, particularly as it relates to the preparation of jury questions.

B. Deductibility of Benefits 'Available', but not 'Received'

Sections 267.8(1), 267.8(4) and 267.8(6) provide that the collateral benefits deductions permissible are in respect of accident benefits 'received' or that are 'available' to the plaintiff before the trial of the action. A number of scenarios ought to be considered when

[11] 2016 ONSC 7604.

evaluating what collateral benefits might be 'available' to the plaintiff, even though the benefits were not actually 'received'.

i. Apply, but Denied – Does the Plaintiff Have to Sue?

Section 267.8(21) stipulates that for the purposes of sections 267.8(1), (4) and (6), a payment is deemed to not be 'available' to a plaintiff if the plaintiff applied for such payment but was denied.

The section is essentially a codification of the common law principles laid out in *Stante v Boudreau*[12]. In *Stante*, the trial judge deducted the total amount of no-fault disability benefits deemed to be available to the plaintiff, even though the no-fault insurer terminated the benefit prior to that amount being exhausted. The Court of Appeal held that the defendant was not entitled to deduct no-fault benefits beyond what was actually paid to the plaintiff until termination, as it could not be said that the plaintiff was entitled to more having been denied by the no-fault insurer. An alternative finding would suggest that a plaintiff may be obliged to pursue a second lawsuit against his or her no-fault insurer, or risk being undercompensated. The law is now clear, both at common law and under statute – a plaintiff does not have to sue.

ii. If 'Available', the Plaintiff Must, at Least, Apply

It should, however, be noted that a plaintiff must actually *apply* for benefits to which he or she is entitled in order for section 267.8(21) to apply. Indeed, section 267.8(22)(a) provides that section 267.8(21) does not apply if a court is convinced that the plaintiff impaired his or her entitlement to a benefit by failing to apply for it. Available benefits cannot simply be ignored.

[12] (1980), 29 OR (2d) 1 (CA).

Accordingly, counsel should be aware that the facts of any given case may discreetly give rise to a deducibility argument for benefits 'available' but not 'received'. Consider, for example, a plaintiff who slips and falls while exiting a vehicle, or other less obvious cases, where an incident may be viewed as arising from the use or operation of an automobile. Unwary accident victims, in these circumstances, may very well not even apply for statutory accident benefits. Counsel should be cognizant of the potential deductibility arguments to be made in such cases pursuant to section 267.8(22)(a).

iii. The Plaintiff Must Comply

It should also be noted that, to the extent that a benefit may be denied on the basis that a plaintiff failed to attend at medical examinations required by the accident benefits insurer, the denied benefits may be deemed to be 'available' for the purpose of deductibility. This is provided for by section 267.8(22)(b) which carves out another exception to section 267.8(21) in such circumstances. In other words, if a plaintiff 'impairs' his or her ability to receive accident benefits by not attending a required medical examination, the otherwise 'available' benefits, though not 'received' by the plaintiff as a result of the default, may nevertheless be deducted from the tort award.

iv. Election of Benefits – When the Plaintiff 'Chooses' to Avoid Deductibility

The Court of Appeal, in *Sutherland v Singh*[13], was faced with interpreting the meaning of section 267.8(1) with respect to what constitutes 'available' benefits. In *Sutherland*, the respondent tortfeasor argued that income replacement benefits that were 'available' to the plaintiff were deductible from his claim for past income loss, although he had elected to receive caregiver benefits instead. The respondent's argument in *Sutherland* was driven by underlying evidence that suggested that the plaintiff had elected to receive lower-valued caregiver benefits as opposed to the higher-valued income replacement benefits, for which

[13] 2011 ONCA 470.

he was eligible, in order to circumvent the deduction of income replacement benefits from damages for income loss. The motion judge was persuaded that in such circumstances, the 'available' income replacement benefits should be deducted, although not 'received'.

The Court of Appeal, however, concluded that once the plaintiff elected to receive caregiver benefits, income replacement benefits were no longer 'available' to him, such that it would be unfair to allow the tortfeasor to reduce damages by an amount that the plaintiff did not 'receive' and could not have received following the election.

Although *Sutherland* appears to definitively decide the issue of the deductibility of benefits that the plaintiff may have legitimately elected not to receive, it is submitted that *Sutherland* leaves the door open for such deductibility in certain circumstances. Specifically, in a case where there is evidence of an election made in bad faith by the plaintiff or where the benefit elected was not legitimately available to the plaintiff, a defendant may be entitled to deduct the value of the benefits that, arguably, should have been elected and paid. This issue was specifically not addressed in *Sutherland*, as the Court found that it had been conceded that the plaintiff was legitimately entitled to, and thus properly received, the caregiver benefits.

v. Improvident vs Bad Faith Settlements – What if the Plaintiff did not get enough?

The issue of the deductibility of benefits 'available' but not 'received' also relates to settlements of a plaintiff's accident benefits claim. Notably, prior to the Bill 59 changes to the *Insurance Act*, it was open to a defendant to argue for the deductibility of accident benefits 'available' to the plaintiff on the basis that the settlement reached with the accident benefits insurer was improvident and the plaintiff ought to have recovered more from the insurer.[14] Legislative changes imposed by Bill 59, namely by way of sections 267.8(21) and

[14] See *Collee v Kyriacou* (1996), 31 OR (3d) 558 (Gen Div); *Orchover v Wright* (1996), 28 OR (3d) 263 (Gen Div).

(22) of the *Insurance Act*, indicate that much more is now required to advance such a position.

Section 267.8(21) provides that a payment is deemed not to be 'available' to a plaintiff if the plaintiff applied for such payment and was denied. However, section 267.8(22)(c) stipulates that section 267.8(21) does not apply if a court is satisfied that the plaintiff impaired his or her entitlement to the payment by "settling in *bad faith* his or her entitlement to the payment to the detriment of a person found liable for damages in the action…[emphasis added]."

Given the plain wording of section 267.8(22)(c), it appears that a merely improvident settlement does not suffice to engage the greater deductibility argument, but that some sort of bad faith or ill motive must be established as well.

This issue and the related legislative provisions have not received a great deal of judicial consideration. This is perhaps not surprising, as it would seem a rare case where a defendant tortfeasor would have the requisite evidence to demonstrate that a settlement was entered into in bad faith.

The little case law found, however, does provide some insight into section 267.8(22)(c). In *Morrison v Gravina*[15], following the jury verdict, the defendants brought a motion for an order reducing the jury award for past loss of income on the basis that the plaintiff had not received certain benefits and took no action against her no-fault insurer, and that she had entered into an improvident settlement with her accident benefits insurer. The plaintiff brought a preliminary motion to preclude the defendants' proposed motion.

The trial judge granted the plaintiff's motion on the basis that the plaintiff had not been cross-examined on the circumstances of her application for non-earner benefits and on the circumstances of her settlement with the accident benefits insurer, when fairness dictated

[15] 2001 CarswellOnt 1870 (SCJ).

that the plaintiff have an opportunity to address these issues. Indeed, Justice Greer found that these issues had not been raised during the course of trial and that the issue of bad faith had not been pleaded. Moreover, Justice Greer commented that it was illogical for the defendants to argue that the plaintiff had an obligation to pursue the benefits (after being denied multiple times) when they had taken the position at trial that the plaintiff's injuries were not serious and she was not entitled to damages for income loss.

Although she granted the plaintiff's motion, Justice Greer nevertheless considered the defendants' motion for the purposes of appeal, but, similarly, the defence motion was dismissed. Justice Greer found that the *Insurance Act* did not mandate that the plaintiff mediate or arbitrate after being denied benefits, as the defendants contended. Additionally, Her Honour determined that the defendants had not met their onus of proving bad faith with respect to the settlement, having not cross-examined her on the issue of malice, bad faith or intent.

In *Morrison*, an appropriate distinction was drawn between an *improvident* settlement, being one that is unreasonable in the circumstances, and a settlement in *bad faith*, which connotes "the conscious doing of a wrong or dishonest act and a state of mind affirmatively operating with ill will or an improper or illegal design."

The *Morrison* decision was cited in the trial decision of *Peloso v 778561 Ontario Inc*[16], where the defendant sought a declaration that damages payable to the plaintiff for income loss should be reduced by the amount of income replacement benefits to which the plaintiff would have been entitled had she not settled with her accident benefits insurer (for two years of income replacement benefits). In dismissing the application, the trial judge concluded that the defendants had not met their onus of proving that the plaintiff acted in bad faith when settling with her accident benefits insurer.

[16] 2005 CarswellOnt 2480 (SCJ).

Justice Aitken noted there was some suggestion in *Morrison* that where a plaintiff signed a release with the accident benefits insurer, a finding that the settlement was improvident would suffice for the purposes of deductibility under section 267.8. However, Justice Aitken did not accept such a suggestion, finding that the legislative intent behind the inclusion of "bad faith" in section 267.8(22)(c) was to make it more difficult for defendants to challenge settlements reached between plaintiffs and their accident benefits insurers under Bill 59. In any event, if an improvident settlement were to suffice, the defendants bear the onus of proving that the settlement achieved was unreasonable in the circumstances.

It is submitted that section 267.8(22)(c) clearly indicates that a defendant must prove both the unreasonableness of the settlement, and bad faith on the part of the plaintiff, in order to effect deductions to damages awards of the value of benefits 'available' but not 'received' due to so called 'lowball' settlements.

C. Split and Deduct – A Profound Impact

When considering the deductibility of collateral benefits, counsel should also be aware of the potential applicability of section 267.8(8), which provides that reductions required by section 267.8(1), (4) and (6) are to be made after any apportionment of damages required by section 3 of the *Negligence Act*. Essentially, the law requires that the full measure of collateral benefits received or available are to be deducted (in accordance with the foregoing considerations) *after* damages are apportioned to account for contributory negligence on the part of the plaintiff. Hence, the order of operations mandated by statute is to split (for the plaintiff's contributory negligence) and then deduct (the collateral benefits received).

This interplay between liability, contributory negligence, damages and collateral benefits deductions can have a profound impact on the parties' success at trial. Consider the following example:

> Following a trial for damages arising from a motor vehicle accident, the jury awards the plaintiff $100,000 for past income loss, and apportions liability at 60% on the defendant, and 40% on the plaintiff. The plaintiff received income replacement benefits from his accident benefits insurer in the amount of $65,000.

Applying the split and deduct approach codified in section 267.8(8), the defendant would be liable for $60,000 given the finding on liability. That amount, however, is reduced to zero after deducting the $65,000 in income replacement benefits received ($100,000 x 0.6 - $65,000 = $0).

In the alternative approach, if collateral benefits were to be deducted prior to accounting for the liability split, the defendant would be liable to pay $21,000 to the plaintiff, being 60% of the $35,000 in damages that remain after deducting the income replacement benefits received (($100,000 - $65,000) x 0.6 = $21,000).

As can be seen, the impact of the order of operations can determine success, or not, at trial – and, of course, impact a party's entitlement to costs. Counsel should ensure that the order of operations prescribed by section 267.8(8) is followed when the circumstances require it.[17]

III. The Trust/Assignment Mechanism – The Problem Posed by Future Collateral Benefits

Sections 267.8(9), (10) and (12) mandate the imposition of trust and assignment obligations on a plaintiff in respect of certain prescribed future collateral benefits payments, with the objective of avoiding double recovery or overcompensation of the plaintiff. Counsel should reflect early on how the issue of collateral benefits should be addressed in order to ensure

[17] It is noteworthy that this approach is often not followed by forensic accountants when calculating past losses in expert reports for use at trial. Often, the accountant will maintain a temporal matching requirement and rarely take into consideration the split and deduct order of operations, as a liability split is rarely assumed. The calculations thus arrived at will likely only be accurate if there is no contributory negligence found on the plaintiff at trial.

the plaintiff is justly and fully compensated and not the recipient of a windfall due to collateral benefits paid in the future. There are, however, a number of issues to consider when seeking to apply sections 267.8(9), (10) and (12) in respect of future collateral benefits.

A. Availability of a Trust or Assignment: Only at Trial

It is important to note that the language of section 267.8(9) with respect to the imposition of a trust for future collateral benefits, and the language of section 267.8(12) with respect to an assignment of future collateral benefits, appears to indicate that these mechanisms are only available following the trial of an action and not explicitly in the context of pre-trial settlements.

In *Stokes v Desjardins Groupe D'Assurances Generales*[18], Justice Smith was required to interpret section 267.8(9) in the context of an application to determine whether the plaintiff was required to hold amounts of future collateral benefits payments in trust for the benefit of the tortfeasor's insurer following a negotiated settlement of the tort action. Justice Smith held that section 267.8(9) was unambiguous and only applied where the plaintiff has recovered damages and has received payments for accident benefits "after the trial of the action". Justice Smith noted that the legislative intent in excluding pre-trial settlement from the trust mechanism appeared to be to allow parties to negotiate compromised settlements being aware of the existence of a potential future claim for accident benefits. It is interesting to note that the legislature appears to have recognized that, upon settlement, the future collateral benefits remained presumptively the plaintiff's, whereas after trial, the future benefits become presumptively the tortfeasor's (at least as they relate to the category and nature of the damages awarded).

The reasoning in *Stokes* was followed by the Divisional Court in *D'Ettore v Coachman Insurance Co*[19]. In *D'Ettore*, the issue before the Court was whether a consent judgment

[18] (2009), 97 OR (3d) 634 (SCJ).
[19] 2012 ONSC 3613.

approving an infant's settlement and otherwise granting judgment in accordance with minutes of settlement constituted an order under section 267.8(12) to allow for an assignment of the plaintiff's future collateral benefits. Citing *Stokes*, the Court concluded that section 267.8(12) required an assessment of damages and their allocation under specific heads of damages to be made by a court, so that a judge may then consider whether an assignment of future collateral benefits is appropriate. An assessment of damages as envisioned by section 267.8(12) was deemed to be different from settlement, such that the section was intended only to apply after a plaintiff recovers damages through trial.

While there may be potential for the negotiating parties to include a trust or assignment of future collateral benefits as part of a settlement, it does not appear that these mechanisms are permitted in the settlement context under the *Insurance* Act. As such, there may be grounds to challenge such terms of settlement, on the basis of the foregoing. At the very least, it would appear that any such agreed upon 'assignment' should be approved by a court.

B. Return to Apples from Apples? – Strict *Bannon* Matching still Required

Unlike the courts' recent more relaxed approach with respect to the matching requirement for the deductibility of collateral benefits paid, recent case law suggests that this is not the approach adopted with respect to the assignment and trust provisions for future collateral benefits.

This strict matching approach is illustrated in the case of *Gilbert v South*[20]. Following the trial, the defendant in *Gilbert* moved for an order pursuant to section 267.8(9), (10) and (12) in respect of future statutory accident benefits and other collateral benefits received or to be received by the plaintiff. In dismissing the motion, Justice Leach outlined some general principles with respect to the provisions that prescribe imposing trust, payment and assignment obligations on plaintiffs vis-à-vis collateral benefits. While underscoring the

[20] 2014 ONSC 3485, aff'd 2015 ONCA 712.

goal of preventing double recovery, Justice Leach noted that the provisions in question are strictly interpreted and applied, and that a plaintiff's entitlement to the benefits in question must be "patently clear". Additionally, Justice Leach required that a level of certainty be established as to the extent to which damages awarded by the jury relate to collateral benefits the plaintiff received or is to receive.

In *Gilbert*, the defendant sought a trust or assignment in respect of "medical benefits" the plaintiff had received or would receive from his accident benefits insurer as it related to "future care costs" awarded by the jury. Justice Leach pointed to a number of temporal considerations that weighed against a finding of double recovery. Namely, where the plaintiff's medical/rehabilitation benefits entitlement would terminate 10 years from the date of the accident, the jury award was a global sum for all future care costs going forward, without any differentiation as to whether the damages were intended to address the plaintiff's care needs before or after the 10 year mark. Accordingly, Justice Leach held that there was no effective way to accurately effect the deductions sought by way of trust or assignment, absent the qualitative distinctions necessary to ensure there was an overlap or matching between the damages awarded and the future collateral benefits at issue.

Justice Leach's decision and reasoning was upheld on appeal. The Court of Appeal noted that an insurer can only obtain an assignment of a plaintiff's future accident benefits or collateral benefits if (a) the jury award mirrors the collateral benefits at issue and, (b) there is no uncertainty as to the plaintiff's entitlement to those benefits. While the Court's comments in this regard appear to be in relation to an assignment, given that the defendant sought either a trust *or* an assignment of future collateral benefits, neither of which were granted, it seems that the same stringent requirements would have to be met with respect to a trust under section 267.8(9).[21]

[21] Of note is section 267.8(11), which provides that disputes with respect to a plaintiff's liability to make payments by way of the trust mechanism outlined in section 267.8(9) and (10) are to be determined by way of a private arbitration under the *Arbitration Act, 1991*. See *El-Khodr v Lackie* (2015 ONSC 4766) in that regard.

The rather strict approach endorsed by Justice Leach and the Court of Appeal in *Gilbert* was adopted by the trial judge in *El-Khodr v Lackie*[22]. While permitting an assignment of accident benefits in certain respects, Justice Toscano Roccamo declined to grant an assignment of future accident benefits due to the jury's global awards for "future professional services" and "future medication and assistive devices", which did not breakdown into sub-headings specific awards for professional services like physiotherapy, psychological treatment, or medication costs. Justice Toscano Roccamo further limited the assignment of income replacement benefits due to the uncertainty of the retirement age considered in the jury award for future loss of income.

Gilbert was further relied upon and endorsed by the trial judge and the Court of Appeal in *Fonseca v Hansen*[23]. In *Fonseca*, the jury awarded a global sum for future health care costs, with no breakdown as to the specific services required. On this basis, the trial judge limited the trust and assignment of future accident benefits to only four specific types of services that she had referenced in her jury charge. The trial judge further imposed a temporal limit on the trust/assignment in relation to income benefits to a period of one year following the date of the judgment. This limit was imposed on the somewhat speculative finding that there was no reasonable scenario under which the jury could have concluded that the plaintiff suffered a monthly income loss over nine or ten years. The Court of Appeal found no error with the trial judge's reasoning, noting that *Gilbert* is largely dispositive of the issue.

There appears to be some discord in respect of the requirement for strict matching between damages awarded and collateral benefits in the context of deductibility of benefits paid versus the context of a trust or assignment of future collateral benefits. While the courts seem to have eased the strict matching requirement in the former context, the same cannot be said in the latter. Should the more relaxed approach directed in *Gurniak* not also be

[22] 2015 ONSC 4766 and 2015 ONSC 5244.
[23] 2016 ONCA 299.

followed with respect to the trust and assignment mechanisms prescribed by the *Insurance Act*? It appears that the door is open (if ever so slightly) for such an argument to be advanced. It can be reasoned that the very nature of the approach of providing a trust/assignment for future benefits (if paid), rather than a deduction, provides a sufficient remedy or safety net to plaintiffs, who would otherwise be understandably concerned about a deduction for benefits that may never be paid.

It is respectfully submitted that the Courts' approach in *Gilbert*, in requiring a certainty of entitlement in order for the defendant to obtain an assignment, is indicative of a conflating of issues of deductibility at trial versus an assignment of future benefits. Indeed, in outlining the certainty requirement, the Court cited its decision in *Chrappa v Ohm*[24], wherein Justice Goudge noted: "If there were uncertainty about the receipt of those future payments the *deduction* of their present value would expose the plaintiff to the possibility of an ultimate recovery less than that awarded to him [emphasis added]."

Respectfully, Justice Goudge's comments speak to the deduction of the present value of future collateral benefits payments. In such a context, certainty of a plaintiff's entitlement to those payments is imperative, as a reduction of damages might otherwise run the risk of undercompensating the plaintiff.

However, in the context of an assignment, much, if not all, of that risk is mitigated. With an assignment the risk is shifted onto the tortfeasor who, in the event that the plaintiff's entitlement to future collateral benefits is limited or terminated, will simply not recover an offset of the damages already paid to the plaintiff. The plaintiff remains wholly compensated with little to no risk of a shortfall. It would appear that with an assignment, as opposed to a deduction at trial of future collateral benefits, it is the defendant who bears the risk of non-payment.

[24] (1998), 38 OR (3d) 651 (CA).

On the contrary, where a judgment is paid by the defendant and an assignment or trust is not granted in respect of future collateral benefits (for want of meeting the certainty requirement outlined in *Gilbert*), there is a near certainty of double recovery on the part of the plaintiff. This, in turn, provides a potential disincentive for the plaintiff to settle an accident benefits claim. With no risk of harm or undercompensation to the plaintiff through the assignment mechanism, the courts' hesitancy in granting an assignment due to uncertainty of entitlement to future collateral benefits appears to nullify the purpose of section 267.8(12).

For example, consider the situation and outcome of the *Fonseca* decision. The plaintiff was awarded damages for future health care costs in the amount of $27,450. The Court ordered a restrictive assignment to the tortfeasor. The judge reasoned that the jury award for future care costs, although not broken down in the award, had to reflect the only four claims she referenced in her jury charge. In addition, the trial judge further reasoned that the claims the jury awarded did not contemplate amounts received over a lengthy period of time. As a result, Her Honour limited the assignment to one year post judgment.

In the end, the defendant was ordered to pay $27,450 with respect to future health care costs. In return, the defendant was afforded an assignment/trust for that amount, but further limited to only four types of future treatment and services (kinesiology sessions, massage, medications (including Botox injections), and bite plate replacements) incurred in a 12-month period post judgment.

As a result, it would seem that if the plaintiff simply waited 13 months to receive those four treatments and/or undertook alternative treatment modalities, the defendant would not be repaid and the plaintiff would receive double recovery – at least as far as that term has been interpreted by Ontario courts in the context of *deductions* for past benefits received (see *Cummings*, *Mikolic* and *Basandra*).

As it stands, the prospect of the tortfeasor obtaining a deduction for future benefits paid as part of an accident benefits settlement is far greater than the likelihood of the defendant being granted an assignment with respect to these same future benefits, if not settled by the plaintiff. As such, the discord regarding the manner in which the value of future benefits are handled at trial based on an accident benefits settlement (and deduction) versus no settlement (and a much less likely assignment) should probably be considered by counsel when deciding when and whether to settle an accident benefits claim.

C. The Trust/Assignment Mechanism and Liability Splits

An issue arises with respect to the impact, if any, of a liability split at trial on the manner in which benefits are paid over to a tortfeasor after the trial, pursuant to an assignment or trust mechanism. It has been argued that the quantum of the benefits paid should be divided in accordance with a liability split at trial, such that the time period required for repayment to the tortfeasor would be greatly extended. The concept can perhaps be better explained through an example:

> Following a trial for damages arising from a motor vehicle accident, the jury awards the plaintiff $50,000 for future loss of income and finds a 50/50 split in liability as between the plaintiff and defendant. Accordingly, the defendant pays to the plaintiff $25,000 for future loss of income. The defendant is granted an assignment of future collateral benefits for loss of income. The plaintiff's potential entitlement to those benefits approximates a total of $60,000, paid at $400 weekly over a period of time by the accident benefits carrier.

If the liability split is accounted for in relation to the assignment of those benefits to the defendant, it would take the defendant twice as long to recover the $25,000 paid to the plaintiff following trial, as the weekly payment would be split equally as between the plaintiff and defendant. However, if the liability split were not accounted for, the

defendant would recover $400 per week until the $25,000 paid to the plaintiff was recovered. Only then would the payment revert to the plaintiff. The issue arises as to which is the appropriate approach.

It is submitted that a defendant should be entitled to a trust/assignment of future collateral benefits up to the amount of the corresponding jury award, without regard for a split in liability as between the plaintiff and defendant.

There has been little judicial consideration in this regard. The little there is, however, supports this position.

In *Strickland v Mistry*[25], Justice Bielby found no merit to the plaintiff's argument that repayment of collateral benefits to the defendant, pursuant to an imposed trust under section 267.8, should be limited by the split in liability determined by the jury. Indeed, His Honour found that there was nothing in the legislation to suggest that an assignment or trust ought to be limited in such a manner, nor was any authority presented in support of that position. Further, it was noted that the plaintiff would have full advantage of the monies paid in satisfaction of the judgment to draw against to meet her needs such that there would be no need to extend the repayment period. As indicated, it appears that this is the correct approach.

D. The Trust/Assignment Mechanism, Offers to Settle and Costs

As one might expect, the trust/assignment mechanism can impact the value of Rule 49 offers to settle and, in turn, costs awarded at the conclusion of trial[26]. For the purpose of considering strategy in this regard, there are two notable cases to consider.

First, in *Moore v Cote*[27], the judgment granted was $55,575 higher than the defendant's settlement offer. However, while the offer allowed the plaintiff to retain his accident

[25] 2009 CanLII 12125 (ON SC).
[26] See *Cadieux v Saywell*, 2016 ONSC 7604; *El-Khodr v Lackie*, 2015 ONSC 5244.

benefits entitlement, the judgment endorsed an assignment of those accident benefits to the defendant. Subsequent to the jury verdict, the tort defendant conditionally settled with the plaintiff's accident benefits insurer for $58,000, provided that a release was executed by the plaintiff.

The defendant argued that, given that the value of the assigned accident benefits was now fixed at $58,000, the plaintiff had not bettered the defendant's settlement offer.

Justice MacKinnon rejected this argument, finding that there was no binding agreement as between the defendant and the plaintiff's accident benefits insurer, as the defendant had no right in law to obtain a release from the plaintiff in the circumstances. Additionally, His Honour found that there was no evidence before him to suggest that the accident benefits insurer would have paid the plaintiff $58,000 had the defence offer been accepted at the time it was made. The value of the accident benefits was thus not truly fixed, at least with respect to its value as of the date of the offer to settle.

Justice MacKinnon further noted that the post-verdict developments of the settlement with the accident benefits insurer were irrelevant considerations to assessing the Rule 49 offer. The appropriate question is whether the plaintiff would have been in a better position had he accepted the offer at the time it was made.

Similarly, in *Giordano v Li*[28], the defendants contended that, after accounting for an assignment of the plaintiff's future income replacement benefits, the plaintiff's recovery was not as or more favourable than the plaintiff's Rule 49 offer to settle. If accepted, this argument would disentitle the plaintiff to substantial indemnity costs.

Justice Shaughnessy declined to reduce the future loss of income award (by virtue of the assignment sought) before comparing the judgment against the offer to settle. His Honour

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[27] 2008 CanLII 45827 (ON SC).
[28] 2015 ONSC 3048.

found no principled basis to deduct the trust/assignment amount from the judgment for the purpose of comparing the Rule 49 offer to settle. However, Justice Shaughnessy indicated that, in the appropriate case, if sufficient evidence were adduced, "the future loss of income claim [*sic* benefit], arguably could have some 'present value', which might be deducted from the judgment in order to compare a Rule 49 offer."

With respect, the decision in *Giordano* seems somewhat unclear. His Honour's finding that there was no principled basis to deduct the trust/assignment amount from the judgment for the purpose of comparing the judgment against the offer to settle appears troubling. It would seem incorrect in law to include potential double recovery in assessing the plaintiff's success at trial against a Rule 49 offer to settle. It may be, however, that the judge's comments were intended to be specific to the facts of *Giordano*, where there appears to have been some uncertainty as to the plaintiff's entitlement to future income replacement benefits and/or the value of those benefits. As well, presumably, Justice Shaughnessy intended to indicate that evidence of the present value of future loss of income benefits could be considered for the purpose of assessing a Rule 49 offer, particularly when comparing an offer (in which the plaintiff keeps all future collateral benefits) with the outcome at trial (where the tortfeasor obtains an assignment of those benefits).

The decision in *Giordano* also seems potentially inconsistent with the decision of Justice Hackland in *Abel v Hamelin*[29]. In *Abel*, the plaintiff made two offers to settle, neither of which provided for an assignment of future income replacement benefits. As the judge's award post-trial allowed for an assignment of statutory income replacement benefits, Justice Hackland noted that it would be necessary to know what the plaintiff's expected income benefits would be in order to assess the two offers. The net recovery to the plaintiff would be the appropriate figure for a Rule 49 comparison. In the circumstances of the case, Justice Hackland found that neither party had achieved a better result at trial than proposed in their respective Rule 49 offers.

[29] 2007 CanLII 50110 (ON SC).

The decisions in *Giordano* and *Abel* appear to leave the door open to the argument that, in circumstances where the value of the assignment makes a difference when comparing offers against the outcome at trial, the value should be considered.

Ultimately, it is important for counsel to bear in mind the potential value of future collateral benefits at the time of crafting offers to settle as, certainly, such entitlement is not without value. Indeed, it is respectfully submitted that the value of collateral benefits must be considered when comparing offers to settle against a damages verdict. It can be a very considerable advantage to a plaintiff to not have to provide an assignment as part of a settlement. Although valuation may be difficult, it is not impossible. Perhaps the "present valuation" suggested by Justice Shaughnessy in *Giordano* could be relied on for the comparison. In any event, one can otherwise envision a number of situations where an offer to settle and an outcome at trial are such that any appreciable value of the assignment will impact the comparison of the two. At least, in such situations, fairness should dictate that the value of the assignment be given effect.

IV. Practical Strategies for Handling of Collateral Benefits at Trial

In light of the foregoing, it is hopefully clear that counsel should probably turn their minds to the issues posed by accident benefits (and other collateral benefits) well before trial.

Prior to trial, consideration should be given to the status of the plaintiff's accident benefits claim, including quantification of benefits received to date, settlement terms, entitlement to future benefits, and documentary evidence to prove the same at trial. As suggested by the trial decision in *Gilbert*, counsel should not wait until the late stages of the litigation to look to establish the required certainty of a plaintiff's entitlement to future accident benefits.

Early consideration should also be given to the handling of collateral benefits at trial, when preparing **offers to settle**. An express provision in the offer, making it clear that the

plaintiff is entitled to keep his or her collateral benefits entitlement if the offer is accepted, appears prudent.

At trial, the complexities and potential consequences of collateral benefits take on even greater significance.

A. Jury Questions and Collateral Benefits

One of the key issues is the preparation of **jury questions**, in light of the deductibility and trust/assignment issues addressed above. On the one hand, the trend in recent cases post *Gurniak* and *Mikolic* with respect to the deductibility of "silos"[30] of collateral benefits paid (as opposed to a strict "apples from apples" approach) suggests that there may be potential to group heads of damages together to some extent (such as in *Basandra*), thereby limiting the number of blank lines to be filled in by a jury.

On the other hand, the approach endorsed by the Court of Appeal in *Gilbert* in respect of the trust and assignment mechanism for future collateral benefits suggests that questions put to the jury need to carefully break down not merely the categories of damages being sought, but also specific items and services thereunder. Indeed, the verdict sheet proposed by Justice Toscano Roccamo in *El-Khodr*[31], which was not adopted by the parties during the course of trial, included no fewer than 11 blank lines for monetary awards, including lines for future attendant care, psychotherapy, physiotherapy, medications and personal training (among others).

The approach adopted regarding jury questions may well be guided by whether the plaintiff has settled his or her accident benefits claim prior to trial. If so, and the question is one of deductibility only, fewer categories appear to be necessary. If not, such that the issue

[30] *Basandra v Sforza,* 2016 ONCA 251.
[31] 2015 ONSC 5244.

of an assignment or trust mechanism with respect to the payment of future collateral benefits will arise, then based on *Gilbert*, careful attention to the categories should be paid.

Some guidance has been provided by the Court of Appeal with respect to the preparation of jury questions in *Basandra*, though importantly, the case did not directly address the assignment and trust issues noted above. The Court noted that counsel must ensure that jury questions are structured so as to allow the trial judge to implement section 267.8 reductions on a benefit-by-benefit basis. Despite the apparent move away from a strict "apples from apples" matching approach in respect of deductibility of accident benefits paid, the Court noted that temporally-specific jury questions are necessary to address past and future losses because the plaintiff bears a different burden of proof for each and, of course, pre-judgment interest is only granted for past losses. Further, the need for temporal division of past and future losses was, somewhat confusingly in light of the Court's findings, suggested to be necessary for collateral benefits deductions. In summary, the Court stated:

> [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. I note that the trial judge has the authority to turn back inadequate jury questions and must approve the final version.

Despite the Court of Appeal's guidance, it is clear that in certain cases, counsel will be faced with a decision regarding the nature of jury questions to present. As stated, an important consideration will be whether the plaintiff has settled his or her collateral benefits entitlement such that the issue of an assignment or trust mechanism does not arise. Based on *Cummings*, *Mikolic* and *Basandra*, fewer categories of damages appear to be required in order to effect deductions with respect to collateral benefits already received. However, based on *Gilbert*, *El-Khodr* and *Fonseca*, greater particularity and categorization

appears to be required for the defendant to be granted an assignment or trust as it relates to future collateral benefits.

B. Proving Collateral Benefits at Trial – When and How?

Another issue which arises is when and how to adduce evidence of collateral benefits during the course of trial and the proper course for dealing with issue of the deductibility of collateral benefits and/or an assignment of future collateral benefits.

The case law demonstrates that various approaches have been taken with respect to adducing evidence of collateral benefits for the purpose of deductibility and/or assignment. In *Brown v Campbell*[32], evidence of collateral benefits was heard by the judge and jury during the course of trial. In *Arteaga*[33], on a motion for judgment, in addition to accident benefits documentation tendered, the plaintiff tendered affidavit evidence from her counsel in respect of the accident benefits claim and from an adjuster with her insurer. In *Abel*[34], an actuarial calculation of the plaintiff's future income replacement benefits was obtained further to addressing the assignment to the defendant.

It appears that there may be some flexibility at least with respect to the manner of adducing evidence of collateral benefits in order to address deductibility and trust/assignment considerations. It is suggested, however, that the issues of proof and the manner in which the collateral benefits issues are going to be handled should be carefully considered before trial. Indeed, a plan should be in place prior to the start of trial. This is particularly so with respect to a jury trial, as counsel need to be aware how the issue is to be determined, by whom, when, and the potential consequence if it is not handled appropriately.

It is well settled that the issue of deductibility is to be handled by the trial judge and not the jury. Indeed, in *Basandra*, the Court of Appeal highlighted the division of labour between

[32] 2011 ONSC 4984.
[33] 2016 ONSC 6628.
[34] 2007 CanLII 50110 (ON SC).

the trial judge and the jury pursuant to the statutory regime. The trial judge has the sole responsibility to reduce a jury award to account for collateral benefits pursuant to section 267.8 of the *Insurance Act*. The task is to be completed after a verdict has been rendered, but before a judgment has been entered.

If the issue is not handled appropriately, a trial judge may refuse to deduct the benefits received. This is particularly so if the judge is of the view that the nature of the evidence adduced and the jury questions posed suggest that the jury will have already considered the benefits paid when awarding damages.[35]

It is suggested that unless the evidence of collateral benefits received is relevant to an issue before the jury (i.e. motivation or mitigation), then such evidence should not be adduced in the presence of the jury.

It would seem preferable to tender the evidence regarding the nature of the benefits already received for the purpose of a deduction, or regarding the availability and value of future collateral benefits for the purpose of a trust or assignment, in a separate motion or *voir dire* in front of the trial judge alone.

If there are witnesses, such as the main plaintiff, who will be called as witnesses during the course of trial, efficiency suggests that perhaps such witnesses could remain on the stand, in the absence of the jury, to provide evidence on the collateral benefits issues that are of concern to the judge alone.

Opposing trial counsel should attempt to agree on as much collateral benefits evidence as possible. For example, it may be relatively easy and non-contentious to agree upon and file documents which set out the benefits paid to the plaintiff to the date of trial, including a breakdown and particulars of any accident benefits settlement entered into.

[35] See *Brown v Campbell*, 2011 ONSC 4984.

To the extent that collateral benefits issues cannot be agreed to, counsel should consider in advance the manner in which such evidence can and will be adduced at trial. Defence counsel will want to recall that the defendant bears the onus of proving the facts necessary to support an order deducting benefits received or granting a trust or assignment in respect of future collateral benefits.

With respect to a deduction, arrangements should thus be made to elicit evidence from the plaintiff's accident benefits insurer, if necessary, to prove the question of benefits paid prior to trial, broken down by category.

As it relates to a trust/assignment mechanism, counsel will also want to be in a position to demonstrate that the trust/assignment sought "mirrors" the damage claim awarded and that the plaintiff will be entitled to the benefit with the requisite degree of certainty. In order to satisfy the test in *Gilbert*, counsel will want to adduce evidence to demonstrate the plaintiff's right to recover the benefit from the accident benefits carrier, both with respect to any quantum-based issues (i.e. availability of residual limits) as well as any time-based issues (i.e. that the appropriate aspect of the policy will cover the time period that the future care cost was contemplated to be incurred in).

Although arguably unnecessarily onerous, it would seem such evidence could likely be adduced through a combination of the plaintiff in cross-examination and a knowledgeable and well-informed accident benefits adjuster from the plaintiff's insurer.

V. CONCLUSIONS

The interplay between tort and accident benefits has been a complicated yet important aspect of motor vehicle litigation for decades.

The present reparation scheme is no exception. The statutory regime, and the manner in which it has been interpreted, raises many issues, including the very different manner in

which deductions for benefits received or available before trial are handled, as compared to the process for future benefits and the corresponding trust or assignment reimbursement process contemplated by the *Insurance Act*.

In terms of 'deductions', we have canvassed the recent judicial relaxation of the strict matching principle, as well as the few circumstances in which benefits 'available' but not 'received' may be deducted. We have also canvassed the split and deduct order of operations issue and the profound impact that process can have on an outcome at trial.

In terms of the trust/assignment as it relates to future collateral benefits, we have canvassed the seemingly over-strict approach the courts have adopted in that regard, particularly in the decision of *Gilbert*. We have also discussed the trust/assignment mechanism in the context of a liability split, and the manner in which it relates to offers to settle and the costs consequences that flow from them.

Lastly, we have canvassed some practical considerations and practice tips for dealing with collateral benefits both at and before trial. In that regard, we have canvassed counsel's preparation as it relates to offers to settle, jury questions, and matters of proof and procedure when handling the collateral benefits issue at trial and after the trial proper.

In the process of reviewing these concepts, it has become clear that the interplay between tort and accident benefits indeed remains complicated, yet important to litigants. It is acknowledged that an exhaustive exploration of these issues, and their impact, is beyond the scope of this paper. It is hoped, however, that this work can be a useful starting point and, thus, of some assistance to counsel who deal with motor vehicle litigation in Ontario.