

Two Impactful Court of Appeal Decisions Affecting Auto Claims

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On September 19, 2017, the Ontario Court of Appeal released two decisions that have a profound impact on the automobile insurance industry: *Cobb v. Long Estate*, 2017 ONCA 717, and *El-Khodr v. Lackie*, 2017 ONCA 716. The decisions are very favourable to insurers. They deal with the deductible, prejudgment interest, collateral benefit deductions, assignment of future collateral benefits, and costs.

Cobb v. Long Estate

Facts

The action arose out of a motor vehicle accident in July 2008. The defendant driver was impaired. He died prior to trial.

At a 19 day trial, which concluded on October 5, 2015, the jury assessed the total damages at \$220,000.

After deductions for the deductible and collateral benefits, and after adding in prejudgment interest, the final judgment was \$34,000. The trial judge awarded the plaintiffs costs in the amount of \$409,000.

Collateral Benefit Deductions

The jury awarded \$50,000 for past loss of income and \$100,000 for future loss of income. Prior to trial, the plaintiff had received \$29,300 in income replacement benefits up to June 29, 2010. On June 29, 2010, the plaintiff settled the accident benefits claim with \$130,000 allocated to all past and future income replacement benefits. The trial judge deducted

these benefits from the awards for past and future income loss, which resulted in zero income loss.

The plaintiff argued that the defendant had a strict onus of proof to establish how much of the settlement related to past income loss and how much related to future income loss, in order to be entitled to a deduction in the tort claim.

The Court of Appeal disagreed. The court noted that s. 267.8(1) of the *Insurance Act* requires the deduction of all payments that the plaintiff has received prior to trial for statutory accident benefits in respect of income loss and loss of earning capacity. The legislation does not distinguish between amounts that relate to past and future income loss.

The plaintiff also suggested that part of the accident benefits settlement may have related to damages for bad faith. The Court of Appeal rejected this argument, stating that there was no evidence to support such a finding. Further, the argument was inconsistent with the Settlement Disclosure Notice in the accident benefits claim, which did not allocate any amounts to damages for bad faith.

Accordingly, the court upheld the trial judge's decision to reduce the jury award for past and future income loss to zero.

As a result, courts are required to combine a plaintiff's award for past and future income loss and deduct from that global amount all amounts received before trial for income losses. Whether these amounts relate to past or future claims is irrelevant for the purpose of deductibility.

Punitive Damages

The plaintiffs argued that the trial judge erred in refusing to allow the plaintiffs to seek punitive damages from the jury. The plaintiffs believed that the issue of punitive damages was relevant since the defendant was convicted of impaired driving.

The Court of Appeal held that the trial judge's decision in this regard was reasonable. An award of punitive damages is intended to accomplish the objectives of retribution, deterrence, and denunciation.

In the impaired driving conviction, the defendant was sentenced to a fine of \$1,300 and a one year driving prohibition. There was no evidence to suggest that this was insufficient to meet the objectives associated with punitive damages.

Only in "rare instances" should the question of punitive damages go to the jury when punishment has already been imposed in a separate proceeding for the same misconduct.

Prejudgment Interest

Effective January 1, 2015, the *Insurance Act* was amended in regards to the rate of prejudgment interest for non-pecuniary loss. Prior to the amendment, plaintiffs were entitled to prejudgment interest of 5% per year for damages for non-pecuniary loss.

The amendment required prejudgment interest to be calculated based on the rate specified in s. 127(1) of the *Courts of Justice Act*. These rates have been much lower than 5% for the past several years. For example, at the time of the claim in question, the rate was 0.5%.

The *Insurance Act* did not specify whether this amendment would apply retrospectively to actions commenced before January 1, 2015, but where the trial occurred after that date. There was no transition rule.

Based on the principles of statutory interpretation, the Court of Appeal held that the legislature intended for the change to the prejudgment interest regime to have retrospective effect so as to apply to pre-existing causes of action. The amendment applies to actions tried on or after January 1, 2015.

In the case at bar, the prejudgment interest rate on non-pecuniary damages would have been 0.5% instead of 5%. However, the Court of Appeal noted that a trial judge has

discretion under s. 130 of the *Courts of Justice Act* to vary the prejudgment interest rate to address concerns such as perceived unfairness to litigants.

The trial judge exercised his discretion to award prejudgment interest at 3%. The defendant was content with this, and the Court of Appeal did not disturb the trial judge's ruling in this regard.

Housekeeping Damages

The jury awarded the plaintiff \$5,000 for past housekeeping loss and \$10,000 for future housekeeping loss. Prior to trial, the plaintiff had received \$9,150 from his accident benefits insurer for housekeeping expenses.

The trial judge treated the housekeeping benefits received from the accident benefits insurer as past benefits and deducted \$5,000 from the jury's award for past housekeeping loss. However, the trial judge refused to apply the remaining \$4,150 in housekeeping expenses to the jury's award of \$10,000 for future housekeeping loss.

The Court of Appeal set aside the trial judge's ruling in this regard, indicating that there is no reason to distinguish between the past and future awards, and that all housekeeping benefits received from the accident benefits insurer prior to trial had to be deducted. This reduced the plaintiff's damages for future housekeeping loss by a further \$4,150.

Statutory Deductible

For several years, the deductible for non-pecuniary loss was \$30,000. Effective August 1, 2015, the *Court Proceedings Regulation* was amended to increase the deductible to \$36,540. This applied to non-pecuniary damages that did not exceed \$121,799. The deductible is adjusted each year to account for inflation. The current deductible is \$37,385 for non-pecuniary damages that do not exceed \$124,616.

The amendment to the Regulation did not contain a transition provision. The Court of Appeal held that the increased deductible applies to judgments on or after August 1, 2015. The Court of Appeal overturned the trial judge's ruling that a \$30,000 deductible applied.

Costs

The trial judge awarded costs to the plaintiffs of approximately \$409,000. This was on a judgment of \$34,000, which was reduced by the Court of Appeal to \$22,136.60.

The Court of Appeal stated that the trial judge's assessment of costs was out of all proportion and could not stand.

The Court of Appeal noted that the trial involved a chronic pain case and that these sorts of cases are never a sure thing from the plaintiff's perspective. The court stated that the defence will put the plaintiff to the strict proof of his case. A defendant is not expected to sit back and simply take a plaintiff's evidence at face value. The court indicated that there was nothing inappropriate for the defence to lead psychiatric evidence to suggest that the plaintiff was a malingerer.

Prior to trial, the defendant had made an offer to settle of \$40,000 plus prejudgment interest and costs. In contrast, the plaintiffs' lowest offer to settle was \$500,000 plus costs.

The plaintiffs argued that the defendant's offer was not valid, primarily because there was a provision which required the plaintiffs to pay costs after the offer was served. The Court of Appeal disagreed and held that the offer was a valid rule 49 offer.

The Court of Appeal overturned the trial judge's ruling on costs and agreed with the defendant that each party should bear its own costs.

Summary

The Court of Appeal addressed a number of important issues in *Cobb v. Long Estate*, including:

- All collateral benefits received by a plaintiff prior to trial, including benefits received from a settlement, must be deducted from past and future tort damages that are of a similar nature.

- The amendment to the prejudgment interest rate for non-pecuniary loss has retrospective effect and applies to all actions that are tried on or after January 1, 2015.
- The amendment which increases the statutory deductible has retrospective application and applies to judgments on or after August 1, 2015.
- Offers to settle with de-escalating costs provisions are valid rule 49 offers.
- Costs must be proportional.

The decision provides needed clarity, particularly on the issues of prejudgment interest and the deductible, which have been a source of controversy among the personal injury and insurance bars.

El-Khodr v. Lackie

Facts

The action arose out of a motor vehicle accident in January 2007. The plaintiff was rear-ended and sustained catastrophic injuries.

A jury trial proceeded, and the jury rendered a verdict on April 30, 2015, awarding damages totalling \$2,931,006.

Prejudgment Interest

The trial judge awarded prejudgment interest on non-pecuniary damages at 5% instead of applying the rate prescribed in s. 127 of the *Courts of Justice Act*, which was 2.5% at the time the proceeding was commenced.

For the reasons outlined in *Cobb v. Long Estate*, the Court of Appeal held that this was an error. The Court of Appeal reiterated that the amendment effective January 1, 2015 regarding the prejudgment interest rate was effective from the day it came into force and applied to all actions then in the system.

Assignment of Future Income Replacement Benefits

The jury awarded damages of \$395,593 for future loss of income. The trial judge held that the defendants were entitled to an assignment of income replacement benefits based on a retirement age of 60.

The Court of Appeal disagreed and held that the defendant's insurer was entitled to an assignment of income replacement benefits until the plaintiff turned 64 years old.

The Court of Appeal stated that the jury must have accepted one of the scenarios presented by the plaintiff's accounting expert, which indicated that, according to Statistics Canada evidence, the average retirement age was 64 years old.

Contingency for Ontario Drug Benefit Program Benefits

People over the age of 65 are eligible for the Ontario Drug Benefit Program, which covers the cost of prescription drugs. The trial judge instructed the jury to treat the plaintiff's eligibility for drug benefits as a contingency because there was substantial uncertainty on whether the drug plan would be available when the plaintiff reached age 65.

The Court of Appeal held that the trial judge erred in this regard. The trial judge should have instructed the jury to award damages based on the law as it currently exists. In particular, the trial judge should have instructed the jury to not award any damages for drug benefits after the plaintiff reached the age of 65.

However, the Court of Appeal stated that it was impossible to correct the trial judge's error because it could not be concluded from the jury award what portion of the damage award for drug benefits, if any, extended past the age of 65.

Assignment of Future Medical and Rehabilitation Benefits

The jury awarded the plaintiff \$1,450,000 for future attendant care costs/assistive living; \$424,550 for future professional services; \$133,000 for future housekeeping and home maintenance; and \$82,429 for future medication and assistive devices.

The defendants sought an assignment of the accident benefit payments to which the plaintiff would be entitled post-trial. The trial judge did not allow an assignment of the future medication and future professional services benefits.

The trial judge indicated that the jury verdict sheet did not adopt the language she had proposed, including separate headings for different types of professional services. The trial judge held that the defendants could not meet their very strict onus of proving that the jury award compensated the plaintiff for the same loss in respect of which the defendants claimed an assignment.

The trial judge applied a strict matching approach based on the Court of Appeal's decision in *Bannon v. McNeely* (1998), 38 O.R. (3d) 659 (C.A.).

In the present case, the Court of Appeal indicated that strict qualitative and temporal matching requirements should not be applied because the policy rationale underlying *Bannon* is not relevant to the current statutory scheme, and *Bannon* may no longer be good law in Ontario.

In reaching this determination, the Court of Appeal cited and relied on a detailed paper written by Stephen Ross and Meryl Rodrigues of Rogers Partners LLP, entitled "The Interplay Between Tort and Accident Benefits".

The regime in place in *Bannon* permitted a collateral benefit deduction from a tort award based on benefits available in the future immediately after a verdict on damages, and at a time when the entitlement to the future receipt of benefits might have been uncertain. Therefore, certainty that a plaintiff would receive future benefits was required to avoid the risk of under-compensation. Further, in *Bannon*, the plaintiffs did not seek recovery of benefits already provided to them by their accident benefits insurer. Their claims were presented net of those benefits. Therefore, any further deduction would have amounted to a double counting of the accident benefits.

The current statutory scheme does not require courts to calculate the present value of future benefits and deduct that amount from the damage award. Rather, the benefits are

held in trust or assigned. The Court of Appeal noted that the concern in *Bannon* regarding the uncertainty of future accident benefit payments does not arise under the current legislation.

Further, in *Gurniak v. Nordquist*, [2003] 2 S.C.R. 652, a majority of the Supreme Court of Canada stated that a specific matching between the particular benefit received under the statutory accident benefits scheme and the heads of damage in the tort award was not required.

The Court of Appeal indicated that the court is only required to match statutory accident benefits that fall into the “silos” created by s. 267.8 of the *Insurance Act* with the tort heads of damage. Income awards are to be reduced only by the collateral benefit payments in respect of income loss, and health care awards are to be reduced only by the collateral benefit payments in respect of health care expenses. All other expenses that are covered by the *SABS* fall into the “other pecuniary losses” category in section 267.8.

Therefore, as an example, a tort award for health care does not have to be broken down into categories such as medications, physiotherapy, psychology sessions, and assistive devices in order to facilitate the deductibility of collateral benefits. The strict matching approach should not apply.

Another previous Court of Appeal decision, *Gilbert v. South*, 2015 ONCA 712, was also considered. In that case, the Court of Appeal upheld a trial judgment in which a very strict matching approach was applied.

In *Gilbert*, the plaintiff was not catastrophically injured, so the accident benefits insurer only had to pay medical and rehabilitation benefits for 10 years and with a monetary limit of \$100,000. The trial judge in *Gilbert* held that there were uncertainties with respect to the plaintiff's future entitlement of benefits. The Court of Appeal upheld the trial judge's decision, indicating that the insurer can obtain an assignment of a plaintiff's future collateral benefits only if the jury award mirrors the benefits sought to be assigned and there is no uncertainty about entitlement.

In the present case, the Court of Appeal distinguished *Gilbert* on the basis of the trial judge's factual determination in *Gilbert* that the jury award encompassed future care costs for which accident benefits would not be received. In the case at bar, the risk of under-compensation due to assignment of future benefits was much smaller than in *Gilbert*.

For example, since the plaintiff had been catastrophically impaired, the 10 year temporal limitation for accident benefits did not arise. Further, there were no benefits for which the assignment was requested that were not covered by accident benefits. The Court of Appeal stated that, without a trust or assignment in respect of the accident benefits to which the plaintiff will be entitled and which he will receive in the future, he would be over-compensated. The legislative scheme is specifically designed to avoid double recovery.

The court noted that, under the present regime (as opposed to the previous regime in place at the time of *Bannon*), the trust and assignment provisions ensure that no risk of under-compensation passes to the plaintiff. The court cited its previous decision in *Basandra v. Sforza*, 2016 ONCA 251, noting that courts are moving towards a more relaxed approach that considers whether the pre-trial benefit received generally fits within one of the broad statutory category of damages.

The court goes further and suggests that the more relaxed approach in *Basandra* should also apply in relation to the assignment provisions in view of the text of the legislation and the decision of the Supreme Court in *Gurniak*.

As a result, the Court of Appeal permitted an assignment in relation to the awards for the cost of future medication and assistive devices and future professional services.

Summary

The Court of Appeal addressed a number of important issues in *El-Khodr v. Lackie*, including:

- Juries should be instructed to not award any sum for drug benefits after a plaintiff reaches the age of 65.

- The strict matching approach for collateral benefits outlined in *Bannon v. McNeely* and *Gilbert v. South* may no longer be good law.
- The court is only required to match statutory accident benefits that fall generally into the “silos” created by s. 267.8 of the *Insurance Act* with the tort heads of damages.

The Court of Appeal's decision is very positive for defendants and insurers as it reduces the likelihood of plaintiffs receiving double recovery and being overcompensated.