



Tort-Collateral Benefit Interface Issues

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OVERVIEW

- **Compensation principles:**

- **TORT**

- place the injured person in the same position as he/she would have been in had the tort not been committed, in so far as money can do so

NO DOUBLE RECOVERY

Fairness is best achieved by avoiding both under compensation and overcompensation –
Ratych v. Bloomer

OVERVIEW

- ***Insurance Act***

- Common law legislatively codified → essentially codified to **remove the insurance and subrogation exceptions** to the rule against double recovery
- Statutory mechanisms to handle collateral benefits in **auto context:**

Past Benefits

- deduction
- s. 267.8(1), (4), (6)

Future Benefits

- trust/assignment
- s. 267.8 (9), (10), (12)

DEDUCTIBILITY – PAST BENEFITS

Deductibility of Collateral Benefits

- *Insurance Act* – broad categorical matching required
 - s. 267.8(1): **income loss** and **loss of earning capacity**
 - s. 267.8(4): **health care expenses** (includes both medical/rehabilitation and attendant care by definition)
 - s. 267.8(6): **other pecuniary loss** (housekeeping)
 - confined to SABS
- Issue is **level of matching** – particularity or granularity – (if any), required beyond the categories in the statute

DEDUCTIBILITY – PAST BENEFITS

The “Matching” Principle

- Judicial interpretation of matching required to effect a **deduction of past benefits** → diverging case law can be represented by:



*Bannon v.
McNeely*
(1998, ONCA)

*Gurniak v.
Nordquist*
(2003, SCC)



- Bannon:** strict subject matter and temporal matching
- Gurniak:** no greater matching than that required by statute
(SCC – out of B.C.)

DEDUCTIBILITY – PAST BENEFITS

Gurniak: ignored for 12 years

Bannon: followed despite (arguable) overruling in *Gurniak*, until 2015

Recent evolution of the case law:

Mikolic v. Tanguay
(2015, Div Ct)

- cites *Gurniak*
- rejects temporal matching



Basandra v. Sforza
(2016, ONCA)

- easing continues
- categories must be taken as “silos”
- “silo” debut in vernacular of ONCA



Cobb v. Long Estate
(2017, ONCA)

- silos endorsed
- strong reservations regarding correctness of *Bannon* (given change in legislation and *Gurniak*)

- Serious relaxing of the strict temporal matching requirement post-*Mikolic*, *Basandra*, *Cobb* – but *Bannon* still not overturned, until...

DEDUCTIBILITY – PAST BENEFITS

Cadieux v. Cloutier (2018, ONCA)

- Five member panel – heard with *Carroll* – argued over 2 days, May 2018; decision in December 2018)
- Silo approach affirmed – categories set out in *Act* govern:
 - **income loss/loss of earning capacity**
 - **health care**
 - **other pecuniary loss (housekeeping)**
- No temporal matching, and no greater subject matter matching, than that required by statute
- To the extent that *Bannon* supports a strict matching approach (under the current statutory scheme), it should be overruled

DEDUCTIBILITY – PAST BENEFITS

No Net Claims

- ONCA rejected the argument that plaintiffs need only present “net” claims
- Plaintiff can’t simply choose not to advance certain losses as covered by CBs
- Approach consistent with *Act* (split and deduct) and prevents manipulation of claims to avoid deduction (which would promote double recovery)
- Claims to be presented on a “**gross**” basis (per silo)
- In *Cadieux*, A/C benefit received used to offset future med/rehab award
- To avoid any potential unfairness of having A/C benefit offset med/rehab award (or vice versa), **advance all losses (per silo) arising from the accident**
 - if advance both the A/C and med/rehab losses, then the deduction will offset the covered loss, leaving the uncompensated loss as basis for the award

DEDUCTIBILITY – PAST BENEFITS

Raises issue: **What's in a Silo?**

Income

s. 267.8(1)

- income replacement benefits
- non-earner benefits?
- caregiver benefits?

Health Care

s. 267.8(4)

- medical, rehabilitation and attendant care benefits

Other Pecuniary

s. 267.8(6)

- housekeeping and home maintenance
- lost educational benefits
- visitor expenses

OTHER ISSUES – PAST – DEDUCTIBILITY CONTEXT

Split and Deduct

- *Insurance Act* – s. 267.8(8) – the **order of operations** in the deduction context...
 - deductions to be made *after* damages apportioned to account for any contributory negligence on the part of the plaintiff
 - note: **rejection of net claims approach is key** to giving effect to this statutory order of operations
 - some plaintiffs previously looked to circumvent impact of section (where split in liability between plaintiff and defendant) by calling **past a ‘wash’** and seeking **future pecuniary damages only**
 - could be major issue, as order of operations of split and deduct can have profound impact

OTHER ISSUES – PAST – DEDUCTIBILITY CONTEXT

Deduct and Split

Split and Deduct – s. 267.8(8)

ASSUME:

Jury award for past income loss: \$100,000

Jury apportionment of liability: 75% plaintiff, 25% defendant

IRBs received: \$50,000

Deduct and Split

$$\$100,000 - \$50,000 = \$50,000$$

$$\$50,000 \times 25\% = \$12,500$$

**Defendant pays \$12,500
for past income loss and entirety of any
future income loss award**



Split and Deduct

$$\$100,000 \times 25\% = \$25,000$$

$$\$25,000 - \$50,000 = -\$25,000$$


**Defendant pays \$0 for past income loss
and \$25,000 can be deducted from any
future income loss award**



OTHER ISSUES – PAST – DEDUCTIBILITY CONTEXT

Split and Deduct – Multiple Defendants

- Order of operations...

- damages awarded
- **split** for plaintiff's contributory negligence
- **less collateral benefits** received per silo
- net amount 
 - Defendant 1
 - Defendant 2
- responsibility divided based on liability split, proportionate share of liability

OTHER ISSUES – PAST – DEDUCTIBILITY CONTEXT

Other Issues

- **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
 - plaintiff **not required to sue SABs carrier** – application and denial enough (s. 267.8(21))

OTHER ISSUES – PAST – DEDUCTIBILITY CONTEXT

Other Issues

- But plaintiff **must apply** (s. 267.8(22)(a))
 - be alert to less obvious cases where SABs **available**, but **not pursued**
 - e.g. plaintiff slips and falls in parking lot while exiting a vehicle
- Plaintiff **cannot frustrate entitlement** → denial of benefits due to plaintiff's failure to attend medical examinations required by insurer (s. 267.8(22)(b))
- Improvident or **bad faith settlements** of SABs claim (s. 267.8(22)(c))
 - defendant must prove settlement was entered into **in bad faith** – improvidence not enough

OTHER ISSUES – PAST – DEDUCTIBILITY CONTEXT

Other Issues

- What if the plaintiff ‘chooses’ to avoid deductibility?
 - *Sutherland v. Singh* – once the plaintiff elected to receive caregiver benefits, IRBs no longer ‘available’ → no deduction
 - again, raises issue of **what’s in a silo?** → caregiver benefits in SABs based income loss silo per ONCA in *Cadieux*, therefore arguably deductible from damages awarded in respect of income loss or loss of earning capacity

Income s. 267.8(1)	<ul style="list-style-type: none">• income replacement benefits• non-earner benefits?• caregiver benefits?
Health Care s. 267.8(4)	<ul style="list-style-type: none">• medical, rehabilitation and attendant care benefits
Other Pecuniary s. 267.8(6)	<ul style="list-style-type: none">• housekeeping and home maintenance• lost educational benefits• visitor expenses

- solution for plaintiff → **advance ALL claims per silo**
 - both caregiver and income loss – so proper loss gets deducted

TRUST/ASSIGNMENT – FUTURE BENEFITS

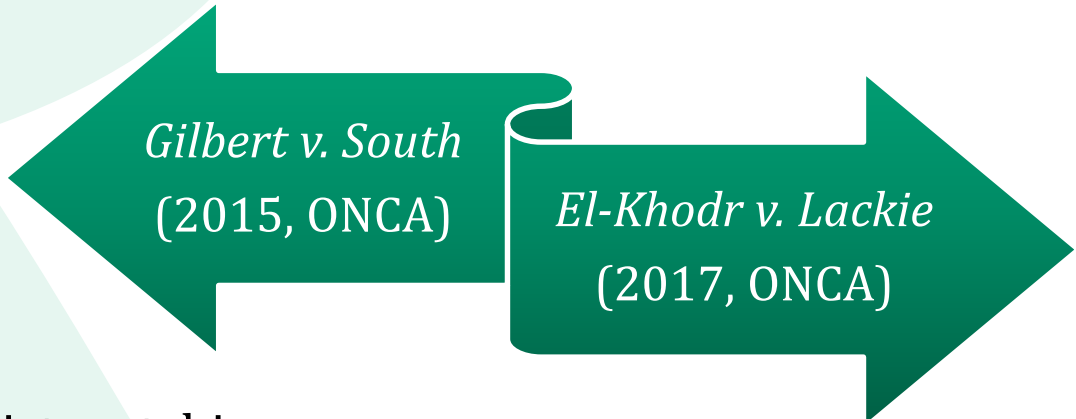
Handling of Future Collateral Benefits

- *Insurance Act* imposes trust or assignment mechanisms with respect to future benefits:
 - s. 267.8(9) and (10): **trust** and **payment** obligations on a plaintiff in respect of future collateral benefits
 - s. 267.8(12): **assignment** mechanism for future collateral benefits
- Plaintiff's damages **not reduced by PV of future CBs** – but plaintiff must hold in trust or provide assignment

TRUST/ASSIGNMENT – FUTURE BENEFITS

The “Matching” Principle Revisited

- Again: issue as to level of matching required to effect trust/assignment
- Judicial interpretation of matching required to grant an **assignment of future benefits** → recent diverging case law:



Gilbert v. South
(2015, ONCA)

El-Khodr v. Lackie
(2017, ONCA)

- ***Gilbert***: strict matching
- ***El-Khodr***: called it all into question
(released with *Cobb*)

TRUST/ASSIGNMENT – FUTURE BENEFITS

Recent evolution of the case law:

Gilbert v. South (2015, ONCA)

- relies on and applies *Bannon*
- award must mirror benefit and no uncertainty as to entitlement



Fonseca v. Hansen (2016, ONCA)

- applies *Gilbert*
- very strict presumed matching resulted in very limited assignment



El-Khodr v. Lackie (2017, ONCA)

- silo approach preferred
- strong reservations regarding correctness of *Bannon*

- *El-Khodr* → ‘silo matching’ per category in Act clearly preferred
 - but Court only distinguished *Gilbert*
- After *El-Khodr*: *Bannon* and *Gilbert* were seriously undermined, but arguably remained good law, until...

TRUST/ASSIGNMENT – FUTURE BENEFITS

Carroll v. McEwen (2018, ONCA)

- Five member panel – heard with *Cadieux*
- Silo approach held to apply in the assignment context as well, bringing **consistency with matching** in deductibility context
- Silos are as set out in the *Act*:
 - **income loss/loss of earning capacity**
 - **health care**
 - **other pecuniary loss**
- As in *Cadieux*, to the extent that *Bannon* and *Gilbert* support a strict matching approach under the current statutory scheme, both should be overruled

“The silo approach is to be applied to s. 267.8 as a whole.”

OTHER ISSUES – FUTURE CONTEXT

Other Issues

- Availability of a trust or assignment – **only at trial** (Div Ct – *D'Ettore v. Coachman Insurance*)
 - what does this mean for negotiations and settlement before trial?
- Impact on **offers to settle** and **costs**
 - should the value of a trust/assignment be considered when evaluating offers to settle and in assessing costs?
 - e.g. plaintiff's recovery at trial equals defendant's offer to settle – but offer allowed her to keep entitlement to future benefits, whereas assignment is granted at trial – has the defendant not beat the offer?
 - plaintiff better off with same number **and** her future CB entitlement → thus, **offer more favourable**

POST-VERDICT CONSIDERATIONS

Losses (π) & Collaterals (Δ): When and How to Prove

- Plaintiff to **prove the loss** – even if covered by CBs
 - as part of trial proper, on agreement between counsel, or otherwise in same manner as would prove any subrogated claim (e.g. OHIP)
 - prove service required and expense incurred (i.e. receipts, etc.)

POST-VERDICT CONSIDERATIONS

Proving Collateral Benefits

- Defendant to **prove CB entitlement** and/or **receipt**
 - **defendant bears onus** of proving facts necessary to substantiate deduction and/or trust/assignment
 - if not proved during course of trial, a **post-verdict motion** may be necessary
 - **means of proof:**
 - agreement with opposing counsel
 - documentary evidence (SDN & release)
 - *viva voce* evidence
 - affidavit evidence
- ...bearing in mind the silos
- letter from SABs carrier re: amounts paid to date and residual limits per category

POST-VERDICT CONSIDERATIONS

Order for Offset: CBs received Post-Verdict, Pending Appeal

- Seek an order/declaration that any benefits received by the plaintiff within a silo post-verdict, and pending the resolution of any and all post-trial motions and appeals, be used to offset the amount of the judgment as it relates to the corresponding head of damages awarded (*Carroll*)
- Essentially, a reconciliation of the judgment based on CBs received post-verdict, pending appeals and finalization of matter, as part of “conditions the court considers just” (s. 267.8(12)) aspect of assignment ordered

POST-VERDICT CONSIDERATIONS

Costs of the SABs Claim

- Plaintiff's recovery of **costs of pursuing SABs claim**
 - *Cadieux* – plaintiff may be permitted to recover costs incurred in recovering SABs as part of the costs of the tort action
 - not recoverable as a general principle or as a matter of course, but rather “**in appropriate cases**” – **benefit to the defendant is not enough**



POST-VERDICT CONSIDERATIONS

Costs of the SABs Claim

- **Various factors** may be considered by trial judge:
 - **fees** and disbursements **actually billed** to plaintiff in SABs context
 - relevant factors under Rule 57.01
 - **proportionality** between **costs** and expenses and **benefit** to tort defendant
 - manner of resolution of SABs claim
 - **costs paid** as a result of **SABs** settlement or arbitration
 - unusual or **labour-intensive** steps
 - fee arrangement between plaintiff and counsel
 - **overall fairness**

POST-VERDICT CONSIDERATIONS

Costs of the SABs Claim

- ONCA notably concerned with “particular risk, effort or expense”
- Clear plaintiff needs some evidence or proof
 - in *Cadieux*, plaintiff settled SABs claim for \$900,000 (available for reduction of damages in tort claim), but led no evidence of risk or effort in pursuing SABs claim, other than benefit to the defendant
→ court awarded no costs of the SABs claim

POST-VERDICT CONSIDERATIONS

Costs of the SABs Claim

- Raises a number of further issues:
 - **circumventing legislative intent?** → LAT lacks jurisdiction to award costs OR even more necessary as an **access to justice issue** (ONCA noted, but declined to comment)
 - can plaintiff seek agreement to have costs covered before fighting a denial/termination?
 - what scale of costs to be used?
 - what potential **impact on offers to settle** in tort action?
 - because of CBs, Δ beats offer → because Δ beats offer, π may not get costs, including costs to obtain the CBs
 - but, may be open to π to argue for these as costs of action incurred prior to trial and prior to Δ offer

POST-VERDICT CONSIDERATIONS

What Next?

- Lots of questions and interesting issues arising in the context of post-verdict considerations in light of *Carroll/Cadieux*
- We hope the paper and this presentation provides some guidance and assistance...

POST-VERDICT CONSIDERATIONS

Questions?

