THE COLLATERAL BENEFITS/TORT INTERFACE:

Recent Developments, Key Issues & Practical Strategies in a Post *Bannon* & *Gilbert* World

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By Stephen Ross & Meryl Rodrigues, Rogers Partners LLP

I. INTRODUCTION

Over the course of the last few years, the law with respect to the interplay between tort and collateral benefits has received considerable appellate consideration. After what seemed to be a period of flux and inconsistency, however, the law appears to finally be settled.

This interplay, relating mainly to the issues of deductibility of collateral benefits (including accident benefits) paid, and the trust/assignment mechanisms available to defendants in respect of future collateral benefits, can have a dramatic impact on the outcome of motor vehicle litigation. While these issues may not necessarily be given much consideration at the outset of a motor vehicle accident tort claim, with the current state of the law, they probably should be – by counsel on both sides of the litigation.

This paper seeks to provide an overview of recent developments in the law in this area, while canvassing some of the practical considerations that need to be taken into account from the commencement of a motor vehicle action through to trial.

We shall start with a review of the present state of the law with respect to the matching required for deduction of collateral benefits, the circumstances in which benefits 'available' but not 'received' may be deducted, and the nature and impact of the split and deduct order of operations. We shall then proceed to review the present state of the law with respect to the manner in which future collateral benefits are to be handled pursuant to the trust and assignment mechanisms set out in the *Insurance Act*, the impact of the same in the context of a liability split, and as it relates to offers to settle and costs awards. Finally, we will provide an overview of the various considerations counsel need to give to these issues during the course of a motor vehicle tort action.

II. DEDUCTIBILITY OF COLLATERAL BENEFITS

The present statutory scheme that dictates both the deductibility of and trust/assignment mechanisms for collateral benefits is outlined in section 267.8 of the *Insurance Act*. The scheme represents a codification of the common law rule against double recovery, a tribute to our system of tort damages that 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.[1]

The deductibility of collateral benefits is provided for by 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 losses).

A. The "Matching" Principle: Not Fruits but Silos

A notable issue that has been the subject of recent appellate consideration is the extent to which collateral benefits for income loss and loss of earning capacity (under section 267.8(1)), for health care expenses (under section 267.8(4)), and for other pecuniary losses (under section 267.8(6)) 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 initially imported more stringent matching requirements than the broad categories set out in the *Insurance Act*. In this regard, two cases stood at somewhat opposing ends of the spectrum regarding how strict a matching was necessary, even within the categorical matching stipulated in the governing legislation.

[1] See *Ratych v Bloomer*, [1990] 1 SCR 940.

In *Bannon v McNeely*[2], 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 in specific type and in time (otherwise referred to as subject matter and temporal matching). So arose the principle that, "apples should be deducted from apples, and oranges from oranges."

On the other end of the spectrum was the Supreme Court of Canada's decision in *Gurniak v Nordquist*.[3] 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 had 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*, Ontario courts had, with few exceptions, continued to rely on *Bannon* and the strict matching approach to require both subject matter and temporal matching in order to effect a deduction of collateral benefits from tort damages awards.[4] Not until the Divisional Court's decision in *Mikolic v Tanguay*[5] did *Gurniak* gain the sort of traction in Ontario that one would expect of a Supreme Court of Canada decision.

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[2] (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 non-pecuniary 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).

[3] 2003 SCC 59.

[4] 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.

[5] 2015 ONSC 71.

The Divisional Court in *Mikolic*, having considered *Gurniak*, looked to the wording of section 267.8(1) and effectively concluded that it was not necessary to differentiate between deductions from tort awards in respect of accident benefits received for past versus future benefits. Simply put, the defendant was not required to prove what portion of the total accident benefits settlement constituted payment for *past* versus *future* losses.[6]

Mikolic appeared to mark an easing of the stringent temporal matching requirement suggested in *Bannon* as to the deductibility of collateral benefits paid, as demonstrated by a number of subsequent lower court decisions, including *Foniciello v Bendall and Acculine*[7], *Basandra v Sforza*[8] and *Arteaga v Poirier and Pro-Landscape Construction*[9]. The movement away from strict subject matter and temporal matching obtained appellate recognition in *Basandra*, where the Court of Appeal indicated that the deductions were to be effected on a benefit-by-benefit basis, with the categories to be taken as "silos".[10]

The courts' apparent move away from a strict item-by-item and temporal matching approach towards the "silo" or categorical approach stipulated by the *Insurance Act* appeared to have been further wholly endorsed by the Court of Appeal in *Cobb v Long Estate*.[11] Indeed, the Court of Appeal expressly noted therein that the legislation does not envisage a temporal distinction for those benefits to be deducted. Moreover, the Court in *Cobb*, citing *Gurniak*, explicitly expressed reservations regarding the correctness of *Bannon* and instead preferred the more relaxed

[6] The Court also relied on the Court of Appeal decision in *Cummings v Douglas*, 2007 ONCA 615, 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. *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.
[7] 2016 ONSC 1119.
[8] See 2016 ONCA 251.
[9] 2016 ONSC 6628.
[10] *Basandra*, at para 21.
[11] 2017 ONCA 717.

approach adopted in *Bassandra*.[12] In fact, the Court stated: "In my view, *Gurniak* puts in considerable doubt any qualitative or temporal matching requirement that is not mandated by the current legislation."[13]

Despite the reservations, however, *Bannon* arguably remained good law, subject to the Court of Appeal's convention of convening a five-member panel when deciding whether to overturn one of its previous decisions.[14]

So set the stage for *Cadieux v Cloutier*[15]*.* Following the appeal heard before a five-member panel of the Court of Appeal, the Court unanimously adopted the broad categorical "silo" approach of matching benefits to tort awards in order to effect the mandated deductions, consistent with the relaxed judicial matching that had developed in recent years and was most recently endorsed by the Court of Appeal in *Cobb*. The Court concluded that the silo approach is consistent with the statutory language, fair to plaintiffs, defendants and their insurers, and promotes efficiency in motor vehicle litigation.

In sum, the Court held that the law does not require a strict qualitative or temporal matching of collateral benefits received prior to trial in order to deduct the same from corresponding heads of damages. Rather, the statutory language requires only a matching of the three broad silos of income loss, health care expenses, and other pecuniary losses in order to effect a deduction, with there being no basis for making a temporal distinction between past and future statutory accident benefits received prior to trial. Benefits received are to be combined in each silo prior to making the corresponding deduction (e.g. benefits received for past and future income loss to be combined and deducted from the total award of damages for past and future income loss).

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[12] These reservations are more thoroughly canvassed by the Court of Appeal in its companion decision to *Cobb* of *El-Khodr v Lackie*, 2017 ONCA 716, which is further discussed below.
[13] *Cobb*, at para 54.
[14] *David Polowin Real Estate Ltd v Dominion of Canada General Insurance Co* (2005), 76 OR (3d) 161 (CA).
[15] 2018 ONCA 903. *Cadieux* was heard together with *Carroll v McEwen*, which dealt with similar issues in the assignment context and is further discussed below.

In a long-awaited pronouncement, the Court held that *Bannon*, to the extent that it supports a strict matching approach under the present statutory schedule, should be overruled in light of the Supreme Court's decision in *Gurniak*.

Subject to a further appeal[16], it seems that the law in the deductibility context is now settled. Accordingly, rather than the fruit-specific deductions of apples from apples – past income replacement benefits only from a past income loss award, and so on – deductions are to be silo from silo – simply total income loss benefits received from the total income loss damages awarded, payments for health care expenses from the total care costs awarded, and statutory accident benefits received for other pecuniary loss from corresponding pecuniary damages awarded.

B. No Net Claims

Importantly, in *Cadieux*, the Court rejected the submission of the intervener, the Ontario Trial Lawyers Association, that plaintiffs need only present "net" claims, such that they did not need to prove expenses covered by statutory accident benefits or other collateral benefits prior to trial. OTLA argued that such an approach would result in lengthier and more expensive motor vehicle accident trials.

The Court held that claims should be presented on a "gross" basis, such that plaintiffs should make a claim for past and future income losses, past and future health care expenses, past and future pecuniary losses covered by statutory accident and collateral benefits, and past and future pecuniary losses that lack statutory accident or collateral benefits coverage. The Court found that there was far from anything unusual or complicated in such an approach. Indeed, it is the usual course in other non-MVA personal injury actions where a plaintiff brings suit for both subrogated and uninsured claims. Moreover, the Court noted that it was commonplace for plaintiffs to prove underlying goods and services consumed as a result of their injuries alleged, in order to demonstrate the severity of their injuries and the ongoing need for such expenses.

[16] An application for leave to appeal to the SCC has been filed in *Cadieux*.

As is addressed further below, the Court's conclusion with respect to presenting gross as opposed to net claims must be accounted for at the outset of commencing litigation, all the way through to preparing for and presenting evidence at trial. The silos as articulated by the Court should also be reflected in the structure of the jury questions in order to facilitate the mandated deduction(s) from corresponding past and future damages within the relevant silos.

C. 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 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*[17]. 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.

[17] (1980), 29 OR (2d) 1 (CA).

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.

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*[18], 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 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 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.

[18] 2011 ONCA 470.

We note, however, that in light of the Court of Appeal's decision in *Cadieux*, there may be reason to question whether *Sutherland* would be decided the same way today. The Court in *Cadieux* suggested that the silo of income loss with respect to statutory accident benefits encompasses income replacement benefits or non-earner benefits or caregiver benefits. It would appear, therefore, to be open to the defendant to seek a deduction of non-earner or caregiver benefits from any damages awarded in respect of income loss or loss of earning capacity.

Any perceived unfairness in this regard is likely resolved by the plaintiff advancing claims on a gross basis, as stipulated by the Court in *Cadieux*, thereby ensuring potential for recovery in the tort action of all damages subject to deduction. In other words, the plaintiff in *Sutherland* would advance a claim in tort for both income losses and the expenses incurred as a result of the accident for replacement caregiving services. From the resulting jury award would be deducted the benefits received by the plaintiff under this silo, i.e. caregiver benefits received. Although many issues were resolved, it would seem that questions with respect to the breadth of the silos and their application will need to await subsequent judicial interpretation of the *Cadieux* decision.

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.[19] Legislative changes imposed by Bill 59, namely by way of sections 267.8(21) and (22) of the *Insurance Act*, indicate that much more is now required to properly advance such a position.

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

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*[20], 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 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 nor on the circumstances of her settlement with the accident benefits insurer, when fairness dictated 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

[20] 2001 CarswellOnt 1870 (SCJ).

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 issues 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*[21], 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.

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

[21] 2005 CarswellOnt 2480 (SCJ).

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.

D. 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 the deductions mandated by sections 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 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. Indeed, in light of the Court of Appeal's direction in *Cadieux* of advancing all claims on a gross basis, the order of operations bears even more significance, given that net claims often served to avoid the effect of the split and deduct mandate. Counsel should ensure that the order of operations prescribed by section 267.8(8) is followed when the circumstances require it.[22]

Multiple Defendants

The factual circumstances of *Cadieux* allowed for the Court to provide guidance with respect to the split and deduct order of operations in the context of multiple tort defendants in a motor vehicle action.

In *Cadieux*, the plaintiff was involved in an altercation with one of the defendant tortfeasors, Saywell. Both the plaintiff and Saywell were pedestrians. Saywell pushed the plaintiff towards the road, causing him to stumble into the path of a vehicle driven by another defendant tortfeasor, Cloutier. Prior to trial, the plaintiff had settled with Cloutier, pursuing only Saywell to

[22] 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.

trial. The jury apportioned liability equally: a third against the plaintiff for his own contributory negligence, and a third against each of Cloutier and Saywell.

The Court addressed the issue of the amount of the statutory accident benefits that the non-settling defendant was entitled to deduct from the jury award. In consideration of practicality, fairness and common sense, the Court determined that a non-settling defendant should not be able to deduct all the statutory accident benefits paid to the plaintiff prior to trial. This would discourage settlement, undercompensate the plaintiff, and result in unfairly enriching the non-settling defendant.

The Court concluded that the order of operations mandated by section 267.8 of the *Insurance Act* with respect to each silo is as follows: (1) damages attributable to the plaintiff's contributory negligence are to be deducted from the damages awarded by the jury (split for contributory negligence first); (2) statutory accident benefits received prior to trial for a silo are to be deducted from the corresponding silo of damages awarded by the jury (deduct); (3) responsibility for the payment of the remaining sum is determined in accordance with the non-settling defendant's proportionate liability as determined at trial (apportion between defendants).

While the Court's consideration in this regard was with respect to the apportionment of the permissible deductions between the settling and non-settling defendants, this would, of course, also be the order of operations for multiple defendants at trial, had no settlement been reached prior to trial. As such, the approach to follow in multiple defendants situations is: split for contributory negligence; deduct collateral benefits by silo; and apportion payment of the remaining quantum between defendants on the basis of the findings of fault against them, as determined at trial.

III. THE TRUST/ASSIGNMENT MECHANISM – AN ANSWER TO 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 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*[23], 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 of benefits and nature of the damages awarded).

[23] (2009), 97 OR (3d) 634 (SCJ).

This could be an important consideration as it relates to negotiations at mediation or otherwise. From time to time, plaintiff's counsel will argue at mediation that the defendant is only entitled to an assignment or trust for future collateral benefits and, at least in early phases of negotiations, will look to recover all future pecuniary damages from the defendant tortfeasor and offer an assignment or trust in return. Apart from the impracticality of the approach and the general reluctance to accept an assignment rather than a (present valued and often compromised) deduction of such future collaterals, it would appear that such an approach is presumptively unavailable on settlement, as a matter of law.

The reasoning in *Stokes* was followed by the Divisional Court in *D'Ettore v Coachman Insurance Co*[24]. In *D'Ettore*, the issue before the Court was whether a consent judgment 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 the trial process.

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. The "Matching" Principle: Apples from Apples No More

[24] 2012 ONSC 3613.

While the courts in more recent years adopted a more relaxed approach with respect to the matching requirement in the deductibility context, this was not the case with respect to the assignment and trust provisions for future collateral benefits. Indeed, case law in recent years marked a clear and inexplicable divergence between the relaxed matching deemed necessary to effect a deduction versus the strict matching deemed necessary to impose a trust/assignment.

The strict matching approach was most notably highlighted in the case of *Gilbert v South*[25]*.* 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. The motion was not granted for failure to satisfy the overlap or strict matching thought to be required between damages awarded and the future collateral benefits at issue. The reasoning was upheld on appeal.

The Court of Appeal in *Gilbert*, relying on *Bannon* and *Chrappa v Ohm*[26], 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, under *Gilbert*, the same stringent requirements would have to be met with respect to a trust under section 267.8(9).[27]

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*[28], and was further relied upon and endorsed by the trial judge and the Court of Appeal in *Fonseca v Hansen*[29]. In *Fonseca*, the jury awarded a

[25] 2014 ONSC 3485, aff'd 2015 ONCA 712.
[26] (1998), 38 OR (3d) 651 (CA).
[27] 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.
[28] 2015 ONSC 4766 and 2015 ONSC 5244. This outcome was reversed on appeal in 2017 ONCA 716, as more fully discussed herein.
[29] 2016 ONCA 299.

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. Therefore, as recently as 2016, a unanimous panel of the Ontario Court of Appeal appeared to endorse a strict subject matter and temporal matching in the assignment (future benefits) context.

As a result of *Gilbert* and *Fonseca*, there was clearly considerable discord in respect of the matching required between damages awarded and collateral benefits received in the context of deductibility of benefits paid, versus the context of a trust or assignment of future collateral benefits. While the courts seemed to heed *Gurniak* and eased the strict matching requirement in the former context (deductibility), the same could not be said in the latter context (trust/assignment).

Over the last two years, however, starting with the Court of Appeal's decision in *El-Khodr v Lackie*[30] followed by the five member panel decision in *Carroll v McEwen*[31], that discord has been ameliorated, with a consistent approach established for courts to handle both past and future collateral benefits, as required under the *Insurance Act*.

Bannon* and *Gilbert* meet *El-Khodr* and *Carroll

When one considers the application of the trust/assignment mechanism provided for by the *Insurance Act*, from an academic perspective, the need for strict matching between damages

[30] 2017 ONCA 716.
[31] 2018 ONCA 902. As noted earlier, *Carroll* was heard together with *Cadieux*.

awarded and future collateral benefits seems perplexing. The very nature of 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 they may never receive.

In the context of an assignment, much, if not all, of the risk of undercompensation 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 by payment of the judgment with no risk of a future shortfall. 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.

On the other hand, 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 threatened to nullify the purpose of section 267.8(12).

Against this backdrop of inconsistency between the matching required in the deduction versus assignment contexts, the Court of Appeal endorsed a need for change in *El-Khodr*. The Court explicitly noted that a strict qualitative and temporal matching stemming from *Bannon* should not be applied to section 267.8, as the policy rationale grounding the decision in *Bannon* was not relevant to the current legislative scheme, and since *Bannon* may no longer be good law in Ontario in light of the Supreme Court's decision in *Gurniak*. Contrary to the Court's approach in *Gilbert*, the Court in *El-Khodr* noted that the assignment mechanism only requires a matching to

the broad, enumerated categories stipulated in the *Insurance Act*, an approach similar to the "silo" approach utilized in the deductibility context.[32]

Nevertheless, the Court in *El-Khodr* stopped short of explicitly pronouncing *Bannon* and *Gilbert* as no longer good law. Instead, the Court distinguished *Gilbert* and found that the strict matching endorsed by *Gilbert* was not applicable to the specific facts in *El-Khodr*. As with *Cobb*, it would seem this forbearance was a function of the Court of Appeal's convention of convening a five-member panel when faced with potentially overturning one of its previous decisions.

To that end, a five member panel in *Carroll v McEwen* in 2018 endorsed a broad categorical matching of benefit to tort award (in accordance with the "silos" dictated by the *Insurance Act*) in order to effect a trust/assignment with respect to future collateral benefits. The Court specifically noted that to the extent that *Gilbert* supports a strict matching approach under the current statutory regime, it (and *Bannon*, upon which *Gilbert* was based) should be overruled.[33]

The Court went on to provide helpful guidance for the handling of collateral benefits received by the plaintiff pending the resolution of any post-trial appeal process. Relying on the wording of section 267.8(12) of the *Insurance Act*, which permits a court to effect an assignment "subject to any conditions the court considers just", the Court ordered that the plaintiff disclose all amounts received for collateral benefits subject to the assignment (in this case, medical/rehabilitation and attendant care benefits) since the date of the trial judgment. The Court further ordered that if the tortfeasor's insurer elected to pursue the assignment after said disclosure, it would be required to pay the judgment less the disclosed amounts of medical/rehabilitation and attendant care benefits received since the date of the judgment.

This aspect of the decision in *Carroll* will likely serve as authority for the tort insurer to not only obtain an assignment of future benefits within a particular category/silo, but also to obtain an order that any amounts received post-verdict by the plaintiff within that category/silo (and

[32] *El-Khodr*, at para 35.
[33] *Carroll*, at para 37.

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.

As it stands, with the decisions in *Cadieux* and *Carroll*, the Court of Appeal has endorsed one consistent and more relaxed approach with respect to the handling of both past and future collateral benefits in order to give effect to the deductibility and trust/assignment provisions of the *Insurance Act*, which were otherwise being inconsistently applied (if not wholly disregarded) as a result of uncertainty and conflict in the appellate jurisprudence.

C. The Trust/Assignment Mechanism and Liability Splits

An issue to be considered in this area is 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*[34], 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.[35]

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.[36] For the purpose of considering strategy in this regard, there are two notable cases to consider.

[34] 2009 CanLII 12125 (ON SC).
[35] This issue does not appear to have even been a consideration in the post-*El-Khodr* trial level decision in *Tuffnail, et al v Meeks et al*, 2017 ONSC 4610, where a trust or assignment was found to be warranted in the context of the plaintiff being found contributorily negligent.
[36] See the lower court decisions in *Cadieux v Saywell*, 2016 ONSC 7604 and *El-Khodr v Lackie*, 2015 ONSC 5244.

First, in *Moore v Cote*[37], the judgment granted was $55,575 higher than the defendant's settlement offer. However, while the offer allowed the plaintiff to retain his accident 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*[38], 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.

[37] 2008 CanLII 45827 (ON SC).
[38] 2015 ONSC 3048.

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 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*[39]. 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

[39] 2007 CanLII 50110 (ON SC).

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.

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

In light of the foregoing, it is hopefully clear that counsel on both sides of motor vehicle litigation should turn their minds to the issues posed by accident benefits (and other collateral benefits) well before trial. Indeed, given the recent appellate decisions in *Cadieux* and *Carroll*, consideration of collateral benefits is imperative at the outset of an action arising from a motor vehicle accident, and through the various stages thereafter.

Pleadings

As outlined above, the Court of Appeal in *Cadieux* has endorsed a 'no net claims' approach to motor vehicle litigation, such that plaintiffs must present their claims on a gross basis, and seek to recover all damages arising from the accident in the action, including pre-trial losses compensated for by collateral benefits. Accordingly, claims must be drafted to advance all losses, on a gross basis, and consideration should be given to each of the categories/silos in this regard.

Notably, the Court in *Cadieux* pointed out that, to the extent there may be ongoing cases that have yet to reach trial where claims have been presented on a net basis, counsel should be permitted to amend the claim, if required, to advance the claim on a gross basis.[40]

As for the defendant, it is suggested that counsel, as a matter of course, should plead reliance on the deductibility and trust/assignment provisions of section 267.8 of the *Insurance Act* in its defence. It is likely that, at the pleadings stage, little (if any) information with respect to availability of, entitlement to or quantum of collateral benefits will be available to the defendant. Nevertheless, given that the pleadings dictate the scope of discovery, counsel will want to ensure that the pleadings include a foundation to canvass collateral benefits issues at the discovery stage.

Discovery

At the discovery stage, counsel on both sides should ensure that evidence is adduced with respect to availability of collateral benefits for accident-related losses, entitlement to collateral benefits, status of collateral and accident benefits claims, quantification of benefits received, settlement

[40] *Cadieux*, at para 91.

terms (if any), and entitlement to future benefits. Documentary evidence should be produced and/or requested in order to prove the same at trial.

There has been a suggestion of some uncertainty as to how plaintiffs are to prove all expenses, whether covered by collateral benefits or not. It is submitted that counsel might simply do so in the same way as these issues are handled in the non-auto context, where subrogated claims may be advanced (by OHIP or collateral benefits providers). As noted by the Court of Appeal in *Cadieux*, the presentation of gross claims is done as a matter of course in non-auto litigation, where plaintiffs claim for both subrogated and uninsured losses.

For those losses incurred not otherwise covered by collateral benefits, plaintiffs' counsel may simply prove the loss as with other out-of-pocket expenses, by means of receipts, invoices and/or statements that speak to the value of underlying goods and services consumed as a result of the accident.

For those losses covered by collateral benefits, benefits paid should generally be an uncontroversial matter of record that simply need be requested and updated prior to trial. It is suggested that, like with OHIP subrogated claims advanced in the non-auto context, a simple chart or handout outlining the services provided and expenses paid will usually suffice. Indeed, in the tort auto/statutory accident benefits context, this may be an easier and less contentious process, as the statutory accident benefits carrier will already have vetted the goods and services incurred for reasonableness and causation, whereas in the non-auto (i.e. OHIP) context, this may not have occurred.

Offers to Settle

As noted above, a plaintiff's entitlement to future collateral benefits is of considerable value and such value ought to be accounted for in pre-trial settlement discussions and in crafting offers to

settle. It is suggested that offers to settle include an express provision making it clear that the plaintiff is entitled to keep his or her collateral benefits entitlement if the offer is accepted.

Trial

Jury Questions

One of the key trial considerations with respect to the deductibility and/or trust/assignment issues outlined above is the preparation of jury questions.

In the past, with the dichotomy in the extent of matching required in the deductibility context versus the trust/assignment context, there was a corresponding dichotomy with respect to the extent of the breakdown of damages sought reflected in jury questions. On the one hand, the trend post *Gurniak* and *Mikolic* with respect to the deductibility of "silos"[41] of collateral benefits paid (as opposed to a strict "apples from apples" approach) suggested that there was 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 that had been endorsed by the Court of Appeal in *Gilbert* in respect of the trust/assignment mechanism for future collateral benefits suggested that questions put to the jury needed to be carefully broken down not merely by category and time, but also for specific items and services thereunder.[42]

Prior to the Court of Appeal's decisions in *El-Khodr* and *Carroll*, the approach adopted regarding jury questions may well have been guided by whether the plaintiff had settled his or her accident benefits claim prior to trial. If so, and the question was one of deductibility only, fewer categories appeared to be necessary. If not, such that the issue of an assignment or trust mechanism with

[41] *Basandra v Sforza,* 2016 ONCA 251.

[42] Indeed, we note that the verdict sheet proposed by Justice Toscano Roccamo in *El-Khodr*, 2015 ONSC 5244, 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).

respect to the payment of future collateral benefits would arise, then based on *Gilbert*, careful attention to the categories seemed to be warranted.

However, with the overruling of *Bannon* and *Gilbert* in *Cadieux* and *Carroll*, it appears that such careful attention to the categories and breakdown in jury questions might be of less importance, given the more relaxed matching required for the granting of a trust/assignment with respect to future collateral benefits. Indeed, the Court appears to have endorsed that in most cases, the manner in which jury questions are to be structured should be based on the silos.[43]

That said, in *Cadieux*, the Court cites the guidance with respect to jury questions provided by Justice MacFarland in *El-Khodr* as useful. It is noted, however, that the Court in *El-Khodr* suggested that in cases involving non-catastrophic injuries, jury questions should reflect the plaintiff's claim accounting for the monetary and temporal limits of collateral benefits. The Court also noted that items not covered by statutory accident benefits ought to be categorized separately vis-à-vis jury questions to avoid any risk of overcompensation or undercompensation.

Respectfully, it is submitted that a temporal and/or item-by-item particularization of jury questions for future damages in this manner should no longer be necessary following the overruling of *Gilbert*. Indeed, such an approach would seem contrary to the relaxed, silo-based matching requirement embraced by the Court in *Carroll*, and the rejection of strict subject matter and temporal matching that underpins the Court's analysis. The full compensation of the plaintiff by virtue of payment of the jury award, coupled with the shift in risk to the tortfeasor's insurer facilitated by an assignment, should serve to ensure that the plaintiff does not suffer undercompensation. As such, it is submitted that neither temporal nor monetary limits on benefits need be considered in the crafting of jury question post *Carroll*/*Cadieux*.[44]

[43] *Cadieux*, at para 90; *Carroll*, at paras 43-45.
[44] It is noted that "broad silos" of damages awarded in accordance with the jury questions in *Tuffnail, et al v Meeks et al*, 2017 ONSC 4610, sufficed for the imposition of an assignment in that case.

Nevertheless, given their importance, the issue of jury questions ought to be considered, discussed with opposing counsel, and addressed with the trial judge prior to or at the start of trial.

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 issues 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*[45], evidence of collateral benefits was heard by the judge and jury during the course of trial. In *Arteaga*[46], 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*[47], 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.

[45] 2011 ONSC 4984.
[46] 2016 ONSC 6628.
[47] 2007 CanLII 50110 (ON SC).

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 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.[48]

As the Court of Appeal in *Cadieux* has now clarified that plaintiffs must advance all losses on a gross basis, whether covered or not by collateral benefits, there will be greater circumstances in which collateral benefits (or the goods and services that give rise to them) may be adduced in the presence of the jury. This would relate to both proving the value of goods and services incurred as a result of accident-related injuries and to demonstrating the severity of injuries and the ongoing need for such expenses.

It is submitted that, to the extent that losses can be proven without reference to specific collateral benefits paid to compensate for those losses (e.g. by way of receipts, statements, etc.), evidence of collateral benefits received ought not to be adduced in the presence of the jury (except if otherwise relevant to an issue before the jury, such as motivation or mitigation). This would help ensure that there is no risk of a jury taking into account benefits paid when awarding damages. In the event that such an approach is not possible or not practical and evidence of collateral benefits received must be adduced before a jury, counsel should ensure that the jury is properly instructed not to consider the fact of the payment of collateral benefits in their assessment and award of damages. Fairness dictates that the benefits should not be deducted

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

twice, once by the jury in their deliberations, and again later by the trial judge in dealing with collateral benefits and entering judgment.

With respect to evidence regarding the availability and value of future collateral benefits for the purpose of imposing a trust or assignment, it is unlikely that such evidence need be adduced before a jury. It would seem preferable to simply tender such evidence in a separate motion or *voir dire* in front of the trial judge alone, as a part of post-verdict considerations and argument.

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, and as alluded to above, 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.

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/silo. As indicated, unless the evidence regarding the actual payment of benefits received prior to trial is relevant to a matter at issue for the jury to determine, it is likely preferable if such evidence is adduced outside the presence of the jury, perhaps on a *voir dire* before the trial judge, initiated for that purpose.

As it relates to the assignment mechanism, counsel will want to simply establish that the plaintiff is entitled to future collateral benefits in respect of heads of damages awarded, but evidentiary considerations beyond that appear to be unnecessary in light of *Carroll*. However, counsel should remember to seek an order, in keeping with the Court of Appeal's direction in *Carroll*, 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.[49]

Costs of the Statutory Accident Benefits Claim – Should the Defendant Pay?

In light of the *Cadieux* decision, one of the issues that is likely to arise at the conclusion of a trial in which a deduction or assignment of collateral benefits has been effected is the recovery of the plaintiff's legal costs of recovering statutory accident benefits.

In *Cadieux*, the Court of Appeal addressed the issue of whether statutory accident benefits ought to be deducted from tort damages net of the legal costs of pursuing the statutory accident benefits claim or on a gross basis.[50] The Court canvassed two streams of jurisprudence in this regard, one in which a "net approach" was taken such that statutory accident benefits were deducted from a tort award net of legal costs incurred to obtain them, the other in which a plaintiff was permitted to recover costs incurred in recovering statutory accident benefits as part of the costs of the tort action.

The Court concluded that the latter approach ought to be followed, finding that it was consistent with the wording and statutory direction in section 267.8 (with the reference to "all payments"), and that it enabled a court to make a fair allocation of costs of pursuing a statutory accident benefits claim "in appropriate cases".[51] Indeed, the Court noted that requiring the tort defendant to pay the costs of the plaintiff's pursuit of accident benefits should not be a general principle or

[49] *Carroll*, at paras 54-55.
[50] *Cadieux*, at paras 121-135.
[51] It ought to be noted that handling the issue as a matter of costs (as opposed to, potentially, an out of pocket expense to be recovered in the tort action) would not erode the policy limits of the tort insurer and would insulate the statutory accident benefits claim costs from any liability split.

a matter of course, but is a fact-driven exercise and depends on the particular circumstances of a case.

In that regard, the Court highlighted some of the considerations a trial judge might take into account in awarding costs related to the statutory accident benefits claim. These include:

- fees and disbursements actually billed to the plaintiff in the accident benefits context;
- relevant factors under Rule 57.01;
- proportionality of legal costs and expenses incurred by the plaintiff to the benefit of statutory accident benefits reduction to the defendant;
- the manner of resolution of the accident benefits claim (i.e. settlement or arbitration);
- costs paid as result of settlement or arbitration;
- whether costs were incurred due to unusual or labour-intensive steps that ought not to be visited on the tort defendant;
- the fee arrangement between the plaintiff and counsel; and,
- the overall fairness of the allocation of the costs as between the plaintiff and the accident benefits insurer and as between the plaintiff and the tort insurer.

The Court specifically noted that the costs allocated to counsel in a settlement disclosure notice as between the plaintiff and the accident benefits insurer should not necessarily determine the costs to be paid by the tort insurer in regards to pursuing the accident benefits claim.

Although the Court acknowledged the change in the statutory accident benefits dispute resolution process post April 1, 2016, namely in respect of the License Appeal Tribunal (“LAT”) lacking jurisdiction to award costs of pursuing a statutory accident benefits claim as a matter of course, the Court declined to comment on any effect of the procedural change on the recoverability of costs of the accident benefits claim in the tort action.

It would seem fair and reasonable that a degree of costs of the successful pursuit of a plaintiff’s statutory accident benefits claims, where such pursuit inures to the benefit of the tort defendant

by way of a deduction or assignment, ought to be borne by the benefiting tort defendant. That said, the issue gives rise to a number of questions that ought to be considered by counsel. For example, it appears that the argument may be raised that in carving out the powers of the LAT, the legislature decided that costs of pursuing the accident benefits claim are not generally recoverable, and seeking such recovery in the tort action amounts to an attempt to circumvent that legislative intent. As another example, the scale of the accident benefits claim costs to be awarded in the tort action (i.e. partial, substantial or full indemnity) must be considered, as well as the impact of any Rule 49 offers in the tort action that may potentially disentitle the plaintiff from recovering costs. How these issues might play out post *Cadieux* remains to be seen.[52]

What is clear is that the plaintiff will need to do more than simply assert that the defendant enjoyed a substantial benefit from the statutory accident benefits process and deduction or assignment. In supplemental reasons in *Cadieux*, the Court of Appeal indicated that they had previously set out a number of factors to be considered when determining the costs issue (as listed above), and emphasized consideration of whether the statutory accident benefits outcome was the result of particular risk, effort or expense, as opposed to a "slam dunk". The Court noted that the benefit to the defendant argument is not enough, as it would be a factor in any case. As the Court found that the parties did not make a serious effort to address the issue and the relevant factors in written submissions, no costs associated with the statutory accident benefits dispute resolution process were awarded in the tort action.[53]

Counsel will be well-advised to ensure that the court is provided with sufficient evidence addressing the factors set out by the Court of Appeal in *Cadieux*, with an emphasis of the risk courted and the work undertaken to procure the benefit(s).

[52] In *Cadieux*, the trial judge adopted the net approach with respect to handling the plaintiff's costs of pursuing his statutory accident benefits claim. As such, the record before the Court did not allow for an analysis with respect to the factors to be considered in awarding said costs in the tort action, and the matter was to be addressed in further written submissions from the parties.
[53] *Cadieux v. Cloutier*, 2019 ONCA 241 at paras 11-14.

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, for a time, the very different manner in which deductions for benefits received or available before trial were handled, as compared to the process for future benefits and the corresponding trust or assignment reimbursement process contemplated by the *Insurance Act*.

As it stands, in light of the recent developments with *Cadieux* and *Carroll*, we now have one consistent and relaxed approach to effect both a deduction of past collateral benefits paid and the imposition of a trust/assignment for future collateral benefits. [54]

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. As indicated, this issue is of even greater importance given the Court of Appeal's clarification that plaintiffs must assert claims on a gross basis, thereby eliminating an oft-used method of avoiding the impact of the split and deduct provision.

In terms of the trust/assignment mechanism as it relates to future collateral benefits, we have canvassed the evolution of the initially strict approach the courts had adopted in that regard to the more relaxed silo approach recently endorsed by a five member panel of the Court of Appeal. 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.

[54] It is noteworthy that leave to appeal to the SCC is being sought in *Cadieux*.

Lastly, we have canvassed some practical considerations and practice tips for dealing with collateral benefits from the outset of litigation through to trial.

It is submitted that careful attention should be paid to these issues, given the profound impact they can have on a plaintiff's recovery at trial. It is hoped that the above review of the many issues that arise in the collateral benefits/tort interface context will provide a useful resource for counsel engaged in such litigation.

APPENDIX "A":

Post-Verdict Considerations – Practical Notes

- The task of accounting for past and/or future collateral benefits pursuant to section 267.8 of the *Insurance Act* is the responsibility of the trial judge post-verdict, ideally before judgment is entered.

- Have collateral benefits that are to be the subject of a deduction or trust/assignment been proven during the course of trial? If not, the issue might need to be addressed by way of a post-verdict motion before the trial judge, with appropriate evidence to be adduced (by agreement between counsel or otherwise). 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.

- The plaintiff should ensure that he/she is in a position to prove the losses associated with the benefits received. This could be done by way of agreement between counsel, a simple exhibit setting out invoices/expenses, or otherwise.

- Evidence with respect to past and future collateral benefits should be adduced with regard to the silos (categories) dictated by section 267.8 of the *Insurance Act*.

- Counsel should remember to seek to an order 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.

- The issue of costs that the plaintiff incurred in pursuing his/her statutory accident benefits claim is likely to arise in the context of the costs of the tort action. While the issue is one for the trial judge to determine on a fact-specific basis, counsel should be mindful of the factors to be considered by the trial judge (as outlined in *Cadieux v. Cloutier*, 2018 ONCA 903 at para 132) and make submissions and elicit evidence accordingly.

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