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ARTICLE

New Appeals Clarify Interplay Between Collateral Benefits and Damages Awards in MVA Claims

BLG successfully acts for respondents on appeal

On December 4, 2018, the Ontario Court of Appeal released its reasons for decision in the companion appeals Carroll v. McEwen (*Carroll*)[1] and Cadieux v. Cloutier (*Cadieux*).[2]

Both appeals arose out of motor vehicle accident jury trials. These decisions provide clarity regarding how trial judges are to deduct and assign collateral benefit amounts when damages are awarded in a motor vehicle accident claim. This is welcome clarification for counsel and insurers involved in these claims.

There are at least three immediate impacts for insurers and personal injury lawyers flowing from the decisions in *Carroll* and *Cadieux*:

1. The decisions provide clarity regarding the SAB deduction, trust and assignment sections of the *Insurance Act*. They confirm that the decisions in *Bannon* and *Gilbert* are no longer good law given the Supreme Court of Canada's decision in *Gurniak v. Nordquist*, 2003 SCC 59, and crucially, the amendments to the *Insurance Act* that support a silo approach to deductions and assignments over the more strict "apples to apples" approach that grew out of the previous legislation.
2. The decisions will make it easier for insurers to secure deductions for SABs settlements made to plaintiffs prior to trial and to obtain assignments of available benefits after trial. There should be fewer disputes between counsel regarding the contents and specificity required of jury questions regarding heads of damages, and less focus on the timing of when SABs benefits were or will be paid to plaintiffs.
3. The decisions simplify the post-trial process and preclude unnecessary arguments about the deduction, trust, and assignment provisions of the *Insurance Act*. Prior to these decisions, several days of court time was often necessary to resolve the issue of appropriate deductions, trusts and assignments. The clarity provided in the *Carroll* and *Cadieux* decisions should streamline the post-trial process and facilitate agreement on many of the post-trial deductions to be applied and assignments to be made.

Kevin Nearing and Erin Durant of Borden Ladner Gervais acted for the successful respondents in *Carroll* — the defendant driver and vehicle owner — at both the Court of Appeal and at trial.

Background

The Ontario automobile insurance regime is complex. To situate the outcome of these appeals, some background is required.

In Ontario, plaintiffs who are injured in motor vehicle accidents are entitled to certain statutory accident benefits (SABs), which are paid for by their own insurers. Plaintiffs may also file civil suits against a negligent driver to recover damages as a result of their injuries. However, s. 267.8 of the *Insurance Act* is structured so that certain deductions, trust arrangements, and assignments can be made post-trial to ensure that the plaintiff does not obtain double recovery — that is, collect benefits under the statute for one type of loss and receive damages at trial for the same loss. The relevant provisions apply equally to SABs and other collateral benefits (such as medical benefits received under a private health insurance plan).

In order for the court to make the necessary post-trial orders to prevent double recovery, the trial judge is required to compare the types of damages awarded at trial with the amount of benefits received or available to the plaintiff. This exercise had become more complicated and cumbersome than the Legislature intended — not helped by the emergence of two competing judicial approaches addressing the matter.

The first approach, which is referred to as the "apples to apples" or "strict matching" approach, requires careful comparison of the exact type of benefit received and the justification for the damages awarded. For the former to be deducted from the latter, both needed to address the same specific losses incurred by the plaintiff—they must be strictly matched, both in terms of the type of loss and the timing of that loss. This approach is based on the Court of Appeal's decisions in *Bannon v. McNeely and Gilbert v. South.*[3]

More recently, Ontario courts applied a "silos" approach, which allowed deductions for SABs to the extent the tort award generally matched the broad corresponding SABs categories, or "silos" (see *Basandra v. Sforza).*[4] The three silos laid out in the *Insurance Act* are health care expenses, income replacement benefits, and other pecuniary loss (which includes lost educational benefits, expenses of visitors, and housekeeping and home maintenance expenses). The silos approach means that benefits received for health care expenses, for example, can offset any damages awarded at trial for health care related losses.

The Court of Appeal most recently addressed this issue in *Cobb v. Long Estate* (*Cobb*) and *El-Khodr v. Lackie* (*El-Khodr*)[5], the subject of an earlier BLG bulletin that assessed the competing approaches, but given the facts at play, left the "specific question as to whether *Bannon* and *Gilbert* remain good law for another day."[6] In light of the Court of Appeal's reasoning in *Cobb* and *El-Khodr,* a request was made in the *Cadieux* appeal for the court to consider whether the decisions of *Bannon* and *Gilbert* remained good law. Accordingly, a five judge panel was struck to determine the issue and provide clarity in the law. That panel heard both appeals. The *Cadieux* appeal dealt with the deduction of SABs received before trial from the tort award, while the *Carroll* appeal considered the assignment of future SABs to the tort liability insurer.

The *Cadieux* Appeal

The main plaintiff in *Cadieux* was a pedestrian who was involved in an altercation at or near the shoulder of a road. The defendant, Saywell, pushed the plaintiff towards the road, causing him to stumble into the path of a truck driven by the defendant driver. The plaintiff suffered significant injuries as a result.

Prior to trial, the plaintiff settled his available SABs with his insurer for $900,000, consisting of $300,000 for past and future income replacement benefits, $250,000 for past and future medical benefits, and $350,000 for past and future attendant care benefits. The plaintiff also settled with the liability insurer for the driver of the truck for $500,000 through a Pierringer Agreement. Most of these funds were put into a structured settlement; some

were used to buy a house wherein the plaintiff could reside with his father (his caregiver).

The plaintiff then proceeded to trial against the defendant, Saywell, for his several liability. After a seven-week trial, the jury granted judgment for the plaintiff in the amount of $2,309,413. The jury apportioned liability equally between the plaintiff, the defendant Saywell, and the defendant truck driver. Subject to applicable deductions, the plaintiff was entitled to recover from Saywell one-third of the damages from the tort action. The trial judge was asked to determine the extent to which the $900,000 accident benefits settlement could be deducted from the jury's award for loss of income and future pecuniary damages (only future costs of care were sought and awarded at trial).

The trial judge adopted the silo approach and found that all health care benefits should be deducted from the overall jury award. The Court of Appeal agreed. It found that, until the decisions in *Cobb* and *El-Khodr*, the treatment of accident benefits in the case law largely failed to take into account the different statutory schemes that had been in place at various times throughout the evolution of the applicable jurisprudence. The policy rationales that previously supported a strict matching approach — for example, that the damages award would be reduced by the amount of any possible future benefits (as opposed to those benefits, *once received*, being assigned to those who have already paid) — were no longer raised by the current legislative regime. Instead, a silo approach, based on the the three broad categories of SABs under the *Insurance Act* and the *Statutory Accident Benefits Schedule*, should apply to both the deduction and the assignment of SABs.

The Court of Appeal agreed with MacFarland J.A, in *El-Khodr,* that the language of the current provisions in the *Insurance Act* does not support matching at a more particular level than the three silos of income loss, health care expenses, and other pecuniary loss. Bearing in mind the principle that the plaintiff should be entitled to full compensation for the loss incurred "but no more"[7], the Court held that a matching of the damage award to the corresponding silo accomplishes that goal. The Court found that the strict matching approach unnecessarily complicates tort actions by focusing on "immaterial distinctions or labels for heads of damages"[8] and requires courts to undertake what the Supreme Court of Canada has referred to as a "complicated and cumbersome process of matching a head of damage in tort to a particular claim for damages under a statutory regime."[9] The Court instructed plaintiffs to present their claims at trial on a gross basis, rather than net of SABs, so that the proper deductions can take place after trial.

The *Carroll* Appeal

The plaintiffs in *Carroll* appealed a trial judge ruling that granted the defendant insurer a conditional assignment upon payment of the judgment.[10] The *Carroll* case arose out of a pedestrian-motor vehicle accident in a township near Ottawa that left the plaintiff with significant injuries. After a seven-week trial, a jury found the defendants to be 62 per cent responsible for the accident and accordingly awarded damages in the amount of $2,610,774.32 — $2,232,000 being for future care costs.

A conditional assignment of future benefit amounts to the defendant insurer was granted at trial. The assignment was conditional upon payment of the full award by the insurer. If the insurer agreed to pay the full award, it could recover the assigned future accident benefits from the plaintiff to address losses that were already contemplated by the jury's decision. Even though the amount of the award exceeded the available $2 million insurance limit, the insurer could potentially reduce its overall liability to less than $2 million if the future assigned amounts are greater than the amount paid in excess of $2 million following the trial.

The appellants appealed the conditional assignment on the basis that it violated the matching principles outlined in *Gilbert* and that the conditional assignment order was premature since the judgment had not been paid when the order was issued (*i.e.*, the appellants argued that the insurers had to pay the judgment in full before they could seek an order for an assignment), even though they refused to advise how much had been paid in benefits following the trial.

The Court of Appeal in *Carroll* confirmed that the silo approach applies equally in cases involving the assignment of future benefits. The Court found that there is no principled or technical reason why a different matching regime should apply to SABs received before and after trial. The Court reiterated that both *Bannon* and *Gilbert* should be overruled to the extent they are inconsistent with the silo approach as:

The current statutory trust and assignment provisions make it unnecessary to require strict proof of entitlement to future benefits. They pass no risk of under-compensation to a plaintiff. The benefits are assigned or held in trust as and when they are received until such time as the defendant or its insurer has been reimbursed for payments made under the judgment in respect of the particular "silo".[11]

In other words, one of the prior policy justifications for the strict matching approach — that under a previous version of the statute a plaintiff could see an award reduced by the amount of only hypothetical benefits — was no longer pertinent. The current provisions allow a Court to make an assignment that bears fruit for a paying defendant only when those benefits are actually received by the plaintiff.

The Court of Appeal also found that the trial judge did not err by making a premature assignment order. The appellants based that argument on a section of the *Insurance Act* that authorizes a trial judge to assign SABs to the defendants or the defendants' insurers from a "plaintiff who recovered damages in the action". As the defendants had not paid the full amount of the judgment by the conclusion of the trial, the appellants argued that they had not yet "recovered damages in the action".

The Court of Appeal found that making an assignment order contingent on the damages having already been paid is impractical and would result in unnecessary post-trial motions. The Court of Appeal also found that the conditional assignment order that was made by the trial judge in this case had been frustrated and devalued as a result of the plaintiffs' appeal and certain positions taken by counsel for the plaintiffs on the appeal. As a result, the Court amended the assignment order to require the plaintiff to disclose to the defendants the amounts received by way of SABs since the trial. Those benefits were to be included in the assignment, regardless of the timing of the defendant paying the award in the circumstances of this case.

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1 2018 ONCA 902.

2 2018 ONCA 903.

3 (1998), 38 O.R. (3d) 659 (C.A.) and 2015 ONCA 712.

4 2016 ONCA 251.

5 2017 ONCA 717 and 2017 ONCA 716.

6 2017 ONCA 716, at para. 37.

7 *supra* note ii, at para. 86.

8 *ibid.*, at para. 87.

9 *ibid.*, at para. 87; *Gurniak v. Nordquist*, SCC 59, at para. 45.

10 The plaintiff in *Carroll* also sought leave to appeal the costs award at trial, which had been reduced as a result of litigation conduct. The Court of Appeal denied leave to appeal the costs award.

11 *supra* note i, at para. 39.

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