Court Of Appeal Clarifies Deduction And Assignment Of Statutory Accident Benefits In Motor Vehicle Accident Litigation

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Overview

The Ontario Court of Appeal released its decisions in *El-Khodr v. Lackie* and *Cobb v. Long Estate* together on September 19, 2017. These were appeals from decisions rendered after jury verdicts on damages from motor vehicle accidents.

The Court of Appeal considered the circumstances in which statutory accident benefits can be deducted from jury awards or assigned to the defendant after trial. The trial judge in *El-Khodr* followed prior Court of Appeal jurisprudence in *Bannon v. McNeely* and *Gilbert v. South* to find that section 267.8 of the *Insurance Act* required strict matching in order for the defendant to benefit from either a deduction or an assignment.

The Court of Appeal relaxed the strict matching test. Rather, it found that when interpreting section 267.8 of the *Insurance Act*, trial judges should consider whether "the pre-trial benefit received generally fits within one of the broad statutory categories of damages" such as income loss or health care, rather than match specific heads of damages with specific benefits such as physiotherapy with physiotherapy. Further, the Court found that in respect of deductions, the *Insurance Act* does not distinguish between past and future losses and, in fact, whether the loss was past or future is irrelevant for deductibility. Further, the Court of Appeal found that *Bannon* may no longer be good law in the province of Ontario and that the decision in *Gilbert* did not apply to facts at issue in these decisions.

The following will highlight the practical impact of this approach on deductibility and assignment.

Deduction from Jury Award for Accident Benefits Received (*Cobb*)

In *Cobb*, the issue before the Court of Appeal was the extent to which the statutory accident benefits that the plaintiff had received were deductible from the jury's award for damages. The plaintiff in *Cobb* received the following before trial:

1. $29,300 in income replacement benefits;
2. $9,150 in housekeeping/home maintenance benefits; and
3. $152,000 in settlement of his accident benefits claim:
    1. $130,000 for income replacement benefits (past and future);
    2. $20,000 for medical benefits; and
    3. $2,000 for costs.

At trial, the jury awarded the plaintiff the following for income loss, housekeeping and future care:

1. Past Income Loss — $50,000
2. Future Income Loss — $100,000
3. Past Housekeeping — $5,000
4. Future Housekeeping — $10,000
5. Future care — $0

The trial judge reduced the loss of income award to $0 on the basis that the $150,000 awarded by the jury was less than the $159,300 received on account of income replacement benefits. With respect to the housekeeping claim, however, the trial judge reduced the past housekeeping award ($5,000) but did not deduct the remaining $4,150 received in past housekeeping/home maintenance from the jury's future housekeeping award.

The Court of Appeal considered the application section 267.8 of the *Insurance Act* which sets out the circumstances in which statutory accident benefits can be deducted from tort awards. It found that the trial judge was correct in reducing the past and future income loss award made by the jury to zero, but that he should have also deducted the remaining $4,150 from the future housekeeping award such that the total award for future housekeeping was reduced to $5,850.

Assignment of Future Benefits

In *El-Khodr*, the plaintiff was catastrophically impaired and evidence about the statutory accident benefits available for the remainder of the plaintiff's life was led at trial. The jury awarded the following damages to the plaintiff for future care:

Future Care Costs:

Attendant Care Costs/Assisted Living:	$1,450,000
Professional Services (Physiotherapy, Psychology, etc.):	$424,550
Housekeeping and Home Maintenance:	$133,000
Medication and Assistive Devices:	$82,429

Following the jury's verdict, the trial judge found that the defendant was not entitled to the assignment of future accident benefits in relation to professional services or for medication and assistive devices. The trial judge reasoned that the verdict sheet had not required the jury to specify awards under various subheadings such as for physiotherapy, psychology, or make separate awards for medication and assistive devices. As a result, the trial judge found the defendants could not meet their onus to show that they were deducting "apples from apples".

The Court of Appeal disagreed. The Court found that the strict matching requirement as applied by the trial judge was not required by s. 267.8 of the *Insurance Act*. In this case, which involved a catastrophically impaired plaintiff, the provisions permitting the assignment of future health care benefits should be given effect as there is little risk that the plaintiff will suffer any loss: the plaintiff will have been compensated by the tort award and will not be worse off in the event that accident benefit insurer denies coverage in the future.

Practical Tips

With these decisions the Court of Appeal is encouraging trial judges to take a broader approach to determining the deductibility and assignment of statutory accident benefits. Additionally, the Court of Appeal distinguished earlier decisions which required strict matching (*Bannon* and *Gilbert*) and specifically questioned whether those decisions remained good law, without going as far as explicitly overruling them. The application of the broader approach to determining deductibility and assignment set out in these decisions to cases which involve non-catastrophically impaired plaintiffs or those who have not settled their accident benefit claim was not explicitly decided, and may be more complex.

The Court of Appeal, however, cautioned plaintiffs' counsel against lumping together claims with a view to making it difficult to match tort awards with accident benefit awards. In particular, the Court stated that future plaintiffs **should** structure their claims according to the broad categories of s. 267.8 of the *Insurance Act*, namely:

1. a claim for past and future income losses,
2. a claim for past and future health care expenses;
3. a claim for other past and future pecuniary losses that have SABs coverage; and
4. a separate claim for any past and future pecuniary losses that lack SABs coverage.

Conclusion

These Court of Appeal decisions build on the more relaxed approach to deductibility used in its 2016 decision in *Basandra v. Sforza*, and emphasize the importance of considering broad categories, or silos, such as health care rather than each individual health care benefit. Subject to a successful Application for Leave to Appeal to the Supreme Court of Canada, these decisions should reduce the need for complex post-trial motions and encourage plaintiffs to consider the availability of statutory accident benefits when evaluating settlement offers.

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