

Noteworthy

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Deductibility of Future Collateral Benefits: Two Helpful Decisions for the Defence

While it has long been understood that Defendants in motor vehicle accident cases are entitled to a deduction for collateral benefits (past and future), in recent years case law has limited the availability of these deductions. However, two recent decisions have clarified the law in a significant manner.

1. Mikolic v. Tanguay et al 2015 ONSC 71 (Div. Ct.)

In this decision the Divisional Court allowed the appeal from a Trial Judgment, in a situation in which the Trial Judge had refused to permit deductions to be made. The Trial Judge refused to deduct Statutory Accident Benefits (SABS) with respect to both income loss and future care costs. At issue was the interpretation of Sections 267.8(1) and (4) of the Insurance Act.

The Divisional Court acknowledged that the onus rested with the Defendant to prove that any collateral benefits payment clearly falls within the statutory definition and that deductibility will not result in under-compensation of the Plaintiff. Of significance was the fact that the Plaintiff had settled the claim against the SABS insurer and the Settlement Disclosure Notice provided a breakdown as to the settlement. The Plaintiff however argued that the Settlement Disclosure Notice provided only a "notional breakdown" of benefits.

While the Divisional Court acknowledged a number of previous decisions, it noted that the language of the current statute had been changed. Accordingly, it was necessary to look at the specific wording of Sections 267.8(1) and (4).

Section 267.8(1) indicated that while the amount paid for income replacement benefits must be matched against income losses in tort, the section did not differentiate between amounts received for past income replacement benefits and for future income replacement benefits. It was therefore only necessary for the Defendant to establish the amount of the deduction and establish that the deduction should properly be made from the global award for loss of income.

Accordingly, the Trial Judge had erred in law in holding that the Defendant was required to prove what portion of the \$77,500.00 amount constituted a payment for future benefits.

The Divisional Court also rejected the Plaintiff's argument that the Settlement Disclosure Notice only provided a "notional" allocation of payments. Having acknowledged that \$77,500.00 was being allocated to income replacement benefits, past and future, it was appropriate to deduct this amount from

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the global award of income loss made in the tort action.

A similar analysis was conducted with respect to the award for future care costs. Section 267.8(4) provided that any Statutory Accident Benefits a Plaintiff had received for health care should be deducted from the jury's award in relation to damages for "expenses that have been incurred or will be incurred for health care". As the Settlement Disclosure Notice made it clear that the Plaintiff had settled his claim for "all past and future medical benefits" for \$37,500.00, this amount was to be deducted from the jury award of \$15,000.00 for future care costs.

2. Siddiqui v. Siddiqui 2015 ONSC 6260 (Trimble, J.)

In this case the jury awarded the Plaintiff \$425,000.00 for future medical and rehabilitation costs and \$50,000.00 for future personal/attendant care costs, in addition to various other heads of damage. Pursuant to a Settlement Disclosure Notice, the claim against the AB insurer had been settled for an amount in excess of \$1.4 million; of this amount \$443,672.00 was "for all past and future medical benefits", while the sum of \$533,575.00 was "for all past and future attendant care benefits".

While Justice Trimble referred to many of the cases cited in the Divisional Court decision in Mikolic, at the time he released his decision he only had the benefit of the Trial Judgment in Mikolic, as the Divisional Court decision was then under reserve.

Justice Trimble agreed that the onus of establishing deductibility rested with the Defendant. He

made reference to Section 267.8 (4) of the Insurance Act, which dealt specifically with health care expenses.

Evidence was led regarding deductibility from a representative of the AB insurer, who had negotiated the settlement. Although the Settlement Disclosure Notice did not have any number placed under the heading "rehabilitation benefits", the evidence was that the insurer had combined the medical benefit and rehabilitation benefit amounts into one total and placed it under "medical benefits", because those two benefits were subject to the same combined limit of \$1 million. Accordingly, Justice Trimble found that the Plaintiff's representative knew that the amount shown in the Settlement Disclosure Notice as being paid for "medical benefits" was in fact a combined amount for medical and rehabilitation benefits.

While Justice Trimble agreed that there needed to be subject matter matching between the jury award and the settlement of the SABS claim, i.e. apples to apples, he rejected the arguments put forward by the Plaintiff as to the specificity of that matching. In his view, the "only reasonable, practical and workable subject matter matching is matching by category".

Accordingly, Justice Trimble permitted the deduction of the SABS settlement amount for medical benefits from the jury's award for future medical and rehabilitation needs. Exact matching was not required; it was sufficient that the SABS benefit paid be "akin" to the award made by the jury. The Plaintiff conceded that there was subject matching with respect to the jury award of \$50,000.00 for future personal care costs and

therefore deductibility was permitted.

Another interesting point raised in the Siddiqui decision was the entitlement to a deduction for legal costs incurred by the Plaintiff in settling the claim against the AB insurer. Justice Trimble acknowledged that a decision on this issue was "fact driven, dependent on the circumstances of the case", as discussed in previous cases. He held that the onus rested with the Defendant to prove that the actual legal fees incurred ought not to be deducted (rather than the amount paid by the AB insurer for legal costs, as outlined in the Settlement Disclosure Notice).

In the result Justice Trimble felt it was appropriate that the amount of the SABS settlement to be deducted from the jury award for each of the two categories in question should be reduced by a pro rata share of the legal fees incurred in obtaining the SABS settlement.

Conclusion

While it is safe to say that we have not yet heard the final word on deductibility of benefits, the cases referenced above should make it easier for Defendants to obtain a deduction for the payment of certain collateral benefits. However, it must be remembered that the onus of establishing deductibility rests with the Defendant.

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Recent Threshold decisions

Below are short notes about 4 recent threshold decisions.

1) In *Bruff-Murphy v. Gunawardena*, Justice Kane finds that the plaintiff's injuries meet the threshold. The Jury awards general damages of \$23,500 and dismisses all of the other claims.

The plaintiff, among other things, complained of soft tissue injuries, major depressive disorder that was "moderate" at the time of trial, post-traumatic stress disorder; and a pain disorder as a result of the October 2008 mva.

The defendant acknowledged that the plaintiff suffered uncomplicated muscle strain injuries to the neck, the right shoulder area, mid back and lower back regions in the mva, from which she has fully recovered. The defendant argued that her complaints from the accident were related to the same conditions she reported many years before October 2008 and were not caused by the mva .

Justice Kane found that one defence medical expert's evidence lacked relevance, while the second expert lacked credibility and decided that the threshold did not apply despite the jury clearly having a contrary view of the case as they awarded the plaintiff "nominal general damages" of \$23,500. Justice Kane makes a point of saying that there can be injuries even if you can't see them. She goes on to indicate that this appears to be the reason defendants select trial by jury, in the hope a jury might accept such an "outdated argument".

Justice Kane found that the evidence of the plaintiff as to her injuries, level of symptoms and limitations were corroborated by her health care providers including some of their testing for veracity. She further notes that such evidence is further corroborated by her husband and her friends. Justice Kane comments that the plaintiff's credibility was bolstered by this supporting evidence.

Again, while Justice Kane found that the plaintiff's claim breached the threshold, the jury's award suggests that they had a different view of the claim than Justice Kane.

2) In *Dimopoulos v. Imad Tafaso Mustafa*, Justice Tzimas finds that the plaintiff's injuries meet the threshold. The Jury awards general damages of \$37,000 and future chiropractic care of \$30,000.

Justice Tzimas concluded that "Mr. Dimopoulos satisfies the statutory requirements and has suffered a permanent serious impairment of important physical functions. The evidence before the court supports the conclusion that the injuries Mr. Dimopoulos sustained resulted in permanent impairment. The impairment is serious as it includes constant pain that fluctuates in intensity, the inability to sleep through the night because of the pain, and a complete change in Mr. Dimopoulos' overall disposition from being totally healthy and 'happy-go-lucky', to being in constant pain, being argumentative and withdrawing from social and family activities. These circumstances, in Mr. Dimopoulos' case makes the impairments important."

Justice Tzimas preferred the expert medical evidence of the plaintiff's orthopaedic surgeon, Dr. Wil-

son, to that of the defence expert, Dr. Cameron,.

Justice Tzimas was not impressed by the surveillance evidence, and found the plaintiff credible. In respect of the latter, she noted, as another judge has done recently, (see the post on the Bruff-Murphy decision), that the S.C.C. has recognized that someone complaining of chronic pain may not have objective symptoms. She also did not think that evidence relating to income tax reporting issues was significant in this case.

3) In *Wheeler-Ellesworth v. Rawlins*, Justice LeMay finds that the plaintiff's injuries do not meet the threshold. The Jury awards general damages of \$10,000 and dismisses all of the other claims.

Justice LeMay found the plaintiff's diagnosed injuries, including chronic pain disorder and fibromyalgia, did not meet the threshold.

Justice LeMay considered the jury's nominal award as one of a number of factors she considered in arriving at her conclusion that the plaintiff's claim did not meet threshold. Justice LeMay, while finding the plaintiff credible, found that the plaintiff failed to prove the alleged injuries were related to the mva. In so doing, Justice LeMay preferred the expert medical evidence of Dr. Rajka Soric, and was influenced by the plaintiff's pre-accident medical history.

4) In *Parra v. Laczko*, Justice Sproat finds that the plaintiff's injuries meet the threshold. The Jury awards general damages of \$10,000, future medical rehabilitation costs of \$5,000 and dismisses

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the claims for income and future housekeeping.

Justice Sproat found that "the weight of the non-expert evidence, however, strongly supports the conclusion Ms. Parra's chronic pain, which developed into chronic

pain syndrome, was caused by the accident."

The defence relied on Dr. Debow, psychologist. Justice Sproat placed no weight on Dr. Debow's evidence and concluded "that he was an advocate for the defence".

With respect to the threshold, defence counsel conceded that the chronic pain syndrome would be considered a permanent impairment. Justice Sproat was also satisfied that Ms. Parra's chronic pain syndrome substantially interfered with Ms. Parra's ability to continue her regular employment.

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