# COURT OF APPEAL FOR ONTARIO

CITATION: Cobb v. Long Estate, 2017 ONCA 717
DATE: 20170919
DOCKET: C61467, C61471, M47419

Doherty, MacFarland and Rouleau JJ.A.

BETWEEN

C61467

Wade Brett Cobb, Erica Mae Cobb and James Wade Cobb,
a minor by his Litigation Guardian, Erica Mae Cobb

Plaintiffs
(Respondents)

and

The Estate of Martin T. Long

Defendant
(Appellant)

AND BETWEEN

C61471

Wade Brett Cobb, Erica Mae Cobb and James Wade Cobb,
a minor by his Litigation Guardian, Erica Mae Cobb

Plaintiffs
(Appellants)

- and -

The Estate of Martin T. Long

Defendant
(Respondent)

Chris G. Paliare and Tina H. Lie, for The Estate of Martin T. Long

Allan Rouben and Kris Bonn, for Wade Brett Cobb, Erica Mae Cobb and James Wade Cobb, a minor by his Litigation Guardian, Erica Mae Cobb

Heard: April 3, 2017

On appeal from the judgment of Justice Douglas M. Belch of the Superior Court of Justice, sitting with a jury, dated November 25, 2015, with reasons reported at 2015 ONSC 6799 and at 2015 ONSC 7373, and the costs judgment by the same judge dated December 23, 2015, with reasons reported at 2015 ONSC 7373.



**MacFarland J.A.**:

[1] These appeals arise from the judgment of Justice Douglas M. Belch of the Superior Court of Justice, dated November 25, 2015, sitting with a jury, and, if leave be granted, from the accompanying costs judgment dated December 23, 2015. They were heard together with the appeal in *El-Khodr v. Lackie*, 2017 ONCA 716 because these cases raise common issues regarding the regime in Part VI of the *Insurance Act*, R.S.O. 1990, c. I.8 for the treatment of statutory accident benefits ("SABs") in the calculation of damages arising from motor vehicle accidents. They also raise a common issue regarding the applicable rate of prejudgment interest under the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The reasons for judgment in this appeal are being released concurrently with the reasons for judgment in *El-Khodr*.

[2] In the *Cobb* appeals, because separate appeals were instituted by the parties, I propose to refer to them as "the plaintiffs" and "the defendant" in order to avoid any confusion that might arise from referring to each party according to

its role in each appeal. When I refer to “the plaintiff” in the singular, I refer to Wade Cobb, the primary victim of the accident.

[3] At the outset of the hearing, the defendant moved to have this court hear its appeal even though it was not within the monetary jurisdiction of this court pursuant to s. 6(2) of the *Courts of Justice Act*. The plaintiffs consented to the motion. The court was satisfied on hearing the submissions of counsel that it has jurisdiction to hear both appeals.



## A. BACKGROUND

### (1) The Claims of Wade Cobb and His Family against Long’s Estate

[4] On July 8, 2008, the vehicles driven by Martin T. Long and the plaintiff, Wade Cobb, collided. Long was charged with operating a motor vehicle while impaired or “over 80” (*Criminal Code*, R.S.C., 1985, c. C-46, s. 253(1)), to which charge he pleaded guilty in August 2009. He was sentenced to a fine of $1,300 and a one-year driving prohibition. Mr. Long died before the trial of the civil action, so his estate became the defendant in this litigation.

[5] In December 2009, the plaintiffs brought this action in negligence and gross negligence, claiming $2.35 million in compensatory damages and $3 million in punitive damages. The trial took place over the course of 19 days in the fall of 2015. The jury awarded $220,000 in compensatory damages. After deducting amounts pursuant to the *Insurance Act* for collateral benefits that Wade Cobb had received from his insurer and for the statutory deductible for

general damages (i.e., damages for “non-pecuniary” losses, such as “pain and suffering” and “loss of amenity”), the trial judge calculated a final judgment amount of $34,000.

[6] At trial, liability for the motor vehicle collision was not seriously in contention. However, the defendant refused to admit liability formally because the plaintiffs had refused to limit their monetary claims to the defendant’s liability insurance policy limit. Over the course of the 19-day trial, the plaintiffs called 28 witnesses, the defendant two.

[7] The real issue dividing the parties was the quantum of damages to which the plaintiff, Wade Cobb, was entitled. The other two plaintiffs had relatively minor claims for compensation pursuant to Part V of the *Family Law Act*, R.S.O. 1990, c. F.3.

[8] By the time of trial, Mr. Cobb’s injuries would be described as soft tissue in nature, resulting in chronic pain, such that he claimed to be permanently disabled and unable to resume either his pre-accident employment in the contracting field or any other meaningful employment.

**(2) The Jury’s Verdict**

[9] Before the jury, the plaintiffs sought damages in the following amounts:

| | | |
|---|---|---|
| General Damages | : | $150,000 |

| | | |
|---|---|---|
| Past Lost Income | : | $178,136 |
| Future Loss of Income | : | $528,000 to $910,000 |
| Past Housekeeping Loss | : | $21,000 |
| Future Housekeeping Loss | : | $82,280 |
| Family Law Act Damages | : | $45,000 |
| | | $1,004,416 - $1,386,416 |

[10] The jury awarded:

| | | |
|---|---|---|
| General Damages | : | $50,000 |
| Past Lost Income | : | $50,000 |
| Future Loss of Income | : | $100,000 |
| Past Housekeeping Loss | : | $5,000 |
| Future Housekeeping Loss | : | $10,000 |
| *Family Law Act* Damages | : | $5,000 |
| Total: | | $220,000 |

[11] The trial judge rejected the plaintiff's request to put the question of punitive damages to the jury. The plaintiff alleged this was a proper case for that question

to go to the jury because of Mr. Long's drinking and driving conviction arising from the accident and the fact that Mr. Long had an earlier conviction for a similar offence.



**(3) The Trial Judge's Deductions from the Jury's Award**

[12] Following receipt of the jury's verdict, the defendant brought a motion to settle the judgment. The trial judge's reasons on this motion are reported at 2015 ONSC 6799. Mr. Cobb had received collateral benefits from his SABs insurer in the following amounts:

Up to June 29, 2010:

| | | |
|---|---|---|
| $29,300 | : | income replacement benefits |
| $9,150 | : | housekeeping and home maintenance benefits ("HKHM") |

On June 29, 2010:

| | | |
|---|---|---|
| $152,000 | : | apportioned as $130,000 in income replacement benefits, $20,000 in medical benefits and $2,000 in costs, as part of a global settlement. |

[13] From the jury's award for past and future income losses, which totalled $150,000, the trial judge deducted the sum of $159,300 that the plaintiffs had

received before trial in SABs for income replacement benefits. This sum was comprised of $29,300 received before the settlement of June 29, 2010 and the $130,000 portion of that settlement apportioned to “all past and future income replacement benefits”. This deduction resulted in a net award of zero for the loss of past and future income.

[14] The trial judge did not determine whether the amendment in s. 258.3(8.1) of the *Act*, which came into force on January 1, 2015, and which reduced the default rate of prejudgment interest for non-pecuniary losses for bodily injury or death from five percent to the bank rate at the time the proceeding was commenced (here, .5 percent), applied retrospectively. Instead, the trial judge exercised his discretion pursuant to s. 130 of the *Courts of Justice Act* and set the prejudgment interest rate at three percent.

[15] The plaintiff had received $9,150 in HKHM benefits before trial from his SABs insurer. Accordingly, the trial judge reduced the jury’s award of $5,000 for past HKHM expenses to zero. However, the trial judge refused to apply the remaining $4,150 in HKHM benefits that the plaintiff had received before the trial to the amount that the jury had awarded for future housekeeping loss, maintaining that award at $10,000.

[16] Effective August 1, 2015, the statutory deductible applicable to an award for non-pecuniary damages increased from $30,000 to $36,540 through an

amendment to s. 5.1(1) of the regulation entitled *Court Proceedings for Automobile Accidents that Occur on or After November 1, 1996*, O. Reg. 461/96.

[17] The trial judge concluded that the change to the regulation was "substantive", as opposed to "procedural", and, accordingly, should not be applied retrospectively to this action. He applied a deductible of $30,000, leaving a net general damage award of $20,000.

[18] The final judgment of $34,000 was made up as follows:

| | | |
|---|---|---|
| General Damages | : | $20,000 |
| Future Housekeeping Loss | : | $10,000 |
| Pre-Judgment Interest (3%) | : | $4,000 |
| Total: | | $34,000 |

**(4) The Trial Judge's Decision on Costs of the Action**

[19] The final issue the trial judge determined was the costs of the action, where, despite the relatively small recovery, the trial judge awarded the plaintiff costs of the action on a partial indemnity scale in the sum of $409,098.48, allocated as follows:

| | | |
|---|---|---|
| Legal Fees | : | $250,000 |
| HST | : | $32,500 |

| | | |
|---|---|---|
| Disbursements | : | $126,598.48 |
| Total: | | $409,098.48 |



[20] In his reasons on costs, the trial judge addressed whether the amendment to s. 267.5(9) of the *Insurance Act* that came into force on August 1, 2015 should apply to this action. Until July 31, 2015, under s. 267.5(9) and this court's decision in *Rider v. Dydyk*, 2007 ONCA 687, 87 O.R (3d) 507, the court was not to consider the statutory deductible in determining entitlement to costs. Effective August 1, 2015, however, s. 267.5(9) was amended so that entitlement to costs was to be determined "with regard" to the statutory deductible. The difference here was significant, because of a defence settlement offer made March 13, 2014.

[21] In reasons for judgment dated December 23, 2015 and reported at 2015 ONSC 7373, the trial judge determined that he "would not give the *Insurance Act* amendments retroactive application". He added, however, that if he was wrong in that determination, he would exercise his discretion and order that each side bear its own costs.

## B. ISSUES ON APPEAL

[22] The plaintiffs raise three grounds of appeal:

1. Did the trial judge err by deducting, pursuant to s. 267.8(1) of the *Insurance Act*, the amounts allocated to income replacement benefits in the SABs settlement from the jury awards for past and future income loss?
2. Did the trial judge err in refusing to put the question of punitive damages to the jury?
3. Did the trial judge err in his determination of prejudgment interest?

[23] The defendant also raises three grounds of appeal:

1. Did the trial judge err by failing to deduct the full amount of the HKHM benefits received by the plaintiff before the trial from the damages awarded for the housekeeping loss?
2. Did the trial judge err in applying the statutory deductible in force prior to August 1, 2015 ($30,000) rather than the statutory deductible in force at the time of judgment ($36,540)?
3. Did the trial judge err in his assessment of costs?

## C. PLAINTIFFS' APPEAL

### (1) Issue One: Did the trial judge err by deducting the amounts allocated to income replacement benefits in the SABs settlement from the jury awards for past and future income loss under s. 267.8(1)?

#### (a) Introduction

[24] At trial, the jury awarded to the plaintiff $50,000 in damages for past loss of income and $100,000 in damages for future loss of income. The trial judge determined that the plaintiff had received $159,300 in respect of income replacement SABs before trial, treated the two awards for income loss as one award of $150,000 for the purpose of deducting SABs, and thereby reduced the damages for income loss to nil.

[25] There is no dispute about the amounts paid by the plaintiff's SABs insurer to him prior to the trial. Up until June 29, 2010, the plaintiff had received $29,300 in income replacement benefits. On that day, he entered into a final settlement agreement with his SABs insurer whereby he finally settled all his claims for statutory accident benefits. According to the Settlement Disclosure Notice, which document the plaintiff, by his signature, acknowledged having received and read on June 29, 2010, the settlement sum of $152,000 was attributed as follows:

> OFFER TO SETTLE INCOME REPLACEMENT BENEFITS
>
> You have been offered $130,000 for all past and future income replacement benefits.
>
> OFFER TO SETTLE MEDICAL BENEFITS

> You have been offered $20,000 for all past and future medical benefits.
>
> OFFER TO SETTLE ANY OTHER ITEMS
>
> You have been offered $2,000 for other items.

[26] The settlement was finalized on this basis and the amounts reflected in the Settlement Disclosure Notice were paid accordingly. The plaintiff was represented by counsel (not appellate counsel) at the time the settlement was negotiated and that counsel was alive to the deductibility aspects of the settlement.

[27] The plaintiff argues that the defendant has the onus of proof – a strict onus – to establish how much of the settlement related to past lost income and how much related to future loss of income and whether any of the settlement monies may have related to a somewhat vague claim for punitive damages. He contends that this strict onus is not met and no amount of settlement monies recovered by him should be deducted from the jury's award.

[28] Of course in this case, there is no issue raised about any future entitlement to SABs. Any such entitlement was finally settled by the June 29, 2010 settlement.

[29] The statutory provision that governs this issue is s. 267.8(1) of the *Insurance Act*. The relevant portion of that provision's text is as follows:

> **267.8** (1) In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, the damages to which a

> plaintiff is entitled for income loss and loss of earning capacity shall be reduced by the following amounts:
>
> 1. All payments in respect of the incident that the plaintiff has received or that were available before the trial of the action for statutory accident benefits in respect of the income loss and loss of earning capacity.

[30] The issue for this court is what amount, if any, of the $130,000 that the SABs insurer paid in settlement of "all past and future income replacement benefits" is deductible from the amounts that the jury awarded for past loss income and for future loss of income.

[31] The defendant says that the issue is a question of fact: did the defendant satisfy its onus of establishing that the $130,000 allocated in the settlement to past and future income replacement benefits constituted "statutory accident benefits in respect of the income loss and loss of earning capacity" received by the plaintiff before the trial under s. 267.8(1)?

[32] The plaintiffs impugn the trial judge's decision to deduct the full $130,000 from the jury's awards for past and future income loss on two grounds. First, they argue that the $130,000 in the settlement was not deductible from the jury's verdict because the defendant did not satisfy the applicable standard of proof. Second, the plaintiffs interpret this court's decision in *Bannon v. McNeely* (1998), 38 O.R. (3d) 659 to require separate treatment of damages and SABs for past income losses and of damages and SABs for future income losses for the purpose of deducting SABs from damages.

### (b) The allegation of compensation for "bad faith"

[33] The thrust of the plaintiffs' first argument is that the settlement with the SABs insurer is not deductible from the jury's verdict because the settlement may have included an unspecified amount settling a claim for "damages for bad faith" in addition to the plaintiff's SAB entitlements.

[34] In support of their allegation that the settlement may have included compensation for a claim of "bad faith", the plaintiffs rely on the language of the Release that the plaintiff signed as a condition of obtaining the settlement funds. The Release states that it covers not only the plaintiff's SAB entitlements but also "ALL claims for damages including, but not limited to, aggravated, exemplary and punitive damages or damages for alleged bad faith arising as a consequence of the accident and/or the handling of any claims by or on behalf of [the SABs insurer]".

[35] I agree with the defendant that the attribution of the settlement funds to particular claims is a question of fact on which this court owes deference to the trial judge. In my view, the record fully supports the trial judge's determination on this issue.

[36] In the settlement negotiations, the SABs insurer left it up to plaintiff's counsel to determine the allocation of the settlement amounts. Had that lawyer wished to allocate the monies in any different way, she could have done so. The Settlement Disclosure Notice divided the settlement compensation of $152,000

into $130,000 for income replacement benefits, $20,000 for medical benefits and $2,000 for “other items”. Correspondence from the settlement negotiations indicates that, before executing the Release, the plaintiff had agreed to allocate $130,000 of the $152,000 settlement to income replacement benefits, $20,000 to medical benefits and $2,000 to the plaintiff’s legal costs. There was no evidence in the record that the plaintiff had negotiated for compensation arising from any allegation of bad faith.

[37] Furthermore, the reference in the Release to claims for “aggravated, exemplary and punitive damages or damages for alleged bad faith” is standard language in any form of release. Indeed, the paragraph goes on to explain that the Release covers such claims for damages “whether these claims are past, present or future and whether these claims are known or unknown at the present time” (emphasis added). Therefore, there was no reviewable error in the trial judge’s determination that the Settlement Disclosure Notice accurately stated the allocation of the settlement.

**(c) Past income loss and future income loss**

[38] The plaintiff argues that the tort damage awards for past lost income (income lost from the date of the accident to the date of trial) and future loss of income (the projected income loss from the date of trial to a future retirement date) are separate heads of damage. Relying on this court’s decision in *Bannon v. McNeely* (1998), 38 O.R. (3d) 659 (C.A.) he submits that an award can only be

reduced by a corresponding statutory accident benefit, on a benefit-by-benefit basis under s. 267.8 of the *Insurance Act*. He says “This reflects the concept that ‘apples should be deducted from apples, and oranges from oranges’”.

[39] As the argument goes, the jury awarded the plaintiff $50,000 for past lost income loss and $100,000 for future loss of income.

[40] First, claims advanced in a tort action for both past and future income claims are required to be separately advanced. Pre-judgment interest is owed on past income claims but not on future loss claims. The onus on a plaintiff is different – a plaintiff who claims for pre-trial pecuniary loss must prove the amount of that loss on the balance of probabilities: *Sales v. Clarke* (1998), 165 D.L.R. (4th) 241 (B.C.C.A.), at paras. 9-16. In contrast, a claim for future (i.e., post-trial) pecuniary loss needs only be proved on the basis of a “real and substantial possibility” of impairment of future earnings and a jury instructed accordingly: *Kim v. Morier*, 2014 BCCA 63, 58 B.C.L.R. (5th) 225, at paras. 7-10; *Basandra*, at para. 24.

[41] The claims are still claims for income loss. The *Insurance Act* does not differentiate between past and future losses – it simply refers to “all “payments…that the plaintiff has received…before the trial of the action for statutory accident benefits in respect of the income loss and loss of earning capacity” (emphasis added). The statutory text uses the terms “income loss” and

"loss of earning capacity" together as the label for both a single head of damage and a single kind of SAB.

[42] There can be little doubt on this record that the sum of $159,300 was received by this plaintiff before the trial for SABs in respect of income loss and that amount should be deducted from the totality of the award for past and future income loss.

[43] In this court's decision in *Basandra v. Sforza*, 2016 ONCA 251, the court considered the deductibility of certain payments received by the plaintiff prior to trial including certain amounts for past and future medical rehabilitation and past and future attendant care.

[44] In *Basandra*, the questions posed for the jury lumped together damages for medical/rehabilitation, attendant care and housekeeping. The trial judge could not judge how much of the lump sum award related to the different heads in order to make the required deductions for the SABs received by the plaintiff before the trial. At para 8 of the reasons this court noted:

> The trial judge accepted the appellant's evidence that he had received a total of $81,658.67 for medical rehabilitation benefits' $58,271.76 for attendant care benefits and $6,939.84 for housekeeping benefits. These amounts included a 2009 lump sum settlement that allocated $30,000 for past and future medical rehabilitation and $5,000 for past and future attendant care. The trial judge noted that the 2009 settlement did not set out the respective portions related to past and future costs.

[45] The trial judge concluded that the jury's entire awards for both past and future care, medical/rehabilitation and housekeeping should be reduced to nil.

[46] The single issue before the court was:

> Did the trial judge err by reducing the jurys' award for past and future attendant care, medical/rehabilitation and housekeeping costs from $105,000 to nil in the absence of clear evidence about the quantum of each collateral benefit.

This court concluded that the trial judge made no error, holding at para. 27, that s. 267.8(4) of the *Insurance Act* combines damages for past and future health care expenses into a single amount for the purpose of deducting SABs in respect of health care expenses.

[47] This case is similar in that the $130,000 paid to settle past and future income loss did not distinguish or allocate a particular amount to either.

[48] The legislation (s. 267.8(1)) does not distinguish between amounts that relate to past and to future income loss. It speaks only to amounts received prior to the trial for income loss. Whether those amounts relate to past or future claims is irrelevant for the purpose of deductibility. Obviously, any amounts received before trial that include a sum for future income loss will, in all likelihood, be received by a plaintiff in settlement of his claims for income loss. Such payments are still payments received before trial for SABs in respect of income loss and are properly deductible from a jury award for both past and future income losses.

[49] The apples to apples concept relates to the type of benefit at issue. As Lauwers J.A. noted at para. 5 in *Basandra*:

> [5] An award can only be reduced by a corresponding statutory accident benefit, on a benefit-by-benefit basis, under s. 267.8 of the *Insurance Act*. This reflects the concept that "apples should be deducted from apples, and oranges from oranges": see *Bannon v. McNeely*, at paras. 49, 74; *Gilbert v. South*, 2015 ONCA 712, 127 O.R. (3d) 526, at para. 44. For example, an award for housekeeping can be reduced by a housekeeping benefit, but not by a medical rehabilitation benefit.



[50] The plaintiffs alternatively submitted that before any deduction can be made from the award for future loss of income, there must be an "accounting" for the five years between the time of the SABs settlement and the trial date. The essence of the argument is that some of what was a "future loss" at the time of the settlement will have become a "past loss" by the time of trial. For reasons already given, I do not accept this argument. First, as discussed above, the language of the legislation does not distinguish between awards for past and future losses and secondly, at para 27 of the reasons in *Basandra*, this court dealt with this argument stating:

> Under s. 267.8(4) of the *Insurance Act*, the total amount of any statutory accidents benefits settlement for past losses or for future expenses is to be combined for the purpose of the reducing the jury's awards in respect of those benefits. There was accordingly no need for the trial judge to consider separately the effect of the "5-6 year period during which one might fairly say there were future amounts on the settlement, but past amounts as at the trial."

[51] The language of s. 267.8(1) is identical to that of s. 267.8(4) except for the type of benefit it references, income loss and loss of earning capacity as opposed to health care.

[52] Since the purpose of the statutory deduction procedure is to prevent double recovery for a single loss, there is no reason in principle to distinguish between pre-trial and post-trial “income loss and loss of income capacity” when deducting SABs from damages.

[53] The law of damages distinguishes between pre-trial pecuniary loss and post-trial pecuniary loss primarily for two reasons, calculation of prejudgment interest and proof of damage: *Basandra*, at para. 24.

[54] Additionally, as is more fully explained in the reasons for judgment in the *El-Khodr* case, I have serious reservations as to whether the strict matching requirement articulated in *Bannon v. McNeely* (1998), 38 O.R. (3d) 659 (C.A.) and *Gilbert v. South*, 2015 ONCA 712, 127 O.R. (3d) 526, the cases referenced by Lauwers J.A. in *Basandra*, remains good law in this province for two reasons. First, the legislation has changed significantly since *Bannon* was decided. Secondly, the Supreme Court of Canada in its decision in *Gurniak v. Nordquist*, 2003 SCC 59, [2003] 2 S.C.R. 652, if it did not specifically overrule *Bannon*, very clearly stated that the case upon which the matching principle in *Bannon* is based was “wrongly decided”. In my view, *Gurniak* puts in considerable doubt

any qualitative or temporal matching requirement that is not mandated by the current legislation.

[55] For these reasons, s. 267.8(1) of the *Insurance Act* requires deduction of all income replacement SABs, and all payments in settlement of claims for income replacement SABs, that the plaintiff receives before trial from the total of all damages awarded at trial for past and future income loss arising from the same incident.

[56] Accordingly, I would uphold the trial judge's decision to reduce the jury award for past loss income loss and future loss of income to zero.

**(2) Issue Two: Did the trial judge err in refusing to put the question of punitive damages to the jury?**

[57] The plaintiffs submit that the trial judge erred in refusing to allow the plaintiffs to seek an award of punitive damages from the jury.

[58] The argument and the basis for the claim relate to the fact that the defendant was convicted of impaired driving on his plea of guilty in relation to this motor vehicle accident.

[59] The plaintiffs submit that this court's decision in *McIntyre v. Grigg* (2006), 83 O.R. (3d) 161, stands for the proposition that a jury should be permitted to consider punitive damages in any civil action for negligence arising from impaired driving.

[60] That is, with respect, not my reading of the *McIntyre* case. As the defendant points out in his factum, the majority in *McIntyre* held, at para. 76, that "a factor of significant importance in assessing whether it would be appropriate to award punitive damages is whether punishment has already been imposed in a separate proceeding for the same misconduct."

[61] In the same paragraph, the court quoted the following statement from Binnie J.'s majority reasons in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, at para. 123: "The key point is that punitive damages are awarded "if, but only if" all other penalties have been taken into account and found to be inadequate to accomplish the objectives of retribution, deterrence, and denunciation."

[62] In *McIntyre*, this court elaborated on how this principle applies to a tort action when the defendant already has received a criminal conviction for the same wrong:

> [79] While the driver Grigg pleaded guilty to, and received a fine for, careless driving, the evidence in the civil trial established that he was significantly impaired and that his conduct should normally warrant a serious punishment. Where a wrongdoer has already been punished for an offence and the same conduct is in question at a civil trial, punitive damages generally will not serve a rational purpose as the sentence imposed in the criminal or regulatory environment will have already met the necessary objectives of retribution, deterrence and denunciation. In our view, there are sound policy reasons for generally not attempting to re-try those proceedings in a civil action. As this court held in *Fleury v. Fleury*, *supra*, at para. 11:

> Where tortious acts have already been sanctioned by the imposition of a criminal sentence, it is inappropriate to award punitive damages in a civil lawsuit. To do so is to punish twice for the same offence. Where, however, the civil proceedings establish that…the sentence does not fully sanction the tortfeasor's behaviour... punitive damages may be awarded.
>
> [80] In our view, a court in a civil proceeding should generally demonstrate deference to the decision of the other court. Otherwise, the review of the appropriateness of a penalty administered in a criminal court, for example, could be viewed as a collateral attack on that decision. In our opinion, the "disproportionality" test enunciated by Binnie J. in *Whiten* in relation to the wrongful conduct and the penalty imposed is one that should be approached with considerable caution.

[63] The majority concluded that, on the particular facts in *McIntyre*, that case was one of the "rare instances" where the question should go to the jury. The facts in *McIntyre* entirely drove the disposition in that case. Ms. McIntyre had been walking along the curb of a street in Hamilton with a group of friends when Grigg's vehicle struck her. Grigg's blood alcohol level at the time was two to three times over the legal limit. Initially he was charged with "over 80"; later, counts of impaired driving causing bodily harm and dangerous driving causing bodily harm were added. Ultimately, the Crown attorney proceeded only with a charge of careless driving and the other charges were withdrawn. This decision was based on the failure to inform Grigg of his right to counsel before the breathalyzer was administered. The Crown gave evidence at the trial that, had Grigg been convicted as charged, he would, in all likelihood, have received a custodial

sentence. As it was, he pleaded guilty to careless driving and received only a fine of $500. There was no license suspension.

[64] In *McIntyre*, unlike in this case, the fact of the defendant's impairment at the time of the accident appeared to have gone unpunished in the criminal proceedings. The defendant in *McIntyre* had pleaded guilty only to careless driving, whereas Mr. Long pleaded guilty to impaired driving.

[65] Here, there was no evidence to suggest that the defendant's criminal sentence, consisting of a fine of $1,300 and a one-year driving prohibition, was insufficient to meet the objectives of retribution, deterrence and denunciation. I note that, in support of the common-law principles that I have discussed, in Ontario, s. 4(4) of the *Victims' Bill of Rights, 1995*, S.O. 1995, c. 6 requires a trial judge in a civil case to "take the sentence, if any, imposed on a convicted person into consideration before ordering that person to pay punitive damages to a victim." In my view, the trial judge's decision not to put the question of punitive damages to the jury was reasonable in the circumstances, and his decision is entitled to deference in this court: *B. (M.) v. 2014052 Ontario Ltd.*, 2012 ONCA 135, 109 O.R. (3d) 351, at paras. 51, 92. Therefore, I would not give effect to this ground of appeal.

## (3) Issue Three: Did the trial judge err in his determination of prejudgment interest?

### (a) Introduction

[66] The last of the plaintiffs' grounds of appeal concerns the rate of prejudgment interest applicable to the plaintiff's damages for non-pecuniary loss, in this context also called "general damages". The disputed statutory provision is s. 258.3(8.1) of the *Insurance Act*, which came into force on January 1, 2015. The provision originated in Schedule 3, s. 12 of the *Fighting Fraud and Reducing Automobile Insurance Rates Act*, 2014, S.O. 2014, c. 9, also known as "Bill 15". The text of s. 258.3(8.1) is as follows:

> (8.1) Subsection 128(2) of the *Courts of Justice Act* does not apply in respect of the calculation of prejudgment interest for damages for non-pecuniary loss in an action referred to in subsection (8).

The kind of action to which subsection (8) refers is an action "for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile".

[67] However, neither Bill 15 nor s. 258.3(8.1) specified whether this amendment to the *Insurance Act* would apply retrospectively to actions commenced before January 1, 2015 but tried thereafter. Whereas some of the provisions in the *Insurance Act* and some of the SABs regulations include a transition rule (see, for example, s. 267.5(8.1.1) and s. 2 of Ont. Reg. 34/10), this amendment to the *Insurance Act* is entirely silent on whether it applies only to

proceedings concerning accidents that occurred on or after the provision's enactment.

[68] To understand the effect of s. 258.3(8.1) to accident cases to which it applies, one must read it in the context of the statutory regime for prejudgment interest. One begins with s. 128(1) of the *Courts of Justice Act*, which creates an entitlement to prejudgment interest and refers to a default rate:

> **128** (1) A person who is entitled to an order for the payment of money is entitled to claim and have included in the order an award of interest thereon at the prejudgment interest rate, calculated from the date the cause of action arose to the date of the order.

[69] For the purposes of s. 128, s. 127(1) defines "prejudgment interest rate" as "the bank rate at the end of the first day of the last month of the quarter preceding the quarter in which the proceeding was commenced". However, s. 128(2) creates an exception from this default rate of prejudgment interest for damages for non-pecuniary loss arising from personal injuries:

> (2) Despite subsection (1), the rate of interest on damages for non-pecuniary loss in an action for personal injury shall be the rate determined by the rules of court made under clause 66 (2) (w).

[70] The relevant "rule of court" to which s. 128(2) refers is r. 53.10 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which provides:

> **53**.10 The prejudgment interest rate on damages for non-pecuniary loss in an action for personal injury is 5 per cent per year.

[71] Therefore, s. 128 of the *Courts of Justice Act* contemplates two default rates of prejudgment interest: one for damages for non-pecuniary loss in personal injury actions, and one, called "the prejudgment interest rate", for all other money awards for which s. 128 makes prejudgment interest available. The plaintiffs commenced their action on December 8, 2009, so the applicable prejudgment interest rate in s. 128(1) is .5%.

[72] I have referred to the regime of prejudgment interest rates in ss. 128 (1) and (2) as one of "default" rates because s. 130 of the *Courts of Justice Act* gives the court discretion to reduce or increase the prescribed rate of interest or to disallow interest otherwise payable under s. 128:

> **130** (1) The court may, where it considers it just to do so, in respect of the whole or any part of the amount on which interest is payable under section 128 or 129,
>
> (a) disallow interest under either section;
>
> (b) allow interest at a rate higher or lower than that provided in either section;
>
> (c) allow interest for a period other than that provided in either section.
>
> (2) For the purpose of subsection (1), the court shall take into account,
>
> (a) changes in market interest rates;
>
> (b) the circumstances of the case;
>
> (c) the fact that an advance payment was made;
>
> (d) the circumstances of medical disclosure by the plaintiff;

> (e) the amount claimed and the amount recovered in the proceeding;
>
> (f) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding; and
>
> (g) any other relevant consideration.

[73] Therefore, the effect of s. 258.3(8.1) of the *Insurance Act* is that, in an action for damages arising out of a motor vehicle accident, the prejudgment interest rate on non-pecuniary damages will now be the rate provided for in ss. 127 and 128(1) of the *Courts of Justice Act*, subject to the overriding discretion of the court in s. 130 of the same statute to increase or reduce the rate, to change the interest period, or to disallow interest altogether.

[74] The plaintiffs argue that the 2015 amendment, which reduces the rate of prejudgment interest, should not apply retrospectively to a collision that occurred in 2008. They accept that procedural legislation is presumed to have immediate application, but rely on this court's decision in *Somers v. Fournier* (2002), 60 O.R. (3d) 225 (C.A.), where this court held that entitlement to prejudgment interest is a matter of substantive law. They also rely on the trial decision in *El-Khodr v. Lackie,* where the trial judge relied on *Somers*, but also relied on *Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256 for the argument that this prejudgment interest amendment should not apply retrospectively because this would provide a "windfall" to insurance companies that previously had charged

premiums on the assumption of a 5% prejudgment interest rate for non-pecuniary damages in personal injury cases.

[75] The defence submits that r. 53.10 is a procedural rule and hence, because the new s. 258.3(8.1) amended a procedural rule, the change in the legislation is procedural in nature. The rate of interest or "means" by which entitlement to prejudgment interest is quantified is procedural. Further, the defence submits that s. 52(4) of the *Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F codifies the common-law presumption that procedural legislation applies immediately, not only to future proceedings but also to ongoing or pending proceedings that relate to events that took place prior to such legislation's enactment.

[76] In this case, the trial judge did not make a determination one way or the other as to whether the amendment applied retrospectively. Instead, he chose what he described as "a third choice" and exercised the discretion available to him under s. 130(1)(b) of the *Courts of Justice Act*. Having "taken into account the factors set out in s. 130(2)" and having "considered the overall circumstances of the case", he fixed the interest rate for non-pecuniary damages at three percent.

[77] I would uphold the trial judge's reasons with respect to his "third choice". I see no basis to interfere with the exercise of that discretion in view of the fact that it benefits the plaintiff and the defendant has advised the court that it is content with that rate of interest. Therefore, the disposition of this appeal does not require

me to decide on the temporal application of the amendment to the prejudgment interest rate. However, the disposition of the companion case, *El-Khodr v. Lackie*, requires me to resolve this issue of temporal application. I prefer to address the issue in detail in these reasons because other issues in the *Cobb* appeals also require consideration of the temporal application question.

[78] For the reasons expressed below, I conclude that the amendment in the *Insurance Act* to the prejudgment interest rate was intended to have retrospective effect and it applies to all actions that are tried after its commencement.

**(b) Legislative intention and temporal application**

[79] The determination of the prejudgment interest amendment's temporal application requires consideration of several rebuttable presumptions that apply in the interpretation of legislation. Before I begin to discuss these principles, I emphasize that the purpose of presumptions concerning the temporal application of legislation is to assist, along with other principles of statutory interpretation, in the determination of legislative intent: *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73, [2005] 3 S.C.R. 530, at para. 36.

[80] The common law generally presumes that legislation does not have retrospective application: *Gustavson Drilling (1964) Ltd. v. M.N.R.*, [1977] 1 S.C.R. 271, at p. 279. However, as *Dikranian* emphasizes, this presumption

applies within a contextual analysis of legislative intent, and contextual analysis can rebut the presumption.

[81] Two additional presumptions are also relevant to the analysis: (1) the presumption against legislative interference with vested rights and (2) the presumption that procedural legislation applies immediately.

[82] Since these presumptions also are relevant to the issues in this appeal concerning the statutory deductible and costs, I will outline each presumption before applying them to the prejudgment interest issue.

[83] First, as a matter of statutory interpretation, there is a presumption that the legislature does not intend to interfere with "vested rights": *Dikranian*, at paras. 32-33. *Dikranian*, at paras. 37-40, endorsed Prof. Côté's test for establishing a "vested right": (1) the individual's legal situation must be "tangible and concrete rather than general and abstract" (i.e.: the individual must point to a specific right); and (2) the legal situation must have been sufficiently constituted at the time of the new legislation's commencement. In other words, by the time of the legislation's commencement, the right must have crystallized and become "inevitable" and "certain": *1392290 Ontario Ltd. v. Ajax (Town),* 2010 ONCA 37, 257 O.A.C. 311, at paras. 37-38. The characterization of the "right" at issue is important to the success of the argument that the right had "vested" by commencement: *1392290 Ontario Ltd.*, at para. 39.

[84] Second, new legislation that affects substantive rights is presumed to have a purely prospective effect unless a clear legislative intent that it is to apply retrospectively is evident. However, “procedural legislation designed to govern only the manner in which rights are asserted or enforced” applies immediately to both pending and future cases because such legislation does not affect the “substance” of the relevant rights: *R. v. Dineley*, 2012 SCC 58, [2012] 3 S.C.R. 272, at para 10. In *Dineley*, the Supreme Court emphasized that this presumption of immediate application does not apply to “procedural legislation” if that legislation “affects substantive rights”. Therefore, “the key task” lies “not in labelling the provisions “procedural” or “substantive”, but in discerning whether they affect substantive rights”: *Dineley*, at para. 11.

**(c) The *Courts of Justice Act* does not create a vested right to a particular rate of prejudgment interest**

[85] In my view, the plaintiff has not demonstrated that he has a crystallized or certain right to a particular rate of prejudgment interest.

[86] Interest rates fluctuate over time and it only makes sense that the interest rates set by the court should reflect these changes as well. Prejudgment interest is meant to compensate for the loss of use of money’s worth from the date when the injury is sustained to the time of judgment. The goal is to fairly compensate an injured party and to restore to him or her, so far as money is able to do, all that he or she has lost as result of the injury – but neither too much, nor too little.

The provisions of the *Courts of Justice Act* concerning prejudgment interest do this by preserving the court's discretion not to apply the default rate.

[87] Although s. 128(1) says that a person "entitled to an order for a payment of money" also is entitled to prejudgment interest, and s. 128(2) contemplates special rates for interest on damages for non-pecuniary loss in personal injury actions, s. 130 provides the court with discretion to disallow prejudgment interest, to vary the rate otherwise applicable, or to vary the period for calculation of interest otherwise applicable.

[88] Read together, these provisions in the *Courts of Justice Act* recognize that rates of prejudgment interest require variation to keep pace with economic realities and to ensure that plaintiffs are not overcompensated nor undercompensated for the lost value of their damage award over time.

[89] In *R. v. Puskas*, [1998] 1 S.C.R. 1207, the Supreme Court interpreted s. 43(c) of the federal *Interpretation Act*, R.S.C. 1985, c. I-21, which codifies the common-law "vested rights" presumption, albeit through use of the synonyms "acquired, accrued, accruing or incurred". The court, at para. 14, held that "a right cannot accrue, be acquired, or be accruing until all conditions precedent to the exercise of the right have been fulfilled". This holding relies on a definition of a "vested right" in which a right does not vest until the purported holder of the right can claim on it without meeting any other "substantive conditions": Ruth Sullivan,

*Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis Canada, 2014), at paras. 25.145-25.146.

[90] In this case, the plaintiff's right to tort damages vested at the moment of the accident: *Dikranian*, at para. 40. However, the rate of prejudgment interest on those damages, as distinguished from the entitlement to prejudgment interest, always was subject to judicial discretion which could only be exercised at the time the damage award was made. Therefore, aside from the fact that there is no right to a particular rate of interest, there can be no expectation on the part of a litigant that he or she is entitled to prejudgment interest at any particular rate until the trial judge determines the rate. Any "right" is not crystallized or certain until that determination is made.

**(d) The presumption of immediate application of "procedural legislation applies**

[91] As I indicate above, the defendant, and the appellants in the *El-Khodr* appeal, rely upon the presumption that procedural legislation applies immediately and upon this court's decision in *Somers* for the proposition that while questions of "entitlement" to prejudgment interest involve substantive rights, any determination as to the applicable rate of interest involves the quantification or measurement of damages, which is a question of procedure.

[92] In *Somers*, the court was concerned with the choice of law to be applied in an international negligence action commenced in Ontario arising from a two-car

motor vehicle collision that occurred in New York State. One of the issues in that case was whether entitlement to prejudgment interest was procedural or substantive in nature. If it was substantive, the law of New York would apply, with the result that no prejudgment interest would be awarded. There was no issue in that case with respect to any particular rate of interest.

[93] This reliance on *Somers* assumes that the categories of "substance" and "procedure" in a conflicts of laws context are closely analogous to the categories of "substantive" and "procedural" legislation in determining the temporal application of a law. One must exercise caution in making this analogy and the cases should not be automatically imported from one context to the other.[1] As I have indicated, the *Dineley* decision indicates that the nature of a procedural provision in the transitional law context is narrow; it deals with the methods by which facts are proven and legal consequences are established. Their operation is generally dependent on the existence of litigation. In my view, it would be an error to rely upon *Somers* for the proposition that the rate of interest is procedural in nature for purposes of determining the temporal application of s. 258.3(8.1) of the *Insurance Act*.



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[1] In the *Interpretation of Legislation in Canada*, 4th ed. (Toronto: Thomson Reuters Canada Ltd., 2011) at p. 192 Pierre-Andre Cote relies on *Upper Canada College v. Smith* (1921), 61 S.C.R. 413 at pp. 442-43 for the proposition that authorities defining "procedure" in private international law cannot be mechanically transposed to transitional law.

[94] In my view, it is not necessary to consider the application of the presumptions or to decide whether s. 258.3(8.1) of the *Insurance Act,* which only deals with the rate of prejudgment interest and not with the entitlement to prejudgment interest, is substantive in nature. Even if the rate of prejudgment interest constitutes a substantive right, the fact that a particular presumption could apply does not necessitate a conclusion that the amendment does not apply in this case. Common-law presumptions on temporal application of legislation are simply aids in the identification of legislative intent. In my view, a contextual analysis of the legislation demonstrates that the legislature intended s. 258.3(8.1) to apply to causes of action that had already arisen but not yet been tried.

[95] The decision of this court in *Sidhu v. State Farm Mutual Automobile Insurance Co.*, 2014 ONCA 920, 43 C.C.L.I. (5th) 22, is of no assistance to the plaintiffs because in this case, the court was determining whether interest owed by the insurer on overdue payments was payable at a rate of two percent as required by the 1996 SABs schedule[2] or at a rate of one percent as required by the 2010 SABs schedule.[3] In holding that the insurer was required to pay the two percent rate, the court noted that s. 2(2) of the 2010 schedule provides that

[2] *Statutory Accident Benefits Schedule – Accidents on or After November 1, 1996*, O. Reg. 403/96 as am., s. 46(2).
[3] *Statutory Accident Benefits Schedule – Effective September 1, 2010,* O. Reg. 34/10, as am., s. 51(3).

interest shall be paid under that regulation in the amount determined under the previous schedule.

[96] As stated, s. 258.3(8.1), and the statute that introduced it, contain no transition language that clearly indicates the temporal application of this amendment. This is in contrast to the legislative evolution of the prejudgment interest provisions. When making significant changes to the prejudgment interest regime in the *Judicature Act* and the *Courts of Justice Act* over the last forty years, the legislature has clearly indicated that the changes were to have only prospective effect.[4]

[97] Prior to the enactment of the *Courts of Justice Act* in 1984, prejudgment interest was addressed in the *Judicature Act*. When the interest provisions of the *Judicature Act* were amended in 1977 in S.O. 1977, c. 51, to introduce the concepts of awarding prejudgment interest at the prime rate and of the trial judge's discretion to depart from that prime rate, the amending legislation specifically provided that it had a prospective effect:

> **3** (6)(2) This section applies to the payment of money under judgments delivered after this section comes into force, but no interest shall be awarded under this section for a period before this section comes into force.
>
> [Emphasis added]

[4] I note that minor amendment have also been made to ss. 127 and 128 where no temporal language has been incorporated. This is not surprising given the nature of those amendments. See for example: *Courts of Justice Amendment Act, 1989*, S.O., c. 55, s. 26; *Access to Justice Act, 2006*, S.O. 2006, c. 21, s. 18; *Courts of Justice Statute Law Amendment Act, 1994*, S.O. 1994, c. 12, s. 44.

[98] When the 1980 consolidation of the *Judicature Act* was published in R.S.O. 1980, c. 223, the specific language of s. 36(7) continued the prospective application of the 1977 amendment:

> **36** (7). This section applies to the payment of money under judgments delivered on or after the 25th day of November, 1977, but no interest shall be awarded under this section for a period before that date.
>
> [Emphasis added]

[99] When the *Courts of Justice Act* was adopted in S.O. 1984, c. 11, s. 138(4), expressly stated that the prejudgment interest provisions applied only prospectively:

> 138 (4) Where a proceeding is commenced before this section comes into force, this section does not apply and section 36 of the *Judicature Act*, being chapter 223 of the Revised States of Ontario, 1980, continues to apply, notwithstanding section 187.
>
> [Emphasis added]

[100] An amendment to the *Courts of Justice Act* in 1989, in S.O. 1989, c. 67, introduced s. 138(1)(a), the provision that is now s. 128(2). It then read, "Despite subsection (1), the rate of [prejudgment] interest on damages for non-pecuniary loss in an action for personal injury shall be the discount rate determined by the rules of court." Subsection 6(2) of the 1989 Act provided that "If the order includes an amount for past pecuniary loss, the interest calculated under subsection (1) shall be calculated on the total past pecuniary loss at the end of

each six-month period and at the date of the order." The legislation clearly indicated that these amendments applied only prospectively:

> **8** (1) The amendments to the *Courts of Justice Act, 1984*, as enacted by this Act, except for the amendments enacted by section 1, section 4 and subsection 6(2), apply to causes of action arising after the 23rd day of October, 1989.
>
> (2) The amendments to the *Courts of Justice Act, 1984*, as enacted by section 4 and subsection 6(2) of this Act, apply to,
>
> (a) actions commenced but not settled or adjudicated upon before this Act comes into force; and
>
> (b) causes of action arising after this Act comes into force.
>
> [Emphasis added]

[101] Because s. 258.3(8.1) of the *Insurance Act* affects the application of the prejudgment interest regime prescribed by the *Courts of Justice Act*, the legislative history relating to the prejudgment interest provisions of the *Courts of Justice Act* is highly relevant. The absence of similar temporal language in s. 258.3(8.1) supports the view that the legislature intended for this change to the prejudgment interest regime to have retrospective effect so as to apply to pre-existing causes of action.

[102] I take further support for the view that this amendment was intended to have retrospective effect from a consideration of how such an interpretation would serve the purposes that the legislature must have intended to achieve in

Bill 15. During the introduction of the Bill at First Reading,[5] the policy underlying the Bill and the rationale for the prejudgment interest amendment were discussed. The expressed goal was to bring down the cost of claims to achieve a reduction in automobile insurance rates within a two-year window and the adjustment of the prejudgment interest rate was one part of that strategy:

> In August of last year, we announced our cost and rate reduction strategy, which is targeting an industry-wide average of a 15% reduction in authorized auto insurance rates within two years. The measures proposed in this bill would move forward on our strategy by helping to reduce costs in the system and continuing to fight fraud. Auto insurance rates are directly linked to claim costs. Reducing cost and uncertainty in the system would help reduce rates for Ontario drivers.
>
> ...
>
> Lastly, the bill would implement measures to reform the prejudgement interest rates for general damages and again reduce costs by protecting and expediting matters more quickly for claimants. This rate, actually, hasn't been updated since 1990. Linking the rate to current market conditions would help reduce the cost to bodily injury claims and auto insurance systems while still ensuring fairness for consumers.

[103] Given the delays that are inherent in litigation, to achieve the cost reduction goal as quickly as possible and within the two-year window promised by the government would require the amendments introduced by Bill 15 to apply

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[5] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 41st Parl. 1st Sess., No. 8 (15 July 2014), at pp. 237-238 (Hon. Charles Sousa)

to cases already in the system. I note that such an interpretation does not undermine the legitimate interests of tort plaintiffs. Any perceived unfairness to litigants who commenced their actions before the effective date of the amendment can be ameliorated through the exercising of a trial judge's discretion under s. 130 of the *Courts of Justice Act* to award prejudgment interest at a rate other than the default rate.

[104] For these reasons, I conclude that the prejudgment interest amendment to the *Insurance Act* applies to this action notwithstanding that the accident occurred and the cause of action arose before it was enacted, with the result that the applicable default prejudgment interest rate on the non-pecuniary damages is .5 percent and not five percent.

[105] However, the defendant accepts that the trial judge was entitled to exercise his discretion under s. 130 of the *Courts of Justice Act* as he did; the defendant is content with the three percent interest rate.

[106] Therefore, I would dismiss this ground of appeal.

## D. THE DEFENDANT'S APPEAL

### (1) Issue One: Did the trial judge err by failing to deduct the full amount of the HKHM benefits received by the plaintiff before the trial from the damages awarded for the housekeeping loss?

[107] The jury awarded the plaintiff $5,000 for past housekeeping loss and $10,000 for future housekeeping loss, for a total amount of $15,000 for all past and future HKHM needs. Prior to the trial, the plaintiff had received the sum of

$9,150 from his SABs insurer for HKHM benefits. The trial judge concluded, “The defence cannot deduct past benefits from future benefits”; he accepted as applicable the plaintiffs’ interpretation of the “apples to apples” matching principle from *Bannon*, which this court decided almost 20 years ago. Therefore, he treated the HKHM benefits that the plaintiff had received before trial as “past benefits” and credited them against the jury’s $5,000 award for past housekeeping loss, reducing that award to zero. However, he refused to apply the remaining $4150 in SABs to the jury’s $10,000 award for future housekeeping loss.

[108] For the same reasons as set out earlier in respect to the plaintiff’s income loss, in light of this court’s decision in *Basandra*, I see no reason to distinguish between the past and future awards – the distinction is a procedural one to meet the requirements of the law. The head of damage is to compensate for loss of the ability to carry out HKHM both in the past and the future. The language of the legislation requires a reduction from the damages awarded – all payments received before the trial for SABs in respect of pecuniary loss.

[109] I would allow appeal and, set aside the trial judge’s ruling and reduce the plaintiff’s damages award for future housekeeping by a further $4,150.

## (2) Issue Two: Did the trial judge err in applying the statutory deductible in force prior to August 1, 2015 ($30,000) rather than the statutory deductible in force at the time of judgment ($36,540)?

### (a) Introduction

[110] The answer to this question turns on the same principles for the interpretation of legislation that I discuss above in relation to the prejudgment interest rate amendment in s. 258.3(8.1) of the *Insurance Act*.

[111] Subsection 267.5(7)3(i) of the *Insurance Act* requires the deduction of a prescribed statutory deductible from an award of damages for non-pecuniary loss in "an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile" :

> 3. Subject to subsections (8), (8.1) and (8.1.1), the amount of damages for non-pecuniary loss to be awarded against the protected defendant shall be determined by reducing the amount [of damages for non-pecuniary loss for which the defendant would be liable without regard to Part VI of the *Insurance Act*] by,
>
> (i) in the case of damages for non-pecuniary loss other than damages for non-pecuniary loss under clause 61(2)(e) of the *Family Law Act*, the greater of
>
> A. $15,000, and
>
> B. <u>The amount prescribed by the regulations</u>
>
> [Emphasis added.]

[112] In this case, the issue for interpretation is whether the amount prescribed in an amendment that came into force on August 1, 2015 to a regulation (the "*Court Proceedings Regulation*") can apply to an accident that occurred in 2008.

The relevant provision of the *Court Proceedings* Regulation in force immediately before August 1, 2015 required the deduction of $30,000:

> 5.1 (1) The amount of $30,000 is prescribed for the purpose of sub-subparagraph 3 i B of subsection 267.5 (7) of the Act in respect of incidents that occur on or after October 1, 2003.[6] [Emphasis added.]

[113] Effective August 1, 2015, s. 5.1 of the *Court Proceedings* Regulation was amended and would require the deduction of $36,540 if applied to this case:

> 5.1 (1) For the purpose of sub-subparagraph 3 i B of subsection 267.5 (7) of the Act, the prescribed amount is the amount determined in accordance with the following rules:
>
> 1. Until December 31, 2015, the prescribed amount is $36,540.
>
> 2. On January 1, 2016, the prescribed amount set out in paragraph 1 shall be revised by adjusting the amount by the indexation percentage published under subsection 268.1 (1) of the Act for that year.
>
> 3. On January 1 in every year after 2016, the prescribed amount that applied for the previous year shall be revised by adjusting the amount by the indexation percentage published under subsection 268.1 (1) of the Act for the year.[7]

[114] Like the amendment to the *Insurance Act* respecting prejudgment interest, the 2015 amendment to s. 5.1 of the *Court Proceedings* Regulation contains no transition provision that clearly indicates its temporal application. In contrast, the

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[6] *Court Proceedings for Automobile Accidents that Occur on or After November 1, 1996*, O Reg 461/96, s. 5.1(1) [version in effect to July 31, 2015].
[7] *Court Proceedings for Automobile Accidents that Occur on or After November 1, 1996*, O Reg 461/96, s. 5.1(1) [version effective August 1, 2015].

version of s. 5.1 in force before August 1, 2015 specifically stated that it was applicable to accidents that occurred on or after October 1, 2003. I also note that s. 267.5(8.1.1) of the *Insurance Act* specifically provides that the statutory deductible does not apply to "damages awarded for non-pecuniary loss awarded in respect of a person who dies as a direct or indirect result of an incident that occurs after August 31, 2010" (emphasis added). It is noteworthy that within that part of the statute that deals with the statutory deductible, the language distinguishes between those sections that are specifically intended to have only a prospective application and those that are not. The fact that there is no similar temporal language in the current version of s. 5.1 of the regulation provides some support for the argument that the change should apply to accidents occurring before its promulgation.

[115] That conclusion is supported by two additional considerations. First, in my view, temporal language is absent in s. 5.1 of the regulation because the provincial executive would have understood that the "rolling incorporation" rule mandated by s. 59 of the *Legislation Act, 2006* would otherwise apply.

[116] Second, the language of the statute and of the 2015 amendment to s. 5.1 of the regulation clarifies that the legislature intended for the 2015 amendment to have retrospective effect to accidents that occurred before the promulgation of that amendment to the regulation.

### (b) Section 59 of the Legislation Act, 2006

[117] Section 59 deals with the question of whether the reference to a regulation in a statute is meant to be interpreted in a static fashion, meaning that it is interpreted as it exists at a particular time:

> **59** (1) A reference in an Act or regulation to a provision of another Act or regulation is a reference to the provision,
>
> (a) as amended, re-enacted or remade; or
>
> (b) as changed under Part V (Change Powers).
>
> (2) Subsection (1) applies whether the provision is amended, re-enacted, remade or changed under Part V before or after the commencement of the provision containing the reference.
>
> (3) If the provision referred to is repealed or revoked, without being replaced,
>
> (a) the repealed or revoked provision continues to have effect, but only to the extent that is necessary to give effect to the Act or regulation that contains the reference; and
>
> (b) the reference is to the provision as it read immediately before the repeal or revocation.

[118] Thus, absent persuasive evidence of a legislative intention to apply the version of a regulation in force at a specific date, s. 59 ensures application of the current version of a regulation to which a statutory provision refers. This kind of incorporation of other legislation by reference is a "rolling" or "ambulatory" reference, as opposed to a "static" or "fixed" reference, which incorporates a piece of legislation as it existed at a particular time, with that incorporation

persisting even after amendment or repeal of the referenced legislation: John Mark Keyes, *Executive Legislation*, 2nd ed. (Markham: LexisNexis Canada Inc., 2010), at pp. 455-456.

[119] Given the direction in s. 59, the interpretation of the regulation at issue must start from the premise that the regulation that is intended to apply to any given case is the regulation that is in force from time to time and not the version of the regulation that was in force at the date of the accident. This premise supports a conclusion that the amount specified in the 2015 amendment to s. 5.1 of the *Court Proceedings* Regulation is the statutory deductible that applies in this case.

**(c) The legislature authorized retrospective application of the regulation**

[120] On my reading, the language of the relevant provisions of the *Insurance Act* and of the 2015 amendment to the *Court Proceedings* Regulation corresponds with the application of the rolling incorporation rule because these provisions indicate that the 2015 amendment was intended to apply to accidents that occurred both before and after the date of its promulgation. One must interpret s. 267.5(7)3(i) in the broader context of related provisions in the *Insurance Act* that prescribe how the statutory scheme for deduction from non-pecuniary damage awards in automobile accident cases operates.

[121] Damages are first calculated without regard to these provisions. Subsection 267.5(7) begins:

> Subject to subsections (5), (12), (13) and (15), in an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, the court shall determine the amount of damages for non-pecuniary loss to be awarded against a protected defendant in accordance with the following rules:
>
> > 1. The court shall first determine the amount of damages for non-pecuniary loss for which the protected defendant would be liable without regard to this Part [Part VI of the *Insurance Act*, the Part concerning "Automobile Insurance"].

[122] The trial judge must then determine if the statutory deductible is to be deducted from the damage award. It will not be deducted if the damages awarded exceed a prescribed amount. Subsection 267.5(8) provides:

> Subparagraph 3 i of subsection (7) does not apply if the amount of damages for non-pecuniary loss, other than damages for non-pecuniary loss under clause 61(2)(e) of the *Family Law Act*, would exceed the amount determined in accordance with subsection (8.3) in the absence of that subparagraph.

[123] The amount determined under subsection 267.5(8.3), above which the statutory deductible does not apply, is indexed to inflation:

> For the purposes of subsection (8), the amount shall be determined in accordance with the following rules:
>
> 1. Until December 31, 2015, the amount is $121,799.
>
> 2. On January 1, 2016, the amount set out in paragraph 1 shall be revised by adjusting the amount by the

> indexation percentage published under subsection 268.1(1) for that year.
>
> 3. On the 1st day of January in every year after 2016, the amount that applied for the previous year shall be revised by adjusting the amount by the indexation percentage published under subsection 268.1(1) for the year.



[124] Section 5.1(1) of the *Court Proceedings* Regulation, which prescribes the actual amount of the statutory deductible, implements an identical inflation-adjustment regime according to the same schedule of dates as in s. 267.5(8.3). Both of these provisions refer to s. 268.1(1) of the *Insurance Act* as the source of the applicable "indexation percentage".

[125] A regulation applies retrospectively where authorized by the regulation's enabling statute, either by express words or by necessary implication: *British Columbia (Attorney General) v. Parklane Private Hospital Ltd.*, [1975] 2 S.C.R. 47, at p. 60; Keyes, at p. 498-9. In my view, the *Insurance Act* authorizes the immediate application of the amended regulation to accidents that occurred before its promulgation. The fact that the dates for calculating the prescribed damage quantum in s. 267.5(8.3) of the *Insurance Act,* above which the deductible does not apply, match the dates in s. 5.1(1) of the *Court Proceedings* Regulation proves that the legislature must have authorized the executive to amend s. 5.1(1) with retrospective application to pending and future proceedings.

[126] Concluding that the statutory deductible was intended to apply retrospectively helps achieve the policy of the Act. Like the pre-judgment interest

provisions in the *Courts of Justice Act*, the provisions respecting the statutory deductible in the *Insurance Act* recognize that both the quantum of the deductible and the prescribed damage quantum above which the deductible does not apply require variation in the future to keep pace with economic realities.

[127] The incorporation of a formula for calculating the statutory deductible in s. 5.1(1) of the *Court Proceedings* Regulation on a go-forward basis, which is based on a published indexation percentage, demonstrates that the quantum will adjust according to future inflation rates. The time value of the deductible will properly correspond with that of the damage quantum above which the deductible does not apply only if the quantum of the deductible is inflation-adjusted to the date of the award of damages rather than to the date of the accident. As the defendant puts it in its factum, "since the jury awards damages in today's dollars, the quantum of the deductible should similarly be calculated in today's dollars."

[128] Accordingly, there is no need to deal with the submissions regarding the effect of the presumption regarding procedural provisions. My earlier comments on the relevance of *Somers* to the prejudgment interest issue apply here as well.

[129] For these reasons, I conclude that the legislature intended for the 2015 amendment to s. 5.1(1) to have retrospective application. Accordingly, the amendment applied at the time of the judgment and the trial judge erred in holding otherwise. I would allow this ground of appeal.

## E. CONCLUSION ON APPEALS FROM NOV. 25, 2015 JUDGMENT

[130] In the result, the final judgment should have been in the following amounts:

1. General (i.e., Non-Pecuniary) Damages = $50,000 - $36,540 = $13,460
2. Future Housekeeping = $10,000 - $4,150 = $5,850
3. Prejudgment Interest on General Damages (3%) = 3% x $13,460 x 7 years = $2,826.60

**Total = $22,136.60**

## F. THE COSTS APPEAL

[131] The trial judge, after taking into consideration the statutory deductible in relation to non-pecuniary damages and the deductions for SABs that he found to be appropriate, concluded the judgment sum (inclusive of pre-judgment interest) to be $34,000 and awarded the plaintiff his costs fixed in the amount of $409,098.48. In assessing costs, he concluded that the amendment to s. 267.5(9) of the *Insurance Act*, effective August 1st, 2015, was not to be taken into consideration. He did so as a matter of fairness and in reliance on a decision of the Superior Court in *Carlton Condominium Corporation No. 21 v. Minto Construction Limited* (2002) 21 C.P.C. (5th) 308 (Ont. S.C.), where the trial judge refused to apply changes made to the costs regime that came into effect between the time judgment was rendered and the time costs were assessed, approximately two months later. Both the judge in the *Condominium* case and the trial judge in the case before this court were of the view that it would be

"unfair" to impose a new costs amendment on parties who had conducted the litigation throughout under the costs regime formerly in place.

[132] Further reliance was placed on this court's decision in *Rider v. Dydyk*. In *Rider*, this court confirmed that, under the former s. 267.5(9) of the *Insurance Act* (the version in force before the August 1, 2015 amendment), the statutory deductible was not to be considered in determining a party's entitlement to costs.

[133] Prior to August 1, 2015, s. 267.5(9) provided:

> In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, the determination of a party's entitlement to costs shall be made without regard to the effect of paragraph 3 of subsection (7) on the amount of damages, if any, awarded for non-pecuniary loss. [Emphasis added.]

[134] Effective August 1, 2015, the subsection was amended and the words "without regard" were changed to "with regard" so that the subsection now reads:

> In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, the determination of a party's entitlement to costs shall be made with regard to the effect of paragraph 3 of subsection (7) on the amount of damages, if any, awarded for non-pecuniary loss. [Emphasis added.]

[135] I conclude that this amendment applies to the fixing of costs in this case for two reasons: (1) there is no vested right to costs, and (2) costs legislation is "procedural".

[136] First, there is no vested right to costs; like the rate of prejudgment interest, any entitlement to costs lacks the required crystallization and certainty of vested rights. The statutory scheme relating to costs, like that relating to prejudgment interest, is discretionary in nature. Subsection 131(1) of the *Courts of Justice Act* provides:

> Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

The language in this provision demonstrates that there is no vested right to costs.

[137] Second, costs legislation has long been considered "procedural" for the purposes of determining the temporal application of legislation: *Wright v. Hale* (1860), 30 L.J. Ex. 40, at p. 42. In *Canadian Broadcasting Corp. Pension Plan (Trustee of) v. BF Realty Holdings Ltd.* (2002), 166 O.A.C. 226, at paras. 12-14, and in *Celanese Canada Inc. v. Canadian National Railway Co.* (2005), 196 O.A.C. 60, at para. 55, this court held that, because legislation concerning litigation costs is "procedural", a newly-enacted costs grid applied to legal services rendered before it came into force. Similarly, the amendment to s. 267.5(9) dealing with the matter of quantification of costs is a procedural provision that applies to accidents that occurred before its enactment.

[138] For these reasons, I am of the view that the amendment should have applied in this case and the trial judge erred in not so holding.

[139] On his figures, the plaintiff achieved a judgment – for purposes of the costs calculation - of $69,185. It was not clear from his reasons how he came to this figure. The judgment sum to which the plaintiff was entitled was $34,000; if the statutory deductible of $30,000 the trial judge found to be applicable at the time is added to that figure, the resulting number is $64,000.

[140] In any event, I have concluded that the amended statutory deductible was effective at the time of the judgment and ought to have applied, rather than the $30,000 number the trial judge used.

[141] Similarly, the deduction for the SABs in relation to HKHM expenses further reduces the judgment amount. The number that ought to have been considered as the plaintiff's recovery in the costs consideration is, for the reasons given, $22,136.60.

[142] This number is important for a number of reasons but particularly in relation to the defendant's offer to settle.

[143] On March 13, 2014, the defendant offered to settle the plaintiff's claim on the following basis:

> 1. To pay the plaintiffs $40,000 inclusive of all damages;
>
> 2. To pay prejudgment interest on the $40,000 in an amount as assessed or agreed at five percent per annum from the date of notice of claim;

3. To pay the plaintiffs' costs and disbursements in an amount as assessed or agreed on a partial indemnity basis to the first day after the offer is served;

4. The plaintiffs to pay the defendant his costs and disbursements in an amount assessed or agreed on a partial indemnity basis from the second day after the offer was served;

5. If the offer was accepted by the plaintiffs within 30 days of service, the plaintiffs would not pay costs to the defendant in accordance with paragraph 4;

6. The offer was open until five minutes after the commencement of the trial.

[144] The trial judge concluded on his numbers that the judgment amount exceeded the offer and accordingly no costs consequences followed from the offer.

[145] In this court, the defendant submits that, once the statutory deductible was taken into account, its offer clearly exceeded the judgment sum, and that the costs consequences that flow from r. 49.10(2) of the *Rules of Civil Procedure* should follow – the plaintiffs should be entitled to their partial indemnity costs only to the date of the offer and the defence should have its costs thereafter.

[146] The plaintiffs submit that the offer was not a proper r. 49 offer for a number of reasons, but primarily because the requirement for the plaintiff to pay the defendant's costs after the offer was served resulted in uncertainty concerning the amount of the offer. The plaintiff could never know what those costs were at any given moment and could not, therefore, make an informed decision about whether or not to accept the offer. It was not, in the plaintiff's submission, a proper r. 49 offer and should not be considered in this court's costs analysis.

[147] In my view, the defendant's offer was a valid r. 49 offer and, based on the amount of the trial judgment as revised according to these reasons, was more favourable than the judgment that the plaintiffs achieved at trial.

[148] In this court's decision in *Rooney (Litigation Guardian) v. Graham* (2001), 53 O.R. (3d) 685 the court concluded that an offer made by the plaintiff in that case was a valid r. 49 offer even though the terms included a provision for costs not unlike the provision in the defendant's offer.

[149] In *Rooney*, the plaintiff's offer was served on all defendants in four separate actions. She offered to settle the action as follows:

1. $800,000 (after deduction of advance payments);

2. Prejudgment interest at ten percent per year on the sum of $225,000 from the date of the offer to the date of settlement or judgment; and

3. Reasonable party-and-party costs, as assessed by an assessment officer or agreed upon, up to the date of the offer, and afterwards reasonable solicitor-and-client costs as assessed or agreed upon.

[150] This court concluded that Rooney's offer to settle was a valid r. 49 offer and upheld the trial judge's order applying r. 49.10. The appellant's main ground of appeal was that, by including a provision for ongoing solicitor-and-client costs, Rooney's offer was not an offer to settle under r. 49 and therefore could not attract the costs consequences of r. 49.10. Laskin J.A., writing for the majority, with Carthy J.A. dissenting on this point, rejected that submission. The court recognized that a provision for ongoing party-and-party (i.e., partial indemnity) costs is "in some measure" uncertain, but such provision alone does not invalidate an offer that otherwise complies with r. 49.

[151] In my view, the defendant's offer in this case was a valid r. 49 offer and it exceeded the plaintiff's judgment. In the ordinary course, it should follow that the plaintiffs would be entitled only to their partial indemnity costs to the date of the offer and the defendant to its partial indemnity costs thereafter.

[152] However, in his reasons on costs, the trial judge said that, if he was incorrect in his calculation of the judgment amount, and it was determined that the deductible was to be taken into account so as to reduce the judgment figure for costs purposes, he would have ordered that each side bear its own costs. The defendant has informed this court that it is prepared to live with that order and will

not require the plaintiffs to pay the defendant's partial indemnity costs from the date of the offer.

[153] The plaintiff, however, in this court asserts and maintains his entitlement to substantial indemnity costs on the basis of s. 4(6) of the *Victims' Bill of Rights, 1995*. The trial judge in his reasons and the defendant in its factum noted that, before the trial judge had made his decision on costs, the plaintiffs had abandoned their claim for costs on the higher scale for which that statute provides. The record before this court does not disclose that any effort was made by way of motion before the trial judge to have the reasons corrected in this or any other relevant respect. In the circumstances, this court must accept the reasons of the trial judge as they were written. I would not give effect to the plaintiff's submissions that he should be entitled to costs on the higher scale.

[154] The trial judge's assessment of costs, in any event, at approximately $409,000 on a judgment of $22,136.60, (or $34,000, as the trial judge found) is out of all proportion and cannot stand. This was a chronic pain case. These sorts of cases are never a sure thing from the plaintiff's perspective. The defence will, as here, put the plaintiff to the strict proof of his case. There was nothing "wrong" with the defence expert giving evidence that he found signs suggestive of malingering in the plaintiff's test scores.

[155] A defendant is not expected to sit back and simply take a plaintiff's evidence at face value. This plaintiff had, between the time of the accident and

the time of trial, managed to earn a black belt in martial arts. Given that fact, it is not surprising that the defence argued that the plaintiff was not as disabled as the plaintiff had suggested in his evidence, nor was it inappropriate for the defence to lead psychiatric evidence to suggest that the plaintiff was a “malingerer”. This defence evidence did not waste court time, as the plaintiff argues. Indeed, it is apparent from the verdict that the jury preferred and accepted the defence version of the case.

[156] The plaintiffs’ lowest offer to settle was for $500,000 plus costs. These parties were very far apart in terms of their view of the worth of the case.

[157] Although the case took some 19 days to try, any costs award must reflect the reality that the final judgment, after this court’s correction of legal errors, was for only $22,136.60. The costs ordered by this trial judge are in an amount that might have been expected had the plaintiffs achieved a judgment closer to the range of value that they had placed on their case. Of course, the amount of the jury’s verdict was $220,000, but the amount remaining from that verdict after all relevant deductions is the relevant one for costs assessment because a plaintiff’s right to tort compensation is to an amount net of any collateral benefits and statutory deductions: *Pilon v. Janveaux* (2006), 211 OAC 19 (C.A.), at paras 15-17.

[158] As I already have mentioned, in his reasons on costs, the trial judge noted that, if he was wrong on the application of the statutory deductible, he would

have ordered both parties to bear their own costs. The defendant indicated to this court that it would be content with the trial judge's alternative order. In my view, the conclusion that each party should bear its own costs is a reasonable one.

[159] On any proportional basis, the plaintiff's costs, even taking the defence offer out of the equation for the moment, could not have been expected to exceed approximately $200,000, given the results achieved.

[160] When the defendant's offer comes into play, the costs payable to the defendant are approximately equal to or more than the plaintiff could hope to recover. In the circumstances, in my view, the fairest result to both sides is that each party bears its own costs.

## G. DISPOSITION

[161] In the result, I would dismiss the plaintiffs' appeal and allow the defendant's appeal, including its appeal from the trial judge's costs award. For the reasons that I have provided, I would reduce the amount of the judgment to $22,136.60 and I would order each party to bear its own costs of the proceedings below.

[162] I would allow the parties to file written submissions on the costs of these appeals to the panel, the defendant within two weeks of the release of these reasons and the plaintiff within two weeks thereafter, with submissions by each party not to exceed ten pages in length.

Released: “DD SEP 19 2017”

“J. MacFarland J.A.”
“I agree. Doherty J.A.”
“I agree. Paul Rouleau J.A.”