COURT OF APPEAL FOR ONTARIO

CITATION: El-Khodr v. Lackie, 2017 ONCA 716
DATE: 20170919
DOCKET: C60918

Doherty, MacFarland and Rouleau JJ.A.

BETWEEN

Kossay El-Khodr

Plaintiff (Respondent)

and

Raymond C. Lackie, John MacPhail, ATS Andlauer Transportation Services GP Inc., and Trailcon Leasing Inc.

Defendants (Appellants)

Barry A. Percival, Q.C. and James W. Gibson, for the appellants

Joseph Y. Obagi and Elizabeth A. Quigley, for the respondent

Heard: April 4, 2017

On appeal from the order and the judgment that resulted from that order of Justice Giovanna Toscano Roccamo of the Superior Court of Justice, dated August 26, 2015, sitting with a jury, with reasons reported at 2015 ONSC 2824, 2015 ONSC 4766 and 2015 ONSC 5244.

MacFarland J.A.:

[1] This appeal from the judgment of Justice Giovanna Toscano Roccamo dated August 25, 2015, sitting with a jury, with reasons reported at 2015 ONSC

2824, 2015 ONSC 4766 and 2015 ONSC 5244, was heard together with the appeals in *Cobb v. Long Estate*, 2017 ONCA 717. The reasons for judgment are being released concurrently. All of the appeals deal with 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. The issue in relation to prejudgment interest is also common to both and my reasoning in *Cobb* on this point applies here as well.

A. FACTS

[2] Kossay El-Khodr was catastrophically impaired when the tow truck he was operating in the early morning hours of January 9, 2007 was rear-ended by the appellants' vehicle. Liability for the collision was never seriously in issue and was admitted by the time of the trial. The trial proceeded before a jury and, by their verdict delivered April 30, 2015, the respondent was awarded damages in the following amounts:

General Damages:	:	$225,000
Past Loss of Income	:	$220,434
Future Loss of Income	:	$395,593
Future Care Costs:		
Attendant Care Costs/Assisted Living	:	$1,450,000

Professional Services (Physiotherapy, Psychology, etc)	:	$424,550
Housekeeping and Home Maintenance	:	$133,000
Medication and Assistive Devices	:	$82,429
Total		$2,931,006

[3] On August 10, 2015, the respondent was paid the full amount awarded by the jury.

B. THE TRIAL JUDGE'S IMPUGNED RULINGS

[4] In a series of rulings during and after the trial, the trial judge held that:

i. Prejudgment interest on the general damage award should be calculated at 5%, the rate that was in effect prior to January 1, 2015, when s. 258.3(8.1) of the *Insurance Act* was amended;

ii. The respondent was required to assign his future income replacement benefit from his SABs insurer only to the age of 60 and not thereafter;

iii. The jury should treat the existence of the Ontario Drug Benefit Program, which would cover the cost of the respondent's medication after the age of 65, as a "contingency" only rather than as a certainty;

iv. There should be no assignment to the appellant of any future payments to be made to the respondent by the SABs insurer in relation to medication and assistive devices;

v. There should be no assignment to the appellant of any future payments to be made to the respondent by the SABs insurer in relation to professional services.

[5] These five rulings are the subject-matter of this appeal.

C. ANALYSIS

Issue 1 - Prejudgment interest amendment

[6] In *Cobb*, I conclude that the January 1, 2015 amendment to s. 258.3(8.1) of the *Insurance Act* was effective from the day it came into force and applied to all actions then in the system. I so conclude because the *Courts of Justice Act*, R.S.O. 1990, c. C.43, does not generate a vested right to any particular rate of prejudgment interest, and 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.

[7] The result here is that the default interest rate to be applied on the general damage award pursuant to s. 127 of the *Courts of Justice Act* is 2.5% and not 5% as the trial judge awarded. The trial judge did not exercise her discretion under s. 130 to depart from that default rate. The consequence in dollar figures is that the interest awarded on general damages ought to have been the sum of $44,583.91 rather than the $89,167.81 awarded by the trial judge. I would reduce the amount of the judgment by the sum of $44,583.90.

Issue 2 - Whether the respondent was required to assign his future income replacement benefit from his SABs insurer only to the age of 60

[8] In her provisional reasons for judgment, reported at 2015 ONSC 4766, the trial judge stated at para. 84 that she would be inclined to order that the respondent assign all future payments for weekly income until either the payments total $395,593 (the amount the jury awarded for future loss of income) or until the respondent reaches the age of 64. In her final reasons for judgment, reported at 2015 ONSC 5244, the trial judge commented at paras. 7 and 8 that the appellants admitted that the award did not disclose the retirement age that the jury had utilized and that it was a matter of speculation that the jury had used age 64. To ensure that the respondent's entitlement to full compensation was not jeopardized, she held that the appellants were entitled to an assignment of income replacement benefits based on a retirement age of 60.

[9] The respondent initially presented his case for future income loss to the jury through four scenarios. For the first three scenarios, the respondent's accounting expert (from Price Waterhouse Coopers and later of KPMG), Mr. Rehman, took figures from Statistics Canada. The first scenario was based on sales statistics for unincorporated businesses. The second was based on 2006 figures for truck drivers, including tow truck drivers. The third was based on 2006 figures for higher-ranking positions in the same industry, specifically for supervisors of motor transport and other ground transit operators, on the assumption that the respondent likely would have obtained a promotion at some

point. The fourth scenario was based on data collected by the Economic Research Institute (ERI) about tow truck operators in the area where the respondent worked. Within those four scenarios presented to the jury, two - and only two - retirement dates were proposed: age 64 and age 67.

[10] During the trial, Mr. Hamzeh, a friend of the respondent and the respondent's colleague at the time of the accident, gave evidence. The two had worked for the same towing company and had planned to go into business together and operate their own towing company. Unfortunately, this motor vehicle accident intervened and the respondent was unable to participate in those plans any further. Mr. Hamzeh, however, did go into business for himself and gave evidence about his business income and expenses from his business over the years. The respondent's expert, Mr. Rehman, was in court for that evidence and, based on what he had heard and on reviewing the financial records for Mr. Hamzeh, as well as his income tax records, he was able to come up with a fifth and a sixth scenario, based on those records and statistical averages for the respondent, for past (prior to trial) income and for future (after trial) income losses.

[11] As Mr. Rehman explained in his evidence, among the first four scenarios, using the Statistics Canada and ERI figures – the average retirement age for all four scenarios came from Statistics Canada – in only one, the "owner of a comparable company" scenario, was the average retirement age 67. In all of the

other three scenarios the average age of retirement was 64 because that was Statistics Canada's average retirement age for employed individuals, as opposed to self-employed individuals, for whom Statistics Canada's average retirement age was 67.

[12] In the calculations for scenarios five and six (referred to as 1-A and 1-B in the evidence), based in part on Mr. Hamzeh's actual numbers, Mr. Rehman used 2030 as the projected retirement date – in 2030 the respondent would be 67 years of age.

[13] Nowhere in her charge to the jury did the trial judge reference anything in relation to the future income loss that suggested any retirement date other than those suggested by Mr. Rehman. Mr. Rehman was not questioned about other possible retirement dates and what, if any, differences other dates might make to his calculations. He was not asked to demonstrate for the jury how they might use the present value numbers if they did not accept the proposed retirement dates. Finally, the respondent was never asked any questions at all about when he expected to retire. On this record, it was a misapprehension of evidence to suggest that this jury might have based their award for future loss of income on a retirement date other than those specifically referenced in the evidence. Any other date was pure speculation.

[14] What is clear from the verdict is that, in relation to the past loss of income award, the jury took the number from Mr. Rehman's Scenario Four, which

projected the respondent's lost income based on ERI's statistics about compensation for tow truck drivers in the local area.

[15] The jury's award for past loss of income matches exactly Mr. Rehman's Scenario Four figure for past loss of income ($220,434). Although their award for future loss of income is less than any of the numbers presented by Mr. Rehman, the Scenario Four amount is the closest to the jury's, with a difference of only $20,821. The average retirement age, according to Statistics Canada evidence, for a Scenario Four person was 64 years of age.

[16] The only reasonable conclusion, based on the evidence and the jury's answers, is that the jury had concluded that the respondent would have retired at age 64 had the accident not occurred.

[17] The appellants are content if the trial judge's order is amended to reflect a retirement date when the respondent will be 64 years of age. The obligation to assign the income replacement benefits payable by RSA Insurance (the respondent's accident benefit insurer) to the defendant's insurer, Northbridge Commercial Insurance Corporation, therefore should also reflect this change. The obligation to assign should continue to the respondent's 64th birthday (August 10, 2027).

[18] Accordingly, I would amend paragraph 1 of the trial judge's order dated August 26, 2015 by deleting the date of December 31, 2019 and substituting the date of August 10, 2027.[1]

Issue 3 - Whether the existence of the Ontario Drug Benefit Program should have been treated as a "contingency" only rather than as a certainty

[19] Under O. Reg 201/96, promulgated pursuant to the *Ontario Drug Benefit Act*, R.S.O. 1990, c. O.10, persons over the age of 65 are eligible for the Ontario Drug Benefit Program ("ODBP"), which covers the cost of prescription drugs. The trial judge instructed the jury to treat the plaintiff's eligibility for this program, once the plaintiff reached the age of 65, as a contingency.

[20] In her instructions to the jury, the trial judge explained that the jury should treat the respondent's eligibility for the ODBP as a contingency because "there is substantial uncertainty about whether the Drug Plan will be available in 2028", the year during which the respondent would reach age 65. In my view she erred in doing so and she should have instructed the jury to award damages based on the law as it currently exists. Given the plaintiff's eligibility under the ODBP at age 65, the liability insurer should have been required to pay for drug benefits only to the age of 65.

[1] The record provides August 10, 1963 as the respondent's birthdate. Since the trial judge's reasons dated August 26, 2015 set a retirement age of 60, her own reasons dictated a terminal date of August 10, 2023 for assignment of income replacement benefits.

[21] Confusingly, in her decision on the issue reported at 2015 ONSC 2824 and dated April 29, 2015, one day before the jury issued its verdict and one day after the trial judge instructed the jury on the "contingency" of the ODBP, the trial judge provided a different reason for treating the ODBP as a "contingency". That reason was that the relevant assignment provision, s. 267.8(12)(a)(v) of the *Insurance Act*, would not capture the reduction in drug prices for senior citizens that the ODBP provides. According to the trial judge, the problem was that subclause (12)(a)(v) captures only "payments to which the plaintiff who recovered damages is entitled in respect of the incident after the trial of the action … under any medical, surgical, dental, hospitalization, rehabilitation or long-term care plan or law" (emphasis added).

[22] The trial judge erred in failing to instruct the jury not to award any sum for drug benefits after the plaintiff reached the age of 65. From that age forward, he would suffer no loss because his drug claims would be covered by the ODBP.

[23] Because the jury was instructed to treat drug benefits as a contingency, it is impossible to conclude from the jury award what portion of the damage award for drug benefits, if any, extends past the age of 65. While the SABs insurer will not be obligated to make any payment to the respondent beyond the age of 65 in relation to drugs, the liability insurer, who has or may have been required to compensate the respondent on this head beyond the age of 65 by reason of the erroneous charge, will receive no corresponding reduction by way of assignment

or trust. Accordingly, in this case, the plaintiff may have been overcompensated for his loss, but, on the record, it is impossible for this court to make any order that would correct the trial judge's error.[2]

Issue 4 - Whether future SABs payments to be made to the respondent in relation to medication, assistive devices and professional services should have been assigned

(a) Introduction

[24] The respondent's future care needs were claimed from the date of trial for the balance of his life. The cost of care evidence is summarized in the cost of care tables that were marked as exhibits at trial. The claim was presented and the respondent's future needs categorized by the respondent under the following headings: Medication and Assistive Devices; Professional Services; Housekeeping and Home Maintenance Services; and Assisted Living. The latter category was broken down into two scenarios – the first using the Phoenix Network Model, a supported independent living model, and the second using a Personal Support Worker and a Rehabilitation Support Worker.

[25] The claims as advanced by the respondent under these categories were:

Future Attendant Care:

---

[2] I note that the trial judge reminded the jury in her charge that Mr. Martel, who had testified as an actuarial expert, had recalculated the cost of future medications with the assumption that the Ontario Drug Benefit Program would fully cover the respondent's medication costs once he reached age 65. The jury award appears to be more in line with Mr. Martel's revised figures and perhaps with his assumption that medication costs would be covered after age 65. Even if one must assume that the jury awarded some portion of drug costs after age 65 in keeping with the trial judge's charge to treat the drug benefit program as a contingency, the jury's figure is only some $4000 more than Mr. Martel's lowest number. Any prejudice to the liability insurer is therefore negligible.

(i) Phoenix Network	$3,373,627
(ii) Personal Support Worker	$2,609,113
Future Professional Services:	$637,125
Future Housekeeping and Home Maintenance:	$133,371
Future Medication and Assistive Devices:	[1] $144,743
	[2] $169,596
	[3] $191,061

[26] The three numbers on the medication and assistive devices resulted from three different proposed dosages for the drug Cymbalta, the higher the dose the more costly the drug.

[27] In her instructions to the jury, the trial judge reminded the jury that, during cross-examination, Mr. Martel, who had testified as an actuarial expert, had recalculated the cost of future medications with the assumption that the ODBP would fully cover the respondent's medication costs once he reached age 65. The recalculated amounts, assuming the same dosages, were: (1) $78,230; (2) $90,434; and (3) $102,043.

[28] The jury awarded:

Future Attendant Care Costs/Assisted Living	:	$1,450,000

Future Professional Services	:	$424,550
Future Housekeeping and Home Maintenance Services	:	$133,000
Future Medication and Assisted Devices	:	$82,429

[29] Following the jury verdict, the appellants sought an assignment of the SABs payments to which the respondent would be entitled post-trial. The trial judge's refusal to make any assignment in relation to future professional services and future medication and assistive devices is the subject of this ground of appeal.

[30] In her reasons for judgment dated July 28, 2015, the trial judge gave provisional reasons on the assignment of future collateral benefits, indicating that she would be inclined to, among other things:

> 1. assign payments for future medication and assistive devices until such time as the payments total $82,429, or until the plaintiff reaches the age of 65, whichever comes first;
>
> 2. find that the jury's award for professional and rehabilitation services included an amount for physiotherapy, entitling the defendant to assignment of any future payments for physiotherapy until such time as the assigned payments for professional services total $424,550; and

3. assign payments for attendant care costs to continue only until such time as the payments total $1,450,000.

[31] In her final decision, the trial judge did not allow an assignment of the future medication benefits and future professional services benefits. She noted that the parties had not adopted the language that she had proposed for the jury verdict sheet. Accordingly, the verdict sheet did not require the jury to specify awards for future care costs under the sub-headings that she had proposed, such as separate headings for each of physiotherapy, psychology, etc., instead of a single one for “Future Professional Services”, and separate headings for medications and for assistive devices instead of a single one for “Future Medication & Assistive Devices”. At paras. 5 and 6 of her reasons, she concluded:

> [5] As a result of the jury's global awards of $424,550 for Future Professional Services, and $82,429 for Future Medication and Assistive Devices, the Defendants are now unable to meet their onus to demonstrate that the jury award compensated the Plaintiff for the same loss in respect of which the Defendants now claim an assignment of benefits.
>
> [6] The case law concerning the trust and assignment provisions of the *Insurance Act* requires me to ensure the prevention of double recovery by a plaintiff. This requirement must be balanced against a plaintiff's entitlement to receive full compensation; that is, by not being subjected unfairly to deductions based on uncertainty and speculation. I adopt the reasoning of Leach, J. in *Gilbert v. South*, 2014 ONSC 3485, 120 O.R. (3d) 703, at para. 9 where she found herself

similarly bound by the very strict onus of proof applied to defendants in these cases:

> However, concern to ensure mandated prevention of such double-recovery is balanced by concern that a plaintiff should receive full compensation and not recover less than that to which he or she is entitled; i.e., by being subjected unfairly to deductions based on collateral benefit entitlements that are in doubt and/or which may not truly overlap with sums recovered in a tort judgment. Statutory provisions of this nature therefore are strictly interpreted and applied. In particular: deductions from a plaintiff's damage award to prevent double recovery will be made only if it is absolutely clear that the plaintiff's entitlement to such collateral benefits is certain, *and* that the plaintiff received compensation for the same benefits in the tort judgment, (as "apples should be deducted from apples, and oranges from oranges"). Evidence of "likelihood" and "probability" in that regard is not enough to warrant a deduction. Rather, a "very strict onus of proof" applies in relation to such matters, and it must be "patently clear" that the preconditions for an appropriate deduction have been established. If there is uncertainty as to a plaintiff's receipt of such benefits, the value of the benefits entitlement, and/or the extent (if any) to which recovered tort damages relate to the same type of expense covered by the benefits received, matters are not "beyond dispute" in the sense required for a deduction, and no deduction should be made. See *Chrappa v. Ohm* (1998), 38 O.R. (3d) 651 (C.A.), at p.657; *Bannon v. Hagerman Estate* (1998), 38 O.R. (3d) 659 (C.A.), at p.679; *Cowles v. Balac*, [2005] O.J. No. 229 (S.C.J.), at paragraph 205,

> affirmed [2006] O.J. No. 4177 (C.A.); *Moore v. Cote*, [2008] O.J. No. 3541 (S.C.J.), at paragraph 9; and *Hoang v. Vicentini*, *supra*, at paragraphs 27-28, 36 and 45. [Emphasis in original.]

[32] The relevant provisions of the *Insurance Act* that address the assignment/trust of SABs received by a plaintiff post-trial provide:

> 267.8(9) A plaintiff who recovers damages for income loss, loss of earning capacity, expenses that have been or will be incurred for health care, or other 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 shall hold the following amounts in trust:
>
> 1. All payments in respect of the incident that the plaintiff receives after the trial of the action for statutory accident benefits in respect of income loss or loss of earning capacity.
>
> 2. All payments in respect of the incident that the plaintiff receives after the trial of the action for income loss or loss of earning capacity under the laws of any jurisdiction or under an income continuation benefit plan
>
> 3. All payments in respect of the incident that the plaintiff receives after the trial of the action under a sick leave plan arising by reason of the plaintiff's occupation or employment.
>
> 4. All payments in respect of the incident that the plaintiff receives after the trial of the action for statutory accident benefits in respect of expenses for health care.
>
> 5. All payments in respect of the incident that the plaintiff receives after the trial of the action under any medical, surgical, dental, hospitalization, rehabilitation or long-term care plan or law.
>
> 6. All payments in respect of the incident that the plaintiff receives after the trial of the action for statutory accident

benefits in respect of pecuniary loss, other than income loss, loss of earning capacity and expenses for health care.

(10) A plaintiff who holds money in trust under subsection (9) shall pay the money to the persons from whom damages were recovered in the action, in the proportions that those persons paid the damages.

…

(12) The court that heard and determined the action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of the automobile, on motion, may order that, subject to any conditions the court considers just,

(a) the plaintiff who recovered damages in the action assign to the defendants or the defendants' insurers all rights in respect of all payments to which the plaintiff who recovered damages is entitled in respect of the incident after the trial of the action,

(i) for statutory accident benefits in respect of income loss or loss of earning capacity,

(ii) for income loss or loss of earning capacity under the laws of any jurisdiction or under an income continuation benefit plan,

(iii) under a sick leave plan arising by reason of the plaintiff's occupation or employment,

(iv) for statutory accident benefits in respect of expenses for health care,

(v) under any medical, surgical, dental, hospitalization, rehabilitation or long-term care plan or law, and

(vi) for statutory accident benefits in respect of pecuniary loss, other than income loss, loss of earning capacity and expenses for health care; and

(b) the plaintiff who recovered damages in the action co-operate with the defendants or the

> defendants' insurers in any claim or proceeding brought by the defendants or the defendants' insurers in respect of a payment assigned pursuant to clause (a).

[33] Section 267.8 of the *Insurance Act* codifies the common-law principle that a plaintiff should not recover twice for the same kind of loss arising from the same incident. The particular benefits that are to be deducted, held in trust or assigned are described in the legislation only in broad categories. For example, s. 267.8(1) requires that benefits for income loss and loss of earning capacity be deducted from damages for income loss and loss of earning capacity. Likewise, s. 267.8(4) requires that health care expense payments be deducted from damages for health care costs. While the *Insurance Act* does not, on its face, further distinguish particular statutory benefits on a qualitative or temporal basis, several cases have imposed those requirements by requiring strict matching between common-law heads of damage and the specific type of SABs benefit received.

[34] The trial judge in this case applied a strict matching approach on the basis of *Bannon v. McNeely* (1998), 38 O.R. (3d) 659 (C.A.), a case decided under a former statutory regime for the deduction of benefits, and *Gilbert v. South*, 2015 ONCA 712, 127 O.R. (3d) 526, a recent decision of this court that applies the *Bannon* approach in the assignment of benefits context.

[35] In my view, strict qualitative and temporal matching requirements should not be applied to s. 267.8 for two chief reasons: (a) the policy rationale

underlying *Bannon* is not relevant to the current statutory scheme; and (b) *Bannon* may no longer be good law in this province.[3] Like the approach that this court adopted with respect to the deductibility of pre-trial benefits in *Basandra v. Sforza*, 2016 ONCA 251, 130 O.R. (3d) 466, and which is the subject of the appeal in the *Cobb* case, the assignment and trust provisions of the *Insurance Act* require the court to match benefits that will be received after trial to the broad, enumerated statutory categories only in a general way.

[36] In the analysis that follows, I discuss: why the policy rationale underlying *Bannon* is no longer relevant; why *Bannon* may no longer be good law in this province; and whether *Gilbert* should apply to prevent the assignment of benefits in this appeal. I also offer some suggestions as to how the claims for special damages should be presented to a jury to better serve the purpose of the statutory provisions.

[37] In this appeal, because I have concluded that the strict matching approach set out in *Gilbert* does not apply to the particular facts of this case, I leave the specific question as to whether *Bannon* and *Gilbert* remain good law for another day.

---

[3] These concepts are discussed by Stephen Ross and Meryl Rodrigues, in "The Interplay Between Tort and Accident Benefits", *The Oatley McLeish Guide to Motor Vehicle Litigation 2017*, (Toronto: Law Society of Upper Canada, 2017).

(b) The policy rationale underlying *Bannon* is no longer relevant

[38] To understand why *Bannon* may no longer be relevant with respect to the treatment of SABs benefits, it is helpful to appreciate the differences between the previous statutory regimes that have applied and the current regime.[4]

[39] For accidents that occurred between 1971 and October 1989, s. 239(2) of the *Insurance Act*, R.S.O. 1980, c. 218, a provision originating in S.O. 1971, c. 84, s. 17, provided:

> (2) Where a claimant is entitled to the benefit of insurance as provided in [the relevant Schedule], this, to the extent of payments made or available to the claimant thereunder, constitutes a release by the claimant against the person liable to the claimant or his insurer.

[40] This provision established a scheme that required future accident benefits payable to a plaintiff by the no-fault insurer be paid to the insurer responsible for payment of the tort damages. At common law, "*Cox and Carter*" orders[5] were fashioned if entitlement to future benefits could not be strictly proven and the present value of future benefits could not be deducted. The courts imposed these orders to ensure there would be no double recovery. Such an order would require the defendant to pay the damage award, while providing the defendant with credit for collateral benefits paid to the date of trial. Future statutory benefits

[4] A helpful summary of the various statutory regimes is provided by Stephen Firestone, "Deductibility of Collateral Benefits under Ontario's Three Automobile Insurance Schemes" (1998) 21 *Adv. Q*. 1.
[5] These orders originated in the decision of *Cox v. Carter* (1976), 13 O.R. (2d) 717 (H.C.) by Morden J., as he then was.

that the plaintiff would receive after trial were subject to a trust and would be paid to the defendant's insurer in the tort action when received.

[41] Accidents occurring between October 1989 and January 1994 were subject to a revised provision in the *Insurance Act*, R.S.O. 1990, c. I.8, originating in S.O. 1990, c. 2, s. 57.[6] Subsection 267(1) provided:

> The damages awarded to a person in a proceeding for loss or damage arising directly or indirectly from the use or operation of an automobile shall be reduced by:
>
> > (a) all payments that the person has received or that were or are available for no-fault benefits and by the present value of any no-fault benefits to which the person is entitled;

[42] It was unclear under this revised language whether "*Cox and Carter*" orders were still available or whether a defendant was simply entitled to a deduction at trial for the present value of future accident benefits that might be payable after trial. It was also unclear whether deductions of no-fault benefits could be made against any head of tort damages. Two decisions of this court in 1998 clarified the application of s. 267.

[43] In *Chrappa v. Ohm* (1998), 38 O.R. (3d) 651 (C.A.), this court addressed the standard of proof that this subsection required. At issue was the treatment of the plaintiff's ongoing entitlement to long-term disability benefits. The defendants argued that s. 267 required the trial judge to deduct the present value of future

[6] Although the provision originated in 1990, subsection 267(6) provided that s. 267 would apply to motor vehicle accidents occurring after Oct. 23, 1989.

disability payments to age 65. The trial judge had concluded that, in order to succeed with respect to the deduction of future benefits, the defendants had to demonstrate that it was “beyond dispute” that the plaintiff qualified in every respect for these payments and that they would be received. She found on the facts that this was not established and refused to make that deduction. However, to avoid the prospect of double recovery, the trial judge imposed a “*Cox and Carter*” order, requiring the plaintiff to hold in trust the future long-term disability payments that were received and, to the extent of the judgment, to pay them to the defendants.

[44] Goudge, J.A., writing for this court, upheld the trial judgment. He stated, at pp. 655-56, 657 and 658:

> What then must be shown to demonstrate entitlement to those future payments? As I have said, the test adopted by the trial judge is that it must be shown to be beyond dispute that the plaintiff qualifies for these payments in every respect. I agree with this. The plaintiff's present right to receive these payments means that so far as the future can be made certain, they will be received. Short of that, there is no entitlement for the purposes of the subsection.
>
> The subsection requires by its terms that the entitlement to future payments exist at the time of trial. It must be shown that there are future payments to which the plaintiff "*is* entitled" (emphasis added). The *New Shorter Oxford English Dictionary* provides that to be entitled is to have a rightful claim to something. The plain meaning of the language of the subsection requires the showing of a present right to receive these future payments. Otherwise the present value deduction does not apply.

> The relevant case-law also supports the conclusion that a strict construction is to be given to the concept of entitlement to insurance benefits where that entitlement is the basis for a reduction in the plaintiff's recovery.
>
> …
>
> Thus, in my view, the jurisprudence supports the view that where the concept of entitlement to future long-term insurance benefits is used as a basis for reducing the [plaintiff's] damage recovery it must be strictly interpreted to require that it be beyond dispute that the plaintiff qualifies for these future payments in every respect.
>
> …
>
> I therefore conclude that the appellants fail on the central issue in this appeal. Both parties agreed that, in this event, no quarrel can be had with the modified "*Cox and Carter*" order imposed by the trial judge. It does full justice to both parties in that it provides a mechanism for ensuring with precision that the respondent obtains no double recovery because of these future payments from the respondent's insurer to compensate her for loss of income. It does so without passing to the respondent any risk that her ultimate recovery will be less than that awarded by the jury. [Emphasis in original.]

[45] *Bannon v. McNeely* addressed whether a deduction of no-fault benefits could be made against any head of damage under a tort award or whether the deduction must be from a head of damage covering that kind of loss to which the no-fault benefit could be attributed. Finlayson J.A., writing for the court, at p. 673 again described why the onus of proof under s. 267(1) was very strict:

> Goudge J.A. in *Chrappa* examined the relevant case-law and concluded that [at p. 657] "the jurisprudence supports the view that where the concept of entitlement to future long-term insurance benefits is used as a basis

> for reducing the plaintiff's damage recovery it must be strictly interpreted to require that it is beyond dispute that the plaintiff qualifies for these future payments in every respect".

[46] One can see in this context why the court required a defendant claiming the benefit of a statutory deduction to bear a strict onus of establishing the present value of any future no-fault benefits to which a plaintiff was entitled. Under the regime in operation at the time, the deduction was made from the damage award immediately after the verdict on damages and at a time when the entitlement to the future receipt of the deducted benefit might have been uncertain. If the SABs insurer decided not to pay the benefit for any reason, the plaintiff would have already accounted, by way of a reduction in her damage award, for a benefit that she would not ultimately receive. Certainty was required under that statutory regime to avoid the risk of under-compensation of the plaintiff.

[47] The position with respect to the deductibility of the SABs benefits advanced by the appellant in *Bannon* was a broad one and, at p. 674, the court described it this way:

> The appellants further submit that no-fault benefits are deducted from <u>any</u> damages awarded in a tort action, <u>regardless of whether or not the damages are awarded for a type of loss akin to that for which the no-fault benefits were intended to compensate</u>. A plaintiff may never apply for no-fault benefits, but if they are available, the defendant is entitled to the deduction of the benefits from the damages awarded; if the plaintiff

> applies for and is rejected the benefits, then the plaintiff must sue for them. [Emphasis added.]

[48] In rejecting the proposition that any no-fault benefits could be deducted from the totality of a tort award regardless of the manner in which the award was structured, Finlayson J.A., at p. 678, referred to the approach adopted by the British Columbia Court of Appeal in *Jang v. Jang* (1991), 54 B.C.L.R. (2d) 121 (C.A.) in considering a similar provision in that province's no-fault scheme. In *Jang*, Lambert J.A. had concluded, at p. 125, "It is only where the benefit corresponds with the particular heading of claim for damages that the benefit is to be deducted, and then only from the award for that particular head of damages."

[49] At p. 679 of *Bannon*, Finlayson J.A. adopted this "apples to apples" approach, stating:

> …my opinion with respect to the deductibility of no-fault benefits is more in accord with the approach taken by the British Columbia Court of Appeal in *Jang*, *supra*. I believe that, where possible, any no-fault benefit deducted from a tort award under s. 267(1)(*a*) must be deducted from a head of damage or type of loss akin to that for which the no-fault benefits were intended to compensate. In other words, and employing the comparison of Morden J. in *Cox*, *supra*, if at all possible, apples should be deducted from apples, and oranges from oranges. It follows further from this conclusion that if the no-fault deduction exceeds the amount awarded under the specific head of damages to which the no-fault benefits can be attributed, then there cannot be resort to another portion of the tort judgment for the balance.

[50] The unusual pleadings in that case also influenced this court's adoption of a strict matching approach. The plaintiffs in *Bannon* had presented a number of "net claims" in the action, net of what were then called "no-fault benefits".

[51] One can perceive this framing of the case, for example, in relation to the housekeeping claim, where at p. 669, this court noted:

> The trial judge favoured the approach of Ms. Carter over Mr. Pesando's and made an award for the loss of housekeeping services that was net of the no-fault benefits received under s. 7(1)(*a*) of the SABS up to the time of trial. This net award was $65,000 after making a 20 per cent contingency reduction. The trial judge also gave an award of $43,000 for the loss of post-trial housekeeping services that covered the period from the date of trial to the time that Mrs. Bannon would reach age 70. That award was also a net award. It included a 20 per cent contingency reduction and excluded the value of no-fault benefits received and receivable during this period. [Emphasis added.]

[52] In *Bannon*, the plaintiffs did not seek recovery of benefits already provided to them by their no-fault insurer; their claims were presented net of those benefits. Nevertheless, the appellants in that case argued that the payments still had to be deducted from the damage award in the tort claim. The result in *Bannon* is not surprising; where the claim was presented net of no-fault payments, any further deduction would have amounted to a double counting of the no-fault benefits.

[53] The current statutory scheme was introduced in November 1996, in s. 29 of the *Automobile Insurance Rate Stability Act, 1996*, S.O. 1996, c. 21. For

present purposes, the 1996 amendments did three important things: they codified the principle that SABs benefits that fall into the enumerated three general categories are deductible; they eliminated the quantification and deduction of the present value of future benefits that might be payable; and they codified the common-law "*Cox and Carter*" orders.

[54] In my view, the policy rationale supporting the strict matching requirement in *Bannon* no longer applies, given these amendments to the statutory scheme. The concern that the court had in *Bannon* regarding the uncertainty of future payment of SABs simply does not arise under the current legislation. Courts are no longer required to calculate the present value of the future benefits to which a plaintiff would be entitled and to deduct that amount from the damage onward. The potential unfairness of this requirement, in my view, was the overriding concern and the rationale that originally drove the strict approach to deductibility under the legislative regime that this court addressed in *Bannon*.

(c) *Bannon* may no longer be good law in this province

[55] As I explain above, the Ontario matching principle articulated in *Bannon* is based on the approach of the British Columbia Court of Appeal in *Jang*. In *Gurniak v. Nordquist*, 2003 SCC 59, [2003] 2 S.C.R. 652, a majority of the Supreme Court of Canada expressly stated that *Jang* was wrongly decided. While interpreting s. 25 of British Columbia's *Insurance (Motor Vehicle) Act,* R.S.B.C. 1996, c. 231, a provision like the one in the Ontario legislation in force

between 1971 and October 1989, the court held that, provided broad similarity was established as the B.C. statute required, a specific matching between the particular benefit received under the statutory accident benefit scheme and the heads of damage in the tort award was not required.

[56] Iacobucci J., writing for the majority, rejected the approach of the British Columbia Court of Appeal in *Jang*. At paras. 44 and 45, he stated:

> [44] With respect, I find the reading of the statute advanced by the British Columbia Court of Appeal and adopted by the respondents problematic in several respects. First, and most importantly, it grafts onto the statutory sections something that is simply not there. I do not agree with the statement in *Jang* that "[t]he requirement that the benefit match the claim is implicit in the legislative scheme ... and is explicit in s. 24(2) [now s. 25(2)], which matches 'a claim for damages' with 'benefits respecting the claim'" (para. 13) […] Since the term "benefits" is defined under s. 25(1) as "includ[ing] accident insurance benefits similar to those described in Part 6", it follows that "benefits respecting the claim" must in this case refer to the <u>full</u> panoply of accident insurance benefits received under the Quebec legislation in respect of the death of Mr. Ross. It is, in my view, a contrived reading of the statute to interpret "benefits respecting the claim" as encompassing various individual heads of damage claimed under the SAAQ scheme, and to thereafter require that these benefits be deducted only to the extent that they individually overlap with elements of the tort award. In my opinion, "benefits respecting the claim" refers to the global package of benefits paid under the SAAQ regime in respect of Ms. Gurniak's claim for damages arising from Mr. Ross's death in a motor vehicle accident. There is, to my mind, nothing in the language of this provision that mandates that there be a "match" between the specific heads of damage in a tort award and the specific heads of damage under the contract or

> benefits scheme in question before a deduction is appropriately made.
>
> [45] This approach has the benefit of simplicity and ease of application and likely explains why British Columbia chose not to introduce an explicit matching requirement into the statute, when it could readily have done so. A trial judge, once he or she has determined that the benefits under the two regimes are broadly similar under s. 25(1), will deduct from the tort award any benefits already received in respect of the claim for damages arising from the motor vehicle accident. The trial judge will not be required to engage in a complicated and cumbersome process of "matching" a head of damage in tort to a particular claim for damages under a statutory scheme. This interpretation of s. 25(2) is supported by the fact that under some statutory schemes, the benefits received are not neatly classified into the various heads of damage for which they compensate, thereby making it nearly impossible for trial judges to give meaningful effect to any sort of matching principle. [Emphasis in original.]

[57] Gonthier J., McLachlin C.J. concurring, agreed with the majority's disposition of the case but preferred not to overrule *Jang* on the matching requirement. At para. 2, he stated:

> [2] Although the correctness of the matching requirement was raised by the parties, we heard no submissions on the effect of overruling *Jang* on other Canadian jurisdictions. *Jang* has been adopted and applied by the Court of Appeal for Ontario in a series of cases interpreting s. 267(1) of the *Insurance Act*, R.S.O. 1990, c. I.8. See *Bannon v. McNeely* (1998), 38 O.R. (3d) 659; *Matt v. Barber* (2002), 162 O.A.C. 34; *Brownell v. Tannahill* (2000), 52 O.R. (3d) 227; *Macartney v. Warner* (2000), 46 O.R. (3d) 669; *Gignac v. Neufeld* (1999), 43 O.R. (3d) 741; *Quiroz v. Wallace* (1998), 40 O.R. (3d) 737. This line of cases was not brought to our attention by the parties and was not the subject of submissions. *I cannot avoid the conclusion*

> *that by overruling Jang, this Court must necessarily be taken to have overruled these Ontario cases as well.* In my view, judicial restraint requires this Court to forbear from such a course until the matching requirement is directly before us and is the subject of full argument. [Emphasis added.]

[58] Notwithstanding the fact that the Supreme Court has overruled *Jang*, few Ontario decisions have considered whether the strict matching principle that was articulated in *Bannon* remains good law under the current statutory scheme and in light of *Gurniak*.

[59] The only previous Ontario appellate case to have specifically addressed the point is *Mikolic v. Tanguay*, 2016 ONSC 71, 129 O.R. (3d) 24 (Div. Ct.). *Mikolic* required the Divisional Court to consider whether the trial judge had erred in refusing to deduct both the statutory income replacement benefits that the plaintiff had received from the tort award for past and future income loss and the statutory medical benefits that the plaintiff had received from the tort award for past and future care costs. The trial judge had concluded that *Bannon* required him to match pre-trial benefits received only against damages awarded for past losses and to match post-trial benefits that would be received only against damages awarded for future losses. In considering the implications of *Gurniak*, Sanderson J., writing for the court, stated at paras. 30-32:

> [30] It is not necessary to decide here whether the Supreme Court of Canada in *Gurniak* has generally overruled the matching principle set out in *Bannon*, although I note that in *Bannon* the Ontario Court of Appeal stated that its approach to the deductibility of no-

> fault benefits "is more in accord with the approach taken by the British Columbia Court of Appeal in *Jang*" (para. 49) and that the majority of the Supreme Court of Canada in *Gurniak* considered and overruled *Jang* at paras. 44-47 of its decision.
>
> [31] The language of the current statute is different from the language dealt with in *Bannon*. In *Bannon,* the statute provided for the deduction of "all payments that the person has received or that were or are available for no-fault benefits and by the present value of any no-fault benefits to which the person is entitled."
>
> [32] Since the legislation has been amended post *Bannon,* it is necessary for us to look at the specific wording of ss. 267.8(1) and (4), which require the court to carry out at least a limited matching when determining the deductibility of statutory benefits.

[60] I agree with Sanderson J. that the present legislation does, to a limited extent, import a matching requirement. The court is required only to match statutory benefits that fall generally into the “silos” created by s. 267.8 of the *Insurance Act* with the tort heads of damage. Income awards are to be reduced only by SABs payments in respect of income loss and health care awards only by SABs payments in respect of health care expenses. The latter item is, I suggest, deliberately broad enough to cover all manner of expenses that relate to health care and would include medications, physiotherapy, psychology sessions, assistive devices and the like. All manner of other expenses that are covered by SABs and that do not fall under the income category or the health care category fall into the “other pecuniary losses” category.

[61] There is nothing in the language of the current Ontario statutory scheme that would require any further subdivision based on common-law heads of damage. In other words, although the legislation requires us to match apples with apples, the relevant categories of "apples" are the statute's categories, not the common law's. Given the Supreme Court's explicit rejection in *Gurniak* of the matching approach in the *Jang* case and Gonthier J.'s comment in relation to *Bannon* and its progeny, *Gurniak* puts into considerable doubt any qualitative or temporal matching requirement that is not mandated by the current legislation.

(d) Whether the strict matching approach in *Gilbert* should be applied

[62] In the *Insurance Act*'s regime for mandatory assignment of accident benefits, plaintiffs who have recovered damages for future income losses, future healthcare costs or other ongoing expenses have an obligation to pay the corresponding statutory benefits, as the plaintiff receives them, to the defendant's insurer. In *Gilbert*, this court applied the strict matching approach adopted in *Bannon* to these assignment provisions.

[63] In *Gilbert*, the plaintiff was not catastrophically injured, so, according to the version of the *Statutory Accident Benefits Schedule*, O. Reg. 34/10, in force at the time, the plaintiff's receipt of health care benefits would cease after ten years and have a monetary limit of $100,000. York Fire & Casualty Insurance Company ("York Fire"), the plaintiff's insurer, had an obligation to provide coverage to Gilbert in relation to any damages caused by an uninsured driver. York Fire

brought a motion for a declaration that Gilbert was required to hold certain future statutory benefits in trust and pay them to York Fire, or, in the alternative, for an order assigning to York Fire the plaintiff's right to certain future statutory accident benefits from the accident benefits insurer. The insurer argued that the jury's award of damages for future care costs, coupled with the plaintiff's entitlement to statutory benefits for medical and rehabilitation expenses, would constitute double recovery in the absence of an order requiring a trust or an assignment of those future benefits.

[64] In the trial decision on assignment, reported at 2014 ONSC 3485, 120 O.R. (3d) 703, in describing the general principles relating to s. 267.8, the trial judge noted that he was required to balance prevention of double recovery against the plaintiff's entitlement to be fully compensated. In other words, he concluded that the plaintiff should not be subjected unfairly to deductions based on collateral benefit entitlements that are in doubt and/or which may not truly overlap with sums recovered in the tort action. In articulating a very strict onus of proof, and relying upon the *Bannon* case, the trial judge stated, at para. 9:

> …it must be "patently clear" that the preconditions for an appropriate deduction have been established. If there is uncertainty as to a plaintiff's receipt of such benefits, the value of the benefits entitlement, and/or the extent (if any) to which recovered tort damages relate to the same type of expense covered by the benefits received, matters are not "beyond dispute" in the sense required for a deduction, and no deduction should be made.

[65] He stated, at para. 10, that there were uncertainties both as to entitlement and overlap that made it inappropriate to grant the relief requested by York Fire. At para. 13, he noted that there was no evidence to indicate with certainty the total amount of statutory accident benefits the plaintiff would receive. Also, it was unclear for what time period the jury award was intended to compensate. The trial judge noted, at para. 18, that the question put to the jury was to determine all future care costs from the trial date forward without differentiating as to whether the damages awarded were allocated to the ten-year statutory accident benefit period, the time period following the end of the ten-year period, or a combination thereof.

[66] In addition to the temporal uncertainty, the trial judge concluded that there were qualitative concerns as the jury award made no allocation of the future care costs towards any particular category of future care expenditures. Because certain future care expenses were not recoverable under the SABs (e.g., transportation of an insured person to and from medical and rehabilitation appointments), he concluded that there was no way of making an accurate determination of the extent to which the jury award was intended to cover aspects of future treatment for which the plaintiff would not be reimbursed under the SABs. He stated, at para. 19, that if these qualitative distinctions were not made, the plaintiff could receive less than the full compensation to which he was

entitled. For these reasons, the trial judge declined to order either a trust or an assignment.

[67] This court upheld the trial judge's decision. Relying on *Bannon* and on *Chrappa*, the court concluded, at para. 44 of its reasons, that an insurer can obtain an assignment of a plaintiff's future no-fault or collateral benefits only if the jury award mirrors the benefit sought to be assigned and there is no uncertainty about entitlement. Laskin J.A., writing for the court, pointed out, at paras. 45 and 46, that the trial record left the trial judge with considerable uncertainty on whether Gilbert's entitlement to accident benefits mirrored the jury award for future care costs on both a temporal and qualitative basis. He stated that:

> [45] York Fire cannot meet these requirements. It did not raise Gilbert's accident benefits entitlement during the trial. It led no evidence from a future care cost expert. And it led no evidence of the present value of Gilbert's claimed future care costs. Thus, the record left the trial judge with considerable uncertainty whether Gilbert's entitlement to accident benefits mirrored the jury's award for future care costs.

[68] The decision in *Gilbert* is anchored by the trial judge's factual determination that the jury award encompassed future care costs for which accident benefits would not be received and that the trial record did not provide a basis to reconcile the two. This likely explains why neither the trial judge nor this court considered the Supreme Court's decision in *Gurniak* and no comparison was drawn between the current legislative scheme and the legislative scheme

that applied when *Bannon* was decided. As stated earlier, the differences in the legislation are significant and important.

[69] The current legislation has codified the "*Cox and Carter*" approach. The imposition of the common-law "*Cox and Carter*" orders under the previous statutory regimes ensured that no risk of under-compensation was placed on the plaintiff. Instead of being subject to a deduction from her damage award for future statutory benefits, the *Insurance Act* now requires a plaintiff to hold in trust or to assign any benefits that she receives from her SABs insurer after the trial judgment. These provisions ensure that the plaintiff is fully compensated by the jury award but limit double recovery by assigning only those benefits actually received in the future to the tort insurer. If the plaintiff does not receive any SAB payments after trial, she loses nothing because the tort insurer simply does not recover an offset of the damages already paid to the plaintiff. That is an important distinction from the previous regime. Like the "*Cox and Carter*" orders, the trust and assignment provisions ensure that no risk of under-compensation passes to the plaintiff, while also minimizing double recovery.

[70] As appears from this court's decision in *Basandra*, courts are moving toward a more relaxed approach that considers whether the pre-trial benefit received generally fits within one of the broad statutory categories of damages. Deductions are mirroring the language of the legislation – past income and future income awards are combined and all benefits received for income loss before

trial, whether for past or future income losses, are deducted. In the *Cobb* appeal, I note that the language of the deductibility provisions in the legislation does not direct the court to apply temporal matching requirements and that in *Basandra*, at para. 27, this court accepted that the total amount of any SABs settlement for past losses or for future expenses is to be combined and deducted from the corresponding heads of damage in the jury award. The Divisional Court came to the same conclusion in *Mikolic*, at paras. 27-38.

[71] It seems to me that the approach in *Basandra* also should apply in relation to the assignment provisions in view of the text of the legislation and the decision of the Supreme Court of Canada in *Gurniak*, which rejected any implicit statutory requirement for a “match” between specific heads of damage in a tort award and the specific heads of damage under the benefits scheme in question.

[72] To summarize on this point, I suggest that the time may have come to reconsider the application of any strict matching requirement between heads of damage and statutory benefits to the current statutory scheme for the following reasons: *Bannon* may no longer be good law in this province; and significant changes have been made to the statutory scheme since *Bannon* was decided. I leave these questions for another day as I conclude, for the reasons expressed below, that the *Gilbert* case can be distinguished on its facts.

(e) *Gilbert* does not apply on the facts to this appeal

[73] This case differs from *Gilbert* factually in ways that make any risk of under-compensation due to assignment of future statutory benefits much smaller than in *Gilbert*. First, the respondent here has been designated catastrophically impaired. The ten-year temporal limitation for SABs that concerned the trial judge in *Gilbert* does not arise in this case. Here, the respondent claimed damages from the time of trial to the end of his life – the same period for which he is entitled to SABs by reason of his catastrophic impairment designation. Second, there were no benefits for which the assignment was requested that were not covered by SABs. The transportation expense that concerned the trial judge in *Gilbert* does not arise here. In that case, the plaintiff had claimed, among the items in support of his claim for future care costs, the cost of transportation to and from medical and other appointments. Because he was not catastrophically impaired, SABs did not cover the transportation cost.

[74] Because the jury's award for future care costs was simply a lump sum global amount, there was no way to determine what, if any, sum the jury had awarded in relation to that item. So, to permit the deduction, it was argued, may have reduced the award for that item and left the plaintiff less than fully compensated. Those concerns do not arise on the facts of this case.

[75] All of the claims in this case that make up the awards for future professional service and future medication and assistive devices were itemized

sufficiently and all were covered by the SABs schedule. They were claimed from the date of trial to the end of the respondent's life – the same period that the SABs will cover. The Cost of Future Care schedules on which the respondent advanced his case before the jury and that were made exhibits set out the respondent's claims in detail.

[76] This was not a lump sum award for future care. The jury awarded an amount for future attendant care/assisted living, a separate amount for future professional services and separate amounts for future housekeeping/home maintenance and for future medication and assistive devices.

[77] The respondent did not recover all of the amounts that he had claimed. For example, he advanced a claim for the cost of future professional services in the amount of $637,125 and the jury awarded $424,550.

[78] But it is for the jury to say what the proper amount of compensation is for a plaintiff. And once the judgment based on that award is paid, a plaintiff has been fully compensated for his loss. This plaintiff was paid the full amount of his judgment on August 10, 2015, and has, therefore, been fully compensated in respect of all his losses arising from this motor vehicle accident.

[79] If there is no trust or assignment in respect of the SABs to which he will be entitled and which he will receive in the future for medication, assistive devices and professional services, he will be over-compensated and his receipt of any such benefits with no obligation to account to the tort insurer will constitute

double recovery – a result this legislative scheme was specifically designed to avoid.

[80] In my view, the trial judge erred in not ordering that there be an assignment in relation to the awards for the cost of future medication and assistive devices and future professional services. I would set aside paragraphs 3 and 4 of the trial judge's order of August 26, 2015 and in their place order that any amounts for future medication and assistive devices payable by RSA Insurance to the respondent be assigned to Northbridge Commercial Insurance Corporation until the sum of $82,429 has been received; and that any amounts for future professional services payable by RSA to the respondent for psychological, physiotherapy, occupational therapy, massage therapy, kinesiology/personal training, case management services, and travel to medical or other specialist be assigned to Northbridge Commercial Insurance Corporation until the sum of $424,550 has been received.

D. THE IMPORTANCE OF PROPER JURY QUESTIONS

[81] Some of the difficulties in the jurisprudence seem to have arisen in relation to the questions to be posed for the jury. Neither the deductibility of benefits nor the assignment of benefits was meant to be complicated. See *Gurniak*, at para. 46.

[82] A review of the jurisprudence quickly reveals the struggles trial judges have had in an effort to follow the "strict matching" said to be mandated by

Bannon. Indeed some of that jurisprudence, in my view, goes beyond even the requirements of *Bannon*.

[83] Plaintiffs should not be able to avoid either the deductibility or assignment of SABs already received or to which they will be entitled in future by the manner in which the claim for special damages is presented. For example, if a non-catastrophically injured plaintiff lumps together claims – as in *Gilbert* – for transportation costs to and from doctor's visits, which would not be covered under SABs, with claims for medication costs, which are covered, it would be contrary to the purpose of the legislative scheme to deduct nothing from such an award. That plaintiff is clearly over-compensated where no deduction is made.

[84] Future plaintiffs in motor vehicle accident cases should minimize trial courts' difficulty in matching damages and statutory benefits by presenting their claims according to the categories in s. 267.8 of the *Insurance Act*: they should make a claim for past and future income losses, a claim for past and future health care expenses; a claim for other past and future pecuniary losses that have SABs coverage; and a separate claim for any past and future pecuniary losses that lack SABs coverage. In cases involving non-catastrophic injuries, the presentation of the claim should account for the monetary limits and temporal limitations on benefits compensating for such injuries.

[85] Plaintiffs should be required to present their cases in this way. They alone know best what amounts they have expended in relation to their injuries that their

SABs insurer did not or will not reimburse. If those items are separately categorized, the matching difficulties disappear – as does any risk of over or under-compensation.

[86] A plaintiff should not be permitted to avoid having SABs deducted from a tort award and thereby defeating the purpose of the legislation by lumping together claims covered by SABs with those which are not.

E. DISPOSITION

[87] In the result, I would allow the appeal and amend the trial judge's order as follows:

i. The judgment is reduced by the sum of $44,583.90 to reflect an interest rate of 2.5% on the general damage award;

ii. The date of December 31, 2019 in paragraph 1 is deleted and the date of August 10, 2027 is substituted therefore;

iii. Paragraph 3 is deleted and in its place is substituted a new paragraph ordering that any amounts for future medication and assistive devices payable by RSA Insurance to the respondent be assigned to Northbridge Commercial Insurance Corporation until the sum of $82,429 has been received; and

iv. Paragraph 4 is deleted and in its place is substituted a new paragraph ordering that any amounts for future professional services payable by RSA

to the respondent for psychological, physiotherapy, occupational therapy, massage therapy, kinesiology/personal training, case management services, and travel to medical or other specialist be assigned to Northbridge Commercial Insurance Corporation until the sum of $424,550 has been received.

[88] If the parties are unable to agree on costs, they may make brief written submissions to the court, the appellants within two weeks of the release of these reasons and the respondent within two weeks thereafter.

Released: “DD SEP 19 2017”

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