Recent changes to

pre-judgment interest and accident benefits deductibility

by the Court of Appeal for Ontario

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In September 2017, the Court of Appeal for Ontario released a trilogy of cases (2017 ONCA 715, 716, 717) which completely revised the calculation of pre-judgment interest (PJI) on general damages and the method of deducting accident benefits from jury awards at trial. These cases – *Cobb v. Long Estate,* 2017 ONCA 717; *El-Khodr v. Lackie*, 2017 ONCA 716; and *Hartley v. Security National*, 2017 ONCA 715 – have changed the landscape of this area of law to require a much more literal interpretation of the *Insurance Act*. While plaintiff's counsel may complain that the cases heavily favour the defence bar, I prefer to interpret the new cases as simply effecting the unambiguous objective of the Government of Ontario.

The trilogy of cases was released in quick succession two days before an appeal was to be heard in *Cadieux (Lit. Guard.) v. Saywell*, 2016 ONSC 7604 (which will now be heard in May 2018). Because essentially all the changes enacted in the trilogy of cases fit neatly into the framework of arguments raised in *Cadieux*, I will explain the changes to the law using this framework.

In *Cadieux,* the defendant pushed the plaintiff in front of a truck and the plaintiff suffered a serious brain injury. This resulted in a six-week coma and the plaintiff not living independently or working in the 10 years leading up to trial. The jury awarded $2.3 million in damages and split liability one-third to the plaintiff for starting the fight, one-third to the defendant for pushing the plaintiff, and one-third to the driver for hitting the plaintiff. The plaintiff entered into a Pierringer agreement with the driver for $500,000 all-in before trial and settled/received $1.2 million in accident benefits (ABs) before the trial. The issue then became how the $1.2 million in accident benefits is properly deducted from the $760,000 tort award against the defendant to determine the final amount owed (and whether the defendant beat his $500,000, plus, plus offer). The following issues needed to be decided by the trial judge after the jury verdict:

1. Has PJI on general damages been retroactively amended?
2. Do accident benefits have to be grouped into three silos (loss of income (LOI), health care, other pecuniary) before they are deducted from the corresponding tort damages awards?
3. Are past and future AB silos combined and then deducted from combined past and future tort?
4. Is a remaining several-liability defendant entitled to deduct 100 percent of AB payments where the plaintiff entered into a Pierringer agreement before trial?
5. Are legal fees paid to settle ABs excluded from the net AB deductions applied to tort?

6. Is an undifferentiated offer to settle all plaintiffs' claims, including *Family Law Act* claims (FLAs), valid under Rule 49?

The Court of Appeal used the trilogy to answer all questions in favour of the defendant (except for no. 4). In addition, in *Cobb*, the Court of Appeal also discussed: Should punitive damages be put to the jury in a case where the defendant was a drunk driver?

Pre-judgment interest has been retroactively amended (and so has the deductible)

The Honourable Justices Doherty, MacFarland and Rouleau were empanelled for the decisions in both *El-Khodr* and *Cobb.* Justice MacFarland wrote both decisions. In *Cobb*, Her Honour considered the effects of section 258.3(8.1) of the *Insurance Act*, which came into force on January 1, 2015. This section eliminated the 5 percent interest on general damages awards set out by the

Courts of Justice Act section 128(2) and by Rule 53.10 of the *Rules of Civil Procedure*. Instead, the new interest rate is simply the same as the pecuniary damage interest rate stated in the Rules (which is about 1–2 percent for most actions begun in the last decade).

Justice MacFarland ruled that the statutory change was retroactive (i.e., it applies to all cases currently active now, no matter when the accident happened). Her Honour felt that a "contextual analysis of the legislation demonstrates that the legislature intended" retroactive application (*Cobb*, para. 94). And further, looking to past legislative changes and the goal of the current legislation led to the conclusion that it must have been intended. Interestingly, Her Honour decided the matter without referring to *Cirillo v. Rizzo*, [2015] O.J. No. 1881, which was the original Superior Court decision that held the changes were retroactive in nature. Perhaps this is because *Cirillo* was decided based on a discussion of substantive/procedural issues, whereas Justice MacFarland preferred to avoid deciding that issue.

Justice MacFarland also held that the statutory deductible to general damages was retroactively amended. For reasons largely analogous to the discussion of PJI, the court retroactively increased the statutory deductible from $30,000 to $36,540 (plus inflation since January 1, 2016) (*Cobb*, paras. 113, 129).

The effect of this decision on the insurance industry cannot be overstated. An average eight-year-old case with $100,000 in general damages has just had the value of pre-judgment interest reduced from $40,000 (5 percent PJI) to $16,000 or so (at 2 percent PJI). This is a $24,000 reduction applied across thousands of cases. In addition, the court increased the value of the deductible by at least $6,450 plus inflation for each case.

It bears noting that the trial judge in *Cobb* did not decide whether the changes were retroactive or not. Instead, he exercised his inherent discretion under the *Courts of Justice Act* section 130(1)(b) to decide the interest rate he wanted to apply (3 percent). Although in many cases trial judges have exercised discretion to award the average interest rate over the period, we should expect some plaintiffs to argue that judges should decide that 5 percent is appropriate based on past expectations of all parties.

Accident benefit silos are deducted from tort (for both amounts received and future assignments)

The Court of Appeal, in *El-Khodr*, has now clearly confirmed that section 267.8 of the *Insurance Act* codifies the common-law principles that the plaintiff should not recover twice for the same kind of loss arising from the accident. This is true of benefits already received or benefits held in trust or assigned to the defendant. There are now only three silos of deductibility: loss of income (s. 267.8(1)), health care (s. 267.8(4)) and other pecuniary expenses (s. 267.8(6)). All accident benefits received or available must be allocated to one of the three silos and deducted from the corresponding tort silo for pecuniary damages.

While the *Insurance Act* is clear that there are only three silos, past cases have seemed to split these silos into dozens of even smaller silos, to effect an ever more minute matching. Two of those cases, *Bannon v. McNeely* (1998), 38 O.R. (3d) 659 (ONCA) and *Gilbert v. South*, 2015 ONCA 712, have now been firmly rejected by *El-Khodr* and *Cobb*. *Bannon* was rejected because (1) it was not good law, and (2) the legislation has changed. *Gilbert* was circumscribed to such a scope that it will likely never be followed again.

The net result is that the past practice of plaintiffs to argue that rehabilitation benefits are not deductible from attendant care benefits and that physiotherapy is not deductible from psychotherapy is wrong. Instead, the court is required to lump together all health care expenses enumerated in Part III of the *Statutory Accident Benefits Schedule* (SABS) into one big silo to be deducted from all tort damages attributable to that silo (e.g., attendant care is now deductible from psychotherapy). Similarly, all loss of income accident benefits paid under Part II of the SABS are now deductible from all forms of income loss awarded under tort. And all remaining pecuniary expenses under Part IV of the SABS are deducted from all other tort pecuniary expenses (e.g., housekeeping is deducted from payments for visitor expenses) (*El-Khodr*, paras. 60, 61).

This is a resounding victory for insurers in Ontario. Unfortunately, the joy might be short lived. It will not take long for plaintiffs to realize they can essentially hide accident benefits from tort deductibility by allocating AB settlements to the third silo (other pecuniary expenses) and pursuing only loss of income and health care at trial. This will indubitably lead to future cases dealing with whether plaintiffs have a duty to avoid bad faith AB settlements which circumvent the intention of the *Insurance Act*.

Past and future AB silos are combined and deducted from past and future tort silos

In *Cobb*, the plaintiff received $29,300 in past income replacement benefits (IRBs) and settled all past and future IRBs for an additional $130,000. The jury awarded $50,000 for past LOI and $100,000 for future LOI. The plaintiff argued that the defendant had not met its onus of proving LOI received from the AB, and even if it had, *Bannon* required that past ABs be deducted only from past tort, and future from future (*Cobb*, paras. 32, 38).

The court rejected the argument that ABs should be temporally divided into past and future. The court pointed out that section 267.8(1) of the *Insurance Act* simply states: "All payments … that the plaintiff has received … for statutory accident benefits in respect of the income loss and loss of earning capacity" (*Cobb*, para. 41), and further that *Basandra v. Sforza*, 2016 ONCA 251, ruled that past and future ABs should be combined and deducted from the past and future tort in each silo (as was also done for housekeeping; *Cobb*, para. 107). Justice MacFarland noted this result was also strongly suggested by the Supreme Court in *Gurniak v. Nordquist*, 2003 SCC 59.

Interestingly, plaintiff's counsel argued that some portion of the AB settlement should be attributable to its bad faith claim. However, the court rejected this argument on the basis of correspondence between parties which failed to discuss the issue (*Cobb*, para. 36). Nevertheless, we should expect to see this argument raised in the future as it could possibly work in the right circumstance.

The same overall result on temporal matching was reached in *El-Khodr*. However, another wrinkle was added in that the jury was faced with the possibility that the plaintiff would be entitled to the Ontario Drug Benefit Program once he turned 65 in the year 2028. The trial judge instructed the jury to treat this health care benefit only as a contingency, not a certainty, given that the Act could be revoked. The Court of Appeal overruled the trial judge on this point; instead, the court said that the law must be decided as it exists today – not on any potential future changes. Therefore, all potential drug expenses after age 65 had to be eliminated because the law requires the Province of Ontario to cover them now (*El Khodr*, para. 20). This rationale will apply to all Ontario plaintiffs, but defendants must insist on a specific jury question to determine the costs of drugs after age 65, for which they will not be responsible (*El Khodr*, para. 23).

Is the remaining several-liability tortfeasor entitled to deduct 100 percent of ABs?

This is the only question that remains unanswered by the Court of Appeal in the trilogy. For a full discussion of the law of Pierringer agreements refer to Joshua Henderson, "Pierringer Agreements: Several Liability and Divisibility of Damages" (2015) 44(3) The Advocates' Quarterly 383–390. The Court of Appeal will answer this question in *Cadieux* when it is heard.

Legal fees paid to obtain ABs are not excluded from AB tort deductions

Hartley was decided by Epstein, Hourigan, and Paciocco, a different panel than *El-Khodr* and *Cobb*. It should, however, be read in conjunction as it seemingly answers an equally important question about AB deductibility. In *Hartley* the plaintiff recovered $500,000 USD for an accident that occurred in Minnesota; this was reduced to $387,000 CDN after the legal fees were deducted. The issue then became how much of the $500,000 USD settlement can be deducted from the $1,000,000 coverage the plaintiff claimed in Canada under Ontario Policy Change Form 44R. The Court of Appeal considered two complementary arguments on behalf of the plaintiff: (1) that only the net amount $387,000 should be deducted from the OPCF 44R exposure, not the full $500,000 USD (based on *Anand v. Belanger*, 2010 ONSC 5356); and (2) that the full $500,000 USD should be deducted but that the plaintiff should be entitled to claim the full legal costs against the OPCF 44R as special expenses (based on *Green v. State Farm*, (2009) 75 C.C.L.I. (4th) 141 (SCJ)).

The Court of Appeal rejected both arguments. Instead the court found that the full $500,000 USD should be deducted from the OPCF 44R exposure, without consideration of the legal fees whatsoever. The court ruled that legal fees are not "compensatory damages" as per the wording of the OPCF 44R and that the wording of the statute is unambiguous; all compensatory damages are deducted.

Technically, *Hartley* applies only to the OPCF 44R, but the wording is very similar to section 267(8) of the *Insurance Act*. We believe it will be applied in the AB context as well.

Undifferentiated offers to settle are valid under Rule 49

In *Cobb*, the defendant offered to settle for $40,000, plus, plus, plus. After deducting ABs, the trial judge concluded the judgment was $34,000 inclusive of PJI. The trial judge then relied on *Rider v. Dydyk* and considered the award to be $34,000 plus the deductible, putting it into the range of $65,000. The trial judge then awarded $409,098 in costs to the plaintiff. The Court of Appeal directly overruled this decision and found that section 267.5(9) of the *Insurance Act* had been retroactively amended such that the deductible was not to be added to the damages in determining whether an offer was beaten. The Court of Appeal also corrected other calculation errors and reduced the total judgment to $22,137, well below the defendant's $40,000 offer to settle (*Cobb*, paras. 131–142).

The plaintiffs then argued that the defendant's offer was not a valid Rule 49 offer because it made one lump sum settlement offer of $40,000 to "the plaintiffs"; it did not differentiate between the main plaintiff claim and the derivative FLA claims (*Cobb*, 147). The court rejected some older Court of Appeal cases and found that the offer was a valid Rule 49 offer even though no specific amounts were stipulated for each individual plaintiff. Because the trial judge had stipulated that, in the alternative, he would order each side to bear its own costs, this was the result the Court of Appeal implemented.

It should also be noted that the offer served by the defendants required the plaintiff to pay partial indemnity costs to the plaintiff after the date of the offer. While some previous court decisions have ruled that this renders an offer invalid, the Court of Appeal has now specifically stated that this type of offer is valid (although redundant because it is simply what the Rules state).

Punitive damages

In *Cobb*, the plaintiff sought an award of punitive damages against the defendant, who was a drunk driver. The trial judge refused to put the question to the jury on the basis that the drunk driver had already paid a $1,300 fine and had his licence suspended for one year. The Court of Appeal agreed with the trial judge that the punitive damages question should not go to the jury because the Supreme Court, in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, held: "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 objective of retribution, deterrence, and denunciation." In *Cobb*, the court held that because the defendant had been sufficiently sanctioned in the criminal proceeding, a further award for punitive damages was unwarranted (*Cobb*, paras. 57–65).

Jury questions

Finally, Justice MacFarland, in *El-Khodr*, has suggested that all future jury questions simply divide the pecuniary damage questions into the four silos: loss of income, health care, other pecuniary expenses, and all other expenses not covered by the SABS (*El-Khodr*, para. 83). Her Honour further suggested dividing these four categories into past and future awards because (1) the standard of proof for past expenses is "balance of probabilities" while the standard for future is "real and substantial possibility" (*Cobb*, para. 40); and (2) past losses attract PJI, while future losses don't (*Cobb*, para. 53). In non-catastrophic claims, the presentation of the claim should account for monetary and temporal limits in the SABS (*El-Khodr*, para. 84).