COURT OF APPEAL FOR ONTARIO

CITATION: Cadieux v. Cloutier, 2018 ONCA 903
DATE: 20181204
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Strathy C.J.O., Hoy A.C.J.O., Feldman, Brown and Paciocco JJ.A.

BETWEEN

Chad Cadieux, by his Litigation Guardian Michael Cadieux,
Michael Cadieux and Lance Cadieux

Plaintiffs
(Respondents/Appellants by way of cross-appeal)

and

Susan Cloutier, Pilot Insurance Company, Eric Saywell
and the Wawanesa Mutual Insurance Company

Defendants
(Appellant/Respondent by way of cross-appeal)

David A. Zuber and Joshua J.A. Henderson, for the appellant/respondent by way of cross-appeal Eric Saywell

Allan Rouben and Éliane Lachaîne, for the respondents/appellants by way of cross-appeal

Kristian Bonn, for the intervener Ontario Trial Lawyers Association

Heard: May 1-2, 2018

On appeal from the judgments of Justice Charles T. Hackland of the Superior Court of Justice, sitting with a jury, dated December 12, 2016 and December 23, 2016, with reasons reported at 2016 ONSC 7604, 63 C.C.L.I. (5th) 79.

By the Court:

A. INTRODUCTION

[1] These reasons, and the reasons in *Carroll v. McEwen*, 2018 ONCA 902 released concurrently, address, among other issues, the intersection of tort damages and statutory accident benefits ("SABs") under s. 267.8 of the *Insurance Act*, R.S.O. 1990, c. I.8. This appeal concerns the deduction from the tort damages award of SABs paid before trial. The *Carroll* appeal concerns the assignment of future SABs to the tort liability insurer.

[2] Both appeals require this court to determine how SABs are matched to tort damages for deduction and assignment purposes in accordance with the statute. Two different methods of matching SABs with tort awards, reflecting different interpretations of the statute, have developed in the case law.

[3] One approach requires temporal and qualitative matching of SABs to heads of tort damages (the so-called "apples to apples" or strict matching approach) and is based on this court's decision in *Bannon v. McNeely* (1998), 38 O.R. (3d) 659 (C.A.). *Bannon* involved an earlier and much different statutory scheme. The reasoning in *Bannon* was based on the decision of the British Columbia Court of Appeal in *Jang v. Jang* (1991), 54 B.C.L.R. (2d) 121 (C.A.). The authority of that decision was subsequently questioned by the Supreme Court of Canada in *Gurniak v. Nordquist*, 2003 SCC 59, [2003] 2 S.C.R. 652.

[4] More recently, a “silo” approach has been applied, which requires the tort award only to match generally with the broad corresponding SABs categories or silos.

[5] This court’s decision in *Gilbert v. South*, 2015 ONCA 712, 127 O.R. (3d) 526 might be viewed as an application of the “apples to apples” approach in the assignment context, while this court’s decision in *Basandra v. Sforza*, 2016 ONCA 251, 130 O.R. (3d) 466 is an example of the silo approach in the deduction context. This conflicting case law was most recently addressed by this court in *Cobb v. Long Estate*, 2017 ONCA 717, 416 D.L.R. (4th) 222 and *El-Khodr v. Lackie*, 2017 ONCA 716, 416 D.L.R. (4th) 189, leave to appeal refused, [2017] S.C.C.A. No. 461.[1]

[6] The *Carroll* appeal was initially heard by a panel of this court and was under reserve when this court released its decisions in *Cobb* and *El-Khodr*. The *Cadieux* appeal was scheduled to be heard in September 2017 when counsel for the respondent requested that a five-judge panel be constituted to determine whether this court’s decisions in *Bannon* and *Gilbert*, remain good law in light of *Cobb* and *El-Khodr*. That necessarily raised the issue of whether *Cobb* and *El-Khodr* themselves were correctly decided.

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[1] This court refused to grant a rehearing of *El-Khodr* with the *Cadieux* and *Carroll* appeals: 2018 ONCA 66, 140 O.R. (3d) 557.

[7] The *Cadieux* and *Carroll* appeals were heard together by a five-judge panel. The Ontario Trial Lawyers Association ("OTLA") was granted leave to intervene on the interpretation and impact of ss. 224 and 267.8 of the *Insurance Act* on civil trials and the retrospectivity of the amendment to the *Insurance Act* with respect to prejudgment interest.

[8] For the reasons that follow in this case, and in *Carroll*, we affirm the silo approach to both deductibility and assignment of SABs set out at paras. 38-56 of *Cobb* and at paras. 33-72 of *El-Khodr*. The silo approach is consistent with the statutory language of s. 267.8, is fair to plaintiffs, defendants and their insurers, and promotes efficiency in motor vehicle accident litigation. The decision of the Supreme Court of Canada in *Gurniak* questions the jurisprudential underpinnings of *Bannon*. In that light, and in view of subsequent changes to the *Insurance Act*, *Bannon* and *Gilbert* can no longer be regarded as binding authority in relation to the degree of "matching" required between tort damages and SABs for deduction and assignment purposes.

[9] We begin with an overview of the relationship between SABs and tort damages, which sets the stage for the issues in both appeals.

B. STATUTORY ACCIDENT BENEFITS AND TORT DAMAGES

(1) Overview

[10] Ontario's automobile accident compensation scheme has two components. The first is based on mandatory automobile insurance, which provides "no-fault" first-party benefits (through SABs) to anyone injured in an automobile accident. The second component is a right to sue the "at fault" driver in a civil tort action, subject to certain statutory thresholds and deductibles, and a common law cap on non-pecuniary general damages: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Thornton v. School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267; *Arnold v. Teno*, [1978] 2 S.C.R. 287.

[11] SABs are the "no-fault" component of this scheme. They are available to anyone involved in a motor vehicle accident in Ontario, whether as driver, passenger, or pedestrian, and regardless of who was at fault.

[12] There are three broad categories of SABs under the *Insurance Act* and the *Statutory Accident Benefits Schedule*, O. Reg. 34/10. These were referred to in *El-Khodr* as silos. The first category provides income replacement benefits or, if the person was not employed at the time of the accident, "non-earner" benefits, or "caregiver benefits", if they provided caregiver services to another person at the time of the accident.

[13] The second category is health care benefits. “Health care” is a defined term in s. 224(1) of the *Insurance Act*. It “includes all goods and services for which payment is provided by the medical, rehabilitation and attendant care benefits provided for in the *Statutory Accident Benefits Schedule*.” The *Statutory Accident Benefits Schedule* sets out in detail the available health care benefits. Health care expenses include medical, rehabilitation and attendant care benefits, goods and services of a medical nature, rehabilitation expenses, and services provided by an attendant or by a long-term care facility, nursing home, home for the aged, or chronic care hospital.

[14] The third category of benefits addresses “other pecuniary loss”, which includes lost educational benefits, expenses of visitors, and housekeeping and home maintenance expenses.

[15] There are limits on the quantum of SABs and time period for which some SABs can be claimed, depending on the nature of the claimant’s injuries – namely, whether they are classified as “catastrophic impairment”, “non-catastrophic impairment”, or within the “minor injury guideline”. SABs are available to claimants immediately after the accident and on an ongoing basis.

[16] The tort component of compensation permits an injured person to pursue a civil action for damages against the person(s) responsible for the accident. Subject to statutory thresholds and deductibles, and a common law cap on general

damages, the plaintiff may claim all pecuniary and non-pecuniary losses incurred as a result of the accident. These can include past and future loss of income, medical expenses, costs of care, costs of housekeeping and home maintenance expenses, as well as general damages for pain and suffering and loss of enjoyment of life. In theory, an award of tort damages will put the injured plaintiff in the position that he or she would have been had the injury not occurred, so far as money can do.

[17] These two forms of compensation – SABs and tort damages – are independent of one another. It is inevitable, however, that there will be overlap between the compensation provided to an accident victim by no-fault SABs and the award of damages to that person in a civil tort action. Section 267.8 of the *Insurance Act* contains provisions designed to address this overlap and to prevent double recovery. It reflects the principle that victims should be fairly compensated, but not over-compensated. Automobile insurers, who provide first-party benefits through SABs insurance, should not be required, when wearing their fault based liability insurer hats, to compensate an accident victim twice for the same losses. In preventing double recovery, the statutory regime modifies the common law “collateral source” rule – that insurance or other benefits available to the injured plaintiff do not reduce the amount for which the tortfeasor is liable: see *Boarelli v. Flannigan*, [1973] 3 O.R. 69 (C.A.).

[18] In broad terms, s. 267.8 of the *Insurance Act* provides that: (a) the tort award must be reduced by the SABs received by the injured party before judgment (s. 267.8(1), (4), and (6)); and (b) SABs received by the plaintiff after judgment must be held in trust for or assigned to the defendant or tort insurer, until such time as the benefits have been exhausted or the defendant has been fully reimbursed for the payments it made under the judgment (s. 267.8(9)).

[19] Before turning to the facts of this appeal, and the issues it raises, it will be helpful to set out and briefly comment on the relevant statutory provisions.

(2) Statutory Provisions

[20] The relevant provisions of the *Insurance Act* are set out below:

> 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.
> >
> > 2. All payments in respect of the incident that the plaintiff has received or that were available before 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 has received before the trial of the action

under a sick leave plan arising by reason of the plaintiff's occupation or employment.

…

(4) 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 expenses that have been incurred or will be incurred for health care 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 expenses for health care.

2. All payments in respect of the incident that the plaintiff has received before the trial of the action under any medical, surgical, dental, hospitalization, rehabilitation or long-term care plan or law.

…

(6) 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 pecuniary loss, other than the damages for income loss or loss of earning capacity and the damages for expenses that have been incurred or will be incurred for health care, shall be reduced by 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 pecuniary loss, other than income loss, loss of earning capacity and expenses for health care.

…

(8) The reductions required by subsections (1), (4) and (6) shall be made after any apportionment of damages required by section 3 of the *Negligence Act*.

(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).

(13) Subsection (9) no longer applies if an order is made under subsection (12).

…

> (20) For the purposes of subsections (1), (3), (4) and (6), the damages payable by a person who is a party to the action shall be determined as though all persons wholly or partially responsible for the damages were parties to the action even though any of those persons is not actually a party.

[21] We will discuss the application of these provisions below, but we note several key features of the legislation.

[22] First, as a matter of statutory interpretation, ss. 267.8(1), (4), and (6) require the deduction of SABs received prior to trial from damages received in a tort action on a silo basis. That is, SABs for income loss are to be deducted from the tort award for income loss (s. 267.8(1)); SABs for health care expenses are to be deducted from the tort award for health care (s. 267.8(4)); and SABs for other pecuniary loss are to be deducted from the tort award for other pecuniary loss (s. 267.8(6)). There is no reasonable interpretation of the legislation, in our view, that permits either a more generalized approach to deduction (that is, a deduction of SABs in one silo from a jury award for damages falling within another silo) or a more particularized approach to deduction (that is, the deduction of particular SABs within a silo only from damages for the identical head of damage awarded by the jury within the same silo).

[23] Second, the deductions of SABs from the tort award are to be made taking into account the apportionment of damages to account for the plaintiff's contributory negligence under s. 3 of the *Negligence Act*, R.S.O. 1990, c. N.1 (s.

267.8(8)). In addition, the deductions of SABs as between defendants must be allocated to the defendants based on their respective shares of liability. We will discuss the application of these requirements in due course.

[24] Third, SABs received after trial are to be held in trust by the plaintiff and paid to the tortfeasor(s) in the same proportion that they paid the tort damages awarded (s. 267.8(9) and (10)). Alternatively, the court may order that the plaintiff assign to the tortfeasor its right to future SABs. The application of these provisions is discussed in our reasons in the *Carroll* appeal.

C. THE FACTS

[25] In September 2006, Chad Cadieux (who was a plaintiff in this action and is a respondent/appellant by way of cross-appeal) and Eric Saywell (who was a defendant in this action and is the appellant/respondent by way of cross-appeal), both pedestrians, were involved in an altercation at or near the shoulder of a road. Saywell pushed Cadieux towards the road, causing him to stumble into the path of a truck driven by Susan Cloutier. Cadieux suffered brain damage and orthopaedic injuries. He became incapable of managing his own affairs.

[26] Cadieux claimed SABs from the no-fault benefits insurer, Aviva. He also commenced a civil action against Saywell and Cloutier. Prior to trial, he settled both his SABs claim and his tort claim against Cloutier.

[27] The SABs settlement with Aviva was for a total of $900,000. The Settlement Disclosure Notice[2] provided by Aviva to Cadieux reflects that the settlement had three components: (a) $300,000 for past and future income replacement benefits; (b) $250,000 for past and future medical benefits; and (c) $350,000 for past and future attendant care benefits.

[28] The settlement with Cloutier's liability insurer was for $500,000. It was a *Pierringer* settlement[3], whereby Cloutier's insurer settled her several tort liability without a right of contribution against the other tortfeasor.

[29] Most of the settlement funds were used to procure a structured settlement, which would provide Cadieux with a stream of payments over time. Some of the settlement funds were used to buy a house where Cadieux could reside with his father, who was his caregiver.

[30] Because Cadieux was incapable of managing his affairs, both settlements and applicable legal costs required and received approval by a judge of the Superior Court of Justice. The judge approved legal fees of $235,000 and disbursements of $30,999.36. The order did not allocate the fees and disbursements as between the SABs settlement and the tort settlement.

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[2] The legislative scheme requires that, when a settlement has occurred, a written disclosure notice in a form approved by the Superintendent of Insurance must be provided to the insured. The settlement disclosure notice must contain certain prescribed information, including the insurer's offer with respect to the settlement: *Automobile Insurance*, R.R.O. 1990, Reg. 664, as amended.

[3] *Pierringer v. Hogan* (1963), 124 N.W.2d 106, 21 Wis.2d, 182.

[31] Cadieux then proceeded with the tort action against Saywell for his several liability. There were offers and counter-offers of settlement, discussed below, but the action did not settle and it proceeded to trial.

[32] After a seven-week trial, the jury granted judgment in favour of Cadieux for $2,309,413. Although Cloutier was no longer a party, it was necessary for the jury to ascertain the degree of fault of each of Cadieux, Cloutier, and Saywell. The jury apportioned liability equally amongst the three: one-third against Cadieux in respect of his own contributory negligence, and one-third against each of Saywell and Cloutier. In principle then, subject to statutory deductions and the accounting for both pre-trial and post-trial SABs, Cadieux was entitled to recover from Saywell one-third of the damages awarded in the tort action.

[33] The jury awarded damages as follows, plus applicable prejudgment interest:

General and *Family Law Act*, R.S.O. 1990, c. F.3 ("*FLA*") damages:

- General damages for Cadieux – $225,000
- *FLA* damages for Cadieux's father – $80,000
- *FLA* damages for Cadieux's brother – $30,000

Past and future loss of income:

- Past loss of income – $133,741
- Future loss of income – $971,000

Total $1,104,741

Future costs of care:

- Physiotherapy – $23,073
- Occupational therapy – $9,491
- Social work – $4,745
- Home gym equipment – $3,569
- Taxi fund – $49,992
- Bookkeeper – $31,380
- Acquired Brain Injury (“ABI”) support worker – $701,809

Housekeeping and other expenses:

- Future housekeeping expenses –$33,113
- Past expenses –$12,500

D. THE TRIAL JUDGE’S DETERMINATION

[34] After the jury’s verdict, the trial judge heard a motion to determine the required adjustments to the jury award and to determine costs. The issues were:

1. reduction of the jury award for statutory deductions;
2. reduction of the jury award for SABs received prior to trial and through the SABs settlement;
3. application of prejudgment interest;
4. the award of a management fee; and
5. costs of the action (including consideration of Rule 49 offers to settle).

[35] We will describe the trial judge’s disposition of these issues.

(1) Statutory deductions

[36] Section 267.5(7) of the *Insurance Act* requires that certain amounts be deducted from damage awards for non-pecuniary loss. Damage awards for non-pecuniary loss suffered by *FLA* claimants are subject to a prescribed deductible. The parties agreed that the only applicable deduction was to the *FLA* damages awarded to Cadieux's brother. These were reduced from $30,000 to $11,730.

(2) Deductions for SABs

[37] As noted above, Cadieux had settled his SABs claim with the accident benefits insurer for a total of $900,000. The issue for the trial judge was the extent to which this settlement was to be deducted from the jury's award for loss of income and future pecuniary damages.

[38] There were several complex issues embedded within this question.

[39] The <u>first issue</u> was the basis upon which deductions should be made, specifically, the extent of matching required when deducting SABs from the jury award. Should there be a strict matching of items in the jury award against the SABs benefits received, on an "apples to apples" basis, as Cadieux contended? Or, should the three different statutory categories of SABs (income replacement benefits, health benefits, and other pecuniary benefits) be regarded as silos, with deductions being made from the applicable silo, without a more precise matching

of individual benefits within those silos against the identical heads of damages in the jury award?

[40] This issue arose because the jury made no award for the costs of future attendant care, but made an award of $701,809 for an Acquired Brain Injury (“ABI”) support worker. The parties agreed, and the trial judge found, that the jury award for the ABI support worker was a medical/rehabilitation award and not an attendant care award. Relying on an “apples to apples” strict matching approach, Cadieux argued that this award should only be set off against the portion of the SABs settlement for medical and rehabilitation benefits ($250,000) and not the portion for attendant care ($350,000). The defence, on the other hand, advocated a silo approach, arguing that both the health care benefits and attendant care benefits were properly classified as being within the silo of health care and should be deducted from the jury’s award for future costs of care, including the $701,809 in damages for the ABI support worker. The deduction would have had the effect of reducing the tort award for the ABI support worker to $101,809.

[41] Relying on this court’s decision in *Basandra* and the decision of the Divisional Court in *Mikolic v. Tanguay*, 2016 ONSC 8196, 129 O.R. (3d) 24 (Div. Ct.), the trial judge adopted the silo approach, holding that all the health care benefits should be deducted from the jury award for the ABI support worker. Put another way, the ABI support worker was a health care expense, whether or not the ABI support worker’s functions involved attendant care.

[42] The second issue was whether, as Cadieux contended, the SABs settlement for past and future losses should be notionally apportioned equally between Saywell and Cloutier, with whom Cadieux had settled prior to trial, because the jury found them equally responsible for the accident. In other words, was the non-settling defendant, Saywell, entitled to set off the full amount of the SABs settlement against his portion of liability for the tort judgment, or was his set-off limited to 50 percent of the SABs amount, having regard to Saywell's proportionate liability for only one-third of the damages, after reduction for Cadieux's contributory negligence and Cloutier's notional one-third share?

[43] The trial judge noted that the *Insurance Act* is silent with respect to the apportionment of deductions between two or more "protected" defendants.[4] There was evidence that Cloutier's insurer was aware of the SABs settlement and took it into account when settling the tort claim against Cloutier. The trial judge also found that the SABs settlement and the tort settlement with Cloutier were a "package deal", in that Cadieux could not accept one without the other. He concluded, at paras. 50-51, that it would unjustly enrich the non-settling defendant Saywell if he were entitled to deduct the full amount of the SABs from his one-third share of the damages. This would serve as a disincentive to pre-trial settlement. Equity and

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[4] The *Insurance Act* distinguishes between protected and non-protected persons in relation to their liability for certain damages. The owner of the automobile, the occupants, and any person present at the incident are considered "protected". In this appeal, we are concerned only with protected defendants.

common sense supported allocation of the deductions for SABs between the defendants based on their respective shares of liability.

[44] The third issue was whether the full amount of the SABs settlement had to be deducted from the jury award, or whether the deduction could be net of the legal costs incurred by Cadieux in obtaining the settlement. The trial judge accepted the argument that failing to deduct these legal costs unfairly penalized and potentially under-compensated Cadieux. He accepted Cadieux's apportionment of the legal fees between the SABs settlement and the tort settlement in proportion to their respective amounts. The proportionate share of fees and disbursements was deducted from the SABs settlement before the SABs were deducted from the jury award.

[45] The fourth and final issue was whether all SABs received by Cadieux prior to the settlement with the insurer were to be deducted from the jury award. The trial judge disallowed the deduction of certain SABs.

(3) Prejudgment interest

[46] The issue relating to prejudgment interest concerned the operation of an amendment to the *Insurance Act*, effective January 1, 2015, which ended the application of the 5 percent interest rate set out in s. 128(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, and Rule 53.10 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to non-pecuniary loss in actions for personal injury such as motor

vehicle accident cases. The effect of the amendment was to replace the fixed 5 percent rate with the variable "prejudgment interest rate", defined in s. 127 of the *Courts of Justice Act*, and provided for in s. 128(1). That rate is subject to increase or reduction in the discretion of the court under s. 130. The court may also, in its discretion, change the period for which interest is payable or disallow interest altogether.

[47] The plaintiffs sought interest at 5 percent, based on s. 128(2). They contended that the amendment was a substantive change in the law and, therefore, did not have retrospective application. The defendants argued that although entitlement to interest is a substantive right, the amendments concerned only the manner of calculation of interest, and therefore were procedural in nature and should apply retrospectively.

[48] The trial judge held that in the interests of uniformity and predictability, he would apply the 5 percent rate to this case, which pre-dated the statutory amendment. In so doing, he followed the approach of the trial judge in *El-Khodr* who found that the entitlement to a particular rate of prejudgment interest is a matter of substantive law. He noted that nearly all subsequent reported decisions had followed that approach and that the issue would be addressed by this court in the *El-Khodr* appeal.

(4) Management fee

[49] The parties left it to the trial judge to determine an appropriate management fee for the administration of Cadieux's assets. The trial judge determined that 5 percent was a "conventional award" and ordered a fee of $65,250, calculated in that manner. His calculation was based on 100 percent of the SABs settlement plus the net tort award.

(5) Costs

[50] There was a significant difference in the parties' positions with respect to costs. This difference arose because about one month prior to trial, Saywell had made what the trial judge described as a "near miss" settlement offer, pursuant to Rule 49. The offer was for $500,000, plus partial indemnity costs. The offer was open for acceptance until the commencement of trial. Just before that offer, Cadieux had made an offer to settle for $900,000, plus costs.

[51] The plaintiffs' recovery at trial, after adjustment in accordance with the trial judge's reasons, was $435,577, plus the management fee of $65,250. Thus, the plaintiffs' total recovery was $500,827. It was less than Saywell's offer without taking the management fee into account, and was slightly in excess of the offer once that fee was taken into account.

[52] The plaintiffs claimed partial indemnity costs in the amount of $494,039 for fees and $98,798 in disbursements, plus HST, on the basis that the recovery exceeded Saywell's offer.

[53] Saywell, on the other hand, claimed costs of $358,380 for fees and $71,700 for disbursements, on the basis that his offer exceeded the jury verdict.

[54] The trial judge found that the costs claimed by each party were reasonable. He observed that costs are discretionary and that relevant considerations include promoting settlement, fairness to the parties, access to justice and, in the context of personal injury cases, ensuring that an injured plaintiff is not under or over-compensated. He also referred to the importance of proportionality in the award of costs.

[55] Referring to the decision of this court in *Elbakhiet v. Palmer*, 2014 ONCA 544, 121 O.R. (3d) 616, leave to appeal refused, [2014] S.C.C.A. No. 427, he found it was appropriate to consider Saywell's "near miss" settlement offer in the exercise of his jurisdiction in relation to costs. The plaintiffs' recovery, when the management fee was awarded, only slightly exceeded Saywell's offer. He therefore awarded Cadieux costs of $100,000 (about one-fifth of the amount claimed) and the disbursements as claimed in the amount of $98,798.

E. ISSUES

[56] The appeal and the cross-appeal raise a number of issues. Those issues, and our answers, are set out immediately below:

(1) Deduction of SABs from tort awards:

a. Should SABs be deducted from tort damages using the silo approach or the strict matching (“apples to apples”) approach? Did the trial judge err in reducing the jury’s award for the ABI support worker by the SABs received for both medical and rehabilitation benefits and attendant care benefits?

   The silo approach should apply and consequently, the trial judge did not err in deducting the SABs received for both the medical and rehabilitation benefits and the attendant care benefits from the jury award for health care expenses.

b. Should past and future SABs be combined in each silo before deducting them from past and future tort damages?

   There is no basis for making a temporal distinction between past and future SABs and they should be combined in each silo before deduction.

c. Did the trial judge err in failing to deduct certain pre-settlement SABs payments?

   The SABs paid prior to the settlement should be deducted from the jury award for corresponding past and future damages within the relevant silos. There is no reason in principle why SABs paid directly to third parties, as a matter of convenience, should not be deducted from the tort award.

d. Where a plaintiff enters into a *Pierringer* agreement, with the result that only one severally liable defendant remains in the proceeding, should that non-settling defendant be

entitled to a deduction of 100 percent of all SABs from its share of tort damages?

In these circumstances, the last defendant remaining in the action should not be entitled to a deduction of all the SABs paid to the plaintiff. It should only be entitled to a proportionate deduction. Such an interpretation is consistent with the application of the principles of statutory interpretation and considerations of practicality, fairness, and common sense.

e. Should legal costs incurred by a plaintiff in pursuing recovery of SABs be deducted from the SABs before deducting SABs from the tort award? Put another way, should SABs be deducted from the tort award on a gross basis, or net of the plaintiff's legal costs?

SABs should be deducted from the tort award on a gross basis. Depending on the circumstances, it may be appropriate to award the plaintiff costs of recovering SABs as part of the costs of the tort action.

(2) Management fee

a. Did the trial judge err in awarding a management fee of 5 percent? If not, did he err in requiring Saywell to pay management fees for 100 percent of the SABs settlement after finding that he was only entitled to a deduction of 50 percent of the SABs from the damages awarded against him?

The trial judge did not err in awarding a management fee, but made an error in principle in calculating that fee on the basis of 100 percent of the settlement and net tort award when Saywell was only entitled to a deduction of 50 percent of the SABs.

(3) Prejudgment interest

a. Are the amendments to the *Insurance Act* concerning the calculation of prejudgment interest on general damages procedural in nature and do they apply retrospectively to causes of action that arose before the amendments came into force?

The amendments are procedural and apply retrospectively.

b. Were *Cobb* and *El-Khodr* correctly decided on this issue?

The issue was comprehensively addressed in *Cobb* and *El-Khodr* and we agree with MacFarland J.A.'s conclusion on this issue and endorse her reasons.

(4) Costs, offers to settle, and disbursements

a. Did the trial judge err in his award of costs?

The parties may make further submission on the issue of costs having regard to the effect of the judgment of this court.

b. Should interest be calculated on Rule 49 offers to settle to the date of the offer, or to the date of trial?

If the parties are unable to agree on the interest payable and the effect of the offers to settle having regard to the effect of the judgment of this court, they may make further submissions.

c. Did the trial judge fail to account for some of the plaintiffs' disbursements?

The appellant did not dispute the error raised by the plaintiffs and in our view, it should be corrected.

F. ANALYSIS

(1) The deduction and assignment of SABs

(a) The silo approach rather than the strict matching approach should be applied

[57] Cadieux, as appellant by way of cross-appeal, submits that the trial judge erred in deducting the attendant care SABs from the jury award for an ABI support worker. Relying on *Bannon* and *Gilbert*, he submits that SABs should only be deducted from tort awards on a strict matching, “apples to apples” basis. He submits that any other approach will under-compensate plaintiffs and unjustly enrich defendants. In this case, although the attendant care and medical rehabilitation components of the SABs settlement both fall within the health care silo, he submits that the benefits are not overlapping and should not both be deducted from the tort award for the ABI support worker.

[58] OTLA supports this position. It submits that the approach adopted by the trial judge and supported by *Cobb*, would complicate jury trials by forcing plaintiffs to advance claims for which they have already been fully compensated by SABs.

[59] For the reasons that follow, we do not accept these submissions. Until the decisions of this court in *Cobb* and *El-Khodr*, the evolution of the treatment of accident benefits in the case law has largely failed to take into account the difference between the statutory schemes that have been in place at various times.

The policy rationale that supported the strict matching approach under a former statutory scheme is no longer applicable under the current legislative regime. In our view, the silo approach, based on the three broad categories of SABs under the *Insurance Act* and the *Statutory Accident Benefits Schedule*, should apply to both the deduction and the assignment of SABs.

(i) The historical treatment of SABs and the judgments of this court in *Cobb* and *El-Khodr*

[60] In *Bannon*, this court interpreted an earlier and significantly different statutory scheme as requiring an "apples to apples" strict matching approach when deducting SABs from tort damages: a specific type of benefit was only deducted from a head of damage for the identical loss.

[61] Confusion concerning the treatment of SABs was evident in post-*Bannon* case law, largely because, despite significant changes to the statutory regime, courts continued to apply the strict matching approach based on *Bannon*, in spite of that approach having been rejected by the Supreme Court in *Gurniak*. As we have noted, in the assignment of benefits context, courts have required a very strict matching of the tort damages to a specific SAB on a qualitative and temporal basis. The silo approach has recently prevailed in the deduction of benefits context. Under this approach, the damage award must only match generally with the corresponding broad SABs category.

[62] The inconsistencies in the case law were discussed in *Cobb* and *El-Khodr*. Those appeals were heard together, because they raised some common issues concerning the interaction between the SABs regime and tort damages. The *Cobb* appeal focused on the deductibility of SABs received by the plaintiff before trial under ss. 267.8(1)-(8) of the *Insurance Act*. The *El-Khodr* appeal dealt with the trust and assignment provisions that apply to the plaintiff's receipt of SABs after judgment under ss. 267.8(9)-(12). Both appeals also raised the issue of the applicable rate of prejudgment interest under the *Courts of Justice Act*. The reasons were released concurrently.

[63] In *Cobb*, as in the case before us, there had been a settlement of the plaintiff's SABs claim prior to trial. The settlement included a lump sum for past and future income loss. One of the issues was whether the *Insurance Act* required a strict temporal matching in the deduction of SABs from a jury award – specifically, whether all SABs received by the plaintiff before trial for income loss should be deducted from the jury award for both past income loss (i.e., income loss from the date of the accident to the date of trial) and future income loss (i.e., projected income loss from the date of trial to future retirement).

[64] In *Cobb*, the plaintiff had received income replacement benefits of $29,300 up to June 29, 2010. On that date, the plaintiff settled the SABs claim, with $130,000 allocated to all past and future income replacement benefits. The jury awarded $50,000 for past income loss and $100,000 for future income loss. The

trial judge deducted the full amount of the SABs from the jury award, with the result that the plaintiff was entitled to no tort award for income loss.

[65] On appeal, the plaintiff argued that *Bannon* required separate treatment of SABs for past and future income loss – that the jury award could only be reduced by a corresponding statutory benefit, on an "apples to apples", strict matching approach. Under this approach, the award for past income loss could only be reduced by SABs for past income loss and the award for future income loss could only be reduced by SABs for future income loss. The plaintiff argued that the onus was on the defendant to prove how much of the SABs settlement related to past loss and how much related to future loss. If that could not be established, the defendant was not entitled to any deduction.

[66] MacFarland J.A. rejected that argument, finding, at para. 41, that the plaintiff's interpretation was not supported by the legislation. Section 267.8(1)1 simply requires the deduction of "all 'payments … that the plaintiff has received … before the trial of the action <u>for statutory accident benefits in respect of the income loss and loss of earning capacity</u>'" (emphasis in original).

[67] Referring to this court's decision in *Basandra*, MacFarland J.A. stated, at para. 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.

[68] MacFarland J.A. added, at para. 54, that, for the reasons more fully explained in *El-Khodr*, she had serious reservations as to whether the strict matching approach articulated in *Bannon* and in *Gilbert* remained good law, in light of subsequent legislative changes. Moreover, the Supreme Court's decision in *Gurniak* had stated that *Jang*, the case on which *Bannon* was based, had been wrongly decided. She stated, at para. 54, that in her view, "*Gurniak* puts in considerable doubt any qualitative or temporal matching requirement that is not mandated by the current legislation."

[69] In the result, this court in *Cobb* affirmed the trial judge on this issue.

[70] The decision in *El-Khodr* dealt with the flip side of the issue: the assignment of future SABs payments to the tort insurer. Although that issue does not arise in this appeal, it arises in *Carroll*.

[71] The issue in *El-Khodr* related to the assignment of future SABs to be paid in respect of medication, assistive devices, and professional services. The jury made a global award for future professional services, and a separate global award for future medication and assistive devices. The trial judge, following the approach in

Bannon and *Gilbert*, did not grant an assignment to the insurer of future SABs for medication or professional services. She noted that the parties had not adopted the language that she had proposed for the jury verdict sheet and the jury had not split future care costs into separate awards for professional services such as physiotherapy and psychology, nor had it made separate awards for medications and assistive devices.

[72] MacFarland J.A. suggested that the trial judge erred in applying the strict matching approach. At paras. 38-54, she explained why the policy rationale for the strict matching approach adopted in *Bannon* no longer applied in light of subsequent amendments to the *Insurance Act* and the Supreme Court's decision in *Gurniak*.

[73] In brief, the statutory provisions in force when *Bannon* was decided did not group benefits to be deducted into categories or silos. Instead, it lumped all accident benefits together and required their deduction from the tort award. In contrast, the current statute sets out broad categories of SABs from which the tort award must be deducted.

[74] Moreover, the former statutory provisions also required that the present value of future no fault benefits be deducted from the jury award. No assignment provisions were included in that statutory regime. In *Chrappa v. Ohm* (1998), 38 O.R. (3d) 651 (C.A.), this court stated that there was a heavy onus on the

defendant to establish that it was “beyond dispute” that the plaintiff would qualify for the future benefit. In that case, the court also approved of the use of a common law “Cox and Carter” order, which required the plaintiff to hold future accident benefits in trust and to pay them to the defendant to the extent that they overlapped with the judgment.

[75] As MacFarland J.A. noted, the amendments to the *Insurance Act* since *Bannon* have obviated the need for strict matching of past and future benefits against the tort award and for “Cox and Carter” orders. The current legislative regime no longer requires the deduction of the present value of future benefits and the statutory trust and assignment provisions in ss. 267.8(9)-(12) replace common law “Cox and Carter” orders.

[76] MacFarland J.A. also explained, at paras. 55-61, why *Bannon* may no longer be good law, in light of *Gurniak*, which arguably overruled *Jang*. We say “arguably” because although Iacobucci J., writing for the majority, did not expressly overrule *Jang*, the minority (Gonthier J. and McLachlin C.J.) clearly interpreted the majority’s decision as having done so.

[77] MacFarland J.A. noted that in *Mikolic*, Sanderson J. distinguished *Bannon* on the basis of the change in legislation, concluding that it was necessary to apply only the “limited matching”, set out in ss. 267.8(1) and (4), which were the provisions engaged in that case. MacFarland J.A. concluded, at para. 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 <u>the statute's categories</u>, 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. [Emphasis in original.]

[78] In *El-Khodr*, MacFarland J.A. also considered whether the strict matching approach should be applied to the assignment of post-trial SABs, as was done in *Gilbert*. MacFarland J.A. noted that neither this court's decision in *Gilbert*, nor the trial judge's decision in *El-Khodr*, referred to the legislative changes since *Bannon* or to *Gurniak*. She observed that, since *Basandra*, courts have moved towards a silo approach in the deduction of benefits context, based on the broad statutory categories, rather than strict matching. In her view, the same approach should apply in relation to assignment. In the case before her, it was not necessary to resolve the issue.

[79] MacFarland J.A. was of the view that the SABs assignment and trust provisions of the *Insurance Act* require a court "to match benefits that will be received after trial to the broad, enumerated statutory categories only in a general way": at para. 35.

[80] With reference to *Gilbert*, she stated, at para. 68, that:

> 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.

[81] However, because she was able to factually distinguish *Gilbert*, (the respondent in *El-Khod*r was designated catastrophically impaired so no temporal limitation would apply and there were no benefits for which the assignment was requested that were not covered by SABs as in *Gilbert*) she concluded, at para. 37, that the specific question as to whether *Bannon* and *Gilbert* remain good law should be left for another day. Nevertheless, she reviewed the development of that law within the context of the legislative history discussed above and concluded, at para. 54, that the differences between those regimes and the current statutory scheme justified a different approach:

> 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*.

[82] Noting that the Supreme Court in *Gurniak* had rejected the strict matching approach on which *Bannon* was based, she suggested, at para. 60, that the present legislation should be interpreted as requiring a court "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." In her view, "*Gurniak* puts into considerable doubt any qualitative or temporal matching requirement that is not mandated by the current legislation": at para. 61. She stated, at para. 71, 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*".

[83] The current state of the law then is that the broad silo approach will apply to the deduction of SABs received before trial, but a strict temporal and qualitative match of specific sub-categories of accident benefits to the tort award would continue to apply to those assignment cases that cannot be factually distinguished from *Gilbert*.

[84] In our view, the uncertainty in this imperfect area of law must be resolved.

(ii) The silo approach applies to the deduction of SABs received before trial

[85] As regards the deduction of SABs received before trial, we agree with MacFarland J.A. that the statutory language does not support matching at a more particular level than the three silos of income loss, health care expenses, and other pecuniary loss. For example, s. 267.8(4), which governs the deduction of health care expenses, provides that the plaintiff's damages for expenses "that have been incurred or will be incurred for health care shall be reduced by … 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 expenses for health care" (emphasis added).

[86] Bearing in mind the principle that the plaintiff should be entitled to full compensation for the loss incurred, but no more, a matching of the damage award to the corresponding silo does just that. Tort law compensates plaintiffs by an award of money. What the plaintiff does with the award is entirely up to him or her. For example, at trial, a plaintiff may claim damages for health care based on evidence of needs and costs for physiotherapy, psychological counselling, medication, and assistive devices and the jury may award damages on that basis. But once the award is paid, the plaintiff can do with the monetary award what he or she wishes. The plaintiff may use it for some or all of those purposes or for something completely different – to buy a house, for example, as Cadieux did with

the proceeds of his settlement. Deducting the SABs within the silo recognizes the plaintiff's autonomy to spend the damage award the way he or she wishes. The matching is fair and reasonable.

[87] The "apples to apples" strict matching approach unnecessarily complicates tort actions by focusing on immaterial distinctions or labels for heads of damages. It requires the trial judge to undertake what the Supreme Court in *Gurniak* referred to as a "complicated and cumbersome process of 'matching' a head of damage in tort to a particular claim for damages under a statutory scheme": at para. 45. Not requiring this type of "apples to apples" strict matching will have the benefit of simplicity and ease of application, an objective endorsed by the Supreme Court in *Gurniak*, at para. 45.

[88] It follows that we do not accept the intervener's submission that requiring plaintiffs to prove all expenses, whether covered by SABs or not, will make motor vehicle accident trials lengthier and more expensive. Plaintiffs should be required to claim at trial all damages arising from the accident, including expenses for which compensation has already been received through SABs or will in the future be paid through SABs. As MacFarland J.A. put it in *El-Khodr*, at paras. 84-85:

> 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.
>
> 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.

[89] Claims should therefore be presented on a “gross” basis, rather than net of SABs. We see nothing unusual or complicated in this approach. It is done as a matter of course in other forms of litigation where a plaintiff brings suit for both insured (subrogated) and uninsured (unsubrogated) claims. It is also commonplace that plaintiffs in personal injury actions will provide proof of underlying goods and services that have already been consumed as a result of their injuries, in order to demonstrate the severity of their injuries and their ongoing need for such expenses. This information will be readily available to counsel, and proof of the expenditures should be uncontroversial. The SABs paid will be a matter of record and can be readily established.

[90] Any concerns as to trial efficiency can and should be dealt with through appropriate trial management and the cooperation of counsel. It seems to us that in most cases, the manner in which the jury questions are structured should be

based on the silos. MacFarland J.A. gave useful guidance on this issue in *El-Khodr*, at paras. 81-86.

[91] To the extent there are cases that have not yet reached trial, where claims have been advanced on a “net of SABs” basis, counsel should be permitted to amend the claim, if required, to advance the claim on a gross basis.

(iii) The silo approach applies to SABs that will be received after trial

[92] With respect to the assignment and trust provisions of the statute, as more fully explained in our reasons in *Carroll*, we see no principled basis on which to apply different approaches to SABs received before and after trial. The statutory assignment and trust provisions make it unnecessary to require strict proof of entitlement to future benefits. They pass no risk of under-compensation to a plaintiff. The benefits are assigned or held in trust as and when they are received until such time as the defendant or its insurer has been reimbursed for payments made under the judgment in respect of the particular silo. If the plaintiff’s entitlement is limited or terminated, the tort insurer simply does not recover an offset of the damages already paid to the plaintiff.

[93] While *Bannon* can be distinguished as being based on a prior statutory regime, and the result in *Gilbert* was based on its unique facts, to the extent that both cases support a strict matching approach under the current statutory scheme, they should be overruled in light of *Gurniak*.

(b) Past and future SABs should be combined before deduction

[94] For the reasons expressed by MacFarland J.A. in *Cobb*, at paras. 38-56, pursuant to ss. 267.8(1), (4), and (6), SABs that were received or were available to the plaintiff prior to judgment must be applied to the jury award in respect of both past and future losses. That is, damages awarded for past and future losses are to be aggregated in each silo before the SABs applicable to that silo are deducted.

[95] In light of our conclusions outlined above in parts 1(a) and 1(b) of this Analysis, the trial judge in this case properly deducted that portion of the SABs settlement attributed to past and future medical and rehabilitation benefits, and that portion of the SABs settlement attributed to past and future attendant care benefits from the jury award for the cost of the ABI support worker.

(c) The trial judge erred in failing to deduct certain pre-settlement SABs

[96] In addition to allowing deductions from the jury award for the items that formed part of the SABs settlement, the trial judge considered the deductibility of SABs paid to Cadieux prior to the settlement.

[97] Before the settlement was negotiated, the SABs insurer paid a total of $262,543.96 in accident benefits, of which $86,863.83 was paid directly to Cadieux. The appellant Saywell takes issue only with the $86,863.83 amount which is comprised of visitor expenses, clothing, attendant care, income replacement, and medical and rehabilitation benefits. In oral argument, counsel for

the appellant conceded that the insurer did not seek a credit for the roughly $175,000 in other benefits that were paid directly to third party service providers.

[98] The trial judge only gave the appellant the benefit of a reduction from the jury award for past and future income loss of one-half of the income replacement benefits paid (one-half of $62,264.78) prior to trial. The trial judge was not satisfied that the other past payments had been received by Cadieux, or that they matched the jury award so as to constitute double recovery.

[99] The appellant asserts that while the trial judge correctly deducted half the past income replacement benefits, he made a palpable and overriding error in rejecting unchallenged affidavit evidence that $20,755.72 in past health care SABs and $3,843.33 in past “other pecuniary expenses” SABs had also been paid directly to Cadieux. He submits that the trial judge erred in refusing to deduct past SABs received from the corresponding future tort damages under each silo.

[100] The respondent, Cadieux, contends that the trial judge appropriately declined to deduct these past payments because the evidence does not indicate the nature of these payments but only the broad categories to which they were attributable. In addition, certain of the SABs were not “received” personally by Cadieux: $14,977.16 was paid to a third party for attendant care and $8,139.16 was paid directly to Cadieux’s father.

[101] In our view, SABs paid prior to the settlement should be deducted from the jury award for corresponding past and future damages within the relevant silos. As stated previously in these reasons, there is no basis for drawing a temporal distinction between past payments of SABs and future tort damages within the silo.

[102] There is also no reason in principle why SABs paid to third parties, as a matter of convenience, should not be deducted from the award. The trial judge in *El-Khodr* made no distinction between SABs paid directly to the plaintiff and those paid to third party service providers in relation to the assignment of post-judgment SABs. She concluded that the plaintiff would be required to account to the defendants for post-trial SABs payments made directly to third party service providers. Otherwise, plaintiffs could avoid the trust and assignment provisions by requesting that their insurer pay third parties directly for services for which they recovered damages. The same rationale applies to SABs paid directly to service providers prior to trial. This result is consistent with the statutory requirement in ss. 267.8(1), (4), and (6) of deduction of amounts that the plaintiff "has received <u>or that were available</u> before the trial of the action" (emphasis added).

(d) The non-settling defendant is only entitled to a proportionate deduction of SABs

[103] The amount of the SABs deduction to which Saywell, as the non-settling defendant, is entitled turns on the meaning of the words "the damages to which a

plaintiff is entitled" in ss. 267.8(1), (4), and (6) of the *Insurance Act*. Those subsections each provide that "the damages to which a plaintiff is entitled" for income loss, health care expenses, and other pecuniary loss shall be reduced by "all payments" that the plaintiff "has received or that were available before the trial" in respect of income loss, expenses for health care, and other pecuniary losses respectively.

[104] As we have noted, Cadieux settled prior to trial with both the SABs insurer, Aviva, and the truck driver, Cloutier. The issue is whether the non-settling defendant, Saywell, is entitled to set off the full amount of the SABs settlement against his share of the tort damages, or whether he can only deduct 50 percent, in proportion to his share of the tort damages that were attributed to the defendants.

[105] Saywell argues that the "damages to which the plaintiff is entitled" means the actual <u>net</u> several damages payable by a defendant after the contributory negligence of the plaintiff is taken into account and the damages attributable to any non-party, in this case the settling defendant Cloutier, are deducted.

[106] Counsel for Saywell conceded in argument that if the tort action had proceeded to trial against both Saywell and Cloutier, the SABs would have been divided proportionate to liability, with each defendant's share of the tort damages being reduced by their share of the SABs.

[107] However, he submits that the effect of the settlement is that Saywell is entitled to deduct 100 percent of the SABs from his share of the damages. Having released the truck driver Cloutier, he argues, Cadieux cannot avoid the consequences of ss. 267.8(1), (4), and (6), which provide that the plaintiff's damages are to be reduced by "all payments" which the plaintiff has received for SABs. He also relies on s. 267.8(8), which provides that the "reductions required by subsections (1), (4) and (6) shall be made after any apportionment of damages required by section 3 of the *Negligence Act*." Finally, he relies on this court's decision in *McDonald v. Kwan*, 2011 ONCA 789, 286 O.A.C. 184.

[108] For the reasons that follow, we agree with the approach taken by the trial judge. In our view, his conclusion on the statutory language is supported by the application of the principles of statutory interpretation as well as considerations of practicality, fairness, and common sense.

[109] The principles of statutory interpretation are well known. The words of the statute are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the enacting legislative body: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at para. 64. Accordingly, it is important that the words "the damages to which a plaintiff is entitled" and "all

payments" be considered within the context of s. 267.8 as a whole and with the purpose of this provision in mind.

[110] In our view, the grammatical and ordinary sense of the words "the damages to which a plaintiff is entitled" is clear. Subsections 267.8(1), (4), and (6) do not refer to "net" damages or even to damages "payable". In our view, the words do no more than describe the effect of the deduction that is to be made.

[111] Such an interpretation is supported by the underlying purpose of s. 267.8. As stated, s. 267.8 contains provisions that are designed to address the overlap between the tort damages and SABs to ensure that the plaintiff is fairly compensated but is not under or over-compensated. The various provisions of s. 267.8 prescribe an order of operations that applies to the calculation of the plaintiff's damages to ensure fair compensation. It does not make sense that the last defendant remaining in the action should be able to deduct all the SABs paid to the plaintiff. As the trial judge noted, this would discourage settlement, would under-compensate the plaintiff, and would unfairly enrich the non-settling defendant.

[112] Section 267.8 also incorporates the principle that the plaintiff's damages reflect the liability of all responsible parties involved in the incident. Subsection 267.8(20), specifically provides that "[f]or the purposes of subsections (1), (3), (4) and (6), the damages payable by a person who is a party to the action shall be

determined as though all persons wholly or partially responsible for the damages were parties to the action even though any of those persons is not actually a party" (emphasis added). The purpose of this subsection is to ensure that the liability of a defendant, for the purpose of calculating its entitlement to deduct SABs from the judgment against it, is based on its proportionate liability, regardless of whether other defendants, protected or not, are parties to the proceeding and regardless of whether other defendants have settled with the plaintiff or on what basis. To construe the words "damages to which a plaintiff is entitled" as net several damages after apportionment between tortfeasors fails to give effect to that explicit direction by ignoring the settling defendant's proportionate responsibility for the loss.

[113] Moreover, a contextual analysis of s. 267.8 as a whole supports the conclusion that the plain meaning of the words "the damages to which the plaintiff is entitled" in ss. 267.8(1), (4), and (6) cannot reasonably be interpreted as referring to "net damages payable".

[114] We do not accept the appellant's submission that s. 267.8(8) requires apportionment as between defendants before the SABs deduction is made. In our view, the principle of statutory interpretation known as the presumption of implied exclusion (sometimes referred to as *expressio unius est exclusio alterius*) precludes such an approach. The principle of implied exclusion presumes that "to express one thing is to exclude another" and accordingly, when a statutory

provision refers to a particular thing, but is silent with respect to other comparable things, that silence reflects an intention to exclude the unmentioned items: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis Canada, 2014), at p. 248. In other words, "legislative exclusion can be implied when an express reference is expected but absent:" *University Health Network v. Ontario (Minister of Finance)* (2001), 151 O.A.C. 286 (C.A.), leave to appeal refused, [2002] S.C.C.A. No. 23, at para. 32.

[115] Subsection 267.8(8) specifically refers to apportionment required by s. 3 of the *Negligence Act*, which deals only with the contributory negligence of plaintiffs. Subsection 267.8(8) does not address the apportionment of liability as between two tortfeasors and accordingly, it directs only that SABs are to be deducted from the plaintiff's damages, after those damages are reduced for any contributory negligence.

[116] There is no specific language in any other subsection that expressly requires that the damages attributable to a non-party defendant be deducted before the SABs deductions required by ss. 267.8(1), (4), and (6) are made.

[117] In our view, the legislature's specific inclusion of s. 267.8(8) is actually incompatible with the appellant's "net damages payable" argument. To interpret the words of ss. 267.8(1), (4), and (6) as meaning net several damages payable after apportionment, as the appellant advocates, would require the apportionment

exercise to implicitly take place under ss. 267.8(1), (4), and (6). There would then have been no need to expressly direct apportionment for contributory negligence under s. 267.8(8). Such an interpretation would render s. 267.8(8) functionally meaningless. Because the legislature specifically directed that the damages to which a plaintiff is entitled are subject to reduction for any contributory negligence, the presumption of implied exclusion precludes any interpretation of ss. 267.8(1), (4), and (6) that would require implicit apportionment as between defendants before the SABs deduction is applied.

[118] In addition, the principle of statutory interpretation known as the presumption of consistent expression precludes an interpretation of the words "damages to which the plaintiff is entitled" in ss. 267.8(1), (4), and (6) as meaning "damages payable". The presumption of consistent expression requires that when different words are used in separate provisions in a single piece of legislation, they must be understood to have different meanings: *Agraira*, at paras. 80-81. The words "damages payable" are explicitly used in s. 267.8(20). Because different words are used in ss. 267.8(1), (4), and (6), the principle of consistent expression requires that these subsections be interpreted as meaning something other than net several damages actually payable by a party defendant.

[119] Finally, we reject the submission based on *McDonald v. Kwan*. That case dealt with successive accidents involving independent torts. The trial judge found that the first accident was the sole cause of the plaintiff's past and future loss of

income. There was no income loss arising from the subsequent accident. In that case, the defendant whose negligence was the sole cause of the plaintiff’s income loss, was entitled to deduct all the SABs. *McDonald* is clearly distinguishable on that basis.

[120] In sum, we agree with the approach taken by the trial judge and with his conclusion that the result of this approach is fair. In our view, the order of operations mandated by s. 267.8 in respect of the two protected defendants in this case requires the following approach within each silo of SABs: (1) the damages attributable to Cadieux’s contributory negligence are deducted from the damages awarded by the jury; (2) the total SABs paid and the settlement amounts attributed to that silo are deducted from the damages awarded by the jury; (3) responsibility for the payment of the remaining sum is then determined in accordance with the non-settling defendant Saywell’s proportionate liability.

(e) SABs should be deducted on a gross basis, not net of legal fees

[121] The appellant Saywell submits that the trial judge erred in deducting the legal costs that Cadieux incurred in pursuing the SABs settlement from the calculation of the SABs deduction from tort damages.

[122] We agree. The deduction of legal costs is inconsistent with the plain wording of ss. 267.8(1), (4), and (6) which provide that “the damages to which a plaintiff is entitled … <u>shall be reduced by</u> … <u>all payments</u> in respect of the incident that the

plaintiff has received … [in respect of SABs]" (emphasis added). The statute calls for deduction of SABs on a gross basis, not a net basis.

[123] For the reasons that follow, it may, in some cases, be appropriate to award the plaintiff, as part of the costs of the tort action, some or all of the costs actually incurred by the plaintiff in recovering SABs which have reduced the amount of the tort award under s. 267.8.

[124] There are two strands in the jurisprudence from the Superior Court of Justice concerning this issue. One strand, exemplified by the approach taken by the trial judge in this case, is a "net approach" in which SABs deducted from the tort award are net of the legal costs incurred to obtain them. In adopting this approach, the trial judge referred to *Anand v. Belanger*, 2010 ONSC 5356, 90 C.C.L.I. (4th) 138 and *Siddiqui v. Siddiqui*, 2015 ONSC 6260, which followed *Anand*. See also: *Jones v. Hanley and Jones v. Livska*, 2018 ONSC 145, 22 C.P.C. (8th) 419. The underlying rationale of this approach, identified by Stinson J., at para. 32 of *Anand*, is that the tort liability insurer should bear the costs of the plaintiff's claim against the SABs, because it has received the benefit of the risk and expense incurred by the plaintiff in pursuing recovery of the SABs.

[125] A second strand, illustrated by the decision of the Divisional Court in *Carr v. Modi*, 2016 ONSC 7255, 62 C.C.L.I. (5th) 295 (Div. Ct.), permits the plaintiff to recover legal fees and expenses incurred in recovering SABs as part of the costs

of the tort action where appropriate, rather than accounting for these costs in the SABs deduction process in all cases. See also: *Ananthamoorthy v. Ellison*, 2013 ONSC 4510; *Hoang v. Vicentini*, 2014 ONSC 5893, 40 C.C.L.I. (5th) 231; *Ryan v. Rayner*, 2015 ONSC 3310.

[126] The rationale for this approach is similar to that expressed by Stinson J. in *Anand*, and was explained by D. Wilson J. in *Ananthamoorthy*, at paras. 21-22:

> … In cases where a Plaintiff claims for damages occasioned by a motor vehicle accident, there is a comprehensive scheme that provides for payment of accident benefits, including loss of income benefits, which includes procedures for dispute resolution that must be followed. However, the payment of these accident benefits is inextricably linked to the action against the driver because the defendant insurer can claim a deduction for amounts the Plaintiff receives from her own insurer. Thus, the solicitor for the Plaintiff is bound to pursue his client's entitlement to various benefits or face the argument at trial from the tort insurer that the Plaintiff could have and should have received benefits from the no-fault insurer.
>
> … In the case before me, it was the obligation of [plaintiff's counsel] to pursue the Plaintiff's entitlement to various benefits and this inured to the credit of the defendant tortfeasor. Had he not done so, it would have been exceedingly difficult to argue at trial that the Plaintiff was totally disabled from working as a result of the injuries from the accident when her own insurer denied payment of benefits based on inability to work. [Plaintiff's counsel] has taken off the sum that he received from the first party insurer, which is appropriate to avoid double recovery of fees.

[127] In *Hoang*, decided a year later, D. Wilson J. qualified her observations, noting, at paras. 65-66 and 68-69, that the plaintiff's costs of pursuing the SABs claim should not be visited upon the tort defendant as a matter of course. Rather, this determination should be made on a case-by-case basis:

> The issue of whether a tort defendant ought to pay some amount of costs that were incurred by Plaintiff's counsel for the pursuit of SABS is fact driven and depends on the particular circumstances of a case. The Regulations provide a comprehensive scheme for the recovery of benefits associated with motor vehicle accidents, and there are provisions for the payment of costs. There are different levels of procedure and adjudication available to applicants, including appeals. The pursuit of SABS and whether to settle or proceed to the next level is in the discretion of counsel and the injured party.
>
> A Plaintiff has an obligation to apply for benefits, and if the request is rejected, there are different options that may be pursued. Tort defendants are not involved in the SABS process and have no ability to control it. It would be unfair as a general proposition, in my view, to lay the costs of the accident benefits pursuit at the feet of the tort defendants. There may be times when a tort defendant derives a clear benefit from the accident benefits matters by way of a deduction of the amounts from damages, and in those circumstances a judge fixing costs in a tort action may consider it appropriate that the tort defendant pay the costs incurred by the Plaintiff in securing the benefits. At other times, however, there may be "compelling circumstances," as described in *Moodie v. Greenaway Estate*, [1997] O.J. No. 6525 (Ont. Ct. J., Gen. Div.), at para. 4, where it would be inappropriate to visit the costs of dealing with other insurers on a Defendant in a tort claim. There is no hard and fast rule (emphasis added).

…

> As I stated in *Ananthamoorthy*, at para. 21, "the solicitor for the Plaintiff is bound to pursue his client's entitlement to various benefits..." There are limitations on that activity. The statutory scheme which exists for securing accident benefits provides for the payment of costs. In many if not the majority of cases where there is a tort action going forward, the pursuit of accident benefits is quite separate from the tort action, including separate disbursements and expert reports. It is appropriate in these circumstances that the solicitor for the Plaintiff accepts the costs as awarded at FSCO.
>
> In other cases, depending on the facts, it may be appropriate for some of the time expended in pursing statutory benefits to be included in the fees sought in the tort action. I do not agree that a Plaintiff can take whatever steps he or she wishes to recover accident benefits and then demand and expect payment from the tortfeasors in a different proceeding.

[128] In our view, the approach in the second strand of cases should be followed. It respects the statutory direction in s. 267.8, while enabling the court to make a fair allocation of the costs of pursuing SABs in appropriate cases.

[129] The court has jurisdiction, under s. 131(1) of the *Courts of Justice Act*, to award “costs of and incidental to a proceeding”. Legal fees and disbursements in pursuing SABs can reasonably be considered incidental to the proceeding where the SABs have reduced the damages payable by the tortfeasor.

[130] We agree with the observations of D. Wilson J. in *Hoang* and in *Ryan v. Rayner*, at para. 8, that the tort defendant should not be required to pay the costs of the plaintiff’s pursuit of SABs as a general principle or as a matter of course.

The issue, as she observed, is fact driven and depends on the particular circumstances of the case.

[131] That observation is particularly relevant in the settlement context. The amount, if any, allocated to costs by plaintiff's counsel and the SABs insurer in a settlement disclosure notice should not necessarily determine the costs to be paid by the tort insurer. Many factors can influence the amount allocated to costs.

[132] A trial judge considering whether to award such costs, and if so, the amount of the award, will have regard to all the circumstances, including: (a) the fees and disbursements actually billed to the plaintiff in pursuit of the SABs; (b) relevant factors in Rule 57.01, including whether the litigation of the SABs claim involved particular risk or effort; (c) the proportionality of the legal costs and expenses incurred by the plaintiff to the benefit of the SABs reduction to the defendant; (d) whether the SABs were resolved by way of settlement or by arbitration; (e) any costs paid as a result of the settlement or arbitration; (f) whether all or any portion of the costs were incurred as a result of unusual or labour-intensive steps that should not reasonably be visited upon the tort defendant; (g) whether or not plaintiff's counsel was acting on a contingent fee basis and, if so, the terms of the arrangement; and (h) the overall fairness of the allocation of the costs of pursuing SABs as between the plaintiff and the SABs insurer and as between the plaintiff and the tort insurer.

[133] There has been a change in the SABs arbitration procedure, effective April 1, 2016. Under the regime in effect at the time of the accident in this case (2006), s. 282 of the *Insurance Act* provided for arbitration of disputed SABs claim and s. 282(11) provided that the arbitrator could award a party the expenses of the arbitration. Arbitrations took place under the auspices of the Financial Services Commission ("FSCO"). A party was not required to arbitrate and could pursue a claim in the courts.

[134] Effective April 1, 2016, disputed SABs claims must be pursued in proceedings before the Licence Appeal Tribunal ("LAT") and not in the courts. The LAT has no jurisdiction to award costs, except in cases where a party has acted unreasonably or the appeal is frivolous, vexatious, or commenced in bad faith, in which case the party may make a request for costs: *Common Rules of the License Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission* (effective October 2, 2017), s. 19.1; see also *License Appeal Tribunal Act, 1999*, S.O. 1999, c. 12, Sched. G, s. 8. The import is that in most cases, the party will bear its own costs of asserting a contested SABs claim against the insurer. The issue is not before us and we make no comment on the effect, if any, of the change in procedure on the recoverability of the costs of the SABs claim in the tort action.

[135] In the case at bar, because the trial judge adopted the net approach, he did not consider whether any portion of the expenses incurred in recovering SABs could be claimed as part of the costs of the tort action. There is nothing in the trial

judge's reasons, nor in the record that is before us, that permits us to address that issue, having regard to the factors outlined above. Accordingly, we are unable to conclude whether it would be appropriate in the particular factual circumstances of this case for some of the costs incurred in pursuing the SABs settlement to be included in the costs sought in the tort action if the parties are unable to resolve this issue. The question to be addressed in additional written submissions by the parties is: Whether, having regard to all of the circumstances, it is appropriate that the appellant pays some of the costs incurred by the respondent in recovery of the SABs, and if so, how much?

(2) Management fee

[136] It was agreed by counsel for the parties that the trial judge would fix an appropriate management fee for the administration of the damages awarded to Cadieux.

[137] A management fee ensures that the tort award is not prematurely exhausted due to the victim's inability to manage his or her affairs: *Townsend v. Kroppmans*, 2004 SCC 10, [2004] 1 S.C.R. 315, at para. 6. Here, Cadieux's affairs were being managed by his father, who was inexperienced in financial management.

[138] Counsel provided the trial judge with case law concerning the quantum of a management fee. The trial judge settled on a fee equal to 5 percent of the assets under administration, which he described as a "conventional award": see *Gordon*

v. Greig (2007), 46 C.C.L.T. (3d) 212 (Ont. S.C.). He applied that percentage to the amount of the SABs settlement ($900,000) plus the net tort award after liability apportionment and, after deduction of the *FLA* portion, arrived at a management fee of $65,250.

[139] The appellant Saywell asserts that: (a) it was a legal error to award a management fee when, based on the evidence, the jury had already made an award of $31,380 for bookkeeping expenses; (b) the funds were in a structured settlement and required no management (relying on the decision of this court in *Wilson v. Martinello* (1995), 23 O.R. (3d) 417 (C.A.), at p. 422); and (c) the trial judge erred in calculating the management fee based on 100 percent of the SABs settlement when he had found that Saywell was only entitled to deduct 50 percent of the SABs amount from his share of damages.

[140] The determination of whether a management fee is appropriate, and the amount of the fee, are questions of fact to be made on a case-by-case basis: see *Mendzuk v. Insurance Corporation of British Columbia*, [1988] 2 S.C.R. 650.

[141] The parties were clearly satisfied that there was sufficient evidence and authority before the trial judge to establish that a management fee was appropriate and to enable him to fix a fair and reasonable management fee. Having entrusted the issue to the court, the appellant can hardly complain that the trial judge found it appropriate to make some award for asset management. There was no dispute

that Cadieux was incapable of managing his affairs and there was no clear overlap with the bookkeeping award, which appears to have been for banking and other personal financial affairs.

[142] However, while the amount of the award is reasonable, the appellant has identified an error in principle in calculating the award on the basis of 100 percent of the SABs settlement and net tort award, when he was only entitled to deduct 50 percent of the SABs amount. We would therefore allow the appeal to that extent.

(3) Prejudgment interest

[143] The appellant re-asserts the submission he made at trial that while the entitlement to prejudgment interest in s. 128(1) is a substantive right, the amendment to the *Insurance Act* regarding the applicable prejudgment interest rate speaks only to the method of calculation of interest and is simply procedural and therefore has retrospective operation. The respondent plaintiffs, supported by the OTLA, take the position that the right to prejudgment interest is substantive and vests at the moment of the accident.

[144] The issue was comprehensively addressed by MacFarland J.A. in *Cobb*, at paras. 66-104. She concluded that as a matter of statutory interpretation the *Insurance Act* amendment was intended to apply to actions such as this, commenced before the legislation came into effect but tried after. Her conclusions were adopted in *El-Khodr*.

[145] We respectfully agree with her conclusion on this issue and endorse her reasons. We therefore allow the appeal with respect to this issue. The default rate prescribed by s. 128 will therefore apply unless it is appropriate for the court to reduce or increase the prescribed rate of interest or to disallow interest otherwise payable under s. 128. As the trial judge made no findings that would permit us to exercise that discretion, we are unable to conclude whether it would be appropriate to do so in this case. The parties may address that issue by further written submissions. The question to be addressed is whether, having regard to all the circumstances, it is appropriate that the court exercise discretion under s. 130 of the *Courts of Justice Act* to award prejudgment interest at a rate other than the default rate prescribed by s. 128.

(4) Costs, offers to settle, and disbursements

(a) Costs in the court below

[146] The parties may make further written submissions with respect to costs in the court below, having regard to the effect of the judgment of this court. As set out above, those submissions may address whether, having regard to all of the circumstances, it is appropriate that the appellant, Saywell, pays some of the costs incurred by the respondent, Cadieux, in recovery of the SABs.

(b) Interest and the Rule 49 offers

[147] If the parties are unable to agree on the interest payable and the effect of the Rule 49 offers to settle having regard to the effect of the judgment of this court, they may make further written submissions on this issue.

(c) Disbursements

[148] Following the trial judge's ruling on costs, the plaintiffs, who are respondents in this appeal, brought to his attention a calculation error in respect of $28,027.80 in disbursements that had been excluded from the costs award. The trial judge advised the parties that he had intended to award the disbursements, but would not make any adjustments to the costs award in light of the delivery of the appellant's notice of appeal. The respondents ask this court to correct this error.

[149] The appellant did not dispute the error, and in our view it should be corrected.

G. ORDER

[150] For these reasons, we allow the appeal in part, allow the cross-appeal in part and order that:

1. those portions of the SABs settlement for past and future medical and rehabilitation benefits and for past and future attendant care benefits should be set off against the jury award of $701,809 for an ABI support worker;

2. the appellant is entitled to deduct health care SABs paid prior to the settlement in the amount of $20,755.72 and SABs for other pecuniary loss paid prior to the settlement in the amount of $3,843.33 from the jury award;

3. the appellant is entitled to set off 50 percent of the SABs settlement against his liability for the tort judgment;

4. legal costs incurred in obtaining the SABs settlement should not have been deducted from the SABs settlement before it was deducted from the jury award – the parties may make further submissions on the issue of whether all, or some part of those legal costs, should be awarded as costs of this proceeding;

5. the management fee should be calculated based on 50 percent of the SABs settlement and net tort award;

6. prejudgment interest should be calculated in accordance with the variable prejudgment interest rate provided for in s. 128(1) subject to increase or decrease pursuant to s. 130 of the *Courts of Justice Act* – the parties may make further submissions on the issue of whether, having regard to all the circumstances, it is appropriate that the court exercise

discretion under s. 130 of the *Courts of Justice Act* to award prejudgment interest at a rate other than the default rate prescribed by s. 128; and

7. the respondents/appellants by way of cross-appeal are entitled to disbursements in the amount of $28,027.80.

Released: "GS" DEC 04 2018

"George R. Strathy C.J.O."
"Alexandra Hoy A.C.J.O."
"K. Feldman J.A."
"David Brown J.A."
"David M. Paciocco J.A."