

# ACCIDENT BENEFIT REPORTER

UPDATER  
Issue 21 | October 2014



## ASSIGNED ACCIDENT BENEFITS OF LITTLE VALUE TO TORT DEFENDANTS



**Darcy R. Merkur**  
PARTNER | THOMSON, ROGERS

Tort insurers beware. The unwelcome revised definition of 'incurred' in the Ontario Statutory Accident Benefits Schedule ('SABS'), combined with a recent court decision concluding that tort defendants will only get credit for directly overlapping benefit entitlement, will result in recoverable tort damage awards well above policy limits and where the assigned accident benefit rights have only marginal value.

The old thinking that a tort claim was not 'really' going over the tort policy limits because of access to extensive catastrophic impairment accident benefits is no longer accurate. The ability of a tort insurer to squeeze out value from an assigned accident benefit claim has become more challenging than ever following the *Gilbert v. South et al*, 2014 ONSC 3485 (CanLII) decision by the Honourable Mr. Justice Ian F. Leach of the Ontario Superior Court of Justice and in light of the recent changes to the SABS.

In *Gilbert*, a jury decided in favour of a plaintiff injured in a motor vehicle accident on April 27, 2010. The jury awarded the plaintiff an assortment of damages, including general damages, damages for income loss, damages for housekeeping and home maintenance needs, and damages for "future care cost". The "future care cost" damages were specifically meant to address the plaintiff's "future treatment, medication, rehabilitation, intervention and aids".

The plaintiff in *Gilbert* had access to a non-catastrophic accident benefit policy that provided up to \$100,000 in medical and rehabilitation benefits, along with the other standard non-catastrophic benefits that were then available.

While the parties agreed to provide appropriate credit for past benefits received, the issue of how to deal with the future benefit entitlement was in dispute.

Because the plaintiff was not receiving ongoing income replacement benefits and had no ongoing entitlement to attendant care benefits nor housekeeping and home maintenance benefits by the time of the trial, the future benefit entitlement dispute was solely in relation to the 'future care cost' award and how it related to the plaintiff's remaining medical and rehabilitation benefit entitlement.

In *Gilbert*, the defendant was essentially asking the court to waive the jury's "future care cost" award of \$57,250, given that the plaintiff had remaining entitlement to medical and rehabilitation benefits from his accident benefit insurer of more than that amount.

In his decision, Justice Leach starts off by reviewing section 267.8 of the Ontario Insurance Act, primarily subsections 267.8(9) and 267.8(12) dealing with the application of collateral benefits in these circumstances. The subsections make it clear that a plaintiff must hold collateral benefits received post-trial in trust for a paying tort defendant and that, upon payment of the judgment in full, a tort defendant has the right to an assignment of the plaintiff's future collateral benefits, including their statutory accident benefits.

Justice Leach then proceeds to review the caselaw dealing with these collateral benefit provisions and highlights the fact that a balance must be drawn between avoiding 'double recovery' to the plaintiff and ensuring full compensation to a plaintiff where overlapping benefit entitlement is not guaranteed.

In the end, Justice Leach denies the defendant's request and concludes that it is not "patently clear" that there will be overlap between the jury's future care cost award and the plaintiff's future medical and rehabilitation entitlement. In explaining why a clear and direct overlap was not obvious, Justice Leach mentions the fact that the plaintiff's non-catastrophic medical



and rehabilitation entitlement would last only up to 10 years post-accident and would not cover certain things like transportation expenses, when the jury award had no such limitations.

In his conclusion, Justice Leach states: “Any such deductions inherently would entail the impermissible risk of reducing Mr. Gilbert’s recovery to something less than full compensation.”

The *Gilbert* case stands for the proposition that credit for future accident benefit entitlement should only be provided to a tort defendant where there is direct and clear overlap between a tort award and a future benefit entitlement.

Notably, in *Gilbert*, Justice Leach references the fact that defence counsel had agreed with the wording of the jury questions.

In personal injury trials, often plaintiff’s personal injury lawyers advocate the use of a care cost chart to be attached as an exhibit to the jury questions. This suggestion is commonly opposed by defence counsel presumably on the assumption that the amount claimed, when itemized, may total more than a lump sum assessment.

The *Gilbert* decision emphasizes that a tort defendant bears the burden of establishing a clear and direct overlap between a tort award and a benefit entitlement and therefore tort defence counsel would be wise to encourage a jury’s use of a detailed care cost chart.

When you combine the impact of the *Gilbert* case with recent changes to the SABS a defendant’s tort exposure is now significantly magnified.

The newly amended definition of ‘incurred’ within the SABS restrains family members from providing paid attendant care services to injury family members thus forcing accident victims to commonly resort to outsourced professional care providers. But, with a massive tort judgment that provides payment for future care needs, the plaintiff’s family will thereafter be able to provide paid care (paid by the tort defendants) to their loved one, rather than having to outsource the care simply to access the accident benefits.

The result is that the value of an assigned catastrophic accident benefit policy may prove to be marginal.

*Darcy Merkur is a partner at Thomson, Rogers in Toronto practicing plaintiff’s personal injury litigation, including plaintiff’s motor vehicle litigation. Darcy has been certified as a specialist in Civil Litigation by the Law Society of Upper Canada and is the creator of the Personal Injury Damages Calculator.*

## UPCOMING EVENTS

- **Practical Strategies for Experts: The Shifting Landscape Conference**  
Thursday, October 23<sup>rd</sup>, 2014 | The Carlu  
For more information, please visit:  
[www.thomsonrogers.com/event-pia-practical-strategies-for-experts-conference-2014](http://www.thomsonrogers.com/event-pia-practical-strategies-for-experts-conference-2014)
- **Brain Injury Association of Niagara’s Conference: Brain Injury Across the Lifespan**  
Thursday, October 23<sup>rd</sup>, 2014 | Americana Conference Resort and Spa  
For more information, please visit: [www.bian Niagara.org/site/conference-14](http://www.bian Niagara.org/site/conference-14)
- **Toronto ABI Network Conference 2014**  
November 20-21, 2014 | Allstream Centre, Exhibition Place  
For more information, please visit:  
<http://www.abinetwork.ca/abi-conference-2014>

*For further inquiries on this article, please contact the author:*

Darcy Merkur  
[dmerkur@thomsonrogers.com](mailto:dmerkur@thomsonrogers.com)

or visit his web page at:  
<http://www.thomsonrogers.com/darcy-merkur>

THOMSON, ROGERS  
Suite 3100, 390 Bay Street,  
Toronto, ON M5H 1W2  
Tel 416-868-3205  
Toll Free 1-888-223-0448  
Fax 416-868-3134

Visit our web site at:  
[www.thomsonrogers.com](http://www.thomsonrogers.com)

**YOUR ADVANTAGE,**  
*in and out of the courtroom*

**THOMSON ROGERS**  
PERSONAL INJURY LAWYERS